UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: ROBERT PITOFSKY
MARY L. AZCUENAGA
JANET D. STEIGER
ROSCOE B. STAREK, III
CHRISTINE A. VARNEY

In the Matter of HARPER & ROW, PUBLISHERS, INC., a corporation.	Docket No. 9217
In the Matter of MACMILLAN, INC., a corporation.	Docket No. 9218
In the Matter of THE HEARST CORPORATION, a corporation, and WILLIAM MORROW AND CO., INC., a corporation.	Docket No. 9219
In the Matter of THE PUTNAM BERKLEY GROUP, INC., a corporation.	Docket No. 9220
In the Matter of SIMON & SCHUSTER, INC., a corporation.	Docket No. 9221

In the Matter of	)	
	)	Docket No. 9222
RANDOM HOUSE, INC.,	)	
a corporation.	)	

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate nonpublic proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and

resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

IT IS ORDERED that these matters be, and they hereby are, returned to adjudication, and

IT IS FURTHER ORDERED that the complaints in these matters be, and they hereby are, dismissed.

By the Commission, Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

Donald S. Clark
Secretary

Issued: September 10, 1996

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in Harper & Row, Publishers, Inc., Docket 9217,
MacMillan, Inc., Docket 9218,
The Hearst Corporation, Docket 9219,
Putnam Berkley Group, Inc., Docket 9220,
Simon & Schuster, Inc., Docket 9221, and
Random House, Inc., Docket 9222.

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief: The Commission could have sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging

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[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. See, e.g., Warner Communications, Inc., 105 F.T.C. 342 (1985).

[4] E.g., YKK (U.S.A.) Inc., 98 F.T.C. 25 (1981). See also the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b).

in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.