

# The Problems of Price-Fixing of E-books: from the Perspective of Consumer Protection Law (Draft for Discussion only)

## Abstract

The price-fixing of e-books has been a tough problem in the days when the high-tech companies like Apple and Amazon are involved. In China, Amazon.cn has sold some e-books at zero price that was followed by Dangdang.com, another well-known online bookseller. This leads some vociferous voices.

This paper consists of four parts. Part 1 describes the current focuses on the systems of price-fixing of e-books. Part 2 gives analysis of the purpose and function of Consumer Protection Law. Part 3 tries to re-examine the problems of the price-fixing of e-books while discussing the consumer protection issues. Part 4 will give a conclusion.

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# Introduction

There are three backgrounds for this paper.

First, some personal experiences initiate the main idea of this paper. I believe that many persons have the experience of buying printed books from Amazon. Perhaps some have the experience of buying the e-books from Amazon or Apple. Some must have noticed the dramatic price fluctuation in a very short time. Here is one example. On June 16, *Steve Jobs: a Biography* was priced as follows: the kindle version was RMB 40.70, the hardcover version was RMB 31.50, and the paperback version was RMB 42.80. On June 20, the respective price was RMB 31.50, RMB 41.40, and RMB 33.30. Such a great change in price often makes people feel upset, annoyed, frustrated, and even angry as a books consumer. It really bothers the consumer.

Second, the lawsuit on the price-fixing of e-books between U.S. Department of Justice (DOJ) and Apple and seven publishing companies kindles the further exploration of this paper.<sup>1</sup>

Third, the Standing Committee of the National People's Congress is discussing the amendments of the Law of the People's Republic of China on the Protection of the Consumer's Rights and Interests.<sup>2</sup>

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<sup>1</sup> About the lawsuit, please see the complaints by the DOJ in *United States v. Apple, Inc. et al.*

<sup>2</sup> Chinese top legislature published a draft amendment to the Law of the People's Republic of China on the Protection of the Consumer's Rights and Interests in order to solicit public opinions on April 28, 2013. The public may submit opinions on the draft via the NPC's website ([www.npc.gov.cn](http://www.npc.gov.cn)), as well as send letters to the NPC Standing Committee's Commission for Legislative Affairs before May 31, 2013.

This paper focus on some problems of price-Fixing of e-books from the perspective of consumer protection law.

# **1 The Current Systems of Price-fixing of E-books**

## **1.1 A Brief Introduction to the Price-fixing Systems of Books**

The price-fixing of books is a complicated problem. Books are one group of commodities in the market. They shall obey the common laws on the commodities and markets. But books also have some special characteristics which can be used to defend some price-fixing strategies, for example, books are the commodities with the character of natural monopoly. Their price depend on the contents, not on the calculation of various cost. This opinion tends to put emphasis on the rights of the authors and publishing companies. While I want to focus on the rights of consumers in the following sections.

Generally speaking, there are two important methods on the price-fixing of books: fixed or free. Fixed prices are often also called Retail Price Maintenance (RPM) and mean the publisher fixes the price of a book; bookshops and other retailers are not allowed to sell it at any other price. Free prices mean bookshops and other retailers may sell the book at whatever price they choose.<sup>3</sup> These two price-fixing systems are the used to describe the traditional book pricing. And the European continental countries usually adopt the fixed price system while England and the United states adopt the free price system.

As the development of high technology, things have changed. In the United States, Apple introduced the Agency Model. This model allows book publishing companies to set the prices of their e-books while the agent (the retailer) takes a commission. Usually, The publishing

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<sup>3</sup> Doris Stockmann, Free or Fixed Prices on Books-Patterns of Book Pricing in Europe, *The Public* vol.11(2004),4, 49-64.

companies take 70% of the sale, and leave 30% to the retailer. Before this model was introduced, the United States took the wholesale model under which The publishing companies may offer the ebooks at 50% of the hardcover price, and then allow the retailer to sell them for whatever price they like.<sup>4</sup> Under the wholesale model, it is possible for Amazon to sell a e-book with the list price of \$30 only at \$9.99 even though the publishing companies sell the e-book to Amazon at \$15. Amazon need to take a \$5 loss. But under the agency model, it is impossible for Amazon to sell the above-mentioned e-book at \$9.99 even though Amazon is willing to take a \$5 loss. This is interesting.

In China, we have several periods. First, the principle for book pricing is cost plus profit plus taxes from 1949 to 1955. Second, the price was controlled because of planning economy from 1956 to 1980. Third, there is a transition period from the beginning of 1980s to 1992 during which the marketing factors in the price-fixing of books were introduced. After 1992, the publishing companies set the price of books. And the discount shall be negotiated by the publishing companies and the retailers except for the textbooks for the middle schools and primary schools.<sup>5</sup> Therefore, it seems that China adopts the free price system.

## **1.2 Some Basic Facts**

The price-fixing of the books can be observed from the point of profits.

The price of a book includes the costs and the profits. For instance, The value of a book consists of four parts: round 35%-40% of the price as cost of the book itself, round 20%-25% of

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<sup>4</sup> <http://ebookreadersresource.com/publisher-news/ebook-agency-model/>.

<sup>5</sup> Chen Xin, Research on the Price-fixing Systems of Books in China, SDX Joint Publishing Company, 2011, pp. 40-43.

the price as gross profit of the publishing house, 5%-10% as the income of the book retailers, and 20%-25% as the income of the bookstores.<sup>6</sup>

Compared with the price of the traditional books, e-books shall be less expensive from the point of view of the consumers because ebooks lack of cost of manufacturing and delivery fee. This is the simplest way to understand the price-fixing mechanism.

In fact, the price of some e-books are close, or very close to that of the printed books. To take The Casual Vacancy by J K Rowling from Amazon.cn for an instance, the Chinese printed version is sold at RMB 33.68 while the kindle version is sold at RMB 28.56 on June 16, 2013. The Chinese printed version of Steve Jobs: A Biography is sold at RMB 31.50 (paperback), or RMB 42.8(hardcover) while the kindle version is sold at RMB 40.7 on the same day. The Youth by Han Han, a popular writer, is sold at RMB 13.5 for its electronic version both from Dangdang.com and Amazon.cn. By contrast, its printed version is sold at RMB 20 from Dangdang.com while RMB 18 from Amazon.cn. By the way, there are numerous books are sold at a pretty low price without the printed counterparts.

## **2 The Purpose of the Consumer Protection Law**

### **2.1 Introduction**

Currently, the price-fixing of e-books is mainly discussed from the perspective of the antitrust law. This is illustrated by the Department of Justice of United States' accusation of collusion against Apple and five book publishers.<sup>7</sup> All of the words around the media are collusion,

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<sup>6</sup> Chen Xin, Research on the Price-fixing Systems of Books in China, SDX Joint Publishing Company, Beijing, 2011, p56.

<sup>7</sup> See the complaints by the DOJ in United States v. Apple, Inc. et al..

monopoly, anti-trust, DOJ, the publishers, Apple. For my limited reading, the consumer is seldom mentioned. Even the consumer is mentioned, it is still in a traditional way.

On Aug. 29, 2012, Connecticut Attorney General George Jepsen along with 54 attorneys general in other states, districts of the United States and U.S. territories, announced that they have reached an antitrust settlement with three of the largest book publishers in the United States. He said:

While publishers are entitled to their profits, consumers are equally entitled to a fair and open marketplace. This settlement will provide restitution to those customers who were harmed by this price-fixing scheme, but it also will restore competition in the e-Book market for consumers' long-term benefit.<sup>8</sup>

Now, the question is where is the CONSUMER, where is the consumer protection law. Perhaps some will argue that the DOJ is against the monopoly on or partly on behalf of the consumer. Some may apply the theory of competitive market to defend that a competitive market can guarantee the price equals the cost.<sup>9</sup>It seems so. The fact is that there is Anti-Monopoly Law in China, and there is also Law on the Protection of the Consumer's Rights and Interests. If the Anti-Monopoly Law can protect the consumers in this respect, what will the the Law on the Protection of the Consumer's Rights and Interests do?

Actually, the purpose of the anti-trust law is different from that of the consumer protection law. The purpose of the anti-monopoly law focuses on a competitive market, the purpose of the consumer protection law focuses on the rights and interests of the consumers.

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<sup>8</sup>Attorney General Jepsen Secures \$69 Million Agreement with Three Major U.S. Publishers over eBook Price-fixing Allegations. <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=510082>.

<sup>9</sup> Mitchell Polinsky, Introduction to Law and Economics, 3rd edition, Aspen Publishers Inc, p.104.

## **2.2 Chinese Consumer Protection Law**

In China, the Law on the Protection of the Consumer's Rights and Interests was adopted in 1993 and revised in 2009. It is still under discussion for its further revision. The problem is how to define the function of the consumer protection law. If is there an approach to deal the price-fixing of e-books from the perspective of the consumer law? First, there are some articles in Law on the Protection of the Consumer's Rights and Interests that deal with this problem.

Of course, the main purpose of the consumer protection law is to protect the rights and interests of the consumers as provided by the first article of the Law on the Protection of the Consumer's Rights and Interests which reads: "this Law is formulated in order to protect the legal rights and interests of consumers, to maintain social and economic order and to promote the healthy development of the socialist market economy. But this kind of general provision does not settle down the concrete problem, for instance, whether the book buyer may use this law to protect their rights and interests under the complicated situation of ebooks transaction."

Therefore, the key question is the boundary of the consumer protection law and in which way to protect the rights and interests of consumers. Fortunately, the Chinese consumer protection law also provides on this problem. Article 2 reads: "the rights and interests of consumers when purchasing or using commodities or receiving services as consumer needs for daily use shall be protected by this Law. Rights and interests covered by this Law shall be protected by other relevant laws and regulations."

Also article 10 reads: "a consumer shall have the right to fair dealing. A consumer shall have the right to fair terms of trade and conditions such as quality guarantee, reasonable price,

accurate measures, etc, when purchasing a commodity or receiving a service, and shall have the right to reject coercive transactions by business operators. ”

In the discussion on the amendment of the Law on the Protection of the Consumer’s Rights and Interests, a suggestion has been advocated, that is, where many consumers’ rights and interests were harmed, the China Consumers’ Association and its branches established in Provinces, Autonomous Regions, and Municipalities directly under the State Council may bring lawsuits in the People’s Courts.<sup>10</sup> Actually, the consumer protection law and civil procedure law have entitled the consumer the rights to bring a lawsuit. For example, Article 30 of the Consumer Protection Law provides that the People's Courts shall adopt measures to facilitate the institution of legal proceedings by consumers. Disputes over the rights and interests of consumers that meet the conditions for instituting an action under the Code of Civil Procedure of the People's Republic of China must be accepted and promptly heard.

Of course, we can not count on the one single consumer protection law to catch all the articles to protect the consumer, other laws can also protect consumer. For example, On 5 April 1993 the EC Directive on Unfair Contract Terms was adopted. This was regarded as one of the most significant pieces of consumer protection legislation to come from Brussels.<sup>11</sup> This does not mean that there is no room for improvement in the consumer protection law. The consumer protection law can broaden the ways to realize its purpose.

### **2.3 To Establish the Class Action System in Consumer Protection Law.**

There should be a class action system in Chinese consumer protection law.

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<sup>10</sup>The Amendment to the Law on the Protection of the Consumer’s Rights and Interests (Draft). [http://www.npc.gov.cn/npc/xinwen/fgz/flca/2013-04/28/content\\_1793762.htm](http://www.npc.gov.cn/npc/xinwen/fgz/flca/2013-04/28/content_1793762.htm).

<sup>11</sup> Dean, Meryll, Unfair Contact Terms: The European Approach, 56 Mod. L. Rev. 581 (1993).



Some may object this proposal because the existed rules have entitled the consumers to sue. In fact, according to the theories on lawsuit, this kind of rule make the single consumer burden such a high cost that it cancels the right to sue.<sup>12</sup>

Some may object this proposal because the existed rules have given the consumers associations the right to sue. There are two problems: a. do the consumers associations have incentives to sue? The answer seems to be no; b. the involvement of the consumers associations tends to rely on the non-marketing factors to protect the consumers. It likely leads to inefficiency.

To establish the class action system may protect the consumers better. Every single consumer will not buy too many e-books in one year even in his/her whole life. However, thousands of millions of consumers may buy too many e-books in one year even in a shorter time. The class action system can lower down the lawsuits cost. The class action is also closely related to the legal professional service markets, therefore it can avoid the shortcoming of litigation by the consumers associations.

### **3 The Price-Fixing Systems revisited**

#### **3.1 A Rough Observation**

We can classify the books that are sold from Amazon.cn in order to simplify the discussion.

1st category: to only have one version, either printed version or electronic version;

2nd category: to have both versions, but the price difference is far more than RMB 5;

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<sup>12</sup> Robert Cooter and Thomas Ulen: Law and Economics, 6th ed. Addison-Wesley, 2011.p. 386.

3rd category: to have both versions, but the price difference is around or less than RMB 5.

### **3.2 Some Explanations**

With some basic knowledge on the price-fixing of e-books and the consumer protection law in the mind, I want to focus on the third category. For the first category, there is no comparability. For the second category, the fact that the electronic version is much less expensive than the printed version is bound to be welcome by the consumers. As to the third category, the consumers may raise some doubts: why is it RMB 5? How to explain the price difference?

Because I am not able to access to the price strategies of Amazon, I have to guess the reasons. One of the reasons may be due to the shipping rates. In China, Amazon has a RMB 5 as the standard delivery fee. It seems to account for the RMB 5 price difference. If it is so, then the consumers shall be justified to request further that where the consideration on the manufacturing cost is, for example, the cost of paper used for the printed book, the cost of ink, the cost of warehousing. The consumers also have the similarly appropriate reasons to request the justification for the price of electronic version that rounds to the price of the printed version. In other words, why do the publishing companies take more profits from the electronic versions if they set the same or approximately same price of electronic version as the printed version. From the point of view of the consumers, the publishing companies should list more detailed explanations.

If these question were asked, the consumers' feeling and perceiving shall be taken into account in the price-fixing of e-books.<sup>13</sup> Thus, the consumers shall not be the strangers to the lawsuits or disputes on price-fixing of e-books.

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<sup>13</sup> Ruidong, Liu: Book Price Method Research Based on Customer's Perceived Value, Master Degree Thesis, Dalian University of Technology, 2006.

## Conclusion

The problems of price-fixing of e-books are by no means none of the business of the consumers and the consumer protection law. The consumer protection law should take into real effectiveness. The consumers shall be involved in the price-fixing of e-books via the class action system. The price of the electronic version of books should be lower than that of the printed version.

The End.

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