

Albanese on the Apple e-books case: Apple's Anticlimactic Appeal

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[Andrew Albanese](#)

By [Andrew Albanese](#)

In October of last year, I had the chance to interview Hachette CEO Arnaud Nourry from the stage at the Frankfurt Book Fair, and I asked him whether his 2009 concerns that low e-book prices would devalue the book—the driving factor behind the alleged e-book price-fixing conspiracy—were in the the past. After all, much has changed over the last six years.

Nourry was resolute in his response.

When you lose control over your price point you are on the way to death. We have to be very careful and never think it is behind us. We are still concerned. And I am glad that there is a consensus among major publishers that we should keep control.

As the non-lawyer here, I'm necessarily going to take a slightly different approach to today's symposium. But I want to be clear, right up front: However the Supreme Court dispatches with Apple's appeal in it e-book price-fixing case, whether the court declines to take up the appeal, or ultimately reverses, it is going to have little effect on the e-book market.

Even though it triggered a high profile antitrust case, and two years of market sanctions, Apple's 2010 scheme with publishers to eliminate retail price competition from the e-book market ultimately succeeded. Today, the Big Five publishers (Hachette, HarperCollins, Macmillan, Simon & Schuster and Penguin Random House) now control the consumer prices of their e-books. Apple does not have to worry about the iBookstore being undercut on price by Amazon. And Amazon's main competitive advantage has been blunted—its \$9.99 price on bestselling new release e-books—"that pitiful, paltry price," as *Daily Beast* co-founder Tina Brown once called it—is history. Frontlist e-books now retail for as high as \$14.99.

So, how is the e-book market faring, post-Apple? It's been a mixed bag. On one hand, e-book sales from the Big Five publishers declined in 2015. For Nourry's company, Hachette, digital sales (including digital audio) accounted for 22% of trade sales last year, down from 26% in 2014. So much for Steve Jobs' 2010 prediction that Apple would usher in a "mainstream e-book revolution."

On the other hand, print sales are up. Publishers say the dip in e-book sales and the rebound of print is a sign that the book market that is beginning to find its balance. And while they concede that higher e-book prices are clearly playing a role in the market's re-balancing act, it is still too early to tell to what degree price or other factors are driving format choices in the publishing market.

For me, the interesting question is where we go from here. In 2016, for the first time in the modern e-book market's short history, there are no major disruptions on the horizon: no game-changing device like the iPad; no fundamental changes coming in the retail market (like the agency model); no looming negotiations with Amazon (for now); no court-imposed e-book discounting. With fewer thumbs on the scale, the next two years are poised to present the clearest picture yet of the demand for e-books, what prices work, or don't, the viability of emerging new channels such as subscription access, where the competitive fault lines truly lie.

In that light, the narrow legal question before the Supreme Court in Apple's appeal—whether a vertical firm that organizes a price-fixing conspiracy among its suppliers can be condemned as per se liable—feels anticlimactic, and largely academic. Sure, there is \$400 million in consumer refunds at stake, per Apple's settlement with the states and consumer class. But here's what's not at stake: the future of innovation.

Despite some outstanding work by Apple's counsel, and some outraged editorials and amicus briefs, this case has never been about innovation, new technology, or novel business arrangements in emerging markets. When the publishers first agreed to Apple's terms, they had yet to even see an iPad, or the iBookstore. And there is no dispute that the iPad was going to be used as an e-reading device regardless of whether or not Apple got into e-book retailing.

Rather, as Macmillan CEO John Sargent once suggested in an email, the benefit of the iPad was that its launch presented a singular opportunity to change the business model for e-books—to wrest pricing control from Amazon, and to raise e-book prices to levels they considered “rational.”

While it is a compelling narrative, it seems highly unlikely to me that upholding per se liability in this case would discourage tech companies from innovating or striking novel new arrangements in emerging digital markets. Again, I am no lawyer. But isn't the greater concern that, if vindicated, Apple's scheme would essentially serve as a blueprint for large vertical players to work with major suppliers to eliminate retail price competition from nascent markets?

I keep going back to U.S. attorney Mark Ryan's closing argument at Apple's trial. Who knows, Ryan argued, how the market would have solved Amazon's \$9.99 problem? That, it seems to me, remains the key question.

Andrew Richard Albanese is Senior Writer for Publishers Weekly and the author of The

Battle of \$9.99: How Apple, Amazon, and the Big Six Publishers Changed the E-Book Business Overnight.

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