



August 16, 2023

To: Lina Khan
Chair, Federal Trade Commission

Jonathan Kanter
Assistant Attorney General, Department of Justice Antitrust Division

The Open Markets Institute respectfully calls on your offices to open an antitrust investigation into how Amazon used and continues to use unfair methods of competition to gain and maintain a monopoly in its role as a seller of books to the public and a monopsony in its role as a buyer of books from publishers.

The open access to the free flow of ideas is essential to a well-functioning democracy. The government has the responsibility to ensure that actors with oversized power cannot control or interfere with the open exchange of ideas because allowing them to do so would undermine our First Amendment rights. The Supreme Court in *Associated Press* affirmed this mandate when it said, “it would be strange indeed ... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. ... Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.”¹ The Court further stated that the First Amendment is premised “on the assumption that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”²

While *Associated Press* referred to journalistic endeavors, the threat applies equally to books—the free exchange of ideas in books is essential to a free society. As the former chairman of the FTC, Robert Pitofsky, once explained, “[I]f you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and

¹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

² *Id.*

thorough in your investigation than if the very same problems arose in cosmetics, or lumber, or coal mining. ... [I]f somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be.”³ Another FTC chairman summed up the problem as follows: “The First Amendment protects us from the chilling shadow of government interference with the media. But are there comparable dangers if other powerful economic or political institutions assume control of the media?”⁴

Unfortunately, we no longer have to wonder what would happen if one of the most powerful economic institutions in the country gains control of books. We now know that it will use its power to line its own pockets to the detriment of readers, authors, publishers, booksellers, and our democracy. Amazon has amassed such power in this space over the last decade and a half that its shadow stretches long over almost every aspect of the book market. Today the free exchange of ideas is impeded and warped by opaque algorithms and sales practices controlled by Amazon and premised on which publisher and/or author is willing and able to pay the highest extortionary tax to get their books promoted on Amazon’s website.

The ultimate effects of Amazon’s business model—which is based on manipulating readers into buying specific books (and formats of books such as Kindle versions over print versions) in ways that maximize Amazon’s profits—include the unfair promotion and suppression of specific ideas, authors, publishers, and the routine disruption of public debate. We need nothing more than common sense to understand that the sort of personalized recommendations that readers welcome in the local independent store will have vast structural effects on the overall market of ideas when pursued by an all-powerful, all-seeing monopolist.

We at the Open Markets Institute fully recognize the enormous importance of the U.S. Department of Justice’s successful effort to block Penguin Random House from acquiring Simon

³ Aled Klein, *A Hard Look at Media Mergers*, THE WASHINGTON POST (Nov. 29, 2000) <https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/>.

⁴ Michael Pertschuk, Opening Address, 1 Fed. Trade Comm’n, PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 1, 1 (1978).

& Schuster. That lawsuit went a long way in protecting authors, independent publishers, booksellers, readers, and the public as a whole from further concentration of power and control in a single publisher. But we must acknowledge that the job of rebuilding a truly public, open, and competitive marketplace for books is far from done. Amazon may have moved into other markets in its quest to become the “everything store,” yet it is important to remember that the harms it inflicted on the book market have yet to be set to right, and in certain respects continue to get worse.⁵

Books are not like other products. A book represents the expression of ideas. Batteries, sneakers, and other goods may represent the bulk of the products that Amazon sells. But it is the corporation’s manipulation of the book industry that most directly threatens the flourishing of our democratic society. The time has come for our law enforcers and policymakers to complete their efforts to reestablish one of the foundational political economic assumptions on which American democracy stands. This is that any corporation that provides services or goods that are essential to the public must provide the same service—without favoritism or any other form of discrimination—to every individual and business that depends on them.

This letter first details Amazon’s history and identifies some of the unfair methods of competition that it used in the past to gain and maintain its market dominance. It then looks forward and identifies how Amazon continues to use unfair methods of competition to harm market participants.

PAST CONDUCT

Amazon began as a bookseller and books continue to be a major source of revenue for the company. When it first opened its doors in 1995, Amazon asserted that one of its goals was to

⁵ See David Streitfeld, *What Happened to Amazon’s Bookstore?*, THE NEW YORK TIMES (Dec. 3, 2021) <https://www.nytimes.com/2021/12/03/technology/amazon-bookstore.html> (detailing the ways that Amazon’s curation of books on its website has gotten worse over time); Seth Kugel & Stephen Hiltner, *A New Frontier for Travel Scammers: A.I.-Generated Guidebooks*, THE NEW YORK TIMES (AUG. 5, 2023) [HTTPS://WWW.NYTIMES.COM/2023/08/05/TRAVEL/AMAZON-GUIDEBOOKS-ARTIFICIAL-INTELLIGENCE.HTML?SEARCHRESULTPOSITION=6](https://www.nytimes.com/2023/08/05/travel/amazon-guidebooks-artificial-intelligence.html?searchresultposition=6) (“Shoddy [travel] guidebooks, promoted with deceptive reviews, have flooded Amazon in recent months.”).

eliminate publishers as the so-called gatekeepers in the industry.⁶ However, its executives soon made it clear that its real goal was to become the sole gatekeeper and eliminate all competition at every level of the industry—a goal that it reached through anticompetitive conduct, which included predatory pricing, locking up services vital to publishers and authors and exploiting their dependence, and ruthlessly punishing publishers who stepped out of line.⁷

At first, publishers, editors, literary agents, and authors were thrilled when Amazon opened its doors because it offered a new path to bring their books to market. Unlike traditional book retailers, Amazon listed all of a publisher’s titles—even backlisted and arcane titles. Readers flocked to the website because it was open 365 days a week, 24 hours a day, had an easy to search and browse format, and provided quick delivery.

In 2007, Amazon once again revolutionized the market when it released the Kindle e-reader, albeit in ways that began to disrupt the business of publishers and authors. The first Kindle cost \$399 and had 88,000 e-books available at launch. The catalogue included 100 New York Times bestsellers and Amazon sold most books for \$9.99 or less. Amazon was able to do this because it controlled the pricing of the editions of books sold on Kindle, used the Kindle editions as a loss leader, and routinely sold books at prices that undercut the ability of publishers and authors to plan and invest in their work.

To publishers and authors, this created a crisis unlike any they had experienced before. While Amazon was purchasing e-books from publishers for \$12 to \$14, it was selling them at a loss without informing readers that it was taking a hit on each sale. As the Pulitzer Prize-winning novelist Richard Russo said in or around 2012, “When you sell books at a loss, by the millions,

⁶ Jeffery P. Bezos, Amazon.com 2011 Letter to Shareholders (“[E]ven well-meaning gatekeepers slow innovation.”).

⁷ Amazon also used tax loopholes to give itself a competitive advantage over brick-and-mortar booksellers. These loopholes allowed Amazon to undercut its rivals on price because it did not collect sales tax in most states. Juliette Garside, *How Amazon Finds Tax Loopholes*, THE GUARDIAN (Apr. 4, 2012, 16.10 EDT), [http:// https://www.theguardian.com/technology/2012/apr/04/amazon-tax-loopholes-us](https://www.theguardian.com/technology/2012/apr/04/amazon-tax-loopholes-us).

to corner the market, you're not interested in competing. You're interested in burying your competitor and then burying the shovel."⁸

Amazon claimed that it was using the loss-leader strategy to pull readers in with the hopes that they would buy a Kindle or other products. But to many, it looked a lot more like a predatory pricing scheme designed to drive rivals like Barnes & Noble and other book retailers—both those with physical stores and those with sophisticated online sales systems—out of the e-book market. This pricing strategy was also a potent entry deterrent against potential competitors like Apple. To publishers and authors, however, it represented a ruthless effort to drive down the value of books in readers' minds and undercut the viability of the entire industry.

Ultimately, it is clear that Amazon did succeed in its goal to become the country's most dominant bookseller.⁹ Since it opened its doors, the number of physical bookstores plummeted from approximately 12,000 stores in 1998 to a little more than 6,000 in 2019. In fact, many Americans do not have a physical bookstore within driving distance, which makes Amazon their primary option. Thus, publishers and authors have become even more reliant on Amazon to get their product to market.¹⁰

Once it consolidated its power over the market, Amazon used that power to demand an ever-growing piece of the pie. Like most retailers, Amazon purchased books from publishers at wholesale before pricing them at a loss to induce more buyers to make purchases on its platform.

⁸ Martinez, *Amazon.com trying to wring deep discounts from publishers*.

⁹ According to Statista's Global Consumer Survey, 67% of U.S. readers reported buying a book on Amazon.com in 2022. See Anna Fleck, *Amazon Dominates Book Sales Almost Everywhere*, STATISTA (Aug. 19, 2022) <https://www.statista.com/chart/28042/share-of-respondents-who-bought-books-from-amazon/>. See also Colin Robinson, *The Trouble With Amazon*, THE NATION (Jul. 15, 2010) <https://www.thenation.com/article/archive/trouble-amazon/> ("Amazon is today, by some margin, the largest bookseller in the world.").

¹⁰ Self-published authors are also completely reliant on Amazon because the corporations Kindle Direct Publishing (KDP) platform dominates the industry. Over 1.4 million books are self-published through KDP every year and these self-published books generate 31% of Amazon's e-book sales. WORDRATED, AMAZON PUBLISHING STATISTICS (Jan. 12, 2023) <https://wordrated.com/amazon-publishing-statistics/#:~:text=Amazon%20publishing%20%E2%80%93%20FAQ&text=As%20the%20biggest%20self%20publishing,increase%20from%20the%20previous%20year>.

Over time, it demanded deeper and deeper discounts from publishers in an effort to increase its margins. For example, in 2012, Amazon demanded that a small publisher, McFarland & Co., give it 45% off the cover price for all of its titles—which was approximately double the wholesale discount that McFarland offered other retailers.¹¹ McFarland had no choice but to acquiesce because it feared Amazon would stop placing orders if it refused.¹² While Amazon’s bare-knuckled approach to negotiations and unreasonable demands may not be illegal,¹³ it does show that Amazon was behaving like a monopsonist at least as early as 2012.

All the more concerning is how Amazon has wielded its dominant position over even the biggest of publishers to retaliate against companies that resisted its demands or even questioned its practices. The first major instance took place in 2010 when Amazon removed the “buy” buttons on all of Macmillan’s titles after that publisher insisted that Amazon raise the e-book prices of Macmillan books.¹⁴ In that instance, Amazon swiftly relented and returned the “buy” button, but the stage was set for an even bigger fight.

In 2014, the publishing house Hachette attempted to switch Amazon to an agency model (where Hachette would retain ownership over the books and control pricing while paying Amazon a commission on every book sold). Amazon’s response was swift and harsh. Similar to Macmillan, it removed the “buy” button on all of Hachette’s titles, but it also prevented readers from pre-ordering Hachette’s new books and significantly delayed shipping books to readers. The dispute went on for eight months and had a major impact on Hachette’s sales. Moreover,

¹¹ Amy Martinez, *Amazon.com trying to wring deep discounts from publishers*, THE SEATTLE TIMES (originally published Apr. 1, 2012, 10:30 PM), <https://www.seattletimes.com/business/amazoncom-trying-to-wring-deep-discounts-from-publishers/>.

¹² Around the same time, Amazon stopped placing orders with a textbook publisher, Berkshire Publishing Group, after the company refused to go higher than a 40 percent discount. *Id.*

¹³ Amazon’s history of squeezing publishers may be a violation of the Robinson-Patman Act of 1936, which prohibits price discrimination against small businesses. Jeff Bezos reportedly told his staff to “approach these small publishers the way a cheetah would pursue a sickly gazelle” and his staff used the directive to pressure publishers to give the corporation more favorable terms. *See* BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON (2013).

¹⁴ Amazon also removed the “buy” button from Melville House’s titles in 2004 and Bloomsbury’s in 2008.

Amazon’s machinations harmed approximately 3,000 of Hachette’s authors by suppressing sales and incomes and hurting their longer-term prospects as writers. Those with new books published during the period reported “losing” a book. Because there were no pre-sales or Amazon sales during the dispute, those books never had a chance to launch and died without a trace.

Amazon’s aggressive responses to Macmillan, Hachette, and others, which took place in the public view, had the desired effect. The mere threat of retaliation created such a significant fear in market participants that nobody dared fight back, not if they wanted to stay in business.

The purpose of this letter is less about Amazon’s past behavior, however. The purpose of this letter is to highlight that Amazon has used and continues to use these and other unfair methods of competition in the book market and that all market participants—including readers, authors, booksellers, publishers, and the public—continue to be harmed to this day.

ONGOING HARMS

Amazon effectively uses the same model that the railroads used in the 19th century—i.e., if you want to get your product to market, you pay the tax and play by their rules. It has the power to act in this manner because it completely dominates almost every aspect of the book market. In the U.S., its website currently sells more than 50 percent of all physical book titles in the retail market, 90 percent of physical books sold online, and more than 80 percent of all e-books.¹⁵ For some types of books, Amazon may account for almost 100 percent of sales. Moreover, approximately three-quarters of the new books sold on the website are sold directly by Amazon as first-party sales, while the remaining quarter are sold by independent booksellers on the Amazon platform (in other words, Amazon’s clients who pay a fee for every book sold). As one literary agent put it, “They aren’t gaming the system. They own the system.”¹⁶ And because it

¹⁵ Amazon also dominates the self-publishing industry and “is responsible for more than 50% of sales from the Big Five Publishers.” Dimitrije Curcic, Amazon Publishing Statistics, Wordsrated (Jan. 12, 2023) <https://wordrated.com/amazon-publishing-statistics/> (“[A]s of 2018, Amazon published more than 91.5% of all self-published books in the U.S.”).

¹⁶ Jeffery A. Trachtenberg, *‘They Own the System’: Amazon Rewrites Book Industry by Marching into Publishing*, THE WALL STREET JOURNAL (Jan. 16, 2019 11:14 am), <https://www.wsj.com/articles/they-own-the-system-amazon-rewrites-book-industry-by-turning-into-a-publisher-11547655267> (quoting literary agent Rick Pascocello).

owns the system, nothing is stopping it from using its control to harm publishers, booksellers, readers, and authors as it continues to line its own pockets.

First, Amazon uses strong-arm tactics to force traditional publishers to agree to onerous contract terms and conditions. These unfair terms include imposing added fees for “services” like warehousing and shipping—on top of taking a cut from the total price of the book. And according to one publisher, “Amazon has used retaliation . . . to coerce publishers to accept contractual terms that impose substantial penalties for promoting competition with Amazon’s rivals.”¹⁷

Further, Amazon’s status as a publisher of books is particularly concerning because it puts the corporation into direct horizontal competition with the traditional publishers over whom the company already wields significant control through a vertical relationship. As a publisher, Amazon owns 17 imprints in the U.S. While the total number of books published by these imprints makes Amazon a relatively minor player compared to the Big Five publishers, it is important to view Amazon as also the de facto publisher of most self-published books sold in the United States, given the degree to which these authors must rely on Amazon services. It should come as no surprise that Amazon uses self-preferencing, exclusivity, and other discriminatory conduct to give its titles an unfair advantage over its rivals, and sometimes also to pit non-Amazon publishers and authors against one another in ways that serve Amazon’s private interests. Amazon also has a leg up on its competitors because it collects data on Americans and uses this data to influence readers’ purchasing decisions through sophisticated marketing and advertising technology. This allows it to recommend its titles to the detriment of its rivals.

Second, authors, booksellers, and readers are harmed by the contracts that Amazon imposes on publishers because they include MFN (Most Favored Nation) clauses and other terms that impose penalties if the publishers promote Amazon’s competitors. Under the MFN clauses, publishers are required to inform Amazon if they offer more favorable terms to rival booksellers

¹⁷ U.S. HOUSE OF REPRESENTATIVES, 116TH CONG., REPORT ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, 269 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (“The publisher added that the platform’s retaliatory conduct shows ‘Amazon’s ability and willingness to leverage its market power to prevent publishers from working effectively with rival e-book retailers and, thereby, maintain and enhance its dominance in e-book distribution’”).

and must offer the same terms to Amazon. This creates a barrier that makes it more difficult for rivals and new entrants to challenge Amazon’s dominance. Because Amazon has a dominant market share, MFN clauses and its practice of punishing publishers if they promote Amazon’s rivals are unfair methods of competition.

Third, Amazon harms readers because after years of unfair competitive practices it has obtained and continues to maintain substantial pricing power. There is also no reason to believe that Amazon does not engage in de facto personalized discrimination in prices, terms, and information based on its extensive surveillance of the interests and needs of almost every American individual and company that buys or sells online.¹⁸

Additionally, because Amazon’s actions have resulted in fewer outlets for books, and less diversity in the retail market, Amazon has an oversized power to control what readers see when browsing for books. Only Amazon understands how its algorithm works. Amazon can up-rank and down-rank titles at a whim. As Amazon steers readers towards its own titles and away from rivals, many readers end up buying books that are less relevant, less interesting, or of lower quality than had they been able to choose in an open and competitive market. Taken together, these behaviors amount to a starkly clear case of deceptive marketing practices, based on the corporation’s routine, mechanized efforts to falsely lead readers into believing that its book recommendations are based on personal preferences when they are actually based on self-preferencing or paid advertising.

Fourth, Amazon’s conduct harms authors—the lifeblood of the industry. Importantly, it does so by depressing wholesale prices for publishers, which in turn means less money for authors, and consequently a less vibrant literary ecosystem for everyone. Many publishers pay authors a “deep discount” royalty of one-half or less of their normal rate when they sell books at a high discount—usually defined as somewhere between 50 percent and 60 percent of the list price. Amazon routinely insists on such steep discounts that books sold on the platform often fall within the “deep discount” clause of the author’s contract—meaning the author earns base

¹⁸ See Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't*, PROPUBLICA (Sept. 20, 2016), <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt> (explaining how Amazon’s algorithm harm consumers).

royalties on the discounted prices the company has granted its customers, which leads authors to earn less than half the amount per copy than they would have earned at “normal” retail discounts. Moreover, Amazon harms authors because it curates a bestseller list that heavily favors its own titles over other publishers’ titles, which impacts authors whose bonuses are tied to being on a bestseller list.

Amazon also provides the main platform for self- or indie publishing, a growing profession with incomes that mirror traditionally published authors. For such independently published authors, Amazon sets all terms without negotiation. The corporation also requires exclusivity to Amazon for authors who wish to engage in Amazon’s Kindle Unlimited, which is a subscription program that allows readers to download eligible books to their Kindle devices and pays authors based on the number of pages that individual customers read.¹⁹

Many authors and literary agents complain that one result of how Amazon uses its power is that it has been more difficult for new and diverse authors, and even for many established midlist authors, to be published by traditional publishers. Instead, publishers have been forced to focus more on “blockbuster” titles written by celebrities and well-established authors. This also harms readers because it results in less diversity of thought and curbs the exchange of ideas.

Amazon’s ability to manipulate sales is further amplified by the fact that it has rolled up a dominant position in hosting and editing online reviews and commentary by readers, both on its own website and on subsidiary websites such as Goodreads.com. In addition to controlling reviews on websites that are seemingly independent, the corporation also games the system by controlling used book sales (including on websites that many users believe are independent such as AbeBooks) and by controlling printing services.

CONCLUSION

There is nothing more powerful than a story. Stories can lead nations to war, topple regimes, fuel revolutions, and even teach children that dragons can be killed. And of fundamental importance to any democracy, they bring new ideas into the public discourse. In a well-functioning society, writers and poets are allowed to share their stories, to speak their truths, to

¹⁹ See KINDLE DIRECT PUBLISHING, KINDLE UNLIMITED, https://kdp.amazon.com/en_US/help/topic/G201537300.

challenge authority, and to mock the status quo. They are allowed—and perhaps encouraged—to make those in power feel uncomfortable and to stir up controversy like silt from the bottom of a pond. This includes targeting those private actors whose power derives from their control of corporations and capital.

It has long been understood that the author who takes the most risk generally needs the most protection. In other parts of the world, writers who dare to challenge authority, who dare to fight back, who dare to write with “honesty and boldness and a passion for life”²⁰ face execution, exile, charges of treason, and imprisonment.

Although in the United States, such threats have been less common, there are many instances in which people have used government to ban or otherwise impede the distribution of books that some people find to be politically or socially threatening in nature. This is anything but a problem of some distant past. In 2022 alone, the American Library Association recorded 2,571 unique book titles that were targeted for censorship, most of which “were by or about LGBTQIA+ persons and Black, Indigenous, and people of color.”²¹

It is only through a diversity of authors, publishers, editors, agents, and booksellers that we as a society can ensure that essential stories are published and are available to every reader. It is imperative that every book and every author can be found and read without interference from powerful companies designed to profit through the monopolization of control over the market and the manipulation of the reading public. As the Supreme Court put it in 1945, near the end of the Second World War, we must guarantee “the widest dissemination of information from diverse and antagonistic sources” because it is “essential to the welfare of the public . . . [and] a condition of a free society.”²² It is time to remove the chilling shadow of Amazon’s interference in the book market. It is time to open an investigation and take action.

²⁰ Sinclair Lewis, *The American Fear of Literature*, Nobel Writers on Writing, 33 (2000).

²¹ This includes *Gender Queer: a Memoir*, *All Boys Aren't Blue*, *Looking for Alaska*, and *The Perks of Being a Wallflower*, among many others for including LGBTQIA+ content. The list also includes *The Bluest Eye* and *The Absolutely True Diary of a Part-Time Indian* for allegedly being sexually explicit. AMERICAN LIBRARY ASSOCIATION, *Banned Books Week* (October 1 – 7, 2023), <https://www.ala.org/advocacy/bbooks/banned>.

²² *Associated Press*, 326 U.S. at 20.

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The Authors Guild
American Booksellers Association