

Comments of the Association of American Publishers

**Federal Trade Commission Hearings on
Competition and Consumer Protection in the 21st Century**

Project No. P181201

Introduction

The Association of American Publishers (“AAP”) appreciates the opportunity to provide these comments to the Federal Trade Commission (“FTC” or the “Commission”) in connection with the Commission’s hearings on Competition and Consumer Protection in the 21st Century. AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

Unfortunately, the marketplace of ideas is now at risk for serious if not irreparable damage because of the unprecedented dominance of a very small number of technology platforms. In order to mitigate this crisis and protect the public interest, AAP urges the Commission to exercise much-needed oversight and regulation, particularly as to circumstances where technology platforms stifle competition and manipulate consumer outcomes.

As the Commission is well aware, and as numerous other commenters have observed, the U.S. economy has undergone a profound shift in recent decades as a result of the growth of digital commerce and the emergence of dominant online platforms. Today, these giants pervade every aspect of the economy: they provide the technological infrastructure through which we consume news, information, books, music, movies and other forms of entertainment; they act as curators and aggregators of news, information, and entertainment; they function as producers, distributors, retailers, marketplaces, and service vendors, often playing these roles simultaneously with regard to specific products and sometimes operating in a fully vertically integrated fashion; they offer the primary means by which we connect to our families, friends, and fellow citizens through email, instant messaging, and social media; they collect, market, exploit, and sell personal data collected from us and about us; they dominate online advertising; and they have prodigious influence on our politics and policy outcomes, and in some cases, even election results.

Some platforms operate at a scale that makes it impossible for suppliers to reach their consumers without them. The concomitant market power this provides warrants close scrutiny by the FTC and other antitrust enforcement agencies for anticompetitive behavior and effects.

Given the power and impact of dominant platforms across the economy, when anticompetitive behavior is detected, enforcement efforts should be swift and vigorous.

Book publishing, like many other industries, has both embraced and been profoundly transformed by the digital revolution and the unprecedented opportunities of the online economy. At the same time, however, book publishing has been negatively impacted by the emergence of dominant platforms. The market for book distribution is far more concentrated than ever before, and there has been an explosion of counterfeiting and deceptive marketing practices that result in consumers purchasing something other than an authorized copy of the book for which they were searching.

For all of these reasons, AAP respectfully submits that the Commission should use its regulatory and enforcement authority under the federal antitrust laws to address platform market dominance and related anti-competitive practices, as well as its authority under Section 5 of the Federal Trade Commission Act to address unfair and deceptive trade practices, both by unscrupulous third-party sellers on platform marketplaces and, where appropriate, by the platforms themselves.

In exercising its authority, the Commission should consider the important ways that the lack of competition in markets dominated by modern technology platforms differs from a lack of competition in most other markets. First, the assumptions that consumers will purchase goods at the lowest available price and that competition for market share will exert downward pressure on market prices depend on consumers receiving timely and accurate information about prices and quality. As discussed below, that is often not the case in markets in which one or a handful of platforms use proprietary search algorithms and manipulated discovery tools to tilt the playing field toward particular suppliers or their own distribution channels or products. Second, modern technology platforms benefit from—and in some cases depend on—network effects. The larger the network, the greater the competitive advantage over rivals and potential rivals and, once entrenched, the platform has a greater ability to preserve and extend its market power in ways that are not available in markets that are not characterized by network effects. Third, in markets dominated by modern technology platforms, an analysis of consumer welfare must not overemphasize retail price levels relative to other critically important factors. The analysis of consumer welfare also must account appropriately for factors such as decreases in quality, consumer choice, and innovation, and a corresponding rise in consumer deception. Nowhere are these considerations more important than in the marketplace for information and ideas.

AAP addresses in greater detail below the following issues concerning dominant technology platforms in the online marketplace, which we respectfully submit warrant closer investigation, additional regulation, and, where appropriate, enforcement: (i) platforms exercising extraordinary market power in the markets for book distribution and Internet search;

(ii) the threat to competition when self-interested platforms act as both producers and suppliers in the marketplaces they operate; (iii) platforms' imposition of most-favored nation clauses ("MFNs") and other parity provisions that stifle competition, market entry, and innovation; (iv) platforms' use of non-transparent and manipulated search algorithms and discovery tools that facilitate infringement and deceive consumers; and (v) platforms' tying of distribution services to the purchase of advertising services. AAP appreciates the Commission's attention to these issues and would be pleased to supplement these comments with additional information if that would be helpful to the Commission's consideration of them.

I. Platforms Exercising Extraordinary Market Power in the Markets for Book Distribution and Internet Search

The dominant technology platforms that concern us exercise extraordinary market power in the markets for book distribution and Internet search, respectively. As the *New York Times* reported earlier this week, Amazon "sells substantially more than half of the books in the United States, including new and used physical volumes as well as digital and audio formats."¹ Amazon is also a publisher, a printer, a self-publisher, a review hub, a textbook supplier, a platform for third-party sellers and resellers, as well as a distributor that now runs its own chain of brick-and-mortar stores.² Amazon also owns Audible, which is the largest audio book supplier in the U.S. The problems with such a concentration of market power in the hands of a single entity are manifold. No publisher can avoid distributing through Amazon and, for all intents and purposes, Amazon dictates the economic terms, with publishers paying more for Amazon's services each year and receiving less in return.

The problems for consumers are no less dire. As the same *New York Times* article noted, "Amazon takes a hands-off approach to what goes on in its bookstore, never checking the authenticity, much less the quality, of what it sells. It does not oversee the sellers who have flocked to its site in any organized way."³ The result is widespread counterfeiting, defective products, and fake reviews that both degrade the consumer experience and diminish the incentives of authors and publishers to create new works and bring them to the marketplace. Additionally, platforms collect information about the sellers they promote in their marketplace. While the platforms may use this information themselves to compete with the sellers (i.e., their

¹ David Streitfeld, *What Happens After Amazon's Domination is Complete? Its Bookstore Offers Clues*, N.Y. Times, June 23, 2019.

² *Id.*

³ *Id.*

customers), platforms do not share this information in any meaningful way with consumers to allow for more informed purchasing decisions.

Google's complete and untouchable dominance in Internet search is no less problematic because its business model is largely indifferent to whether consumers arrive at legitimate or pirated goods. All too frequently, Google displays the links to legitimate sites only below a long list of links to unauthorized ones. With respect to Google's advertising models, it neither controls nor apparently educates its advertisers, which in any particular case can result in advertising being attached to infringing products, including books. Given what otherwise amounts to direct profiteering, there is no good reason that Google cannot choose to diligently direct consumers away from a pirated or otherwise unauthorized copy in response to search queries. Since publishers have no effective recourse to check Google's direct role in facilitating consumer confusion, and because said confusion in turn facilitates counterfeiting and infringement, AAP believes it is appropriate for the government to address these issues through regulation.

We also note that, to make matters worse, dominant online platforms have used their dominant position in one market to develop structural advantages in other markets, thereby extending their market power. They have done so both through organic growth and by acquisition of potential competitors. AAP urges the Commission to take a more active role in checking the market power of dominant platforms and in regulating deceptive practices in the marketplaces those platforms operate.

II. The Threat to Competition When Platforms Act as Both Producers and Suppliers in the Marketplaces They Operate

AAP recognizes that the phenomenon of retailers offering their own branded products in competition with those offered by third-party suppliers is not new. But because of their consumer data collection practices and their ability to generate revenues from sources other than the sale of their own branded products, dominant technology platforms pose unique threats to competition when they act as both producers and suppliers in the online marketplaces they operate.

As many others have observed in connection with these hearings, dominant platforms benefit from network effects. Accordingly, many platforms (and notably successful ones) have adopted a strategy of building out the network through prolonged periods of unprofitability. These platforms have adopted a strategy of offering their services at no or low cost to users of the platform—at least no or low monetary costs—in order to collect vast amounts of data about those users that can be monetized through other means. But of course, these services do come with costs to consumers—it is just that the currency paid is personal data, not dollars and cents. In those instances, the users are not really the consumers, they are the product itself.

AAP recognizes that, in general, the collection of consumer data doesn't have to be problematic, but rather can be pro-competitive and used to enhance consumer welfare. For example, platforms can help retailers and producers use such data to target the marketing of desirable offerings that the consumer might otherwise miss. Or the data may be used to create new and distinct technology products of considerable appeal, such as customized playlists by music streaming services or traffic navigation systems. There are, however, significant competition concerns when dominant platforms act as producers and suppliers in the marketplaces they operate. The Commission is well aware of instances in which dominant platforms have been accused of using the vast amounts of data they collect to engage in below-cost pricing on other goods to trample smaller rivals and drive them out of business. Even when these practices offer consumers lower prices in the short-term, they harm competition and will ultimately result in harm to consumer welfare under any reasonable definition.

AAP offers the following observations about these competitive concerns:

- First, dominant platforms have massive data advantages that stack the deck further in their favor. They can use the vast amounts of data they collect about what consumers are buying and searching for on their site not only to manipulate search or target ads on their platforms, but also—with unique access to what search words are used on their own platforms—can purchase those search words as keywords for advertising *on other platforms as well*. For example, Amazon knows what search words consumers use on its own site. Not only does it have the ability to steer consumers to its own products at the expense of those offered by other suppliers on its own site, but it also has the ability to use its inside knowledge of consumer searches to buy targeted advertising on Google to steer consumers looking for information on that platform to its own products as well, compounding the competitive disadvantage of third-party suppliers.
- Second, dominant platforms have inside advantages regarding rival suppliers' forthcoming products and marketing strategies that they would not have if they competed only as suppliers. For example, platforms that offer distribution services will have advance knowledge of rival suppliers' new products and product launches. Platforms that offer advertising services have advance knowledge, and more detailed intelligence, of rival suppliers' marketing plans than competing suppliers do in other circumstances. In the absence of adequate firewalls, these types of knowledge can be used to unfair advantage by the platform when making decisions about where and how to invest in creating its own products. The platform's ability to use information it garners from its activities as a distributor to compete as a rival to its suppliers scales with the size of its network, *i.e.*, the number of different suppliers and the number of different products they offer. In this way (as in others), dominant platforms have the ability to extend their dominance into other areas of economic activity.

- Third, dominant platforms do not need to make money on the sale of products they produce because they can make their money in other ways. In some markets, this forces suppliers to compete with below-cost pricing. In the book publishing market, publishers are sometimes compelled to compete with products given away for free or treated as loss leaders, because, for example, Amazon includes them as part of a bundle with a Kindle Unlimited or a subscription to Amazon Prime.
- Fourth, dominant platforms are effective at manipulating search algorithms and other discovery tools to steer consumers to their own branded products or away from those of rival suppliers, degrading the quality of their consumer search offerings and stacking the deck for competition for product sales. This is particularly problematic when the platform is offering products that directly substitute for those offered by a third-party supplier.

When platforms have the ability to usurp the profits that otherwise would be earned by rival suppliers, consumers are harmed by the resulting loss of rival suppliers' willingness to invest in creating innovative new products and the corresponding diminished innovation. If publishers know that a dominant platform will capture all of their profits, they will not invest in publishing the book in the first place. Consumer welfare with respect to book publishing cannot be measured by the retail price of books alone, but rather, must take into consideration the societal benefits of a robust publishing industry, with multiple competitors, contributing the broadest array of viewpoints and ideas to the public discourse. Moreover, platforms that utilize a strategy of offering low prices may lose their commitment to that strategy once they drive competing suppliers from the business or leave them irreparably diminished or may decide to abandon a product category after destroying a previously viable market for it.

Accordingly, the Commission should investigate the effect on competition that dominant platforms have when they act as both producers and sellers in the marketplaces they operate and should consider how best to redress and prevent harm to competition, whether through structural remedies, requirements for treatment of competitors on fair, reasonable and non-discriminatory terms, or other means.

III. Platforms' Imposition of Most-Favored Nation Clauses and Other Parity Provisions That Stifle Competition, Market Entry, and Innovation

AAP respectfully submits that the Commission should regulate more actively the use of MFNs and similar parity provisions by digital platforms. When used by platforms with market power, they are anti-competitive and harmful to both suppliers and consumers. They prevent

rival distributors, including new entrants, from bargaining with suppliers for lower prices, different business models, or promotional advantages.⁴

In the book publishing industry, Amazon uses MFNs in precisely this way to limit competitive alternatives for publishers and to extend its market power. For example, Amazon requires publishers to offer similar (or better) economic terms and conditions as those offered to any competing distributors and to inform Amazon about more favorable or alternative terms given to competitors. The other MFN provisions that Amazon has previously imposed, moreover, are not limited to price terms, such as wholesale prices, sales commissions, and discount and credit terms. They also cover the availability of books (“selection parity”), included book features (“features parity”), alternative distribution models (“business model parity”), and promotional offerings (“promotions parity”).

These types of provisions effectively prevent publishers from offering lower prices to, or doing special promotions with, smaller and emerging distributors because they would require the publishers to voluntarily receive less from Amazon as well which, given Amazon’s dominant share of book sales, makes such a proposition economically untenable in most, if not all, cases. Making matters worse, if a publisher does a deal with a competing distributor that includes special pricing in exchange for promotional value, these types of provisions may require that publishers provide the same special pricing to Amazon *without* receiving the same promotional benefits in exchange. By eliminating the ability for existing rivals or new entrants to gain any competitive advantage relative to Amazon by offering lower prices, alternative models, or special promotions, these provisions destroy the incentives for other distributors to compete on price, to invest in and support innovative products or business models, or to differentiate their product offerings in any meaningful way.

In June 2015, the European Commission launched an investigation into Amazon’s use of MFNs to address its (well-founded) concern that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing the incentives for publishers and competitors to develop new and innovative e-book offerings and alternate distribution systems. The European Commission sought to understand the extent to which such provisions had led to less choice, less innovation, and higher consumer prices as a result of reduced competition in e-

⁴ See generally Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L. J. 7, 1176 (2018); Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J. L. Econ. 105 (2016); Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored Nations Provisions*, 27 Antitrust 20, 22-25 (2013).

book distribution in the European Economic Area (“EEA”).⁵ In 2017, Amazon addressed the European Commission’s concerns through a series of commitments, including: (i) an agreement not to enforce or otherwise rely upon the MFNs and other parity provisions contained in agreements between Amazon and e-book suppliers for the sale of e-books to consumers in the EEA, including those related to alternative/new business models, release date and catalogue of e-books, features of e-books, promotions, agency price, agency commission and wholesale price; (ii) notification to suppliers that it would not enforce such provisions; and (iii) an agreement not to include such provisions in new agreements.

Amazon’s commitments to the European Commission are temporary and geographically limited: they are limited to a five-year term and only cover Amazon’s activities directed toward the EEA.⁶ But MFN provisions have negative consequences in the U.S. market, just as they do in the EEA. U.S. publishers should not be subject to the whims of Amazon on this important issue—for example, it should not be left to Amazon to decide whether to impose or enforce MFN requirements on U.S. publishers. Furthermore, there is no reason to expect that the problems associated with such provisions will dissipate by the end of Amazon’s five-year commitment to the European Commission. Amazon’s market power is growing, not shrinking.

Simply put, the use of MFNs by platforms with market power is anti-competitive and should not be allowed.

IV. Platforms’ Use of Non-Transparent and Manipulated Search Algorithms and Discovery Tools that Facilitate Infringement and Deceive Consumers

As the Commission of course knows, classic economic theory holds that consumers will purchase products at the lowest available price and that robust competition for market share will thus exert downward pressure on market-wide prices. But, as noted above, this fundamental assumption underpinning antitrust law depends on consumers obtaining timely and accurate information about prices and the quality of the products they are purchasing.

⁵ European Commission, Case AT.41053 – E-book MFNs and related matters, at 6 (April 5, 2017) (“European Commission MFN Decision”). The European Commission also has investigated Google’s use of exclusivity and “relaxed exclusivity” provisions in connection with its sale of online advertising. Finding that such provisions were an abuse of Google’s dominant market position in the online advertising market, the European Commission fined Google and its parent company, Alphabet, 1.49 billion euros earlier this year to redress the resulting harm to competition. See European Commission, Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising, March 20, 2019, http://europa.eu/rapid/press-release_IP-19-1770_en.htm.

⁶ See European Commission MFN Decision.

AAP and its members are concerned that control of the information infrastructure by a small number of highly influential firms is distorting the information available to consumers about the price and quality of goods and that concentrated control will thereby result in a misallocation of resources that favors those firms at the expense of broader economic growth and other benefits brought by competition.

The ways in which dominant platforms use their positions in the information infrastructure to maximize self-interest may be highly opaque to other market participants, including not only consumers, but suppliers and competitors as well. For example, AAP and its member companies, like others, are just beginning to understand the extent to which platforms' proprietary algorithms have been influencing everything from purchasing decisions to political choices. However, while we still have very little visibility into precisely how those algorithms operate, we are increasingly aware of the ways in which those algorithms are being used to distort competition, facilitate copyright infringement, and mislead consumers.

Platforms can and do manipulate consumers' product searches in multiple ways. For example, if a consumer is searching for a new book, the platform may use an algorithm that generates search results that do not yield discovery of convenient means to purchase an authorized copy of that book, but instead steer the consumer to a counterfeit copy or to a substitute product offered by the platform itself. Their economic incentives to do so vary: to capture sales for their own competing products; to secure more favorable commissions from third-party suppliers, who sometimes procure the products from counterfeiters or other illegitimate sources; to create additional opportunities for advertising sales; to maximize consumer engagement on their site; or to create additional leverage with the publisher of the authorized copy on terms and conditions of supply. It is doubly concerning that none of these incentives is aligned with those of the publisher who is purchasing the platform's distribution services, and few, if any, are aligned with consumer interests. Platforms also have the ability to manipulate discovery through recommendation engines, which may be pro-consumer and generally beneficial if based on neutral, objective criteria that inform consumers about additional legitimate products that may be of interest—but, conversely, may be highly problematic when biased to favor or disfavor particular suppliers. Moreover, search manipulation of this type is hardly unique to the market for books. For example, in 2017, the European Commission fined Google 2.42 billion euros for, among other things, steering consumers to its own comparative shopping services in search results at the expense of rival services.⁷

⁷ See European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 27, 2017, http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

Search algorithms have important consequences for both competition and consumer protection. For example, in the market for books, search algorithms that elevate retail price considerations over all other factors without any screening of the source of the product can lead to important degradations in quality for consumers because they frequently showcase pirated and counterfeit goods. When search engines direct consumers to unscrupulous sellers that offer pirated or counterfeit goods, rather than legitimate sellers, they not only facilitate copyright and trademark infringement, they also increase the likelihood that consumers will be exposed to malware and viruses.⁸ Search algorithms also often steer unwitting consumers toward deceptive “summaries,” foreign editions, older editions, teacher editions, or used copies. While such copies are not necessarily infringing, they may have important substantive and undesirable differences from the authorized copy of the edition the consumer wished to buy. If these distinctions are not adequately disclosed to consumers at the point of sale, they may be deceived into buying the wrong product. Both Amazon and Google frequently market alternative versions either in place of or in parallel with the publisher’s current edition in a manner that leaves consumers confused as to what they are buying and from whom they are buying.⁹

Biased recommendation engines also create both competition and consumer production problems. As discussed in greater detail in Section V below, the distribution services and advertising services offered by digital platforms are separate markets, making the threat of discovery suppression to leverage the purchase of advertising services a highly problematic business practice from an antitrust perspective. But there are important consumer protection issues that the Commission should consider as well. Most consumers reasonably believe that product recommendations based on lists with headings such as “most popular,” “if you like this, you will also like ...” and “purchasers who bought this product also bought ...” are based on neutral, objective criteria. Often, however, these types of recommendations are not objective. In some cases, products are included or excluded based on the supplier’s advertising commitments to the platform. In other cases, a platform may manipulate the lists by giving its own products away to customers for free (and without regard to whether the customers even want to receive the products) but counting each copy distributed in this manner when marketing “best seller” lists or lists of which goods are the “most popular.”

⁸ Indeed, for some consumer products, search engines may be increasing the risks to consumer health and safety by directing consumers to websites that traffic in counterfeit goods.

⁹ See, e.g., David Streitfeld, *What Happens After Amazon’s Domination is Complete? Its Bookstore Offers Clues*, N.Y. Times, June 23, 2019 (citing numerous examples with respect to Amazon).

Search algorithms and recommendation engines may enhance competition or provide other benefits to consumers in some circumstances; they may suppress competition or deceive consumers in others. But it is much more challenging for anyone to evaluate the effect of conduct when platforms do not disclose what the conduct actually is. Accordingly, AAP respectfully submits that the Commission should investigate dominant platforms' use of non-transparent and manipulated search algorithms and discovery tools and bring enforcement actions as needed to redress and prevent competitive harm and consumer deception.

V. Platforms' Tying of Distribution Services to the Purchase of Advertising Services

Generally speaking, the platforms that operate online retail marketplaces for products supplied by independent firms typically provide at least two distinct services to their suppliers: distribution services and advertising services. The distribution services that the platform provides typically include matters such as providing the means for consumers to find and purchase products; shipping, handling, and delivery of the products, whether digital or physical; customer service; and collection and remission of sales proceeds. Suppliers compensate platforms for distribution services either by paying a commission on each sale or by making the product available to the platform at a wholesale price below the retail price the platform will be able to charge.

In addition to distribution services, platforms that operate retail marketplaces typically offer advertising services to their suppliers. These advertising services are marketed as a way to help maximize opportunities for consumers to find products, and for products to find consumers, on the site. Indeed, their websites are designed precisely to facilitate such discovery in the platform's controlled environment through a wide variety of opportunities to advertise to consumers on various parts of the site and at different points in the customer experience and through vast troves of consumer data that enable the platform to offer targeted promotions. Advertising services may include the placement of advertisements on various parts of the platform, such as a home page, a search results page, the pages devoted to a supplier's own products, and the pages devoted to a competing supplier's own products. They may affect the placement of the supplier's products on the platform. As noted above, the purchase of advertising services may be a precondition for entry into the platform's recommendation engines and personalized feeds, and it may affect search results whether through placements clearly marked as sponsored or paid or through less transparent means. The ability to deliver highly targeted advertising, as well as data to track the effectiveness of specific promotions on their platforms, may make their advertising services particularly desirable.

When offered separately under competitive-market conditions, both distribution services and advertising services are highly valuable to book publishers and other type of suppliers. Increasingly, however, digital platforms are tying distribution services to advertising

services in ways that warrant the Commission’s scrutiny. The brazenness of the tie ranges from manipulating discovery tools to make a supplier’s products more difficult to find without a required level of advertising, to conditioning the maintenance of existing levels of distribution services or “vendor status” on increased spending for advertising services, to refusing to provide distribution services at all without the purchase of advertising services. All are harmful. Amazon in particular has used tactics of this nature to require publishers to pay significant sums for services that used to be free, are provided for free by others, or where the actual cost of delivering the service is far below the fees demanded. These tactics are a means by which to extract supracompetitive prices for distribution services from suppliers. They are also a means by which to diminish competition from rival distributors because rivals cannot compete effectively for advertising dollars already tied to a dominant platform’s distribution services.

In analyzing the legality of these tying arrangements, AAP urges the Commission to recognize that platform distribution and platform advertising are separate services, and they have different end consumers. When digital platforms premise their business models on making their platforms “free” to users in order to generate a sufficiently large user base and monetize the vast amounts of data collected about them, there is substantial risk that they will use their market power over distribution services to obtain leverage over suppliers in the market for advertising services. That has been an all-too-common experience for the United States book publishing industry.

Conclusion

As the Commission completes its evaluation of Competition and Consumer Protection in the 21st Century, AAP encourages the Commission to pursue a regulatory framework that encourages innovation and competitive-market choices for both consumers and suppliers. The marketplace of ideas will be irreparably diminished if the government permits it to be served only—or even predominantly—by a very small number of dominant platforms.

June 27, 2019

Respectfully submitted,



Maria A. Pallante
President and CEO
Association of American Publishers