1615 New Hampshire Avenue NW, First Floor
Washington, DC 20009-2520

Phone (202) 628-8410
Fax (202) 628-8419

ALA American Library Association

BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

COMPETITION IN DIGITAL MARKETS

October 15, 2019

The American Library Association ("ALA") is pleased to respond to the Committee's request for information concerning competition in digital markets. Established in 1876, ALA is a nonprofit professional organization of more than 57,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

America's libraries are engines for economic development and lifelong learning in an increasingly digital world. More and more, current policies and practices in digital markets limit libraries' ability to deliver core services. These practices threaten Americans' right to read what and how they choose, and imperil other fundamental First Amendment freedoms.

In every community across the country, libraries work to advance their missions to inspire education, creativity, and innovation. While print books remain a staple, today's libraries are modernizing their services to offer the latest digital technologies to meet the needs of 21st century students, jobseekers, and entrepreneurs.

However, unfair behavior by digital market actors – and the outdated public policies that have enabled them – is doing concrete harm to libraries as consumers in digital markets. Libraries are prepared to pay a fair price for fair services; in fact, over the past ten years, libraries have spent over $40 billion acquiring content. But abuse of the market position by dominant actors in digital markets is impeding essential library activities that are necessary to ensure that all Americans have access to information, both today and for posterity. If these abuses go unchecked, America's competitiveness and our cultural heritage as a nation are at risk.

Libraries operate in distinct digital markets. First, public and K-12 school libraries purchase popular content aimed at the general market. Second, academic and research libraries purchase scholarly communications, such as journals and monographs, as well as textbooks. Significantly, many of the publishers of both the popular and academic content are foreign-owned. Below, ALA will provide an overview of the anti-competitive conduct of content producers in these two markets. Attached to this overview are documents which describe the anti-competitive conduct in more detail.

I. POPULAR CONTENT

A. eBooks

In the past decade, eBooks have grown from a niche phenomenon to become about 19% of the U.S. book market.[1] Though consumers may acquire eBooks easily through commercial channels, libraries face major barriers because of abuse of market power by dominant firms.

The worst obstacle for libraries are marketplace bans: refusal to sell services at any price. Amazon Publishing, now a large publisher in its own right, ranks as the fifth largest publisher for eBooks by dollar sales.[2] Among Amazon Publishing clients are high-profile authors Dean Koontz, Mindy Kaling, and Mark Sullivan.[3]

The eBook titles from Amazon Publishing are not available to libraries for lending at any price or any terms. By contrast, consumers may purchase all of these titles directly from Amazon. This is a particularly pernicious new form of the digital divide; the Amazon Publishing books are available only to people who can afford to buy them, without the library alternative previously available to generations of Americans.

A related problem is the delayed release of eBooks to the library market. The Big 5 publishers[4] control over 80% of the trade book business in the United States.[5] One of the Big 5, Macmillan Publishers, recently announced an eight-week embargo of new eBook sales to libraries, to take effect on November 1, 2019.[6] For a new release, a library may purchase only a single eBook copy, and then must wait until the ninth week before purchasing additional copies,[7] regardless of the size of the library community. A single eBook is made available to serve the people of the Providence (R.I.) Public Library, or for the entire New York Public Library system of 92 locations.

Abusive pricing for libraries also is typical from the Big 5 publishers. For example, *The Codebreakers* by David Kahn and published by Simon & Schuster was quoted for $59.99 as an eBook for a consumer purchase[8]—which means lifetime access. By contrast, the price to

---

[1] Based on unit sales in 2018; presentation by David Walter of the NPD Group at Book Expo America, May 2019.
[2] Authors Earnings report, U.S. Online Book Sales, January 2018.
[3] Amazon also commands vertical integration advantages as its share of the overall sales of eBooks in the U.S. is 83%. https://www.idealog.com/blog/changing-book-business-seems-flowing-downhill-amazon/.
[4] The Big 5 publishers are Hachette Book Group, HarperCollins, Macmillan Publishers, Penguin Random House, and Simon & Schuster.
[5] https://www.bookbusinessmag.com/post/big-5-financial-reports-reveal-state-traditional-book-publishing/.
[6] Andrew Albanese, *After Tor Experiment, Macmillan Expands Embargo on Library E-books*, Publishers Weekly, https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/80758-after-tor-experiment-macmillan-expands-embargo-on-library-e-books.html.
[7] Publishers typically make eBooks available to libraries through the OverDrive platform. A library licenses a certain number of copies of an eBook title from OverDrive, and OverDrive delivers copies of the eBook to that number of user devices. After a checkout period (such as three weeks), the eBook disappears from the user's device and is available to be checked out by another user. Amazon Publishing does not make its eBooks available on OverDrive, and its own platform does not provide a library lending capability.
[8] On Amazon, September 30, 2019.

libraries for the very same eBook is $239.99—and this is for one copy (i.e., it can be loaned out to one person at a time, simulating the print loan model) and lasts for only two years. If a library wanted access for four years, it would pay $479.98. If the library wanted access for 20 years, it would pay a staggering $2,399.90—for one copy, lending that eBook to one person at a time.

As another example, *All the Light We Cannot See: A Novel* by Anthony Doerr, is priced as an eBook for $12.99 to consumers. The library price is $51.99—for two years[9] or $519.90 for 20 years—for one copy.

Denying or delaying new content to libraries certainly is a market failure. It also prevents libraries from accomplishing their democratizing mission of providing equal access to information to American citizens.

B. Streamed Content

The restrictive license terms for streamed music and audiovisual content present libraries with similar access challenges. Here too, the digital platforms refuse to negotiate terms that enable libraries to provide essential content to users.

As more players enter the marketplace for streaming content, the amount of media content available has skyrocketed. The content can be culturally significant and valuable to many educational uses when considering the increasing importance of media literacy. However, this content often is offered only online with no analog equivalent such as CDs or DVDs available to purchase. The media also can be fleeting or unavailable as rights transfer and vendors go out of business.

Libraries and educational institutions need these works to provide the services that their users demand, yet often have difficulty obtaining and distributing the content. A library could acquire a license to stream audiovisual content from platforms such as Amazon, Hulu, or Netflix, but the license typically is restricted to "personal, non-commercial use."[10] Accordingly, a library technically may be breaching the terms of its license agreement if it makes the content available to its users, even on the library premises. Additionally, there is the practical problem of enabling users to watch this content in their homes.[11]

For example, a high school teacher might want her class to view important content such as *13 Reasons Why* (a Netflix series about teenage suicide), *When They See You* (a Netflix series about the Central Park Five), or *The Handmaid's Tale* (a Hulu series about a dystopian, misogynistic future). This content is not available on DVD or any other physical medium. While the screening of a DVD in a classroom is clearly lawful, the streaming of these programs into a classroom

---

[9] The library eBook prices were provided by Multnomah County Library, Oregon.

[10] *See* Judy Tsou & John Vallier, *Ether Today, Gone Tomorrow: 21st Century Sound Recording Collection in Crisis*, 72 Notes 461 (2016), attached as Exhibit A.

[11] While there are services that enable libraries to provide users the ability to stream films, they offer foreign, independent, and documentary films, not the original content distributed by the major streaming platforms. Chris Cagle, *Kanopy: Not Just Like Netflix, and Not Free*, Film Quarterly (May 3, 2019), https://filmquarterly.org/2019/05/03/kanopy-not-just-like-netflix-and-not-free/.

might not be considered a “personal” use under the Netflix or Hulu licenses. And if the teacher assigns these programs for the students to watch at home in preparation for a class discussion, the public or school library cannot provide access to students whose parents cannot afford internet access and the additional subscription fee to Netflix or Hulu.

The same problem exists with music. Deutsche Grammophon released several Los Angeles Philharmonic recordings only online. Popular artists such as Frank Ocean use online releases for mix tapes, bonus tracks, singles, and live performances. Spotify has exclusive online-only releases. The licenses for these online releases typically are restricted to “personal use.”

Furthermore, the streaming licenses do not permit the creation of preservation copies. In 100 years, Netflix, Hulu, Amazon, Spotify and other companies creating streamed content may be out of business or have no financial reason for maintaining their older works. The only way to ensure the availability of this content to future generations of researchers, students, and artists is for libraries to have the right to preserve it, notwithstanding contractual restrictions to the contrary.

Libraries have made many attempts to negotiate a library license with rights holders of digital media. Unfortunately, the rights holders respond they are not interested because of the small size of the market that libraries and educational institutions represent.

II. ACADEMIC AND RESEARCH CONTENT

A. “Big Deals” in Scholarly Publishing

One of the important services that academic and research libraries provide to their communities is access to scholarly journals. These publications serve a dual purpose in higher education: to communicate the latest research results and to provide the primary mechanism for evaluation of academics. The unique dual nature of scholarly journals has created a market where academics are essentially required to publish in journals and academic institutions feel pressure to buy access to them—no matter the cost.

Like many other publications, scholarly journals have transitioned to largely digital format over the past 25 years, and this period has also been marked by unprecedented consolidation. While three decades ago, dozens of publishers published large catalogs of journals, today just five large publishers control the majority of the market (Reed-Elsevier, Wiley-Blackwell, Springer, Sage, and Taylor & Francis).[12] Over the same time period, double-digit annual price increases have raised the cost to subscribe to these publications at a pace that has far outstripped the inflation rate for other consumer goods.[13] Additionally, since the late 1990s, these five large publishers have moved away from selling individual journals and now almost exclusively sell digital journal bundles known colloquially as “big deals.” The value proposition to publishers is to

[12] Vincent Larivière et al., *The Oligopoly of Academic Publishers in the Digital Era*, PLoS ONE, (2015), 10(6): e0127502, https://doi.org/10.1371/journal.pone.0127502, attached as Exhibit B.

[13] Mark J. McCabe, *Journal Pricing and Mergers: A Portfolio Approach*, American Economic Review, American Economic Association, at 259, (March 2002), vol. 92(1), pages 259-269.

leverage the low marginal cost of digital distribution into more recurring revenue. The perceived benefit for the institutions has been access to more digital journals at a lower per-title price than a la carte subscriptions, which was standard for journals distributed in print.

Over time, however, the value of these "big deals" has been thrown into question. Because publishers often require libraries to sign non-disclosure agreements, it is extremely difficult to ascertain what any given library is paying for the same content. Because publishers also often lock libraries into multi-year arrangements with built-in price increases, libraries have found a growing chunk of their budgets allocated to servicing these big deals, forcing them to cut books, monographs, and single-journal purchases.[14] What was once seen as a way to get a significant collection of journals at a discount off of list price has devolved into a restrictive agreement that limits financial and strategic flexibility. The "big deal" has often been compared to a cable or satellite TV package, an apt analogy insofar as the customer cannot choose to pass on content that is of no interest, with initial price breaks quickly giving way to locked-in increases.

A growing number of libraries are now electing to critically appraise these deals. Earlier this year, the University of California system cancelled its approximately $11 million annual contract with Elsevier, one of the world's largest scholarly publishers. However, the high concentration of the publishing industry gives providers significant leverage at the negotiating table. Competition in the scholarly publishing market is further limited by the fact that scholarly works are non-substitutable goods. Each journal contains unique contributions to the scholarly record, so a library cannot simply substitute one publisher's journal with another and provide researchers with access to the same information.

B. Anti-Competitive Behavior in Textbook Publishing

Academic libraries have played an increasing role in college course materials in response to rapidly rising prices. Textbook prices have risen 184 percent over the last two decades[15]—three times the rate of inflation—and nearly two-thirds of students say they have skipped buying required textbooks because of the cost.[16] Libraries have been active in helping students bridge this gap, establishing textbook reserve programs that provide short-term access to print textbooks.

The college textbook publishing market has a long history of anti-competitive behavior that has led to the current crisis. The same three companies—Pearson, Cengage, and McGraw-Hill Education—have dominated the market for more than two decades and currently account for an

---

14 Claudio Aspesi et al., *Landscape Analysis: The Changing Academic Publishing Industry – Implications for Academic Institutions*, SPARC, at 5, (March 28, 2019), https://osf.io/preprints/lissa/58yhb/download, attached as Exhibit C.

15 Mark J. Perry, *Chart of the day.... or century?*, American Enterprise Institute (January 11, 2019), http://www.aei.org/publication/chart-of-the-day-or-century/.

16 Florida Virtual Campus: Office of Distance Learning & Student Services, 2 018 Student Textbook and Course Materials Survey: Results and Findings, at 13 (March 8, 2019), https://dlss.flvc.org/documents/210036/1314923/2018+Student+Textbook+and+Course+Materials+Survey+Report+--+FINAL+VERSION+--+20190308.pdf.

estimated 85 percent of industry revenues.[17] Competition is further limited because student consumers are effectively a captive market, since professors assign their materials and are not always fully informed about the price. However, in recent years, the publishing industry has begun an aggressive push toward digital distribution. Pearson, the market leader, announced this summer that it would begin phasing out printed textbooks, and Cengage has begun shifting its model toward a Netflix-style all-access subscription to digital services.[18] This shift is driven largely by a desire to eliminate the secondary market of used print textbooks,[19] and has potential to further restrict competition and limit the role libraries have played in providing access to course materials.

In May 2019, Cengage and McGraw-Hill Education—the second and third largest companies—announced plans to merge. If allowed to proceed, this merger would remake the already highly concentrated market into a duopoly, with the combined firm holding approximately 45% share. As such, the merger is presumptively illegal under the Clayton Act and is currently under review by the Department of Justice. The Scholarly Publishing and Academic Resources Coalition ("SPARC") filed a detailed antitrust analysis against the merger with DOJ in August, and numerous organizations have opposed the merger, including the Association of Public and Land Grant Universities, consumer organizations, and more than 40 student governments.

C. Academic Publishing's Future in Capturing and Exploiting Data

Academic publishing is undergoing a major transition from an industry traditionally focused on content toward a business built around data and analytics. As education and research materials move to digital formats, publishers are poised to capture vast amounts of data about students, faculty, research outputs, institutional productivity, and campus life. This data represents a potential multi-billion-dollar market with enormous possibility for network effects and the same kind of winner-take-all dynamics that led to the rise of platform monopolies like Facebook, Google, Amazon, and others.[20]

Myriad consequences can arise from the publishing industry's increasing control over academic data. The more data companies are able to gather about students and faculty, the more possible it is for that data to be compromised. For example, Pearson disclosed a major data breach affecting hundreds of thousands of students earlier this summer.[21] Even with federal laws concerning

---

[17] SPARC, Opposing the Merger Between Cengage and McGraw-Hill Education, at 17, (August 14, 2019), https://sparcopen.org/wp-content/uploads/2019/08/DOJ_Filing_08142019830.pdf, attached as Exhibit D.

[18] Brian Barrett, The Radical Transformation of the Textbook, Wired (Aug. 4, 2019), https://www.wired.com/story/digital-textbooks-radical-transformation/amp.

[19] SPARC, *supra*, at 24.

[20] Aspesi et al., *supra:* at 6. Additionally, publishers are seeking control of all phases of the research workflow by acquiring the tools for the production of scholarship, thereby locking scholars and institutions into their platforms. Reed Elsevier, for example, has actively sought control of a broad range of scholarly infrastructure through the acquisitions of Mendeley (research collaboration platform), Aries (manuscript submission system), SSRN (preprints), bPress (institutional repository), and Plum Analytics (altmetrics to measure scholarly impact). *See* Lindsay Ellis, *Elsevier's Presence on Campuses Spans More Than Journals. That Has Some Scholars Worried*, The Chronicle of Higher Education (April 3, 2019), https://www.chronicle.com/article/Elsevier-s-Presence-on/246048.

[21] Parmy Olson, Pearson Hack Exposed Details on Thousands of U.S. Students, The Wall Street Journal (July 31, 2019), https://www.wsj.com/articles/pearson-hack-exposed-details-on-thousands-of-u-s-students-11564619001.

student data privacy, publishers may capture data in other ways, such as through the financial planning and career "quizzes" offered in Cengage's digital subscription service or Pearson's app for Amazon Alexa devices[22] that have been criticized for "listening in" on users.[23]

There are also concerns over analytics products that use algorithms to derive information on everything from a student's learning style, daily patterns, or likelihood of dropping out to the productivity of research faculty, to tracking the most promising or profitable research trends. Algorithms that are commercially controlled are often "black boxes" that cannot be analyzed for biases or held accountable for mistakes.

The future of competition in academic publishing – and the ability of academic libraries and institutions to negotiate access to education and research products on behalf of their communities – is at risk. Both the education and research segments of the market are highly concentrated with significant barriers to entry, and large firms are able to exploit the decentralized nature of academic communities to gain leverage in negotiations.[24] Promoting vigorous competition in these new digital markets is vital to avoid the potential consequences that can arise as publishers transition to the data and analytics business. Offering strong privacy protections, favorable terms of service, and transparency for algorithms are all potential points of competitive differentiation that must be preserved.

III. FOLLOW-UP AND CONTACT INFORMATION

ALA appreciates the opportunity to participate in this investigation. If the Committee has any questions, please contact Alan S. Inouye, Senior Director, Public Policy & Government Relations, in ALA's Washington, D.C. office, ainouye@alawash.org; 202-628-8410.

---

[22] Amazon Web Services, *Pearson Announces New Alexa Skill at Imagine EDU* (July 12, 2019), https://aws.amazon.com/blogs/publicsector/pearson-announces-new-alexa-skill-at-imagine-edu/.

[23] TJ McCue, *Alexa is Listening All the Time, Here's How to Stop It*, Forbes (April 19, 2019), https://www.forbes.com/sites/tjmccue/2019/04/19/alexa-is-listening-all-the-time-heres-how-to-stop-it/#7545a2fe5e2d.

[24] Aspesi, *supra*, at 5.