



August 17, 2020

The Hon. David Cicilline
Chairman, Antitrust Subcommittee
U.S. House of Representatives
2233 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline,

We write to thank you for your bipartisan leadership of the House Antitrust Subcommittee. Your work has been critical to documenting the alarming dominance of a few tech platforms in the digital marketplace and the extraordinary leverage they wield over their competitors, suppliers, customers, the government, and the public. As you succinctly observed at the Subcommittee's July 29, 2020 hearing: "They have too much power."

Together, our organizations—the Association of American Publishers, the Authors Guild, and the American Booksellers Association—represent thousands of authors, publishers, and booksellers in the United States who serve the democratic exchange of ideas by creating, publishing, and selling books. Our members rely upon a level playing field in the marketplace of ideas to reach, inform, and transact with customers for the delivery of books, whether in physical or digital form. Regrettably, as the Subcommittee's hearings have laid bare, the competitive framework of the publishing industry has been fundamentally altered in recent years—and remains at serious risk of further diminishment—because of the concentrated power and influence of one company in particular: Amazon.

Amazon's scale of operation and share of the market for book distribution has reached the point that no publisher can afford to be absent from its online store. A year ago, the New York Times reported that Amazon controlled 50% of all book distribution, but for some industry suppliers, the actual figure may be much higher, with Amazon accounting for more than 70 or 80 percent of sales. Whether it is the negative impact on booksellers of Amazon forcing publishers to predominantly use its platform, the hostile environment for booksellers on Amazon who see no choice but to sell there, or Amazon's predatory pricing, the point is that Amazon's concomitant market dominance allows it to engage in systematic below-cost pricing of books to squash competition in the book selling industry as a whole. Remarkably, what this means is that even booksellers that avoid selling on Amazon cannot avoid suffering the consequences of Amazon's market dominance. The ongoing COVID-19 crisis is exacerbating the problem: it continues to threaten the financial well-being of authors, publishers, and booksellers, some of whom will not survive the year. Amazon, by contrast, with its ever-extensive operation and data network, has grown only more dominant, enjoying its largest-ever quarterly profits during April, May and June.

As many antitrust experts have articulated, Amazon has aggressively exercised its market power against both suppliers and customers, and it possesses an unhealthy degree of control over the fate of other companies. To be clear, this market power stems not only from Amazon's share of the market for book distribution, but also from the astonishing level of data that it collects across its entire platform. Amazon tracks and uses data that provides it with an

incredible amount of information about individuals and how to target them, such as: what their interests are; what products or books they have bought or pre-ordered; from whom; at what price point; what they have perused or considered purchasing; what video-games they are playing; and what television shows or movies they are watching. The result is that Amazon no longer competes on a level playing field when it comes to book distribution, but, rather, owns and manipulates the playing field, leveraging practices from across its platform that appear to be well outside of fair and transparent competition.

Members of the Subcommittee would surely agree that a robust, diverse, and competitive publishing industry is profoundly important to the United States. Indeed, publishing is intertwined with the founding and Constitutional underpinnings of the Nation, and the publishing industry seeks to serve the interests and expectations of American readers who want a wide and unfiltered spectrum of books—from comprehensive political commentary to essential historical accounts to award-winning literature for both children and adults. As Rohit Chopra said in his Remarks at the Silicon Flatirons Conference, University of Colorado Law School, on February 10, 2019: “We will never know what damage has already been done. What books will never be written? What ideas will never see the light of day? Moving forward, we need to ask ourselves what these developments mean for our democratic values. We need to make sure that technology is propelling our democracy, not holding it back.”

As to the publishing industry, we believe that Amazon acts anti-competitively in multiple ways, dictating the economic terms of its relationships with suppliers so that publishers, their authors, and the booksellers who sell on Amazon pay more each year for Amazon’s distribution and advertising services but receive less each year in return. Amazon employs non-transparent data algorithms and recommendation engines to steer consumers toward Amazon’s own products, or even toward infringing products without disclosing to consumers that it is doing so. It has required suppliers to agree to most-favored-nation provisions (MFNs) that stifle the emergence and growth of competitive alternatives in the book distribution marketplace. And it manipulates suppliers and rivals by tying the purchase of distribution services to the purchase of its advertising services.

As the Subcommittee continues to debate and decide the future rules of digital commerce, including more enforcement, modern regulation, and reform legislation, we respectfully highlight our concerns and recommendations for your consideration:

1. Prohibit Amazon from Leveraging Data from the Operation of its Online Platform to Compete with and Disadvantage the Suppliers Doing Business There:

The authors, publishers, and booksellers that sell on Amazon’s platform are forced to do business in direct competition with Amazon’s myriad proprietary products but with very little insight into what Amazon is doing. As discussed in a variety of submissions to government agencies and at agency hearings during the past year, Amazon employs opaque algorithms, search and discovery tools on its platform, and then uses the data it collects from its suppliers and platform customers to manipulate greater leverage and greater profits for its own interests. The data that Amazon collects from across its platform not only gives Amazon leverage over its book suppliers, it also gives Amazon an insurmountable lead over any would-be distribution rivals—a lead so daunting that, at this point, absent government intervention, there is no possibility of meaningful competition from anyone, whether they be publishers, booksellers, or emerging platforms. Additionally, some of Amazon’s tools steer customers to sellers of infringing books, deceptive summaries, counterfeits, and other unauthorized copies that compete with legitimate sales.

2. Prohibit Amazon from Tying Distribution Services to the Purchase of Advertising

Services: Amazon offers two distinct services to the authors, publishers and booksellers that supply and sell books through its online bookstore, but brazenly ties them together so that suppliers must spend advertising dollars in order to make distribution services viable.

Distribution services include helping customers find and purchase books on the Amazon platform, shipping, handling, and delivery of the books (physical and/or digital), customer service, and collection and remittance of proceeds, for which the operator of the platform receives compensation from its suppliers. Advertising services, on the other hand, are designed to maximize the placement of advertisements to consumers at various points of the search and purchase experience—for example, through targeted or sponsored feeds. Offered separately, both distribution and advertising are valuable services that authors, publishers, and booksellers will consider and decide to purchase under competitive market conditions. But in instances where Amazon manipulates discovery tools to make a supplier's books difficult to find without the purchase of advertising or refuses distribution unless the supplier also purchases advertising, Amazon can extract both unwanted purchases and supra-competitive prices from suppliers. It also disadvantages rivals by directing valuable advertising dollars to its own dominant business. We believe such tactics are anticompetitive because they allow Amazon to control its suppliers and prevent the emergence and growth of would-be rivals.

3. Prohibit Amazon from Imposing MFNs and Other Parity Provisions: While MFNs and parity provisions are not inherently anti-competitive, Amazon's use of such provisions against publishers has been, and it has had a direct impact on authors, booksellers, and other competitors. For example, through MFNs, Amazon has required publishers to a) offer Amazon similar or better economic terms and conditions as those offered to any competing distributors; b) inform Amazon about more favorable or alternative terms given to competitors; and c) restrict pricing discounts to consumers. To provide some additional context, we note that Amazon has imposed conditions that affect wholesale and agency prices, sales commissions, discount and credit terms, the availability of books, book features, alternative distribution models, and promotional offerings. Because of Amazon's market power, these contractual requirements have the effect of preventing rival distributors, including new entrants, from bargaining with suppliers for lower prices, different business models, promotional advantages, or even from offering customers lower prices on their own. Lawmakers should be concerned that Amazon imposes MFNs and other parity provisions to eliminate the ability of rivals or new entrants to gain any meaningful competitive advantage relative to Amazon, and extremely wary of permitting Amazon to regulate itself as to whether, when, and against whom it will impose or enforce such provisions.

4. Prohibit Amazon from Using Loss-Leader Pricing to Harm Competition: For over two decades, Amazon has used books as loss leaders in the book industry to lure consumers to its website, gather data, make profits on bigger ticket items, and capture an increasing market share. Despite innovation in the independent bookselling world, independent bookstores find themselves struggling to compete with a company that historically sells books at a loss to that end. Amazon has garnered the bulk of the online book market through loss leader pricing, including by offering books below cost in order to promote and sell its proprietary Kindle device. Importantly, Amazon's use of pricing tactics in the book industry reveals that one of its core business strategies is one used by monopolies for over a century – underselling the competition to monopolize markets. Amazon is now using similar pricing tactics to harm competitors in other markets, such as the third-party platform market.

Shaoul Sussman of the Institute for Local Self-Reliance reports that Amazon is the largest negative cash flow firm in the world, and that these types of companies “can achieve greater market share” through this type of pricing strategy, which involve “long-term, below-average variable cost prices.” Sussman stresses that the negative impact of this behavior is the elimination of present and future competition. This has certainly been the case in the bookselling world, where Amazon’s strategy has been indirectly or directly responsible for the closure of countless bookstores. As it employs this pricing strategy in other markets, we are seeing the same impact on business sectors ranging from hardware stores to malls.

The Subcommittee’s work has shown that Amazon holds an outsized position of power and control in our country, giving it the ability to interfere with the free flow of information, ideas and literature on a large scale. With great appreciation for your leadership, we note that the American book publishing industry is and always has been uniquely intertwined with our democracy. Many authors, publishers, and booksellers along the way have contributed to the marketplace of ideas, and we hope that many more will emerge and thrive to the benefit of the public. This will not happen, however, unless government officials step in decisively to exercise appropriate governance of Amazon.

In closing, we note the words of House Judiciary Chairman Jerry Nadler during the Subcommittee’s July 29, 2020 hearing, invoking Thomas Jefferson and Louis Brandeis: The “concentration of economic or political power is dangerous to a democratic society.”

Respectfully submitted,



Maria A. Pallante
President and Chief Executive Officer
Association of American Publishers



Mary E. Rasenberger
Executive Director
The Authors Guild



Allison K. Hill
Chief Executive Officer
American Booksellers Association

With copies to:

The Hon. Makan Delrahim
Assistant Attorney General for the Antitrust Division
U.S. Department of Justice

The Hon. Joseph Simmons
Chairman
Federal Trade Commission