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ON BEHALF OF THE INFORMATION ACCESS ALLIANCE
PREPARED FOR THE
U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION
HEARINGS ON SINGLE-FIRM ANTICOMPETITIVE CONDUCT

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Introduction

This statement is presented to the Department of Justice and the Federal Trade Commission (the Agencies) on behalf of the Information Access Alliance (IAA). The IAA was created to allow library associations to share resources to explore the potential of focusing antitrust enforcement on promoting competition in the scholarly publishing marketplace.¹ The members of the IAA are the Association of Research Libraries, the American Library Association, the Association for College and Research Libraries, the American Association of Law Libraries, the Medical Library Association, the Special Library Association, and SPARC, the Scholarly Publishing and Academic Resources Coalition.

The IAA has focused on activities it believes are reducing effective competition in scholarly publishing and creating barriers to new entrants into these markets. In addition to concerns about market concentration, the IAA has been increasingly concerned with emerging practices among a small group of large publishers of scholarly journals who are using bundling practices to protect

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¹ See generally <http://www.informationaccess.org/>.

market share and create barriers to entrants. Hence, we believe it is timely and appropriate to provide this statement for these hearings.

The use of technology in the publishing industry and the emergence of digital distribution of publications ought to have made the industry more competitive. Yet it has been well-documented that the prices of for-profit academic journals have skyrocketed for more than a decade, rising substantially faster than both the rate of inflation and the rate of price increases of nonprofit journals.²

One potential reason for this phenomenon is the consolidation of the publishing industry. The history of increasing concentration in the publishing industry has been documented and analyzed elsewhere.³ But concentration does not account for the escalating prices and diminishing choices faced by research libraries. There is more.

The IAA believes that single-firm anticompetitive conduct accounts at least in some part for the serious problems confronting research libraries today. Our concerns include the rapid expansion of publisher bundles, the perceived lack of viable alternatives in the marketplace, the frequent demand for nondisclosure clauses in contracts, publishers' practices of requiring multi-year commitments, and the strict limitations on reducing the scale of bundles. The ubiquitous

² See Lee Van Orsdel & Kathleen Born, *Journals in the Time of Google*, 131 *Library J.* 39-44 (May 15, 2006). The articles and papers cited in these footnotes are appended to this Statement for the convenience of the Agencies.

³ See Thomas M. Susman & David J. Carter, *Publisher Mergers: A Consumer-based Approach to Antitrust Analysis*. Information Access Alliance White Paper, June 2003, available at <http://www.informationaccess.org/WhitePaperV2Final.pdf>; Mark J. McCabe, *Journal Pricing and Mergers: A Portfolio Approach*, 91 *American Econ. Rev.* 259-69 (2002).

presence of these practices by the major scholarly journal publishers was recently demonstrated by a survey conducted by the Association of Research Libraries.⁴

The library community is concerned that as bundles lock up substantial portions of library budgets for scholarly journals, competition is inhibited and new market entrants are barred. The lack of market alternatives, at least for the high value segments of the bundles, means that libraries have little ability to resist over-reaching terms, counting as gains the mitigating of damage rather than increasing of benefits from a more efficient market.

This submission does not attempt exhaustively to describe and analyze the scope and impact of bundling, nor to recommend application of specific antitrust remedies to what the IAA believes constitutes a violation of the U.S. antitrust laws. Rather, we summarize here the problem as seen by the purchasers and users of scholarly journals – a problem that is each year resulting in increasing erosion of library budgets – and we provide additional references to relevant literature that will assist the Agencies in understanding the nature and scope of the problem and how it might best be addressed.

Bundling of Scholarly Journals

The principal commercial publishers of scholarly journals all pursue the practice of bundling, and members of the Association of Research Libraries (ARL) have reported a high level of "market penetration of journal bundles," with fewer than 7% of libraries that responded to last

⁴ See Karla L. Hahn, *The state of the large publisher bundle: Findings from an ARL member survey*, ARL Bimonthly Rept. issue 245, at 1-6 (Apr 2006).

year's survey reporting that they had not licensed any of the journal bundles from the top five publishers. Additionally, the majority of libraries report multiple bundle contracts.⁵

Under the typical bundling arrangement, the library enters into a long-term (often confidential) agreement with the publisher to secure an electronic portfolio of journals. A typical bundle is sold with the requirement that a library maintain its historic “spend-level” for hard-copy subscriptions with that publisher for the library to obtain access to electronic versions of the content. The bundle may include some titles that were previously not selected by the library, either as an incentive or for an added charge. Libraries must agree to cancellation restrictions that prohibit substantial reductions in the numbers of titles purchased. These contractual constraints that accompany the bundle offerings by major publishers make it particularly difficult for libraries to mitigate the adverse effects of the bundle on the individual library and on the market.

Because libraries have limited budgets and face escalating costs of journal titles, bundling creates a barrier to entry in the journals market. Consider the example of a library with a fixed budget that purchases titles from one or more publishers. In the print environment, suppose that no publisher bundles its titles, so that they are available a la carte. In this case, when new, preferred entrant titles appear, the library need only cancel a small number of titles to make room in its budget for the new journals. In a digital environment, where the cost of distributing content is much lower, bundling can be more profitable than a la carte sales. If each incumbent publisher makes a take-it-or-leave-it offer of all of its content to the library (in the form of a bundle), it is less likely that the new entrants can displace any of the incumbent content. The use value of the

⁵ *Id.* at 2.

new preferred content is unlikely to exceed the aggregate value of the incumbent journal bundle. This implies that the library will be unwilling to cancel journal bundles, resulting in more revenue for incumbent publishers and thus higher profits (because distribution costs are lower than in the print case). Furthermore, because the library is unable to cancel less desirable individual journals, the quality of its collection is reduced relative to an unbundled digital environment.

In short, with their limited budgets and inability to reduce the numbers of titles within bundles, libraries are effectively restrained by the journal bundle from purchasing titles from other publishers. This, in turn, creates a major strategic entry barrier in the journals market that forecloses entry by new or smaller publishers and allows major bundling publishers to continue supracompetitive price increases.⁶ These conclusions comport with those reached in a paper sponsored by the European Commission's Directorate General for Research.⁷

Bundling Efficiencies

Commercial scholarly journal publishers might be expected to defend bundling practices based upon procompetitive efficiency justifications, although the difficulty of assessing and calculating

⁶ See Albert A. Foer, *Antitrust Perspectives On Mergers In The Academic Publishing Industry* presented at The Information Access Alliance and the American Antitrust Institute Invitational Symposium on Antitrust Issues in Scholarly and Legal Publishing, Feb 11, 2005, available at <http://www.informationaccess.org/ats/bios/bertabstract.pdf>; Aaron S. Edlin & D L. Rubinfeld, *Exclusion Or Efficient Pricing? The "Big Deal" Bundling Of Academic Journals*, 72 Antitrust L.J. 119-157 (2004).

⁷ See Study on the Economic and Technical Evolutions of the Scientific Publication Markets in Europe, Prepared for the European Commission 2006, available at http://ec.europa.eu/research/infocentre/article_en.cfm?id=/comm/research/press/2006/pr3103en.cfm&item=Infocentre&artid=1638.

the value of those efficiencies is likely to be monumental.⁸ Experience suggests that, while there may be some transaction cost savings to be obtained by bundling, it is not likely that these would outweigh the anticompetitive effects and, in any event, those efficiencies could readily be obtained without the ancillary contractual restrictions that invariably accompany bundled scholarly journals.

Remedies

Most of the discussion of bundling is couched in the antitrust language of tying. As explained in the case law, the purposes of remedies in tying cases are to terminate the illegal action, deny the defendant the fruits of its violation, compensate those injured by the illegal behavior, and deter future violations.⁹ The IAA recognizes the difficulty of formulating an appropriate antitrust remedy should this kind of bundling of scholarly journal subscriptions by commercial publishers be condemned as illegal under Section 2. Nonetheless, a variety of remedies may be available: monetary damages to compensate persons injured by the unlawful practice; required divestitures to break up mergers that have enabled publishers to bundle; direct prohibition of bundling;

⁸ See Edlin & Rubinfeld, *supra* note 6.

⁹ U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), *citing* U.S. v. United Shoe Machinery Corp., 391 U.S. 244, 250 (1968).

application of an "adding up" rule;¹⁰ or prohibition of the contractual constraints that exacerbate and block market responses to bundling practices.¹¹

Conclusion

The literature relating to the bundling of scholarly journals remains sparse. Hence, rather than simply repeating the findings, assessment, and conclusions of those few lawyers and scholars who have studied this problem, this Statement presents only an overview and summary of our concerns; citations to additional data, analyses, and background material are provided in the bibliography appended to this Statement, and copies of documents relied on are appended for the convenience of the Agencies.

The IAA and its member organizations and research libraries across the United States are convinced that the result of bundling practices by the leading for-profit scholarly journal publishers is detrimental to competition, results in increased prices to libraries, compromises the ability of librarians to make rational acquisition decisions based upon the desires and needs of

¹⁰ See Barry Nalebuff, *Bundling and the GE-Honeywell Merger* (Sept 2002), Yale SOM Working Paper No. ES-22. <http://ssn.com/abstract=327380>: “[W]here the facts support a finding of anticompetitive bundling, or the use of such a strategy is a matter of concern for the future, the remedy is potentially very simple. In many such cases, the only remedy needed is what can be termed an “adding up” rule. That is, if the bundled products are also sold separately and the separate prices add up to no more than the bundled price, the anticompetitive potential of bundling is eliminated.”

¹¹ Under the specific circumstances of journal bundling, the IAA believes that the most effective – and practical – remedy against illegal bundling of journals may ultimately be simply the prohibition of those harmful contractual constraints that accompany bundling. The components of that remedy would be: (a) a no spend-level requirement as a condition to a bundled discount; (b) an a la carte price list as a part of every contract, with a stated applicable discount for any bundle being offered; (c) multi-year contracts must be subject to cancellation of up to some substantial portion of titles or value, with the library to be credited for the pro-rata share of a la carte price; (d) no no-swapping clauses; and (e) no nondisclosure clauses.

their users, and, because of resource constraints of libraries, ultimately adversely affects the availability to researchers and the general public of scholarly journals. We thus urge the Agencies to review and analyze the problem of journal bundling as expounded in this paper and the cited studies; to apply to this analysis the learning gleaned during the very extensive discussions and presentations in the course of these hearings on single-firm anticompetitive conduct; and to explore the application of appropriate remedies. Most important, we urge that the agencies not draw from these hearings a conclusion that would reduce the ability of businesses, libraries, and others injured by bundled discounts to obtain appropriate redress. The IAA would be pleased to assist in any additional data-gathering and analysis that might be useful to this effort.

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