

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BOOKLOCKER.COM, INC.	:	
	:	CIVIL ACTION NO.
Plaintiff,	:	1:08-cv-00160-JAW
	:	
vs.	:	
	:	AMENDED COMPLAINT
AMAZON.COM, INC.	:	AND JURY DEMAND
	:	
Defendant	:	
	:	

1. Plaintiff BookLocker.com, Inc. (“BookLocker” or “Plaintiff”), on its own behalf and on behalf of the class defined herein, brings this antitrust action to obtain injunctive and monetary relief against Amazon.com, Inc. (“Amazon”) with regard to an anticompetitive tying arrangement that violates section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Plaintiff’s allegations as set forth below are based upon the personal knowledge of Plaintiff’s principals, except for such allegations stated as being “on information and belief,” which allegations are based upon an investigation by Plaintiff and Plaintiff’s counsel, including extensive correspondence sent by various publisher informants to Plaintiff and Plaintiff’s counsel and interviews with officers of publishing and printing companies conducted by Plaintiff and Plaintiff’s counsel.

INTRODUCTION

3. Plaintiff is an independent print on demand (“POD”) publishing company. “Print on demand” refers to both a printing technology and business process in which copies of a book are only printed when an order has been received from a consumer or retail bookseller, and only the number of books that have been ordered are printed. “Print on

demand” technology allows for very small print runs for lower-demand titles for which traditional printing technology, such as offset printing, is uneconomical.

4. Upon information and belief, there are thousands of POD publishers presently operating in the United States, who in the aggregate publish hundreds of thousands of titles.

5. Plaintiff and other POD publishers use a variety of printing companies to print physical copies of the books in their catalogs as those books are ordered. Presently, Lightning Source, Inc. (“Lightning Source”), a subsidiary of Ingram Industries, Inc., is the leading printer of POD books.

6. POD books are predominantly sold through online bookstores. Amazon is widely recognized as being the largest Internet retailer in the world and markets itself in its press releases as having “Earth’s Biggest Selection.” Amazon owns and operates the Amazon bookstore, an Internet site that sells books to consumers (the “Bookstore”). Through the Bookstore, Amazon has market power in the online bookselling market, outselling even brick and mortar bookstore chains.

7. Amazon acts as a direct-sales agent for POD books, not as a standard retailer. It does not buy and then sell or even take possession of Plaintiff’s and other POD publishers’ books, but instead only sends orders to the POD publisher’s printer (such as Lightning Source) after an Amazon customer orders a POD book over Amazon’s web site. Lightning Source and other printers then ship the books directly to Amazon’s customers using an Amazon label.

8. In 2005, Amazon entered a new market by purchasing a POD printing company called On Demand Publishing LLC, d/b/a BookSurge (“BookSurge”). BookSurge is a competitor of Lightning Source and other printing companies that print POD books.

However, BookSurge charges higher fees than the Plaintiff and many other POD publishers pay for printing, and BookSurge prints books of lower quality than Plaintiff's printer and other printers.

9. Upon information and belief, no later than February 10, 2008, Amazon began notifying POD publishing companies that Amazon and the Bookstore would only directly sell to consumers POD Books that were printed by BookSurge.

10. Amazon's practice of requiring POD publishers to use BookSurge's printing services in order for Amazon to sell those books through the Bookstore constitutes an illegal tying arrangement that has caused, and will continue to cause, damage to Plaintiff and the Class. Specifically, Amazon's unlawful tying arrangement prevents POD publishing companies, such as Plaintiff, from selecting a printing service on a competitive basis, but rather coerces publishing companies into using BookSurge's printing services, even though those services are both more expensive and result in an inferior product than the printing services offered by BookSurge's competitors.

PARTIES

11. Plaintiff BookLocker.com, Inc. ("BookLocker") is a POD publisher headquartered in Bangor, Maine with approximately 1200 books currently available.

12. Defendant Amazon.com, Inc. ("Amazon") is the world's largest online retailer and transacts business throughout the United States.

JURISDICTION AND VENUE

13. This case arises under the Federal antitrust laws. Jurisdiction is conferred upon this judicial district pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331 and 1337.

14. Venue is proper in this district pursuant to 15 U.S.C. §§ 15, 22, and 26, and 28 U.S.C. § 1391 because Defendant transacts business in this district and Plaintiff (and likely other class members) operates and has been harmed in this district. Additionally, a substantial part of the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was and is carried on in part within this district. The acts complained of have had, and will have, substantial anti-competitive effects in this district.

CLASS ACTION ALLEGATIONS

15. Plaintiff brings this action pursuant to Rule 23(a) and Rules 23(b)(2) and (3) of the Federal Rules of Civil Procedure on behalf of itself and all POD publishers and publishing companies in the United States who either had books listed for sale in the Bookstore, or who had or have an application to have books listed for sale in the Bookstore, at any time from February 10, 2008 through the conclusion of trial of this matter (the “Class” and “Class Period”).

16. The Class is so numerous that joinder of all members is impractical. There are thousands of members in the Class who are geographically dispersed throughout the United States.

17. Plaintiff’s claims are typical of the claims of the members of the Class because Plaintiff and all Class members have been or will be damaged by the same wrongful conduct of the Defendant alleged herein.

18. There are questions of law and fact common to the Class which predominate over any questions affecting only individual Class Members. Such common questions include:

- a. The definition of the relevant market;

- b. Amazon's market power within that market;
- c. Whether Amazon's conduct constitutes an illegal tying arrangement under the Sherman Act;
- d. Whether the contractual conditions Amazon and BookSurge impose upon Plaintiff and Members of the Class are unfair and improper;
- e. Whether Amazon's conduct has or will cause damage to Plaintiff and members of the Class; and
- f. The appropriateness of injunctive relief to restrain ongoing and future violations of the law.

19. The claims of the Plaintiff are typical of the claims of the Class, and Plaintiff has no interest adverse to the interest of other members of the Class.

20. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel experienced and competent in the prosecution of complex class actions.

21. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without duplication of effort and expense that numerous individual actions would engender. Class treatment will also permit the adjudication of relatively small claims by many Class members who could not afford on their own to individually litigate an antitrust claim against a large corporate defendant. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of the controversy.

AMAZON'S IMPROPER CONDUCT

MARKET DEFINITION

22. The "Online Book Market" is defined as the market for physical books ordered online by consumers and then delivered to consumers by means of a shipping service.

23. POD publishers like Plaintiff and members of the Class use the Online Book Market to sell the vast majority of their books because traditional brick-and-mortar bookstores (like Borders or Barnes & Noble) generally do not stock books from POD publishers.

24. Amazon's Bookstore is the dominant channel through which consumers purchase POD books in the Online Book Market. On information and belief, Amazon has significant market power in the Online Book Market, with a market share of up to 70%.

BOOK SALES ON AMAZON

25. Consumers generally purchase POD books from the Bookstore in one of two ways. First, consumers may purchase POD books directly from Amazon itself, through a prominent button labeled "Add to Shopping Cart" (the "Direct Amazon Sales Channel"). The vast majority of POD books sold in the Bookstore are sold through the Direct Amazon Sales Channel. Consumers prefer the Direct Amazon Sales Channel for several reasons, including the privacy and security of purchasing direct from Amazon and various free shipping deals that Amazon offers for products purchased directly from Amazon. As Amazon admits on its BookSurge website, the availability of a POD book in the Direct Amazon Sales Channel is "a distinction proven to lift sales."

26. Alternately, Amazon allows third-party vendors to sell books on Amazon through a program known as "Amazon Marketplace." To purchase a book in the "Amazon Marketplace", a consumer must provide shipping information to the third-party vendor and

cannot take advantage of Amazon's free shipping programs. Only a small fraction of POD book Bookstore sales are effectuated through the "Amazon Marketplace".

POD BOOK SALES BROKER SERVICES

27. Amazon acts as a direct-sales agent rather than as a traditional retailer with regard to its "sales" service for POD books.

28. On information and belief, after a customer places an order for a POD book over Amazon's website and simultaneously pays for the POD book with a credit card, Amazon transmits that purchase order to the printer (such as Lightning Source). The printer then prints a copy of the ordered book and "drop ships" it directly to the consumer using an Amazon label.

29. Accordingly, Amazon generally does not pay for POD books in advance or maintain inventory of POD books in its warehouses. (Indeed, maintaining an inventory of POD books would be contrary to the entire "print of demand" business model.) Nor does Amazon take title or possession of those books. Rather, when Amazon "sells" a POD book, it effectively is acting as a sales broker who merely assists customers in locating POD books and then processes customer orders on behalf of POD publishers and transmits those orders to POD printers, who then print and deliver POD books directly to customers. POD publishers then pay Amazon a percentage of the sales price for the service it provides.

POD BOOK PRINTING SERVICES

30. In April 2005, Amazon acquired BookSurge, a company that, among other services, provides printing services to POD publishers.

31. Several printing companies compete to provide book printing services to POD publishers. Lightning Source has been the dominant POD printing service. For example,

according to its website, Lightning Source prints over 1 million books every month on behalf of over 4,300 publishers. Plaintiff presently prints its books through Lightning Source.

32. BookSurge is a competitor of Lightning Source (and other printing companies).

33. BookSurge charges higher fees than its competitors. For example, under Plaintiff's contract with Lightning Source, Lightning Source remits 70% of the list price of each POD book it prints to Plaintiff. By contrast, BookSurge would remit only 50% of the list price of each POD book it prints to Plaintiff (and claims that it can alter that percentage at any time).

34. These higher fees would cause Plaintiff to incur a loss on almost every book sold. Plaintiff would be forced to raise book prices across the board and lower author royalties, which would price many of Plaintiffs' books beyond what the market will bear.

35. In addition, upon information and belief, the quality of the books printed by BookSurge is substantially inferior to the quality of the books published by competitors like Lightning Source.

AMAZON'S ILLEGAL TYING SCHEME

36. On information and belief, beginning no later than February 10, 2008, Amazon began notifying POD publishers that Amazon would only continue to sell POD books through the Direct Amazon Sales Channel if the publisher agreed to print its books through BookSurge rather than a competing service

37. For example, on March 26, 2008, Amazon representative John Clifford notified Plaintiff that Amazon would only continue to sell BookLocker's POD books through the Direct Amazon Sales Channel if Plaintiff agreed to print its books through BookSurge rather than Lightning Source. The Amazon representative further stated that books printed by

Lightning Source or any other competing printer would have their “Add to Shopping Cart” buttons removed.

38. Due to the onerous terms of the BookSurge printing contracts (under which the publisher receives only 50% of a POD book’s list price, as compared to the 70% received by Plaintiff under the Lightning Source contract), Plaintiff would lose money on almost every book sold if it were to sign the BookSurge contract. Moreover, Plaintiff would lose much if not all of its business if it increased the price of its books to account for BookSurge’s excessive fees, as Plaintiff’s books would then be priced beyond what the market will bear.

39. On March 31, 2008, Amazon issued an “Open letter to interested parties” publicly stating and confirming that Amazon would only continue to sell POD books through the Direct Amazon Sales Channel that were printed through BookSurge rather than a competitor’s printing service. Upon information and belief, this includes academic presses and traditional publishing houses who use POD technology for older and/or smaller-selling titles.

40. Amazon has continued through the present date to threaten POD publishers that unless they purchase the BookSurge printing service, their Direct Amazon Sales Channel will be discontinued.

41. Amazon has informed POD publishers that they may keep the Direct Amazon Sales Channel active if they agree to enroll in a program known as “Amazon Advantage.” However, the terms and conditions of participating in that program are so onerous so as to preclude it from being an economically viable option for POD book publishers. First, the “Amazon Advantage” contract requires publishers to deposit five copies of each title with Amazon at the publisher’s own expense – Amazon does not pay for any book until an order is

received and paid for by a customer. It would be prohibitively expensive for a POD publisher to front this enormous cost. For example, since Plaintiff currently publishes 1,200 titles, it would have to pay for 6,000 books to be printed and supplied to Amazon. Plaintiff's expenses merely to join this program would easily exceed \$35,000 before any revenue was received, with a continuing obligation to incur costs of placing POD books in Amazon's inventory. Second, under the "Amazon Advantage" program, Amazon only remits 45% of a POD book's list price to the publisher once it has been purchased by an ultimate consumer. These financial terms would force Plaintiff to sell its books at a loss or to price its books beyond what the market will bear.

42. Amazon also has informed POD publishers that they may continue to sell books on the Amazon website without signing the BookSurge contract – albeit *not* through the Direct Amazon Sales Channel – through the third-party vendor "Amazon Marketplace" program discussed above. However, Amazon has admitted on its BookSurge website that the sale of a POD book through the Direct Amazon Sales Channel is a "distinction proven to lift sales." Upon information and belief, a significant proportion of sales in the "Amazon Marketplace" are for used or out-of-print books, and sales of POD books would be substantially lower through the "Amazon Marketplace" than through the Direct Amazon Sales Channel. Further, to purchase a book in the "Amazon Marketplace", a consumer must provide shipping information to the third-party vendor and cannot take advantage of Amazon's free shipping programs. Finally, Amazon requires all "Amazon Marketplace" booksellers to charge a preset amount per book for shipping that frequently exceeds the actual shipping costs. As a result, the end cost to consumers for books purchased through the "Amazon Marketplace" is unduly inflated, further limiting sales.

43. From the consumer's perspective, the foregoing makes "Amazon Marketplace" a less desirable method for purchasing books and, upon information and belief, causes a lower volume of purchases than would otherwise occur using the Direct Amazon Sales Channel. Accordingly, some of Plaintiffs' authors have advised that if Plaintiff is not able to sell through the Direct Amazon Sales Channel, those authors will retain other publishers who do use BookSurge, or will go to BookSurge directly.

44. Participating in the "Amazon Marketplace" program also unduly increases costs for POD publishers by forcing them to enter manually each book they want to list for sale and then to key in manually every customer's ordering information, line by line, from one system to another. This substantial additional burden would require Plaintiff (and other POD publishers) to hire additional staff to process manual data entry requirements.

45. Amazon's illegal tying arrangement harms Plaintiff and other POD publishers in their roles as purchasers in the otherwise competitive market for POD printing services. Specifically, Amazon's tying arrangement prevents POD publishing companies from selecting a printing service on a competitive basis. Rather, Amazon harms competition by illegally coercing POD publishing companies who wish to use Amazon's market-dominating Direct Sales Channel into purchasing BookSurge's printing services even though those services both are more expensive and result in an inferior product than the services offered by competitors.

46. As Amazon acknowledged in its "open letter" of March 31, 2008, Amazon's requirement that POD publishers sign a contract with BookSurge to have access to the Direct Amazon Sales Channel applies across the board to *all* publishers using POD printing services. Accordingly, all POD publishers are similarly harmed in their roles as purchasers in the

otherwise competitive market for printing services by Amazon's tying arrangement and are entitled to injunctive relief.

47. Class Members whom Amazon has illegally coerced into signing a BookSurge contract additionally are entitled to restitution, disgorgement and damages as a result of the payment of supracompetitive prices for lower quality product. Upon information and belief, at least four POD publishers have been coerced into signing a contract with BookSurge (with the attendant higher prices and poorer quality) in order to secure and retain customers.

48. Plaintiff has additionally been harmed financially by Amazon's anticompetitive conduct because several potential clients (authors) stated that they refused to use Plaintiff's POD publishing services after being informed that Plaintiff had not signed the BookSurge contract because Plaintiff could not guarantee that their authors' books would be sold through the Direct Amazon Sales Channel.

49. Plaintiff and other Class Members will continue to suffer injury unless the relief prayed for herein is granted. Amazon's improper conduct has presented Plaintiff and members of the Class with an untenable choice: either continue to lose business due to the improper restriction on the Direct Amazon Sales Channel or be forced into signing with BookSurge.

COUNT I

(Tying Claim For Violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1)

50. Plaintiff re-alleges and incorporates by reference each of the allegations set forth in paragraphs 1 through 49, above.

51. Amazon's sale of books in the Online Book Market is a separate service from the printing of POD books by BookSurge.

52. Amazon has market power for the sale of books in the Online Book Market.

53. The amount of interstate commerce affected in the market for the printing of POD books is substantial.

54. Amazon forces POD publishers to use BookSurge for printing services when they might otherwise prefer to purchase such printing services elsewhere.

55. Amazon's practice of tying printing services to sales in the Online Book Market unreasonably restrains trade and is unlawful per se under Section 1 of the Sherman Act.

56. Through the unlawful acts and practices described above Amazon has harmed competition for and consumers of printing services.

WHEREFORE, Plaintiff BookLocker, on its own behalf and on behalf of the putative class, prays that the Court declare, adjudge and decree the following:

A. that this action may be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with respect to Plaintiff's claims for injunctive relief, and Rule 23(b)(3) of the Federal Rules of Civil Procedure with respect to the claims for damages and other monetary relief, and declaring Plaintiff as representative of the Class and its counsel as counsel for the Class;

B. that the conduct alleged herein constitutes unlawful tying in violation of Section 1 of the Sherman Antitrust Act;

C. that Plaintiff and the Class are entitled to injunctive relief under the Clayton Act, 15 U.S.C. § 26, and other applicable law, enjoining Amazon from continuing or engaging in the unfair and anti-competitive activities alleged herein;

D. that Plaintiff and the Class are entitled to damages, penalties and other monetary relief provided by the Clayton Act, 15 U.S.C. § 15, and other applicable law, including treble damages;

E. that Plaintiff and the Class recover their costs of suit, including reasonable attorneys' fees and pre- and post- judgment interest;

F. that Plaintiff and the Class are entitled to an order requiring full restitution of all funds acquired from Amazon's unfair business practices, including disgorgement of revenues and/or profits;

G. that Plaintiff and the Class are granted such other, further and different relief as the nature of the case may require or as may be determined to be just, equitable and proper by the Court.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated this 10th day of February, 2009, in Bangor, Maine.

/ s / Anthony D. Pellegrini

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