Please Stop Calling Amazon A Monopoly

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I read a lot of book-related publications and blogs, and thus I have endured weeks of *Hachette-versus-Amazon* posts, as the publishing giant has wrangled with the online retail giant over the terms of their contract. Perhaps unsurprisingly, the writers and publications with ties to the "Big Five" in the publishing industry have sided with Hachette, whereas the commenters to the articles and the blogs (most of which are presumably *customers* of books) tend to wonder why a garden-variety dispute between two big companies over money is being billed as the downfall of civilization.

I ignored most of these articles until I read Steve Wasserman's* op-ed in *The Nation* — which argues "the time has come for closer scrutiny and regulation of a company that, like Standard Oil a century ago, provides an indispensable service for a modern economy and a healthy culture" — and I just couldn't take it anymore. **For the sake of our "modern economy" and "healthy culture," we must stop calling Amazon a "monopoly."**

Please don't misunderstand: I believe in the vigorous enforcement of antitrust laws in all industries. I've written before about how the Supreme Court wrongly decided *Bell Atlantic v. Twombly*, which made it harder to begin antitrust cases of any sort, and wrongly decided *Comcast v. Behrend*, which made it harder to win antitrust claims on behalf of consumers. I wrote before that the Bush Administration's policy was "that anti-monopoly law was so dead there was no point in the Justice Department even bothering to enforce it," and I applauded when the Obama Administration rescinded that policy and took seriously the threat of monopolies.

But we can't be cavalier about accusations of "monopoly" or "predatory pricing," or we risk diluting the terms and losing sight of *real* antitrust violations. **Amazon is neither a "monopoly" nor a "monopsony."**

A **"monopoly"** is when one supplier of a particular product or service is able to control the market. That does not remotely describe Amazon: the vast majority of books sold by Amazon are supplied by someone else, i.e., the publisher, and those same books are available elsewhere. As Hachette's own statement on the Amazon dispute says:

> HBG's titles are widely and immediately available on barnesandnoble.com, powells.com, booksamillion.com,

> walmart.com, target.com, overstock.com, and in thousands of great chain and independent bookstores across the country.

It is rather hard to have a "monopoly" over sales of something when the exactly same product is also sold online, through the largest retailers in the country, and through "thousands" of independent stores.

A **"monopsony"** is when one *buyer* of a particular productive or service is able to control the market. (Consider, for example, if there were several commercial airplane manufacturers, but only one commercial airline.) "Monopsony" is potentially a better fit for Amazon than "monopoly," because Amazon's real pricing power is that it can push a hard bargain with *publishers* when it *buys* the ebooks, whereas with *consumers* Amazon *sells* the books at or below the prevailing market prices. And, indeed, publishers *feel* obligated to deal with Amazon given its position as the largest retailer of ebooks.

But the claim just doesn't hold up. In a monopsony, the monopsonist *refrains from buying* to force the suppliers to start discounting against one another (because there are no other buyers), until they are no longer making a profit. That simply isn't the case here. First, the publishers have total control over where they sell their ebooks, and they exercise that power: the "Big Five" chose to not participate in Amazon Unlimited. Second, the ebooks are available all over the place, like Walmart and Target. Apple, for example, has used the feud as an opportunity to discount Hachette's books. There's nothing wrong with Apple doing that: this is competitive capitalism working for the benefit of consumers, as it should.

Even if a company is not a monopolist or monopsonist, it can engage in predatory pricing — but Amazon didn't. Wasserman claims, "the Obama Justice Department, seemingly mesmerized by visions of a digital utopia, is oddly blind to the threat to publishing posed by Amazon's growing monopoly," and concludes, "A serious Justice Department investigation is past due." But *the Justice Department already investigated Amazon* as part of the Apple case, and they published the results two years ago.

Back in 2012, as part of the settlement with the Big Five publishers for their admitted collusion with Apple to raise prices, the Justice Department solicited public comment, receiving hundreds of comments, including from Barnes & Noble, the Authors Guild, and the American Booksellers Association. As the Justice Department summarized in its response to the

comments, the most common complaint against Amazon is that it sometimes charges too little for ebooks, and that "that lower pricing will mean reduced profits for bookstores, authors, literary agents, and publishers, and an eventual reduction in quality, service, variety, and other benefits to consumers."

In response, the Justice Department explained — I know this is a long blockquote, but it's the root of the issue — on page 21-22:

> The United States recognizes that many of the comments reflect a concern that a firm with the heft of Amazon may harm competition through sustained low or predatory pricing. In the course of its investigation, the United States examined complaints about Amazon's alleged predatory practices and found persuasive evidence lacking. As is alleged in the Complaint, the United States concluded, based on its investigation and review of data from Amazon and others, that "[f]rom the time of its launch, Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles." Compl. ¶ 30.

> Some of the criticism directed at Amazon may be attributed to a misunderstanding of the legal standard for predatory pricing. Low prices, of course, are one of the principal goals of the antitrust laws. Cf. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). This is because of the unmistakable benefit to consumers when firms cut prices. Id. "Loss leaders," two-for-one specials, deep discounting, and other aggressive price strategies are common in many industries, including among booksellers. This is to be celebrated, not outlawed. Unlawful "predatory pricing," therefore, is something more than prices that are "too low." Antitrust law prohibits low prices only if the price is "below an appropriate measure of . . . cost," and there exists "a dangerous probability" that the discounter will be able to drive out competition, raise prices, and thereby "recoup[] its investment in below-cost pricing." *Brooke Group v. Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). No objector to the proposed Final Judgment has supplied evidence that, in the dynamic and evolving e-book

> industry, Amazon threatens to drive out competition and obtain the monopoly pricing power which is the ultimate concern of predatory pricing law. The presence and continued investment by technology giants, multinational book publishers, and national retailers in e-books businesses renders such a prospect highly speculative. Of course, should Amazon or any other firm commit future antitrust violations, the United States (as well as private parties) will remain free to challenge that conduct.

This is basic antitrust law. Professor John Kirkwood recently agreed in his article, "Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy." As he wrote, "considerable evidence suggests that Amazon was engaged in loss leading, not predatory pricing. … Amazon was almost certainly using loss leading not as a predatory device but as an efficient promotional tool, drawing consumers to its website to buy products they might not otherwise purchase."

But sometimes an ounce of common sense is worth a pound of legal analysis. Consider this part of Onnesha Roychoudhuri's article calling for increased regulation:

> What's a book lover to do? Hachette authors have taken the fight online, calling their readers to boycott Amazon. In spirit, I'm all for a boycott, but given Amazon's size and ubiquity, we're not going to buy our way out of this, and we shouldn't. The idea that we can spend our way to a more just world reduces us in value to the money we've got in our wallets. Nor should the responsibility lie solely with us as consumers. And that's where regulation comes in.

What sense does that make? If you don't like how Amazon deals with ebook publishers, then stop buying ebooks from them! A boycott is exactly the right idea — vote with your wallets! Amazon is *not* Bell Telephone. Amazon is *not* Standard Oil. Amazon is *not* the Hollywood studio system.** If you don't want to deal with them, you don't have to; the fact that everyone, from publishers to consumers, continues to *want* to deal with Amazon is proof

enough that they're not abusing a monopoly position, they're just doing a better job.

* Wasserman, says his bio, was "served as editorial director of Times Books and publisher of Hill & Wang, an imprint of Farrar, Straus & Giroux. He is a past partner of the Kneerim & Williams Literary Agency and is currently editor at large for Yale University Press."

** Wasserman gives one example of "precedent," *United States v. Paramount Pictures, Inc.*, which broke up Hollywood's studio system. There, the Hollywood studios (i.e., the suppliers), conspired to preclude independent theaters from showing their films, thereby controlling the theater market. It is indeed precedent: it's similar to what *the ebook publishers did to Amazon* by refusing to sell their books to it except on very specific terms.

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