

AMAZON AND THE INDEPENDENT BOOKSELLER: A NEW LOOK AT MARKET DEFINITION?

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When one thinks of technological advances that have forced antitrust lawyers to think about market definition differently, Amazon’s rise to power is perhaps the most obvious example. For years, the behemoth company and its business practices have been the subject of scrutiny by the FTC, private litigants, legal scholars, and even Elizabeth Warren, with the publication of her plan last year to make Amazon a “platform utility.”¹ Indeed, it may seem as if nothing new or different could be written about Amazon and the definitions of the markets it occupies, but these are new and different times. In just two months, the global pandemic has altered, perhaps forever, the way in which United States consumers shop and purchase goods, necessitating a fresh look at market definition as well.

Back to Books

While there has been a great deal of antitrust scrutiny on Amazon’s business practices in the last couple of years, the focus has not been on books. Indeed, it appears that since the Apple e-books case, which, among other things, served to shore up Amazon’s dominance in the market for electronic books, the antitrust discussion about Amazon has largely been about other markets or practices. For instance, Amazon’s entry into the grocery market and its merger with Whole Foods garnered a great deal of attention. Amazon’s relationship with third-party retail sellers on its platform is now the subject of a class action and an antitrust investigation by the EU. And the growing popularity of Amazon Prime has forced competing businesses to think of new and creative ways to deal with shipping costs and consumer loyalty. While all of these issues deserve the attention they are getting, Amazon started with books, and it is to that market that this piece turns.

For almost 15 years, Amazon has dominated the market for online book sales, both physical books and e-books. By 2018, Amazon controlled 75 percent of online sales of physical books and 65 percent of e-book sales.² At the time that Amazon entered the scene in 1995 as an online seller of physical books, the number of independent bookstores was at an all-time high.³ Only a few years later, the combination of Amazon’s growth in online book sales and big chain bookstores (Borders and Barnes & Noble being the obvious examples) drove the number of independent book sellers

¹ “Here’s How We Can Break Up Big Tech,” March 8, 2019, <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

² Authors United to William J. Baer, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, May 2018, <https://openmarketsinstitute.org/wp-content/uploads/2018/05/NA-Authors-United-Letter.pdf>.

³ Pamela N. Danziger, “How Indie Bookstores Beat Amazon at the Bookselling Game: Lessons Here for Every Retailer,” *Forbes Magazine*, Feb. 12, 2020, <https://www.forbes.com/sites/pamdanziger/2020/02/12/how-indie-bookstores-beat-amazon-at-the-bookselling-game-lessons-here-for-every-retailer/#26a3ca741a67>.

down by over 40 percent.⁴ While the big chain bookstores have continued to suffer (and in the case of Borders, gone out of business) in the wake of Amazon’s success, however, independent bookstores have experienced a resurgence over the last few years. Focusing on what Ryan Raffaelli calls, in a widely-cited working paper for Harvard Business School, the “three C’s,” community, curation, and convening, independent bookstores have been able to distinguish themselves from Amazon to provide customers with a more personalized experience, including book talks, bookstore cafes, and face-to-face contact with salespeople who can give recommendations and make conversation.⁵ This of course depends on the availability of a brick and mortar store, as well as a neighborhood or tourist population interested in preserving the concept of independent bookstores and supporting small business owners. There is some overlap among consumers who purchase books on Amazon’s website and those who shop in independent bookstores, but the latter tend to view their shopping experience as more than just buying a book.⁶

Do these differences in the buying experience mean anything for defining a market for purposes of an antitrust claim? Obviously, the most natural competitor to an independent bookstore would be another independent bookstore, a physical location where customers could shop for books, attend events, or perhaps sit and drink coffee. But assume instead that an independent bookseller files a complaint against Amazon for exclusionary or unlawfully monopolistic conduct with respect to book sales. Perhaps the hypothetical bookstore feels that Amazon is entering into exclusionary deals with publishers or distributors that limit the bookstore customers’ choices, potentially diverting customers to Amazon. Perhaps the bookstore has a complaint about Amazon’s pricing practices. Whatever the issue, the relevant product market is most likely physical books.

Determining the geographic market in the above hypothetical is a bit trickier. Geographic markets for antitrust purposes are often localized, denoting the area in which consumers will look for a substitute or competing product. Until very recently, as discussed below, independent bookstores generally had a very limited geographic footprint, extending only to a neighborhood or a town. Amazon, on the other hand, has a geographic footprint that is limited only by whether a consumer has access to a computer or a smart phone. The geographic market in the hypothetical therefore could be confined to the location in which the independent bookstore sits (because consumers could go home and shop online if they did not find what they were looking for at the bookstore) or it could be much broader. Given that Amazon sells online and ships to the entire world, its geographic reach is global. That said, it does not have the ability to provide the shopping and purchasing experience that customers who frequent independent bookstores are looking for, i.e., a physical store with unique characteristics. So, while the geographic area and the products might be the same or similar, there are differences in the relevant market that fit neither the geographic nor the product description because of Amazon’s technological capabilities and its exclusively online presence.

⁴ *Id.*

⁵ Ryan Raffaelli, Ph.D., “Reinventing Retail: The Novel Resurgence of Independent Bookstores,” Harvard Business School, Jan. 2020, available at https://www.hbs.edu/faculty/Publication%20Files/20-068_c19963e7-506c-479a-bcb4-bb339cd293ee.pdf.

⁶ Max Graham, “Betting on Books: Can the Indie Bookstore Revival Last?”, Feb. 4, 2019, <https://thepolitic.org/betting-on-books-can-the-indie-bookstore-revival-last/>.

Does Shifting Strategies Mean Shifting Market Definition?

As discussed above, the resurgence of independent bookstores in the last several years was due, at least in part, to the physical location of those stores and the communities that the owners were able to build around those locations. By scheduling events, personally interacting with customers, and personalizing their brick and mortar spaces so that customers feel welcome and invested in the stores' success, independent bookstore owners have been able to retain a corner of the market for book sales, even in the face of Amazon's rise and competition from big box stores. But what happens when that physical space is no longer available (even if temporarily) and the future of in-person shopping looks uncertain because of a global pandemic? Will independent bookstores have to try to find space in the market that Amazon already dominates, namely, the online book market? It appears that some are already doing so, raising potentially interesting issues with respect to market definition.

In January of this year, a new website, Bookshop.org, was launched. Like Amazon, Bookshop is an online book seller set up as a B corporation, so that consumers can designate the book profits to a particular independent bookstore, if it is signed up with Bookshop. Alternatively, the profits from book sales are distributed evenly among independent bookstores.⁷ Bookshop also has an affiliate program that promotes books and authors, and customers also have a choice to link directly to a participating bookstore's website to buy the books directly. When Bookshop was launched, it said it had about 250 stores signed up and was selling approximately \$5000 in books each day. By April, after the pandemic hit and stores closed across the country, Bookshop grew to 465 stores and broke \$150,000 in sales in a single day.⁸ It hit \$1 million per week in sales within four weeks of the pandemic closing stores.⁹ This spike appears to be due to a number of factors, including Amazon's postponement of shipping non-essential items for a time, people being concerned with the treatment of Amazon employees (leading them to shop elsewhere), and the supportiveness of people for local businesses in a time of extreme uncertainty and hardship.

While it is too early to tell whether Bookshop will continue to grow, especially as the country reopens and people slowly get back to their shopping habits, its model raises some interesting market definition issues. For instance, if an independent bookseller signs on with Bookshop, does its geographic footprint change so that the relevant geographic market becomes nationwide (or worldwide)? Are the ways in which Bookshop and Amazon conduct their sales different enough so as not to make them direct competitors for purposes of the relevant market? Now that more independent booksellers are selling online through Bookshop, should one now take into account Amazon's e-book and audiobook sales as well when determining market power? Does Bookshop complement or compete with independent booksellers?¹⁰ All of these are likely hypotheticals that will never need to be answered in the antitrust context because Amazon's dominance is unlikely to be threatened by a startup that caters to independent bookstores, but it is clear that the pandemic

⁷"Amazon Who? Independent Booksellers Find New Allies," May 11, 2020, <https://www.pymnts.com/news/retail/2020/independent-booksellers-amazon-competition/>.

⁸ *Id.*

⁹ Angela Lashbrook, "Two Book Startups Compete Where Amazon Won't," May 5, 2020, <https://onezero.medium.com/two-new-book-startups-compete-where-amazon-wont-a0aa23dd8fa9>.

¹⁰ Alexandra Alter, "Bookstores are Struggling. Is a New E-Commerce Site the Answer?," June 16, 2020, <https://www.nytimes.com/2020/06/16/books/bookshop-bookstores-coronavirus.html?searchResultPosition=5>.

already has caused a shift in buying practices. If that shift becomes permanent and more consumers try to find a way to support small bookstores even if their favorite bookstores have now gone online instead of hosting book chats in their brick and mortar stores, Amazon might need to pay attention. Depending on the type of attention, market definition could well become a central issue.