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Book Reviews-Monographic Musings

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In fall 2013 ABC-CLIO is poised to publish a number of titles including:

- **American Civil War: The Definitive Encyclopedia and Document Collection** (9781851096770, $625; eISBN: ISBN: 978-1-85109-677-0, call 800-368-6868 ext. 2 for pricing), edited by Spencer Tucker, provides a “multidisciplinary examination of the Civil War period ranging from pre-Civil War developments and catalysts such as the Mexican-American War to the rebuilding of the war-torn nation during Reconstruction... this encyclopedia includes all significant battles and skirmishes; important figures, both civilian and military; weapons; government relations with Native Americans; and a plethora of social, political, cultural, military, and economic developments.”

- **Consumer Survival: An Encyclopedia of Consumer Rights, Safety, and Protection** (978-1-59884-937-0, call for pricing), edited by Wendy Reiboldt and Melanie Horn Maller, is a “two-volume, alphabetically arranged reference covering a broad array of topics related to consumer rights, including those of interest to older demographic populations such as older adults, veterans, and the homeless. Specific entries address critical areas including food and product safety, housing, health care, the financial industry, the automobile industry, and telecommunications...”

- **Food and Drink in American History: A ‘Full Course’ Encyclopedia** (97816092328, $310; eISBN: 978-1-61069-233-5, call for pricing), edited by Andrew F. Smith, “comprises two volumes containing more than 600 alphabetically arranged historical entries on American foods and beverages as well as dozens of historical recipes for traditional American foods; and a third volume of more than 120 prima-ry source documents. Never before has there been a reference work that coalesces this diverse range of information into a single set...”

July saw Oxford University Press publish another in its series of specialized encyclopedias spun off from the Oxford Companion to United States History.

- **The Oxford Encyclopedia of American Business, Labor, and Economic History** (9780199738816, $395), edited by Melvyn Dubofsky, is a scholarly effort that “offers students and scholars access to information about the concepts, institutions/organizations, events, and individuals that have shaped the history of economics, business, and labor from the origins of what became the United States in an earlier age of globalization and the expansion of capitalism to the present.”

be Judge Chin’s comment when he rejected the Google Books settlement in 2011. At that time, he flatly declared: “Google engaged in wholesale, blatant copying, without first obtaining copyright permissions.” 770 F. Supp. 2d at 679. Perhaps his view of Google’s conduct will soften when he immerses himself in the nuances of the fair use doctrine in Section 107 of the Copyright Act.

** Book Reviews **

suggestions, findings, and tips (1) generalize across the spectrum, and (2) speak to issues and needs experienced across the spectrum.

Get this book for your library ASAP! For institutions and organizations supporting a library school or program, a copy for the circulating collection is a must. All libraries, though, should consider acquiring several copies to distribute among library personnel. If administrators, librarians, and other staff could take just ten minutes a day to read a chapter or two, they could easily finish the book within a month. Individual chapters or even the book as a whole could serve as a strong basis for dialogue to improve services and productivity, and overall to “do more with less” — a road that all organizations are navigating. To provide even more bang for the buck, staff could employ some of the communication and project management strategies to organize such dialogues. Happy reading and happy library-lifehacking, everyone!

The publishers and Apple began meeting in December 2009 and, by January 2010, “agreed to work together to eliminate retail price competition in the eBook market and raise the price of eBooks above $9.99.” Opinion at 11. According to the opinion Apple was the lynchpin in the conspiracy between and among Apple and the publishers. “It provided the Publishers the vision, the format, the timetable, and the coordination that they needed to raise eBook prices.” Id.

Apple executed individual “agency agreements” with each of the publishers under which Apple would act as an “agent” in selling eBooks at a retail price set by the publishers (which were $3 to $5 higher than Amazon’s $9.99 retail price).

The agreements also included a price parity provision, or Most-Favored-Nation clause (“MFN”), which not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor’s e-bookstore, but also imposed a severe financial penalty upon the publisher if they did not force Amazon and other retailers similarly to change their business models and cede control over eBook pricing to the publishers.

On April 11, 2012, the Department of Justice filed a civil suit against Apple and five of the six largest U.S. publishers. (Thirty-three states filed their own cases against the defendants, which were joined with the DOJ’s suit.) On the same day, the DOJ filed a proposed consent decree settling the case against Hachette, HarperCollins, and Simon & Schuster. After considerable fireworks, the settlement was approved by the court, and settlements subsequently followed with the other publishers. Only Apple chose to go to trial.

In the court’s view, the MFN “eliminated any risk that Apple would ever have to compete on price when selling eBooks, while as a practical matter forcing the Publishers to adopt the agency model across the board.” Opinion at 48. The MFN clause “literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from Amazon.” Id. at 56. And during their negotiations with Amazon, the publishers shared their progress with one another.

Since “the laws of supply and demand were not suspended for eBooks” when the publishers increased the prices of their eBooks, they sold fewer books. Opinion at 97. Thus, consumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise eBook prices: some consumers had to pay more for eBooks; others bought a cheaper eBook rather than the one they preferred to purchase; and still others deferred a purchase altogether rather than pay the higher price. Id. at 98.

Analyzing the trial record, Judge Cote found that there was “compelling evidence” that Apple “conspire[d] with the Publisher Defendants to eliminate retail price competition and to raise eBook prices” and “overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy.” Opinion at 113. Apple was “a knowing and active member of that conspiracy … not only willingly join[ing] the conspiracy, but also forcefully facilitat[ing] it.” Id.

The circumstances of the publishers’ simultaneous adoption of the agency agreement model advocated by Apple is itself powerful evidence of their agreement:

[In adopting a model that deprived each of them of a stream of expected revenue from the sale of eBooks on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by Amazon. [Opinion at 120.]

In finding that Apple has engaged in an illegal conspiracy to restrain trade, the district court rejected Apple’s argument that the court would reverse well-recognized antitrust law if it held that the publishers’ MFN clause was illegal. The court emphasized that:

The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. That does not, however, make it lawful for a company to use those business practices to effect an unreasonable restraint of trade. And here, the evidence taken as a whole paints quite a different picture — a clear portrait of a conscious commitment to cross a line and engage in illegal behavior with the Publisher Defendants to eliminate retail price competition in order to raise retail prices. [Opinion at 132.]

In short, “[t]he totality of the evidence leads inextricably to the finding that Apple chose to join forces with the Publisher Defendants to raise eBook prices and equipped them with the means to do so.” Id. at 134-35. Judge Cote even quoted Apple founder Steve Jobs’ own words against his company, pointing out that, on the day of the launch of the iPad, Jobs told a reporter that “Amazon’s $9.99 price for [a book newly offered on iPad for $14.99] would be irrelevant because soon all prices will be the same.” Id. at 149.

One might think that it is amazing that one of America’s most innovative and revered high-tech companies would land itself in such a pickle. But from a review of the testimony and documents quoted in the district court’s opinion, it was clear to Judge Cote that Apple’s executives had a totally tin ear and a blind eye to the obvious price-fixing conspiracy that they were orchestrating. The publishers’ executives were no better.

The five publishers in the case have already settled the states’ claims against them for $166 million in damages. (Their settlement with the DOJ involved only injunctive relief.) This case also will cost Apple a pretty penny in damage claims before all is said and done. And it should also remind American businesses that merely calling a sales term a “most favored nation” clause does not immunize the arrangement from federal or state antitrust laws.