

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	12 Civ. 2826 (DLC)
	:	
v.	:	
APPLE, INC. et al.,	:	
	:	
Defendants.	:	
	:	
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**MEMORANDUM OF THE AUTHORS GUILD, INC.  
IN SUPPORT OF MOTION FOR LIMITED PARTICIPATION  
AS *AMICUS CURIAE* IN TUNNEY ACT PROCEEDINGS**

The Authors Guild, Inc. respectfully submits this memorandum in support of its motion pursuant to 15 U.S.C. § 16(f) for limited participation as *amicus curiae* in the Court’s Tunney Act proceedings regarding the United States’ (“DOJ”) Proposed Judgment against three of the defendant publishers.

**I. BACKGROUND**

On June 25, 2012, the Authors Guild submitted to the DOJ, pursuant to 15 U.S.C. § 16(b), an eight-page comment on the Proposed Judgment.<sup>1</sup> In sum, the Authors Guild argued that the Proposed Judgment is not in the public interest, particularly because it requires the settling publishers to routinely allow e-book vendors -- notably Amazon -- to sell e-books below cost, which would have devastating effects on the literary market.

On July 23, 2012, the DOJ filed its Response to all of the comments, which specifically addressed the Authors Guild’s comment. Dkt. 81. However, the Response ignores the far-reaching effects of the Proposed Judgment that the Authors Guild

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<sup>1</sup> The comment (ATC-0214) is available at <http://www.authorsguild.org/advocacy/articles/guilds-tunney-act-filing-to-the.html> and at <http://www.justice.gov/atr/cases/apple/comments/atc-0214.pdf>.

identified. Therefore it impedes the Court's ability to fully assess "the impact of entry of [the Proposed Judgment] upon competition in the relevant market or markets" as the Tunney Act requires. *See* 15 U.S.C. § 16(e)(1)(B).

By this motion, the Authors Guild seeks to remove that impediment, clarifying for the Court what the true "impact of entry of" the Proposed Judgment will be in "the relevant market or markets." The Authors Guild respectfully requests that the Court (i) accept the attached five-page reply to the Response (Exhibit 1), and (ii) permit the Authors Guild to participate in any hearing or oral argument the Court may hold on the Proposed Judgment.

## **II. THE AUTHORS GUILD'S INTEREST AS *AMICUS***

The Authors Guild is the nation's oldest and largest professional society of published authors, representing 8,500 published book authors. As its members' advocate, the Authors Guild has a significant interest in this matter, which could reshape the markets in which authors sell their work. For example, entry of the Proposed Judgment would allow Amazon to sell e-books below cost, which would enable it to further entrench its dominance over the entire literary marketplace. Such dominance has, and will continue to have, devastating effects on authors. Those effects include, but are not limited to, the reduction of Amazon's traditional bookstore competitors which play vital roles in the literary market. For instance, they provide showrooms for new books, introduce new authors to readers, host gatherings of authors and readers, and facilitate other functions that diversify and enrich our culture.

### III. APPLICABLE LAW

A court determining whether, under the Tunney Act, an antitrust consent decree is in the public interest “must ensure that it is adequately informed about the intricacies and complexities of the industry affected by the consent decree.” *United States v. Microsoft Corp.*, 159 F.R.D. 318, 324-25 (D.D.C. 1995), *rev’d on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995). *See* Dkt. 93 at 3 (granting ABA/Barnes & Noble’s *amici curiae* motion and noting Court’s responsibility under the Tunney Act).

Industry participants’ and other outsiders’ input is “vital” to this determination. *Microsoft*, 159 F.R.D. at 325 (quoting Judge J. Skelly Wright’s observation during the 1973 hearings on the Tunney Act that such input “helps to correct [any] oversights” by the DOJ). Accordingly, the Tunney Act permits “full or limited participation in proceedings” by such outsiders as *amici curiae*. *See* 15 U.S.C. § 16(f)(3); Dkt. 93 at 3.

Courts -- including this one -- frequently permit industry participants, such as the Authors Guild, who previously submitted comments on a proposed judgment to subsequently submit responses, appear at hearings, and otherwise continue to participate in proceedings to help the Court’s determination. *See* Dkt. 93 (permitting ABA/Barnes & Noble’s response); Dkt. 94 at 3 (noting that oral argument or a hearing may be held on the Proposed Judgment); *United States v. Microsoft Corp.*, 2002 WL 319366, at \*3 (D.D.C. Feb. 28, 2002) (Microsoft competitor that submitted 160-page comment subsequently permitted to reply to DOJ’s response and participate in a hearing because it “may be of use to the Court”); *United States v. AT&T*, 552 F. Supp. 131, 147 (D.D.C. 1982) (outsiders who previously submitted comments were invited to “further elucidate[] and refine[] . . . key issues” in subsequent briefs and at a hearing).

**IV. THE COURT SHOULD PERMIT THE AUTHORS GUILD TO PARTICIPATE AS *AMICUS CURIAE*.**

The Authors Guild's perspective on the book industry is not represented by any party to this matter. Thus it is uniquely equipped to provide the Court with valuable information "about the intricacies and complexities of [that] industry" which will assist the Court's public interest determination. *See United States v. Microsoft*, 159 F.R.D. at 324-25; *see also Microsoft*, 2002 WL 319366, at \*3. Further, accepting the attached reply would cause no undue delay or prejudice. The reply complies with the page and time limits on parties' replies, thus it adds minimal additional work for the Court and no delay. *See* Dkt. 93 at 3 (citing Fed. R. Civ. P. 24); Dkt. 71 ¶ 3; Dkt. 94. And the Authors Guild would similarly limit its participation in a hearing or argument to any Court-established limits, and of course to its most salient points. *See* Dkt. 94 at 3.

**V. CONCLUSION**

For these reasons, the Authors Guild respectfully requests that the Court (i) accept the attached five-page reply to the DOJ's Response (Exhibit 1), and (ii) permit the Authors Guild to participate in any hearing or oral argument on the Proposed Judgment.

Dated: August 15, 2012

Respectfully submitted,

THE AUTHORS GUILD, INC.

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*Motion for Leave to Appear as  
Amicus Curiae Pending*