Apple likely to appeal US e-books decision--analysis

Although Apple remained non-committal on 30 June, the company is likely to appeal the ruling by the Second Circuit Court of Appeals, which affirmed that the company conspired with publishers to raise the price of e-books.

Apple has two significant reasons to appeal, said Christopher Sagers, a law professor at the Cleveland-Marshall School of Law and a former Washington DC attorney.

First, the company will not have to pay the USD 450M in penalties and fees until the conclusion of all of the appeals. He said that second, it is widely speculated that Apple wants to model other businesses, such as video streaming, on its e-books framework.

“Apple ideally would like to use vertical agreements to get the prices of its content-delivery competitors up, but that’s going to be a lot harder to do if it loses this case,” he said.

As previously reported, Apple appealed a federal district court’s USD 450m verdict against the company. On 30 June, the US Court of Appeals for the Second Circuit affirmed the district court’s ruling that Apple had conspired with publishers to raise the price of e-books.

The company continues to deny the allegations, and in a statement, an Apple spokesperson left open the possibility of an appeal. “We know we did nothing wrong back in 2010 and are assessing next steps,” the spokesperson said.

Not the last word

The Second Circuit’s decision was not surprising, according to John Kirkwood, a senior fellow of the American Antitrust Institute who teaches at Seattle University School of Law. He said there was extensive evidence that Apple had encouraged and assisted in a conspiracy to impose a new pricing model on e-books. This conspiracy resulted in a sharp increase in the price of e-books and harmed consumers, Kirkwood said.

Additional attorneys said the Second Circuit might have the last word on the case.

“Apple will try to appeal,” said Robert Lande, a law professor at the University of Baltimore and a former official at the Federal Trade Commission. However, he added that the US Supreme Court hears only a small number of cases.

Before filing with the Supreme Court, the company is likely to seek a hearing before the entire Second Circuit
Sagers said that Apple is likely to base its appeal on allegations that US District Court Judge Denise Cote used the wrong legal standard in determining whether there was a conspiracy in which Apple was complicit, and that she should not have applied a per se standard to Apple's role in the conspiracy. Still, because the matter is very fact-driven and there are no relevant splits among the judicial circuits, Sagers said he doubts that SCOTUS will review the case.

But regardless of the possibility of an appeal, state and federal government officials already were hailing the decision as a victory.

“The decision confirms that it is unlawful for a company to knowingly participate in a price-fixing conspiracy, whatever its specific role in the conspiracy or reason for joining it,” William Baer, the DoJ’s Assistant Attorney General for the Antitrust Division, said in a statement.

State officials—33 of whom joined the lawsuit—also touted the decision as a win.

The case is USA et al. v. Apple et al., 13-3741 in the US Court of Appeals for the Second Circuit.

by David Baumann and Peter Geier in Washington DC