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**AMERICAN BOOKSELLERS ASSOCIATION AND  
BARNES & NOBLE, INC.**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE, INC.; HACHETTE BOOK GROUP,  
INC.; HARPERCOLLINS PUBLISHERS  
L.L.C.; VERLAGSGRUPPE GEORG VON  
HOLTZBRINCK GMBH; HOLTZBRINCK  
PUBLISHERS, LLC d/b/a/ MACMILLAN;  
THE PENGUIN GROUP, A DIVISION OF  
PEARSON PLC; PENGUIN GROUP (USA),  
INC.; and SIMON & SCHUSTER, INC.,

Defendants.

Civil Action No. 1:12-CV-2826

**MOTION OF AMERICAN BOOKSELLERS  
ASSOCIATION AND BARNES & NOBLE,  
INC. FOR LEAVE TO FILE *AMICI CURIAE*  
RESPONSES TO THE U.S. DEPARTMENT  
OF JUSTICE TUNNEY ACT FILINGS**

**PLEASE TAKE NOTICE** that upon the accompanying Declaration of David N. Wynn, dated July 31, 2012, the exhibits thereto, and the Memorandum of Law in Support of Motion, Proposed *Amici Curiae* American Booksellers Association (“ABA”) and Barnes & Noble, Inc. (“Barnes & Noble”) hereby move this Court, before the Honorable Denise L. Cote, United States District Judge, at the Daniel Patrick Moynihan United States Courthouse, United States District Court for the Southern District of New York, 500 Pearl Street, New York, NY 10007-1312, for

an order permitting ABA and Barnes & Noble to file and serve Responses of *Amici Curiae* to the U.S. Department of Justice's ("DOJ's") July 23, 2012 Response to Public Comments and its August 3, 2012 motion to enter the Proposed Final Judgment, and to participate in any hearing on the DOJ's motion, together with such other and further relief as the Court may deem just, proper and equitable.

Dated: July 31, 2012

Respectfully submitted,

By: /s/ David N. Wynn  
DAVID N. WYNN, ESQ. (DW 8660)

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**DECLARATION OF DAVID N. WYNN IN  
SUPPORT OF MOTION OF AMERICAN  
BOOKSELLERS ASSOCIATION AND  
BARNES & NOBLE, INC. FOR LEAVE TO  
FILE *AMICI CURIAE* RESPONSES TO  
THE U.S. DEPARTMENT OF JUSTICE  
TUNNEY ACT FILINGS**

I, David N. Wynn, hereby declare as follows:

1. I am an partner at Arent Fox, LLC, and submit this declaration in support of the motion of proposed *Amici Curiae* American Booksellers Association and Barnes & Noble, Inc. for leave to file and serve Responses of *Amici Curiae* to the U.S. Department of Justice's July 23, 2012 Response to Public Comments and its August 3, 2012 motion to enter the Proposed

Final Judgment. I attach the documents described below to facilitate the Court's attention to this motion.

2. Attached hereto as Exhibit A is an op-ed by Charles E. Schumer entitled "Memo to DOJ: Drop the Apple E-Books Suit" which appeared in the Wall Street Journal on July 17, 2012.

3. Attached hereto as Exhibit B is an article by Michael Cader entitled "A Closer Look at What BookStats Says About the Trade (It's Still Flat)" which appeared in Publisher's Lunch on July 25, 2012.

4. Attached hereto as Exhibit C is an article entitled "College Stores Association Argues Against DOJ, E-Books and E-Textbooks Are Different" which appeared in Digital Book World on July 24, 2012.

Pursuant to U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: July 31, 2012

/s/ David N. Wynn  
DAVID N. WYNN, ESQ. (DW 8660)

# Exhibit A



**BARRON'S**  
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**THE WALL STREET JOURNAL.**  
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OPINION | July 17, 2012, 6:36 p.m. ET

## Memo to DOJ: Drop the Apple E-Books Suit

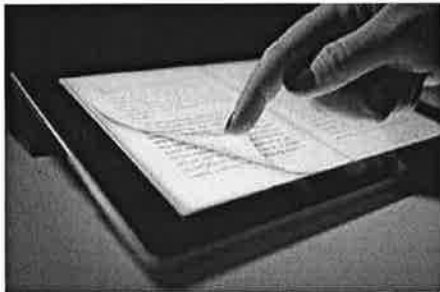
*Restoring Amazon's monopoly in digital publishing is not in the public interest.*

By CHARLES E. SCHUMER

Recently the Department of Justice filed suit against Apple and major publishers, alleging that they colluded to raise prices in the digital books market. While the claim sounds plausible on its face, the suit could wipe out the publishing industry as we know it, making it much harder for young authors to get published.

The suit will restore Amazon to the dominant position atop the e-books market it occupied for years before competition arrived in the form of Apple. If that happens, consumers will be forced to accept whatever prices Amazon sets.

All of us will lose the vibrant resources a diverse publishing universe provides. As Scott Turow, president of the Author's Guild, has explained, the Justice Department's suit is "grim news for everyone who cherishes a rich literary culture." These losses will be particularly felt in New York, which is home not only to many publishers, but also to a burgeoning digital innovation industry.



Bloomberg News

The e-books marketplace provides a perfect example of the challenges traditional industries face in adapting to the Internet economy. Amazon took an early lead in e-book sales, capturing 90% of the retail market. Because of its large product catalog, Amazon could afford to sell e-books below cost.

This model may have served Amazon well, but it put publishers and authors at a distinct disadvantage as they continued to try to market paper books and pave a way forward for a digital future. Without viable retail competitors, publishers were forced to make a Hobson's choice. They could allow their books to be sold at the prices Amazon set, thus undercutting their own current

hardcopy sales and the future pricing expectations for digital books—or stay out of the e-books market entirely. In an increasingly digital age, the latter was simply not an option.

Then the market changed. Apple entered and negotiated an agency model with publishers, in which the publisher could establish a retail price and Apple would take a percentage cut. The result was increased competition. Amazon's market share quickly eroded to 60%, and consumers had multiple platforms through which to purchase digital books. Amazon was forced to expand its catalog, invest in innovation, and reduce the prices of its Kindle reading devices.

Most importantly, the average price for e-books fell to \$7 from \$9, according to a filing in the case.

The Justice Department has ignored this overall trend and instead focused on the fact that the prices for some new releases have gone up. This misses the forest for the trees. While consumers may have a short-term interest

in today's new release e-book prices, they have a more pressing long-term interest in the survival of the publishing industry.

If publishers, authors and consumers are at the mercy of a single retailer that controls 90% of the market and can set rock-bottom prices, we will all suffer. Choice is critical in any market, but that is particularly true in cultural markets like books. The prospect that a single firm would control access to books should give any reader pause.

The Justice Department lawsuit is also unsettling from a broader perspective. As our economy transitions to digital platforms, we should be celebrating and supporting industries that find ways to adapt and grow. By developing a pricing model that made e-book sales work for them, publishers did just that.

I am concerned that the mere filing of this lawsuit has empowered monopolists and hurt innovators. I believe it will have a deterrent effect not only on publishers but on other industries that are coming up with creative ways to grow and adapt to the Internet.

The administration needs to reassess its prosecution priorities. Justice Department officials currently have comprehensive guidelines in place to determine when they should challenge mergers, but they have no such guidelines for non-merger investigations. It's time to come up with some. These new guidelines should take a broad, pragmatic view of the market as a whole. As the e-books case shows, this kind of perspective is sorely missing today.

*Mr. Schumer, a Democrat, is a U.S. senator from New York.*

*A version of this article appeared July 18, 2012, on page A15 in the U.S. edition of The Wall Street Journal, with the headline: Memo to DOJ: Drop the Apple E-Books Suit.*

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# Exhibit B

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## A Closer Look at What BookStats Says About the Trade (It's Still Flat)

by [Michael Cader](#) on July 25, 2012 in [eNews](#), [Industry Statistics](#), [Sales](#)

Now that BookStats has released some additional data to their paying subscribers, we're allowed to provide deeper coverage of our own of their "extrapolations" of revenue shifts across trade publishing. (Our first story is [here](#).) As a standing reminder, we subtract religious book sales of roughly \$1.5 billion from the BookStats "trade" data. So all of the data you see below is our own modification and analysis of tables generously provided by BookStats. And this all derives from two relatively simple spreadsheets; the BookStats full annual report and electronic digital dashboard provide a wealth of additional, highly granular data across all segments of the publishing business--for your own analysis and deeper understanding, the larger datasets are sold by BookStats (and support the collection and improvement of the data on an ongoing basis).

Before getting to the details, we also want to repeat (and refine) an important data point that we put at the end of our Monday story on the Justice Department's comments in the ebook pricing case. Though the DOJ sidestepped answering directly Barnes & Noble's data showing that average consumer ebook prices have declined, BookStats clearly shows that publishers' average ebook prices continue to fall. In 2011, the first full year of agency pricing, the average publisher price for an ebook was \$6.62, 8 percent lower than the year before (a drop over over 50 cents). In the biggest category--adult fiction--the average publisher ebook price was even lower; \$6.24 a unit, down over 9.5 percent from 2010.

In the initial wave of BookStats coverage, a lot was made--and even misinterpreted--of the emergence of ebooks as the single-largest selling format for adult fiction in dollars. But what you haven't read yet is that the ailing mass market novel is still the bigger seller by units. Mass-market fiction is estimated

to have moved 248 million units last year, while ebook fiction accounted for 203 million units. BookStats says that mass-market novels were in second place in fiction by dollars as well, at \$1.016 billion--though the category fell by a whopping 31 percent from \$1.612 billion in 2010. (Bear in mind that nearly all mass market books are fiction.)

Across the trade, ebooks are the third largest category by dollar volume and by units. They accounted for 16 percent of dollar sales, and 14 percent of unit sales. At the end of the day--as usual--trade sales of \$12.519 billion were basically flat. All that really changed is about \$300 million in wholesale sales moved from adult fiction to juvenile fiction. That could have a lot to do with Hunger Games and some other "crossover" YA novels overlapping with with other fiction dollars.

#### **2011 Trade Segments By Revenue (as a percentage of all trade)**

Hardcover	\$4.505 billion	(36%)
Paperback	\$4.185 billion	(33%)
eBooks	\$1.970 billion	(16%)
Mass Market	\$1.100 billion	(9%)
Audio	\$312 million	
Other	\$447 million	
<b>TOTAL</b>	<b>\$12.519 billion</b>	

#### **2011 Trade Segments By Unit Sales (as a percentage of all trade)**

Paperback	924 million units	(44%)
Hardcover	485 million units	(23%)
eBooks	298 million units	(14%)
Mass Market	275 million units	(13%)
Other	127 million units	
<b>TOTAL</b>	<b>2.109 billion units</b>	

#### **eBooks: A Closer Look**

Since the ebook market continues to grow so quickly, we'll look at BookStats' particular assessment of changes there. As you can see, ebook adoption still varies widely across the industry. Penetration is highest in adult fiction, where ebooks accounted for nearly 30 percent all dollar sales and likely a higher percentage of \*frontlist\* dollars. (BookStats does not currently separate frontlist and backlist sales. But if 75 percent of the fiction ebook revenues were earned by brand-new releases, there would be a roughly 50/50 ratio between frontlist ebook fiction and hardcover fiction.) Regardless, that's a significant change from 2010, when adult fiction ebooks only comprised about 13 percent of sales. Every other category lags significantly:

#### **2011 Trade eBook Penetration, By Category (As a Percentage of Revenues)**

Adult Fiction	29.5 percent
Adult Nonfiction	9.5 percent
Juvenile Fiction	8 percent
Juvenile Nonfiction	3 percent

Yet on a year-over-year basis, adult fiction ebooks are the slowest-growing segment--in part because they had the largest base. But it may also indicate that ebook adoption in the most prominent area is maturing, as the smaller segments start to take off.

While children's ebooks grew the most on a percentage basis, they are still the smallest segment of the market--and smaller still if you could account for the "special" boost that *Hunger Games* provided to the juvenile ebook numbers.

On the other hand, color ereading tablets only started to take off in late 2011, so this data may not provide a full sense of the impact of those new devices. But clearly "children's ebooks" are still a very modest part of the market:

#### 2011 Trade eBook Revenues

Adult Fiction	\$1.267 billion	(up 117%)
Adult Nonfiction	\$468 million	(up 136%)
Juvenile Fiction	\$220 million	(up 378%)
Juvenile Nonfiction	\$15 million	(up 200%)
TOTAL	\$1.970 billion	(up 136%)

The unit numbers tell a similar story; adult fiction is still growing the least, but against the largest base. Adult nonfiction isn't outpacing juvenile fiction that much in unit sales--but those adult ebooks are selling for a lot more money per book, generating a lot more revenue.

Among plans for next year's BookStats, the organizers tell us they hope to have the 2012 data available for release much earlier in the year.

#### Trackbacks/Pingbacks

1. [WRITING ON THE ETHER: Cleans Up | Jane Friedman](#) - July 26, 2012

[...] There's more in Cader's report, *A Closer Look at What BookStats Says About the Trade (It's Still Flat)*. [...]

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# Exhibit C

 [digitalbookworld.com](http://www.digitalbookworld.com) <http://www.digitalbookworld.com/2012/college-stores-association-argues-against-doj-e-books-and-e-textbooks-are-different/>

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## College Stores Association Argues Against DOJ, E-Books and E-Textbooks Are Different

Categories: [Digital Book Wire](#)  
July 24, 2012 | [DBW](#) |

The National Association of College Stores wants the Department of Justice and the U.S. District Court to provide a clearer definition of “e-books” so that e-textbooks are not lumped in with consumer-focused trade e-books in the proposed e-book price-fixing settlement.

In its [July 23 response to comments on the proposed e-book price-fixing settlement](#) between the DOJ and three of the largest U.S. publishers, the DOJ said, “because none of the Settling Defendants sell e-textbooks, and the Complaint already makes it clear that ‘e-books’ in the context of this case do not encompass ‘non-trade e-books’ such as ‘academic textbooks.’”

Counsel for the NACS says in a statement that this argument is not factual and not persuasive.

“Factually, the terms ‘academic textbook’ and ‘e-textbook’ are not used consistently, so without an explicit definition in the settlement agreement, interpretation of the document will be difficult and could cause publishers to hesitate to experiment in the higher education marketplace. Are ‘the Odyssey’ or ‘The Grapes of Wrath’ academic books when sold for use in a classroom?,” said Marc Fleischaker, of Arent Fox LLP, the NACS counsel.

Fleischaker goes on to argue that the settling publishers — Hachette, HarperCollins and Simon & Schuster — produce books that are used in the classroom and that they could go on to produce textbooks in the future if they chose.

Since no illegal conduct was alleged in the e-textbook market, the DOJ should make clear that e-textbooks are exempt from the settlement and from the lawsuit, the NACS says. Further, the NACS is urging the court — Judge Denise Cote — to reject the settlement unless it makes this distinction in the e-textbook market.

Later this Summer, Judge Cote will decide whether a proposed settlement between the Department of Justice and the three settling publishers is in the public interest and will go through. Antitrust experts expect [the settlement to be approved](#). Nearly [900 comments](#) have been sent to the judge, the vast majority of them against the settlement. Yesterday, the [DOJ responded to the comments](#), reasserting the illegality of the publishers’ actions and that the settlement justly remedies the e-book price-fixing alleged in the DOJ’s lawsuit.

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Defendants.

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**ORDER GRANTING MOTION FOR LEAVE  
TO SERVE AS *AMICI CURIAE***

American Booksellers Association (“ABA”) and Barnes & Noble, Inc. (“Barnes & Noble”), having filed a Motion for Leave to File *Amici Curiae* Responses to the U.S. Department of Justice (“DOJ”) Tunney Act Filings; and

Upon consideration of any responses or opposition thereto;

NOW, upon reading the Motion and for good cause shown, IT IS

ORDERED, that ABA and Barnes & Noble may participate as *Amici Curiae* in the Tunney Act proceedings to evaluate the public interest of the DOJ’s Motion for Entry of Proposed Final Judgment; and

IT IS FURTHER ORDERED, that the Clerk of the Court is hereby directed to accept from *Amici Curiae* ABA and Barnes & Noble, not later than August 15, 2012, a response of not

more than 10 pages to DOJ's Response to Comments and a response of not more than 5 pages to DOJ's Motion for Entry of Proposed Final Judgment; and

IT IS FURTHER ORDERED, that the Clerk of the Court is hereby directed to provide notice to counsel for *Amici Curiae* ABA and Barnes & Noble of the date of any hearing scheduled on DOJ's Motion for Entry of Proposed Final Judgment so that *Amici Curiae* may participate in and offer oral argument at that hearing.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2012.

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THE HONORABLE DENISE L. COTE