Court File No. CT-2014-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the Act;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act.*

BETWEEN:

KOBO INC.

Applicant

- and -

THE COMMISSIONER OF COMPETITION;

HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC; HARPERCOLLINS CANADA LIMITED; HOLTZBRINCK PUBLISHERS, LLC; AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS HOLDINGS CO.

Respondents

AFFIDAVIT OF HOLLIE FELIX

I, **HOLLIE FELIX**, a Senior Paralegal, of the City of Ottawa, in the Province of Ontario, **AFFIRM THAT:**

1. I make this affidavit in support of the Commissioner of Competition's Response to a Notice of Motion filed by Kobo Inc. on February 21, 2014.

2. I am the Senior Paralegal with the Competition Bureau Legal Services and as such have personal knowledge of the matters to which I depose.

3. Attached hereto and marked as **Exhibit "A"** is a copy of the Complaint filed in the civil antitrust action, styled *United States of America v. Apple, Inc., et al.*, before the United States District Court for the Southern District of New York on April 11, 2012.

4. Attached hereto and marked as **Exhibit "B"** is a copy of the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment filed in the United States District Court for the Southern District of New York on July 23, 2012.

5. Attached hereto and marked as **Exhibit "C"** is a copy of the European Commission's decision of December 12, 2012 addressed to Hachette Livre SA, HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C., Georg von Holtzbrinck GmbH & Co. KG, Verlagsgruppe Georg von Holtzbrinck GmbH, Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc., and Apple, Inc. relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case Comp/39.847 – E-Books).

6. Attached hereto and marked as **Exhibits "D-G"** are copies of Commitments offered to the European Commission by Hachette; Simon & Schuster; HarperCollins and Holtzbrinck/Macmillan in respect of Case Comp/39.847 – E-Books.

7. Attached hereto and marked as **Exhibit "H"** is a copy of an article written by Laura Hazard Owen and published on May 30, 2013 entitled "Free is not the magic number: New trends in ebook pricing."

8. Attached hereto and marked as **Exhibit "I"** are copies of postings from the "Kobo Café" Blog dated February 1, 2010 through August 18, 2010.

AFFIRMED BEFORE ME at the City of Gatineau in the Province of Quebec this 3rd day of March 2014

A Commissioner of Oaths

Esther Lasman

LSUC # 54414R

Hollie Felix

EXHIBIT “A”

12 CV 2826

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

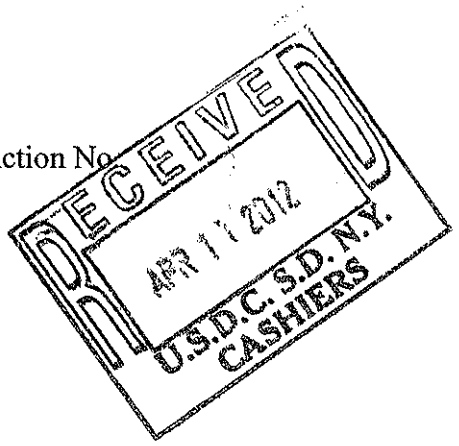
Plaintiff,

v.

APPLE, INC.,
HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS L.L.C.,
VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH,
HOLTZBRINCK PUBLISHERS, LLC d/b/a MACMILLAN,
THE PENGUIN GROUP, A DIVISION OF PEARSON PLC,
PENGUIN GROUP (USA), INC., and
SIMON & SCHUSTER, INC.,

Defendants.

Civil Action No.



COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants Apple, Inc. ("Apple"); Hachette Book Group, Inc. ("Hachette"); HarperCollins Publishers L.L.C. ("HarperCollins"); Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (collectively, "Macmillan"); The Penguin Group, a division of Pearson plc and Penguin Group (USA), Inc. (collectively, "Penguin"); and Simon & Schuster, Inc. ("Simon & Schuster"; collectively with Hachette, HarperCollins, Macmillan, and Penguin, "Publisher Defendants") to obtain equitable relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Plaintiff alleges:

I. INTRODUCTION

1. Technology has brought revolutionary change to the business of publishing and selling books, including the dramatic explosion in sales of "e-books"—that is, books sold to consumers in electronic form and read on a variety of electronic devices, including dedicated e-readers (such as the Kindle or the Nook), multipurpose tablets, smartphones and personal computers. Consumers reap a variety of benefits from e-books, including 24-hour access to product with near-instant delivery, easier portability and storage, and adjustable font size. E-books also are considerably cheaper to produce and distribute than physical (or "print") books.

2. E-book sales have been increasing rapidly ever since Amazon released its first Kindle device in November of 2007. In developing and then mass marketing its Kindle e-reader and associated e-book content, Amazon substantially increased the retail market for e-books. One of Amazon's most successful marketing strategies was to lower substantially the price of newly released and bestselling e-books to $9.99.

3. Publishers saw the rise in e-books, and particularly Amazon's price discounting, as a substantial challenge to their traditional business model. The Publisher Defendants feared that lower retail prices for e-books might lead eventually to lower wholesale prices for e-books, lower prices for print books, or other consequences the publishers hoped to avoid. Each Publisher Defendant desired higher retail e-book prices across the industry before "$9.99" became an entrenched consumer expectation. By the end of 2009, however, the Publisher Defendants had concluded that unilateral efforts to move Amazon away from its practice of offering low retail prices would not work, and they thereafter conspired to raise retail e-book prices and to otherwise limit competition in the sale of e-books. To effectuate their conspiracy,

the Publisher Defendants teamed up with Defendant Apple, which shared the same goal of restraining retail price competition in the sale of e-books.

4. The Defendants' conspiracy to limit e-book price competition came together as the Publisher Defendants were jointly devising schemes to limit Amazon's ability to discount e-books and Defendant Apple was preparing to launch its electronic tablet, the iPad, and considering whether it should sell e-books that could be read on the new device. Apple had long believed it would be able to "trounce Amazon by opening up [its] own ebook store," but the intense price competition that prevailed among e-book retailers in late 2009 had driven the retail price of popular e-books to $9.99 and had reduced retailer margins on e-books to levels that Apple found unattractive. As a result of discussions with the Publisher Defendants, Apple learned that the Publisher Defendants shared a common objective with Apple to limit e-book retail price competition, and that the Publisher Defendants also desired to have popular e-book retail prices stabilize at levels significantly higher than $9.99. Together, Apple and the Publisher Defendants reached an agreement whereby retail price competition would cease (which all the conspirators desired), retail e-book prices would increase significantly (which the Publisher Defendants desired), and Apple would be guaranteed a 30 percent "commission" on each e-book it sold (which Apple desired).

5. To accomplish the goal of raising e-book prices and otherwise limiting retail competition for e-books, Apple and the Publisher Defendants jointly agreed to alter the business model governing the relationship between publishers and retailers. Prior to the conspiracy, both print books and e-books were sold under the longstanding "wholesale model." Under this model, publishers sold books to retailers, and retailers, as the owners of the books, had the freedom to establish retail prices. Defendants were determined to end the robust retail price competition in

e-books that prevailed, to the benefit of consumers, under the wholesale model. They therefore agreed jointly to replace the wholesale model for selling e-books with an "agency model." Under the agency model, publishers would take control of retail pricing by appointing retailers as "agents" who would have no power to alter the retail prices set by the publishers. As a result, the publishers could end price competition among retailers and raise the prices consumers pay for e-books through the adoption of identical pricing tiers. This change in business model would not have occurred without the conspiracy among the Defendants.

6. Apple facilitated the Publisher Defendants' collective effort to end retail price competition by coordinating their transition to an agency model across all retailers. Apple clearly understood that its participation in this scheme would result in higher prices to consumers. As Apple CEO Steve Jobs described his company's strategy for negotiating with the Publisher Defendants, "We'll go to [an] agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." Apple was perfectly willing to help the Publisher Defendants obtain their objective of higher prices for consumers by ending Amazon's "$9.99" price program as long as Apple was guaranteed its 30 percent margin and could avoid retail price competition from Amazon.

7. The plan – what Apple proudly described as an "aikido move" – worked. Over three days in January 2010, each Publisher Defendant entered into a functionally identical agency contract with Apple that would go into effect simultaneously in April 2010 and "chang[e] the industry permanently." These "Apple Agency Agreements" conferred on the Publisher Defendants the power to set Apple's retail prices for e-books, while granting Apple the assurance that the Publisher Defendants would raise retail e-book prices at all other e-book outlets, too. Instead of $9.99, electronic versions of bestsellers and newly released titles would be priced

according to a set of price tiers contained in each of the Apple Agency Agreements that determined de facto retail e-book prices as a function of the title's hardcover list price. All bestselling and newly released titles bearing a hardcover list price between $25.01 and $35.00, for example, would be priced at $12.99, $14.99, or $16.99, with the retail e-book price increasing in relation to the hardcover list price.

8. After executing the Apple Agency Agreements, the Publisher Defendants all then quickly acted to complete the scheme by imposing agency agreements on all their other retailers. As a direct result, those retailers lost their ability to compete on price, including their ability to sell the most popular e-books for $9.99 or for other low prices. Once in control of retail prices, the Publisher Defendants limited retail price competition among themselves. Millions of e-books that would have sold at retail for $9.99 or for other low prices instead sold for the prices indicated by the price schedules included in the Apple Agency Agreements—generally, $12.99 or $14.99. Other price and non-price competition among e-book publishers and among e-book retailers also was unlawfully eliminated to the detriment of U.S. consumers.

9. The purpose of this lawsuit is to enjoin the Publisher Defendants and Apple from further violations of the nation's antitrust laws and to restore the competition that has been lost due to the Publisher Defendants' and Apple's illegal acts.

10. Defendants' ongoing conspiracy and agreement have caused e-book consumers to pay tens of millions of dollars more for e-books than they otherwise would have paid.

11. The United States, through this suit, asks this Court to declare Defendants' conduct illegal and to enter injunctive relief to prevent further injury to consumers in the United States.

II. DEFENDANTS

12. Apple, Inc. has its principal place of business at 1 Infinite Loop, Cupertino, CA 95014. Among many other businesses, Apple, Inc. distributes e-books through its iBookstore.

13. Hachette Book Group, Inc. has its principal place of business at 237 Park Avenue, New York, NY 10017. It publishes e-books and print books through publishers such as Little, Brown, and Company and Grand Central Publishing.

14. HarperCollins Publishers L.L.C. has its principal place of business at 10 E. 53rd Street, New York, NY 10022. It publishes e-books and print books through publishers such as Harper and William Morrow.

15. Holtzbrinck Publishers, LLC d/b/a Macmillan has its principal place of business at 175 Fifth Avenue, New York, NY 10010. It publishes e-books and print books through publishers such as Farrar, Straus and Giroux and St. Martin's Press. Verlagsgruppe Georg von Holtzbrinck GmbH owns Holtzbrinck Publishers, LLC d/b/a Macmillan and has its principal place of business at Gänsheidestraße 26, Stuttgart 70184, Germany.

16. Penguin Group (USA), Inc. has its principal place of business at 375 Hudson Street, New York, NY 10014. It publishes e-books and print books through publishers such as The Viking Press and Gotham Books. Penguin Group (USA), Inc. is the United States affiliate of The Penguin Group, a division of Pearson plc, which has its principal place of business at 80 Strand, London WC2R 0RL, United Kingdom.

17. Simon & Schuster, Inc. has its principal place of business at 1230 Avenue of the Americas, New York, NY 10020. It publishes e-books and print books through publishers such as Free Press and Touchstone.

III. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

18. Plaintiff United States of America brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, to obtain equitable relief and other relief to prevent and restrain Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C § 1.

19. This Court has subject matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

20. This Court has personal jurisdiction over each Defendant and venue is proper in the Southern District of New York under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391, because each Defendant transacts business and is found within the Southern District of New York. The U.S. component of each Publisher Defendant is headquartered in the Southern District of New York, and acts in furtherance of the conspiracy occurred in this District. Many thousands of the Publisher Defendants' e-books are and have been sold in this District, including through Defendant Apple's iBookstore.

21. Defendants are engaged in, and their activities substantially affect, interstate trade and commerce. The Publisher Defendants sell e-books throughout the United States. Their e-books represent a substantial amount of interstate commerce. In 2010, United States consumers paid more than $300 million for the Publisher Defendants' e-books, including more than $40 million for e-books licensed through Defendant Apple's iBookstore.

IV. CO-CONSPIRATORS

22. Various persons, who are known and unknown to Plaintiff, and not named as defendants in this action, including senior executives of the Publisher Defendants and Apple, have participated as co-conspirators with Defendants in the offense alleged and have performed acts and made statements in furtherance of the conspiracy.

V. THE PUBLISHING INDUSTRY AND BACKGROUND OF THE CONSPIRACY

A. Print Books

23. Authors submit books to publishers in manuscript form. Publishers edit manuscripts, print and bind books, provide advertising and related marketing services, decide when a book should be released for sale, and distribute books to wholesalers and retailers. Publishers also determine the cover price or "list price" of a book, and typically that price appears on the book's cover.

24. Retailers purchase print books directly from publishers, or through wholesale distributors, and resell them to consumers. Retailers typically purchase print books under the "wholesale model." Under that model, retailers pay publishers approximately one-half of the list price of books, take ownership of the books, then resell them to consumers at prices of the retailer's choice. Publishers have sold print books to retailers through the wholesale model for over 100 years and continue to do so today.

B. E-books

25. E-books are books published in electronic formats. E-book publishers avoid some of the expenses incurred in producing and distributing print books, including most manufacturing expenses, warehousing expenses, distribution expenses, and costs of dealing with unsold stock.

26. Consumers purchase e-books through websites of e-book retailers or through applications loaded onto their reading devices. Such electronic distribution allows e-book retailers to avoid certain expenses they incur when they sell print books, including most warehousing expenses and distribution expenses.

27. From its very small base in 2007 at the time of Amazon's Kindle launch, the e-book market has exploded, registering triple-digit sales growth each year. E-books now

constitute at least ten percent of general interest fiction and non-fiction books (commonly known as "trade" books[1]) sold in the United States and are widely predicted to reach at least 25 percent of U.S. trade books sales within two to three years.

D. Publisher Defendants and "The $9.99 Problem"

28. The Publisher Defendants compete against each other for sales of trade e-books to consumers. Publishers bid against one another for print- and electronic-publishing rights to content that they expect will be most successful in the market. They also compete against each other in bringing those books to market. For example, in addition to price-setting, they create cover art and other on-book sales inducements, and also engage in advertising campaigns for some titles.

29. The Publisher Defendants are five of the six largest publishers of trade books in the United States. They publish the vast majority of their newly released titles as both print books and e-books. Publisher Defendants compete against each other in the sales of both trade print books and trade e-books.

30. When Amazon launched its Kindle device, it offered newly released and bestselling e-books to consumers for $9.99. At that time, Publisher Defendants routinely wholesaled those e-books for about that same price, which typically was less than the wholesale price of the hardcover versions of the same titles, reflecting publisher cost savings associated with the electronic format. From the time of its launch, Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles.

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[1] Non-trade e-books include electronic versions of children's picture books and academic textbooks, reference materials, and other specialized texts that typically are published by separate imprints from trade books, often are sold through separate channels, and are not reasonably substitutable for trade e-books.

31. To compete with Amazon, other e-book retailers often matched or approached Amazon's $9.99-or-less prices for e-book versions of new releases and *New York Times* bestsellers. As a result of that competition, consumers benefited from Amazon's $9.99-or-less e-book prices even if they purchased e-books from competing e-book retailers.

32. The Publisher Defendants feared that $9.99 would become the standard price for newly released and bestselling e-books. For example, one Publisher Defendant's CEO bemoaned the "wretched $9.99 price point" and Penguin USA CEO David Shanks worried that e-book pricing "can't be $9.99 for hardcovers."

33. The Publisher Defendants believed the low prices for newly released and bestselling e-books were disrupting the industry. The Amazon-led $9.99 retail price point for the most popular e-books troubled the Publisher Defendants because, at $9.99, most of these e-book titles were priced substantially lower than hardcover versions of the same title. The Publisher Defendants were concerned these lower e-book prices would lead to the "deflation" of hardcover book prices, with accompanying declining revenues for publishers. The Publisher Defendants also worried that if $9.99 solidified as the consumers' expected retail price for e-books, Amazon and other retailers would demand that publishers lower their wholesale prices, further compressing publisher profit margins.

34. The Publisher Defendants also feared that the $9.99 price point would make e-books so popular that digital publishers could achieve sufficient scale to challenge the major incumbent publishers' basic business model. The Publisher Defendants were especially concerned that Amazon was well positioned to enter the digital publishing business and thereby supplant publishers as intermediaries between authors and consumers. Amazon had, in fact, taken steps to do so, contracting directly with authors to publish their works as e-books—at a

higher royalty rate than the Publisher Defendants offered. Amazon's move threatened the Publisher Defendants' traditional positions as the gate-keepers of the publishing world. The Publisher Defendants also feared that other competitive advantages they held as a result of years of investments in their print book businesses would erode and, eventually, become irrelevant, as e-book sales continued to grow.

E. Publisher Defendants Recognize They Cannot Solve "The $9.99 Problem" Alone

35. Each Publisher Defendant knew that, acting alone, it could not compel Amazon to raise e-book prices and that it was not in its economic self-interest to attempt unilaterally to raise retail e-book prices. Each Publisher Defendant relied on Amazon to market and distribute its e-books, and each Publisher Defendant believed Amazon would leverage its position as a large retailer to preserve its ability to compete and would resist any individual publisher's attempt to raise the prices at which Amazon sold that publisher's e-books. As one Publisher Defendant executive acknowledged Amazon's bargaining strength, "we've always known that unless other publishers follow us, there's no chance of success in getting Amazon to change its pricing practices." In the same email, the executive wrote, "without a critical mass behind us Amazon won't 'negotiate,' so we need to be more confident of how our fellow publishers will react. . . ."

36. Each Publisher Defendant also recognized that it would lose sales if retail prices increased for only its e-books while the other Publisher Defendants' e-books remained competitively priced. In addition, higher prices for just one publisher's e-books would not change consumer perceptions enough to slow the erosion of consumer-perceived value of books that all the Publisher Defendants feared would result from Amazon's $9.99 pricing policy.

VI. DEFENDANTS' UNLAWFUL ACTIVITIES

37. Beginning no later than September 2008, the Publisher Defendants' senior executives engaged in a series of meetings, telephone conversations and other communications in which they jointly acknowledged to each other the threat posed by Amazon's pricing strategy and the need to work collectively to end that strategy. By the end of the summer of 2009, the Publisher Defendants had agreed to act collectively to force up Amazon's retail prices and thereafter considered and implemented various means to accomplish that goal, including moving under the guise of a joint venture. Ultimately, in late 2009, Apple and the Publisher Defendants settled on the strategy that worked—replacing the wholesale model with an agency model that gave the Publisher Defendants the power to raise retail e-book prices themselves.

38. The evidence showing conspiracy is substantial and includes:

- Practices facilitating a horizontal conspiracy. The Publisher Defendants regularly communicated with each other in private conversations, both in person and on the telephone, and in e-mails to each other to exchange sensitive information and assurances of solidarity to advance the ends of the conspiracy.

- Direct evidence of a conspiracy. The Publisher Defendants directly discussed, agreed to, and encouraged each other to collective action to force Amazon to raise its retail e-book prices.

- Recognition of illicit nature of communications. Publisher Defendants took steps to conceal their communications with one another, including instructions to "double delete" e-mail and taking other measures to avoid leaving a paper trail.

- Acts contrary to economic interests. It would have been contrary to the economic interests of any Publisher Defendant acting alone to attempt to impose agency on all of its retailers and then raise its retail e-book prices. For example, Penguin Group CEO John Makinson reported to his parent company board of directors that "the industry needs to develop a common strategy" to address the threat "from digital companies whose objective may be to disintermediate traditional publishers altogether" because it "will not be possible for any individual publisher to mount an effective response," and Penguin later admitted that it would have been economically disadvantaged if it "was the only publisher dealing with Apple under the new business model."

- Motive to enter the conspiracy, including knowledge or assurances that competitors also will enter. The Publisher Defendants were motivated by a desire to maintain both the perceived value of their books and their own position in the industry. They received assurances from both each other and Apple that they all would move together to raise retail e-book prices. Apple was motivated to ensure that it would not face competition from Amazon's low-price retail strategy.

- Abrupt, contemporaneous shift from past behavior. Prior to January 23, 2010, all Publisher Defendants sold their e-books under the traditional wholesale model; by January 25, 2010, all Publisher Defendants had irrevocably committed to transition all of their retailers to the agency model (and Apple had committed to sell e-books on a model inconsistent with the way it sells the vast bulk of the digital media it offers in its iTunes store). On April 3, 2010, as soon as the Apple Agency Agreements simultaneously became effective, all Publisher Defendants immediately used their new retail pricing authority to raise the retail prices of their newly released and bestselling e-books to the common ostensible maximum prices contained in their Apple Agency Agreements.

A. The Publisher Defendants Recognize a Common Threat

39. Starting no later than September of 2008 and continuing for at least one year, the Publisher Defendants' CEOs (at times joined by one non-defendant publisher's CEO) met privately as a group approximately once per quarter. These meetings took place in private dining rooms of upscale Manhattan restaurants and were used to discuss confidential business and competitive matters, including Amazon's e-book retailing practices. No legal counsel was present at any of these meetings.

40. In September 2008, Penguin Group CEO John Makinson was joined by Macmillan CEO John Sargent and the CEOs of the other four large publishers at a dinner meeting in "The Chef's Wine Cellar," a private room at Picholene. One of the CEOs reported that business matters were discussed.

41. In January 2009, the CEO of one Publisher Defendant, a United States subsidiary of a European corporation, promised his corporate superior, the CEO of the parent company, that he would raise the future of e-books and Amazon's potential role in that future at an upcoming

meeting of publisher CEOs. Later that month, at a dinner meeting hosted by Penguin Group CEO John Makinson, again in "The Chef's Wine Cellar" at Picholene, the same group of publisher CEOs met once more.

42. On or about June 16, 2009, Mr. Makinson again met privately with other Publisher Defendant CEOs and discussed, *inter alia*, the growth of e-books and Amazon's role in that growth.

43. On or about September 10, 2009, Mr. Makinson once again met privately with other Publisher Defendant CEOs and the CEO of one non-defendant publisher in a private room of a different Manhattan restaurant, Alto. They discussed the growth of e-books and complained about Amazon's role in that growth.

44. In addition to the CEO dinner meetings, Publisher Defendants' CEOs and other executives met in-person, one-on-one to communicate about e-books multiple times over the course of 2009 and into 2010. Similar meetings took place in Europe, including meetings in the fall of 2009 between executives of Macmillan parent company Verlagsgruppe Georg von Holtzbrinck GmbH and executives of another Publisher Defendant's parent company. Macmillan CEO John Sargent joined at least one of these parent company meetings.

45. These private meetings provided the Publisher Defendants' CEOs the opportunity to discuss how they collectively could solve "the $9.99 problem."

B. Publisher Defendants Conspire To Raise Retail E-book Prices Under the Guise of Joint Venture Discussions

46. While each Publisher Defendant recognized that it could not solve "the $9.99 problem" by itself, collectively the Publisher Defendants accounted for nearly half of Amazon's e-book revenues, and by refusing to compete with one another for Amazon's business, the

Publisher Defendants could force Amazon to accept the Publisher Defendants' new contract terms and to change its pricing practices.

47. The Publisher Defendants thus conspired to act collectively, initially in the guise of joint ventures. These ostensible joint ventures were not meant to enhance competition by bringing to market products or services that the publishers could not offer unilaterally, but rather were designed as anticompetitive measures to raise prices.

48. All five Publisher Defendants agreed in 2009 at the latest to act collectively to raise retail prices for the most popular e-books above $9.99. One CEO of a Publisher Defendant's parent company explained to his corporate superior in a July 29, 2009 e-mail message that "[i]n the USA and the UK, but also in Spain and France to a lesser degree, the 'top publishers' are in discussions to create an alternative platform to Amazon for e-books. The goal is less to compete with Amazon as to force it to accept a price level higher than 9.99 . . . . I am in NY this week to promote these ideas and the movement is positive with [the other four Publisher Defendants]." (Translated from French).

49. Less than a week later, in an August 4, 2009 strategy memo for the board of directors of Penguin's ultimate parent company, Penguin Group CEO John Makinson conveyed the same message:

> Competition for the attention of readers will be most intense from digital companies whose objective may be to disintermediate traditional publishers altogether. This is not a new threat but we do appear to be on a collision course with Amazon, and possibly Google as well. It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy. This is the context for the development of the Project Z initiatives [joint ventures] in London and New York.

C. *Defendants Agree To Increase and Stabilize Retail E-book Prices by Collectively Adopting an Agency Model*

50. To raise e-book prices, the Publisher Defendants also began to consider in late 2009 selling e-books under an "agency model" that would take away Amazon's ability to set low retail prices. As one CEO of a Publisher Defendant's parent company explained in a December 6, 2009 e-mail message, "[o]ur goal is to force Amazon to return to acceptable sales prices through the establishment of agency contracts in the USA . . . . To succeed our colleagues must know that we entered the fray and follow us." (Translated from French).

51. Apple's entry into the e-book business provided a perfect opportunity for collective action to implement the agency model and use it to raise retail e-book prices. Apple was in the process of developing a strategy to sell e-books on its new iPad device. Apple initially contemplated selling e-books through the existing wholesale model, which was similar to the manner in which Apple sold the vast majority of the digital media it offered in its iTunes store. On February 19, 2009, Apple Vice President of Internet Services Eddy Cue explained to Apple CEO Steve Jobs in an e-mail, "[a]t this point, it would be very easy for us to compete and I think trounce Amazon by opening up our own ebook store." In addition to considering competitive entry at that time, though, Apple also contemplated illegally dividing the digital content world with Amazon, allowing each to "own the category" of its choice—audio/video to Apple and e-books to Amazon.

52. Apple soon concluded, though, that competition from other retailers – especially Amazon – would prevent Apple from earning its desired 30 percent margins on e-book sales. Ultimately, Apple, together with the Publisher Defendants, set in motion a plan that would compel all non-Apple e-book retailers also to sign onto agency or else, as Apple's CEO put it, the Publisher Defendants all would say, "we're not going to give you the books."

53. The executive in charge of Apple's inchoate e-books business, Eddy Cue, telephoned each Publisher Defendant and Random House on or around December 8, 2009 to schedule exploratory meetings in New York City on December 15 and December 16. Hachette and HarperCollins took the lead in working with Apple to capitalize on this golden opportunity for the Publisher Defendants to achieve their goal of raising and stabilizing retail e-book prices above $9.99 by collectively imposing the agency model on the industry.

54. It appears that Hachette and HarperCollins communicated with each other about moving to an agency model during the brief window between Mr. Cue's first telephone calls to the Publisher Defendants and his visit to meet with their CEOs. On the morning of December 10, 2009, a HarperCollins executive added to his calendar an appointment to call a Hachette executive at 10:50 AM. At 11:01 AM, the Hachette executive returned the phone call, and the two spoke for six minutes. Then, less than a week later in New York, both Hachette and HarperCollins executives told Mr. Cue in their initial meetings with him that they wanted to sell e-books under an agency model, a dramatic departure from the way books had been sold for over a century.

55. The other Publisher Defendants also made clear to Apple that they "certainly" did not want to continue "the existing way that they were doing business," *i.e.*, with Amazon promoting their most popular e-books for $9.99 under a wholesale model.

56. Apple saw a way to turn the agency scheme into a highly profitable model for itself. Apple determined to give the Publisher Defendants what they wanted while shielding itself from retail price competition and realizing margins far in excess of what e-book retailers then averaged on each newly released or bestselling e-book sold. Apple realized that, as a result of the scheme, "the customer" would "pay[] a little more."

57. On December 16, 2009, the day after both companies' initial meetings with Apple, Penguin Group CEO John Makinson had a breakfast meeting at a London hotel with the CEO of another Publisher Defendant's parent company. Consistent with the Publisher Defendants' other efforts to conceal their activities, Mr. Makinson's breakfast companion wrote to his U.S. subordinate that he would recount portions of his discussion with Mr. Makinson only by telephone.

58. By the time Apple arrived for a second round of meetings during the week of December 21, 2009, the agency model had become the focus of its discussions with all of the Publisher Defendants. In these discussions, Apple proposed that the Publisher Defendants require *all* retailers of their e-books to accept the agency model. Apple thereby sought to ensure that it would not have to compete on retail prices. The proposal appealed to the Publisher Defendants because wresting pricing control from Amazon and other e-book retailers would advance their collusive plan to raise retail e-book prices.

59. The Publisher Defendants acknowledged to Apple their common objective to end Amazon's $9.99 pricing. As Mr. Cue reported in an e-mail message to Apple's CEO Steve Jobs, the three publishers with whom he had met saw the "plus" of Apple's position as "solv[ing the] Amazon problem." The "negative" was that Apple's proposed retail prices – topping out at $12.99 for newly released and bestselling e-books – were a "little less than [the publishers] would like." Likewise, Mr. Jobs later informed an executive of one of the Publisher Defendant's corporate parents that "[a]ll major publishers" had told Apple that "Amazon's $9.99 price for new releases is eroding the value perception of their products in customer's minds, and they do not want this practice to continue for new releases."

60. As perhaps the only company that could facilitate their goal of raising retail e-book prices across the industry, Apple knew that it had significant leverage in negotiations with Publisher Defendants. Apple exercised this leverage to demand a thirty percent commission—a margin significantly above the prevailing competitive margins for e-book retailers. The Publisher Defendants worried that the combination of paying Apple a higher commission than they would have liked and pricing their e-books lower than they wanted might be too much to bear in exchange for Apple's facilitation of their agreement to raise retail e-book prices. Ultimately, though, they convinced Apple to allow them to raise prices high enough to make the deal palatable to them.

61. As it negotiated with the Publisher Defendants in December 2009 and January 2010, Apple kept each Publisher Defendant informed of the status of its negotiations with the other Publisher Defendants. Apple also assured the Publisher Defendants that its proposals were the same to each and that no deal Apple agreed to with one publisher would be materially different from any deal it agreed to with another publisher. Apple thus knowingly served as a critical conspiracy participant by allowing the Publisher Defendants to signal to one another both (a) which agency terms would comprise an acceptable means of achieving their ultimate goal of raising and stabilizing retail e-book prices, and (b) that they could lock themselves into this particular means of collectively achieving that goal by all signing their Apple Agency Agreement.

62. Apple's Mr. Cue e-mailed each Publisher Defendant between January 4, 2010, and January 6, 2010 an outline of what he tabbed "the best approach for e-books." He reassured Penguin USA CEO David Shanks and other Publisher Defendant CEOs that Apple adopted the

approach "[a]fter talking to all the other publishers." Mr. Cue sent substantively identical e-mail messages and proposals to each Publisher Defendant.

63. The outlined proposal that Apple circulated after consulting with each Publisher Defendant contained several key features. First, as Hachette and HarperCollins had initially suggested to Apple, the publisher would be the principal and Apple would be the agent for e-book sales. Consumer pricing authority would be transferred from retailers to publishers. Second, Apple's proposal mandated that every other retailer of each publisher's e-books – Apple's direct competitors – be forced to accept the agency model as well. As Mr. Cue wrote, "all resellers of new titles need to be in agency model." Third, Apple would receive a 30 percent commission for each e-book sale. And fourth, each Publisher Defendant would have identical pricing tiers for e-books sold through Apple's iBookstore.

64. On January 11, 2010, Apple e-mailed its proposed e-book distribution agreement to all the Publisher Defendants. As with the outlined proposals Apple sent earlier in January, the proposed e-book distribution agreements were substantially the same. Also on January 11, 2010, Apple separately e-mailed to Penguin and two other Publisher Defendants charts showing how the Publisher Defendant's bestselling e-books would be priced at $12.99 – the ostensibly maximum price under Apple's then-current price tier proposal – in the iBookstore.

65. The proposed e-book distribution agreement mainly incorporated the principles Apple set out in its e-mail messages of January 4 through January 6, with two notable changes. First, Apple demanded that the Publisher Defendants provide Apple their complete e-book catalogs and that they not delay the electronic release of any title behind its print release. Second, and more important, Apple replaced the express requirement that each publisher adopt the agency model with each of its retailers with an unusual most favored nation ("MFN") pricing

provision. That provision was not structured like a standard MFN in favor of a retailer, ensuring Apple that it would receive the best available wholesale price. Nor did the MFN ensure Apple that the Publisher Defendants would not set a higher retail price on the iBookstore than they set on other websites where they controlled retail prices. Instead, the MFN here required each publisher to guarantee that it would lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer, even if the Publisher Defendant did not control that other retailer's ultimate consumer price. That is, instead of an MFN designed to protect Apple's ability to compete, this MFN was designed to protect Apple from having to compete on price at all, while still maintaining Apple's 30 percent margin.

66. The purpose of these provisions was to work in concert to enforce the Defendants' agreement to raise and stabilize retail e-book prices. Apple and the Publisher Defendants recognized that coupling Apple's right to all of their e-books with its right to demand that those e-books not be priced higher on the iBookstore than on any other website effectively required that each Publisher Defendant take away retail pricing control from all other e-book retailers, including stripping them of any ability to discount or otherwise price promote e-books out of the retailer's own margins. Otherwise, the retail price MFN would cause Apple's iBookstore prices to drop to match the best available retail price of each e-book, and the Publisher Defendants would receive only 70 percent of those reduced retail prices. Price competition by other retailers, if allowed to continue, thus likely would reduce e-book revenues to levels the Publisher Defendants could not control or predict.

67. In negotiating the retail price MFN with Apple, "some of [the Publisher Defendants]" asserted that Apple did not need the provision "because they would be moving to

an agency model with [the other e-book retailers,]" regardless. Ultimately, though, all Defendants agreed to include the MFN commitment mechanism.

68. On January 16, 2010, Apple, via Mr. Cue, offered revised terms to the Publisher Defendants that again were identical in substance. Apple modified its earlier proposal in two significant ways. First, in response to publisher requests, it added new maximum pricing tiers that increased permissible e-book prices to $16.99 or $19.99, depending on the book's hardcover list price. Second, Apple's new proposal mitigated these price increases somewhat by adding special pricing tiers for e-book versions of books on the *New York Times* fiction and non-fiction bestseller lists. For e-book versions of bestsellers bearing list prices of $30 or less, Publisher Defendants could set a price up to $12.99; for bestsellers bearing list prices between $30 and $35, the e-book price cap would be $14.99. In conjunction with the revised proposal, Mr. Cue set up meetings for the next week to finalize agreements with the Publisher Defendants.

69. Each Publisher Defendant required assurances that it would not be the only publisher to sign an agreement with Apple that would compel it either to take pricing authority from Amazon or to pull its e-books from Amazon. The Publisher Defendants continued to fear that Amazon would act to protect its ability to price e-books at $9.99 or less if any one of them acted alone. Individual Publisher Defendants also feared punishment in the marketplace if only its e-books suddenly became more expensive at retail while other publishers continued to allow retailers to compete on price. As Mr. Cue noted, "all of them were very concerned about being the only ones to sign a deal with us." Penguin explicitly communicated to Apple that it would sign an e-book distribution agreement with Apple only if at least three of the other "major[]" publishers did as well. Apple supplied the needed assurances.

70. While the Publisher Defendants were discussing e-book distribution terms with Apple during the week of January 18, 2010, Amazon met in New York City with a number of prominent authors and agents to unveil a new program under which copyright holders could take their e-books directly to Amazon – cutting out the publisher – and Amazon would pay royalties of up to 70 percent, far in excess of what publishers offered. This announcement further highlighted the direct competitive threat Amazon posed to the Publisher Defendants' business model. The Publisher Defendants reacted immediately. For example, Penguin USA CEO David Shanks reported being "really angry" after "hav[ing] read [Amazon's] announcement." After thinking about it for a day, Mr. Shanks concluded, "[o]n Apple I am now more convinced that we need a viable alternative to Amazon or this nonsense will continue and get much worse." Another decisionmaker stated he was "p****d" at Amazon for starting to compete directly against the publishers and expressed his desire "to screw Amazon."

71. To persuade one of the Publisher Defendants to stay with the others and sign an agreement, Apple CEO Steve Jobs wrote to an executive of the Publisher Defendant's corporate parent that the publisher had only two choices apart from signing the Apple Agency Agreement: (i) accept the status quo ("Keep going with Amazon at $9.99"); or (ii) continue with a losing policy of delaying the release of electronic versions of new titles ("Hold back your books from Amazon"). According to Jobs, the Apple deal offered the Publisher Defendants a superior alternative path to the higher retail e-book prices they sought: "Throw in with Apple and see if we can all make a go of this to create a real mainstream e-books market at $12.99 and $14.99."

72. In addition to passing information through Apple and during their private dinners and other in-person meetings, the Publisher Defendants frequently communicated by telephone to exchange assurances of common action in attempting to raise the retail price of e-books.

These telephone communications increased significantly during the two-month period in which the Publisher Defendants considered and entered the Apple Agency Agreements. During December 2009 and January 2010, the Publisher Defendants' U.S. CEOs placed at least 56 phone calls to one another. Each CEO, including Penguin's Shanks and Macmillan's Sargent, placed at least seven such phone calls.

73. The timing, frequency, duration, and content of the Publisher Defendant CEOs' phone calls demonstrate that the Publisher Defendants used them to seek and exchange assurances of common strategies and business plans regarding the Apple Agency Agreements. For example, in addition to the telephone calls already described in this complaint:

- Near the time Apple first presented the agency model, one Publisher Defendant's CEO used a telephone call – ostensibly made to discuss a marketing joint venture – to tell Penguin USA CEO David Shanks that "everyone is in the same place with Apple."

- After receiving Apple's January 16, 2010 revised proposal, executives of several Publisher Defendants responded to the revised proposal and meetings by, again, seeking and exchanging confidential information. For example, on Sunday, January 17, one Publisher Defendant's CEO used his mobile phone to call another Publisher Defendant's CEO and talk for approximately ten minutes. And on the morning of January 19, Penguin USA CEO David Shanks had an extended telephone conversation with the CEO of another Publisher Defendant.

- On January 21, 2010, the CEO of one Publisher Defendant's parent company instructed his U.S. subordinate via e-mail to find out Apple's progress in agency negotiations with other publishers. Four minutes after that e-mail was sent, the U.S. executive called another Publisher Defendant's CEO, and the two spoke for over eleven minutes.

- On January 22, 2010, at 9:30 a.m., Apple's Cue met with one Publisher Defendant's CEO to make what Cue hoped would be a "final go/no-go decision" about whether the Publisher Defendant would sign an agreement with Apple. Less than an hour later, the Publisher Defendant's CEO made phone calls, two minutes apart, to two other Publisher Defendants' CEOs, including Macmillan's Sargent. The CEO who placed the calls admitted under oath to placing them specifically to learn if the other two Publisher Defendants would sign with Apple prior to Apple's iPad launch.

- On the evening of Saturday, January 23, 2010, Apple's Cue e-mailed his boss, Steve Jobs, and noted that Penguin USA CEO David Shanks "want[ed] an assurance that he is 1 of 4 before signing." The following Monday morning, at 9:46 a.m., Mr. Shanks called another Publisher Defendant's CEO and the two talked for approximately four minutes. Both Penguin and the other Publisher Defendant signed their Apple Agency Agreements later that day.

74. On January 24, 2010, Hachette signed an e-book distribution agreement with Apple. Over the next two days, Simon & Schuster, Macmillan, Penguin, and HarperCollins all followed suit and signed e-book distribution agreements with Apple. Within these three days, the Publisher Defendants agreed with Apple to abandon the longstanding wholesale model for selling e-books. The Apple Agency Agreements took effect simultaneously on April 3, 2010 with the release of Apple's new iPad.

75. The final version of the pricing tiers in the Apple Agency Agreements contained the $12.99 and $14.99 price points for bestsellers, discussed earlier, and also established prices for all other newly released titles based on the hardcover list price of the same title. Although couched as maximum retail prices, the price tiers in fact established the retail e-book prices to be charged by Publisher Defendants.

76. By entering the Apple Agency Agreements, each Publisher Defendant effectively agreed to require all of their e-book retailers to accept the agency model. Both Apple and the Publisher Defendants understood the Agreements would compel the Publisher Defendants to take pricing authority from all non-Apple e-book retailers. A February 10, 2010 presentation by one Publisher Defendant applauded this result (emphasis in original): "The Apple agency model deal means that we will have to **shift to an agency model with Amazon which [will] strengthen our control over pricing**."

77. Apple understood that the final Apple Agency Agreements ensured that the Publisher Defendants would raise their retail e-book prices to the ostensible limits set by the

Apple price tiers not only in Apple's forthcoming iBookstore, but on Amazon.com and all other consumer sites as well. When asked by a *Wall Street Journal* reporter at the January 27, 2010 iPad unveiling event, "Why should she buy a book for . . . $14.99 from your device when she could buy one for $9.99 from Amazon on the Kindle or from Barnes & Noble on the Nook?" Apple CEO Steve Jobs responded, "that won't be the case . . . . the prices will be the same."

78. Apple understood that the retail price MFN was the key commitment mechanism to keep the Publisher Defendants advancing their conspiracy in lockstep. Regarding the effect of the MFN, Apple executive Pete Alcorn remarked in the context of the European roll-out of the agency model in the spring of 2010:

> I told [Apple executive Keith Moerer] that I think he and Eddy [Cue] made it at least halfway to changing the industry permanently, and we should keep the pads on and keep fighting for it. I might regret that later, but right now I feel like it's a giant win to keep pushing the MFN and forcing people off the [A]mazon model and onto ours. If anything, the place to give is the pricing -- long run, the mfn is more important. The interesting insight in the meeting was Eddy's explanation that it doesn't have to be that broad -- any decent MFN forces the model.

79. Within the four months following the signing of the Apple Agency Agreements, and over Amazon's objections, each Publisher Defendant had transformed its business relationship with all of the major e-book retailers from a wholesale model to an agency model and imposed flat prohibitions against e-book discounting or other price competition on all non-Apple e-book retailers.

80. For example, after it signed its Apple Agency Agreement, Macmillan presented Amazon a choice: adopt the agency model or lose the ability to sell e-book versions of new hardcover titles for the first seven months of their release. Amazon rejected Macmillan's ultimatum and sought to preserve its ability to sell e-book versions of newly released hardcover titles for $9.99. To resist Macmillan's efforts to force it to accept either the agency model or

delayed electronic availability, Amazon effectively stopped selling Macmillan's print books and e-books.

81. When Amazon stopped selling Macmillan titles, other Publisher Defendants did not view the situation as an opportunity to gain market share from a weakened competitor. Instead, they rallied to support Macmillan. For example, the CEO of one Publisher Defendant's parent company instructed the Publisher Defendant's CEO that "[Macmillan CEO] John Sargent needs our help!" The parent company CEO explained, "M[acm]illan have been brave, but they are small. We need to move the lines. And I am thrilled to know how A[mazon] will react against 3 or 4 of the big guys."

82. The CEO of one Publisher Defendant's parent company assured Macmillan CEO John Sargent of his company's support in a January 31, 2010 email: "I can ensure you that you are not going to find your company alone in the battle." The same parent company CEO also assured the head of Macmillan's corporate parent in a February 1 email that "others will enter the battle field!" Overall, Macmillan received "hugely supportive" correspondence from the publishing industry during Macmillan's effort to force Amazon to accept the agency model.

83. As its battle with Amazon continued, Macmillan knew that, because the other Publisher Defendants, via the Apple Agency Agreements, had locked themselves into forcing agency on Amazon to advance their conspiratorial goals, Amazon soon would face similar edicts from a united front of Publisher Defendants. And Amazon could not delist the books of all five Publisher Defendants because they together accounted for nearly half of Amazon's e-book business. Macmillan CEO John Sargent explained the company's reasoning: "we believed whatever was happening, whatever Amazon was doing here, they were going to face – they're going to have more of the same in the future one way or another." Another Publisher Defendant

similarly recognized that Macmillan was not acting unilaterally but rather was "leading the charge on moving Amazon to the agency model."

84. Amazon quickly came to fully appreciate that not just Macmillan but all five Publisher Defendants had irrevocably committed themselves to the agency model across all retailers, including taking control of retail pricing and thereby stripping away any opportunity for e-book retailers to compete on price. Just two days after it stopped selling Macmillan titles, Amazon capitulated and publicly announced that it had no choice but to accept the agency model, and it soon resumed selling Macmillan's e-book and print book titles.

D. Defendants Further the Conspiracy by Pressuring Another Publisher To Adopt the Agency Model

85. When a company takes a pro-competitive action by introducing a new product, lowering its prices, or even adopting a new business model that helps it sell more product at better prices, it typically does not want its competitors to copy its action, but prefers to maintain a first-mover or competitive advantage. In contrast, when companies jointly take collusive action, such as instituting a coordinated price increase, they typically want the rest of their competitors to join them in that action. Because collusive actions are not pro-competitive or consumer friendly, any competitor that does not go along with the conspirators can take more consumer friendly actions and see its market share rise at the expense of the conspirators. Here, the Defendants acted consistently with a collusive arrangement, and inconsistently with a pro-competitive arrangement, as they sought to pressure another publisher (whose market share was growing at the Publisher Defendants' expense after the Apple Agency Contracts became effective) to join them.

86. Penguin appears to have taken the lead in these efforts. Its U.S. CEO, David Shanks, twice directly told the executives of the holdout major publisher about his displeasure

with their decision to continue selling e-books on the wholesale model. Mr. Shanks tried to justify the actions of the conspiracy as an effort to save brick-and-mortar bookstores and criticized the other publisher for "not helping" the group. The executives of the other publisher responded to Mr. Shanks's complaints by explaining their objections to the agency model.

87. Mr. Shanks also encouraged a large print book and e-book retailer to punish the other publisher for not joining Defendants' conspiracy. In March 2010, Mr. Shanks sent an e-mail message to an executive of the retailer complaining that the publisher "has chosen to stay on their current model and will allow retailers to sell at whatever price they wish." Mr. Shanks argued that "[s]ince Penguin is looking out for [your] welfare at what appears to be great costs to us, I would hope that [you] would be equally brutal to Publishers who have thrown in with your competition with obvious disdain for your welfare. . . . I hope you make [the publisher] hurt like Amazon is doing to [the Publisher Defendants]."

88. When the third-party retailer continued to promote the non-defendant publisher's books, Mr. Shanks applied more pressure. In a June 22, 2010 email to the retailer's CEO, Mr. Shanks claimed to be "baffled" as to why the retailer would promote that publisher's books instead of just those published by "people who stood up for you."

89. Throughout the summer of 2010, Apple also cajoled the holdout publisher to adopt agency terms in line with those of the Publisher Defendants, including on a phone call between Apple CEO Steve Jobs and the holdout publisher's CEO. Apple flatly refused to sell the holdout publisher's e-books unless and until it agreed to an agency relationship substantially similar to the arrangement between Apple and the Publisher Defendants defined by the Apple Agency Agreements.

E. Conspiracy Succeeds at Raising and Stabilizing Consumer E-book Prices

90. The ostensible maximum prices included in the Apple Agency Agreements' price schedule represent, in practice, actual e-book prices. Indeed, at the time the Publisher Defendants snatched retail pricing authority away from Amazon and other e-book retailers, not one of them had built an internal retail pricing apparatus sufficient to do anything other than set retail prices at the Apple Agency Agreements' ostensible caps. Once their agency agreements took effect, the Publisher Defendants raised e-book prices at all retail outlets to the maximum price level within each tier. Even today, two years after the Publisher Defendants began setting e-book retail prices according to the Apple price tiers, they still set the retail prices for the electronic versions of all or nearly all of their bestselling hardcover titles at the ostensible maximum price allowed by those price tiers.

91. The Publisher Defendants' collective adoption of the Apple Agency Agreements allowed them (facilitated by Apple) to raise, fix, and stabilize retail e-book prices in three steps: (a) they took away retail pricing authority from retailers; (b) they then set retail e-book prices according to the Apple price tiers; and (c) they then exported the agency model and higher retail prices to the rest of the industry, in part to comply with the retail price MFN included in each Apple Agency Agreement.

92. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers led to an increase in the retail prices of newly released and bestselling e-books. Prior to the Defendants' conspiracy, consumers benefited from price competition that led to $9.99 prices for newly released and bestselling e-books. Almost immediately after Apple launched its iBookstore in April 2010 and the Publisher Defendants imposed agency model pricing on all retailers, the Publisher

Defendants' e-book prices for most newly released and bestselling e-books rose to either $12.99 or $14.99.

93. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers for their newly released and bestselling e-books also led to an increase in average retail prices of the balance of Publisher Defendants' e-book catalogs, their so-called "backlists." Now that the Publisher Defendants control the retail prices of e-books – but Amazon maintains control of its print book retail prices – Publisher Defendants' e-book prices sometimes are higher than Amazon's prices for print versions of the same titles.

VII. VIOLATION ALLEGED

94. Beginning no later than 2009, and continuing to date, Defendants and their co-conspirators have engaged in a conspiracy and agreement in unreasonable restraint of interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This offense is likely to continue and recur unless the relief requested is granted.

95. The conspiracy and agreement consists of an understanding and concert of action among Defendants and their co-conspirators to raise, fix, and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the Publisher Defendants, ultimately effectuated by collectively adopting and adhering to functionally identical methods of selling e-books and price schedules.

96. For the purpose of forming and effectuating this agreement and conspiracy, some or all Defendants did the following things, among others:

a. Shared their business information, plans, and strategies in order to formulate ways to raise retail e-book prices;

b. Assured each other of support in attempting to raise retail e-book prices;

c. Employed ostensible joint venture meetings to disguise their attempts to raise retail e-book prices;

d. Fixed the method of and formulas for setting retail e-book prices;

e. Fixed tiers for retail e-book prices;

f. Eliminated the ability of e-book retailers to fund retail e-book price decreases out of their own margins; and

g. Raised the retail prices of their newly released and bestselling e-books to the agreed prices – the ostensible price caps – contained in the pricing schedule of their Apple Agency Agreements.

97. Defendants' conspiracy and agreement, in which the Publisher Defendants and Apple agreed to raise, fix, and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the Publisher Defendants by fixing retail e-book prices, constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

98. Moreover, Defendants' conspiracy and agreement has resulted in obvious and demonstrable anticompetitive effects on consumers in the trade e-books market by depriving consumers of the benefits of competition among e-book retailers as to both retail prices and retail innovations (such as e-book clubs and subscription plans), such that it constitutes an unreasonable restraint on trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

99. Where, as here, defendants have engaged in a *per se* violation of Section 1 of the Sherman Act, no allegations with respect to the relevant product market, geographic market, or market power are required. To the extent such allegations may otherwise be necessary, the relevant product market for the purposes of this action is trade e-books. The anticompetitive acts

at issue in this case directly affect the sale of trade e-books to consumers. No reasonable substitute exists for e-books. There are no technological alternatives to e-books, thousands of which can be stored on a single small device. E-books can be stored and read on electronic devices, while print books cannot. E-books can be located, purchased, and downloaded anywhere a customer has an internet connection, while print books cannot. Industry firms also view e-books as a separate market segment from print books, and the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade e-books.

100. The relevant geographic market is the United States. The rights to license e-books are granted on territorial bases, with the United States typically forming its own territory. E-book retailers typically present a unique storefront to U.S. consumers, often with e-books bearing different retail prices than the same titles would command on the same retailer's foreign websites.

101. The Publisher Defendants possess market power in the market for trade e-books. The Publisher Defendants successfully imposed and sustained a significant retail price increase for their trade e-books. Collectively, they create and distribute a wide variety of popular e-books, regularly comprising over half of the *New York Times* fiction and non-fiction bestseller lists. Collectively, they provide a critical input to any firm selling trade e-books to consumers. Any retailer selling trade e-books to consumers would not be able to forgo profitably the sale of the Publisher Defendants' e-books.

102. Defendants' agreement and conspiracy has had and will continue to have anticompetitive effects, including:

a. Increasing the retail prices of trade e-books;

b. Eliminating competition on price among e-book retailers;

c. Restraining competition on retail price among the Publisher Defendants;

d. Restraining competition among the Publisher Defendants for favorable relationships with e-book retailers;

e. Constraining innovation among e-book retailers;

f. Entrenching incumbent publishers' favorable position in the sale and distribution of print books by slowing the migration from print books to e-books;

g. Making more likely express or tacit collusion among publishers; and

h. Reducing competitive pressure on print book prices.

103. Defendants' agreement and conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

VIII. REQUEST FOR RELIEF

104. To remedy these illegal acts, the United States requests that the Court:

a. Adjudge and decree that Defendants entered into an unlawful contract, combination, or conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. Enjoin the Defendants, their officers, agents, servants, employees and attorneys and their successors and all other persons acting or claiming to act in active concert or participation with one or more of them, from continuing, maintaining, or renewing in any manner, directly or indirectly, the conduct alleged herein or from engaging in any other conduct, combination, conspiracy, agreement, understanding, plan, program, or other arrangement having the same effect as the alleged violation or that otherwise violates Section 1 of the Sherman Act, 15 U.S.C. § 1, through fixing the

method and manner in which they sell e-books, or otherwise agreeing to set the price or release date for e-books, or collective negotiation of e-book agreements, or otherwise collectively restraining retail price competition for e-books;

c. Prohibit the collusive setting of price tiers that can de facto fix prices;

d. Declare null and void the Apple Agency Agreements and any agreement between a Publisher Defendant and an e-book retailer that restricts, limits, or impedes the e-book retailer's ability to set, alter, or reduce the retail price of any e-book or to offer price or other promotions to encourage consumers to purchase any e-book, or contains a retail price MFN;

e. Reform the agreements between Apple and Publisher Defendants to strike the retail price MFN clauses as void and unenforceable; and

f. Award to Plaintiff its costs of this action and such other and further relief as may be appropriate and as the Court may deem just and proper.

DATED: APRIL 11, 2012
FOR PLAINTIFF
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EXHIBIT “B”

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC., and SIMON & SCHUSTER, INC., Defendants.	Civil Action No. 12-CV-2826 (DLC)

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT[*]

July 23, 2012

[*] Public Comments are available at http://www.justice.gov/atr/cases/apple/index.html.

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PRELIMINARY STATEMENT

When Apple launched its iBookstore in April of 2010, virtually overnight the retail prices of many bestselling and newly released e-books published in this country jumped 30 to 50 percent—affecting millions of consumers. The United States conducted a lengthy investigation into this steep price increase and uncovered significant evidence that the seismic shift in e-book prices was not the result of market forces, but rather came about through the collusive efforts of Apple and five of the six largest publishers in the country. That conduct, which is detailed in the United States' Complaint against those entities, is *per se* illegal under the federal antitrust laws.

Three of the publishers named in the Complaint as defendants—Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc.—have entered into settlement agreements with the United States. As it is required to do under the Tunney Act, the United States solicited comments from the public regarding the settlements. The United States received 868 comments from individuals, publishers, booksellers, and even from Apple, a key conspirator in the underlying price-fixing scheme.

Comments were submitted both in support of, and in opposition to, the proposed settlements. Those in support largely commented favorably on the government's efforts to end the conspiracy that cost e-book purchasers millions of dollars, and restore competition to the e-book market. Critical comments generally were submitted by those who have an interest in seeing consumers pay more for e-books, and hobbling retailers that might want to sell e-books at lower prices. Many such comments expressed a general frustration with conditions that arise not from the settlements or even the United States' Complaint, but from

the evolving nature of the publishing industry—in which the growing popularity of e-books is placing pressure on the prevailing model that is built on physical supply chains and brick-and-mortar stores. Many critics of the settlements view the consequences of the conspiracy—higher prices—as serving their own self-interests, and they prefer that unfettered competition be replaced by industry collusion that places the welfare of certain firms over that of the public. That position is wholly at odds with the purposes of the federal antitrust laws—which were enacted to protect competition, not competitors. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The United States received many comments that sought to excuse price fixing as necessary to end Amazon's reported ninety percent share of the e-book market, and noted that Apple's entry effectuated erosion of Amazon's share and spurred all sorts of innovations, such as color e-books. But the reality is that, despite its conspiratorial efforts, Apple's entry into the e-book market was not immediately successful. It was, in fact, Barnes & Noble's entry—prior to Apple—that took significant share away from Amazon; and many of the touted innovations were in development long before Apple decided to enter the market via conspiracy.

Some critical comments simply misunderstand the decree. They assert that the United States is imposing a business model on the industry by prohibiting agency agreements. The United States, however, does not object to the agency method of distribution in the e-book industry, only to the collusive use of agency to eliminate competition and thrust higher prices onto consumers. Publishers that did not collude are not required to surrender agency agreements and even the settling publishers here can resume

agency, if they act unilaterally, after only two years. This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements, if any.

Overall, the United States is entitled to broad discretion to settle with antitrust defendants, so long as the settlements are within the reaches of the public interest. In that regard, the Court's inquiry is a limited one, focused on whether the proposed Final Judgment provides effective and appropriate remedies for the antitrust violations alleged in the Complaint, with respect to the Settling Defendants. As set forth below, after carefully considering the comments received, the United States has concluded the settlements meet that test.

I. INTRODUCTION

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States hereby responds to the public comments received in this case regarding the proposed Final Judgment as to defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. (collectively "Settling Defendants"). After careful consideration of the comments, the United States has concluded that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint, with respect to the Settling Defendants. The United States will move the Court for entry of the proposed Final Judgment after this response has been published in the *Federal Register* and online. All timely comments are posted publicly at http://www.justice.gov/atr/cases/apple/index.html, pursuant to 15 U.S.C. § 16(d).

On April 11, 2012, the government filed a civil antitrust Complaint alleging that Apple, Inc. ("Apple") and five of the six largest publishers in the United States ("Publisher Defendants") restrained competition in the sale of electronic books ("e-books"), in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On the same day, the United States filed a proposed Final Judgment with respect to the three Settling Defendants.

The United States and Settling Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on April 11, 2012; the proposed Final Judgment and CIS were published in the *Federal Register* on April 24, 2012, at 77 Fed. Reg. 24518; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments

relating to the proposed Final Judgment, were published in both *The New York Post* and *The Washington Post* for seven days beginning on April 20, 2012 and ending on April 26, 2012. The sixty-day period for public comment ("Tunney Act period") ended on June 25, 2012.

The United States received 868 comments during the Tunney Act period.[1] Nearly seventy of those comments favored the suit and settlement. The favorable comments included a submission from the Consumer Federation of America ("CFA"), the only consumer group to submit a comment on the decree. Another supportive comment included the signatures of 186 authors who favorably noted the growth of the e-book industry and the opportunities it gave them to bypass traditional distribution channels and successfully self-publish e-books at lower prices. Among the group of comments that supported the settlement were fifty-two readers and consumers, several of whom echoed the themes of a form letter suggested by online publisher Wordpress.com.[2] The comments supporting the proposed Final Judgment did, however, include several that asserted the relief obtained in the settlements did not go far enough. One observation raised in these comments was that two years is too short a period to ban Settling Defendants from prohibiting price discounting by retailers.

The remaining comments opposed the suit and/or the settlement.[3] Most of these comments came from publishers, authors, agents, and bookstores that acknowledged an interest in higher retail e-book prices. An overarching theme of their comments was that lower e-book

[1] An additional fourteen comments arrived after the Tunney Act period expired and, therefore, have not been published. However, the United States reviewed the comments and none of them raised any issue not already addressed in this Response to Comments.

[2] As of this writing, that letter is available at: http://support4settlement.wordpress.com/2012/04/30/support-the-settlement/.

[3] Two comments expressed no opinion either in favor of the suit or settlement, or in opposition to it.

prices would harm booksellers directly and others indirectly. They claimed that the pre-conspiracy lower e-book prices were caused by predatory conduct of Amazon and that the proposed Final Judgment would allow Amazon to lower prices once again, which could lead to an Amazon monopoly. These comments suggested that the current industry equilibrium, even if collusively attained, is preferable to the competitive dynamic that preceded it, and that the United States erred both in suing the conspirators and in agreeing to a settlement designed to restore competition. Comments among this group include those from the American Booksellers Association ("ABA"), The Authors Guild,[4] a group of nine mid-tier publishers ("Independent Book Publishers"), and Amazon's two largest e-book retail competitors, Barnes & Noble ("B&N") and Apple.

This response proceeds as follows: Section II describes the Complaint and the industry facts that the United States considered when it entered into the settlements. Section III outlines the legal considerations for the Court as it reviews the proposed Final Judgment. Section IV explains the provisions of the proposed Final Judgment and how they will aid in restoring competition. Finally, Section V addresses the most prominent concerns raised in comments, then responds directly to the key assertions of the most detailed comments submitted.

[4] Both the Authors Guild and the ABA posted talking points online and instructed members "How to Weigh In" on the proposed Final Judgment. As of this writing, that guidance is available at: http://authorsguild.org/advocacy/articles/the-justice-departments-e-book-proposal-needlessly.html, and http://news.bookweb.org/news/aba-members-urged-make-their-voices-heard-re-agency-model.

II. THE COMPLAINT AND THE E-BOOK INDUSTRY

On April 3, 2010, simultaneously with Apple's iPad launch, the retail prices of most bestselling and newly released e-books published by Publisher Defendants jumped from the then-prevailing price of $9.99 to $12.99 or $14.99. Compl. ¶¶ 7-8, 74. In May 2010, the United States formally opened an investigation into the possibility that the price hike was the result of collusion. During the investigation, the United States issued Civil Investigative Demands to obtain documents and sworn testimony from defendants and third parties. On the strength of the evidence gathered during its investigation, the United States filed its Complaint on April 11, 2012.

The Complaint alleges that defendants conspired and agreed to raise, fix, and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among Publisher Defendants. Defendants ultimately effectuated this agreement by collectively adopting and adhering to functionally identical price schedules and methods of selling e-books, as laid out in each Publisher Defendant's contract with Apple (the "Apple Agency Agreements"). In 2008, defendants began to communicate about the threat posed by Amazon's $9.99 pricing strategy, and the need to work together to end it. Compl. ¶ 37. Though Amazon's e-book distribution business was "[f]rom the time of its launch . . . consistently profitable," it "substantially discount[ed] some newly released and bestselling titles." Compl. ¶ 30. By the end of the summer of 2009, Publisher Defendants agreed to work collectively to raise Amazon's retail prices. Compl. ¶ 37.

Apple was aware of Publisher Defendants' common objective to end Amazon's $9.99 pricing. Compl. ¶ 59. In late 2009, Apple and Publisher Defendants agreed to replace the

wholesale model for e-book sales with an agency model that would allow Publisher Defendants to raise prices. Compl. ¶ 37. Apple first proposed that each publisher expressly adopt an agency pricing model for all of its retail e-book sales, Compl. ¶ 63, then replaced that express requirement with an unusual most favored nation ("MFN") pricing provision that accomplished the same result. Compl. ¶¶ 65-66. This MFN was designed to protect Apple from having to compete on price at all, while still maintaining its margin. Compl. ¶ 65. Apple facilitated this transition to agency pricing across all e-book retailers by entering into functionally identical agency contracts with each Publisher Defendant that allowed Publisher Defendants to set Apple's retail prices for e-books. Compl. ¶ 6-7. The same terms granted Apple the assurance that Publisher Defendants would raise retail e-book prices at all other e-book retailers, and contained price tiers that created de facto retail e-book prices as a function of a title's hardcover list price. Compl. ¶ 7.

As explained more fully in the Complaint and CIS, defendants' conspiracy resulted in higher consumer prices for e-books than would have been possible absent collusion. "[T]he average price for Publisher Defendants' e-books increased by over ten percent between the summer of 2009 and the summer of 2010." CIS at 8-9. "On many adult trade e-books, consumers have witnessed an increase in retail prices between 30 and 50 percent." CIS at 9. Additionally, defendants' agreement prevented e-book retailers "from introducing innovative sales models or promotions with respect to Publisher Defendants' e-books, such as offering e-books under an 'all-you-can-read' subscription model where consumers would pay a flat monthly fee." CIS at 9.

Since the proposed Final Judgment was announced, more companies are investing to enter or expand in the market and compete against Amazon, Apple, and other e-book retailers. According to public reports, Microsoft has invested hundreds of millions of dollars in Barnes & Noble's digital book business, a business that Microsoft valued at $1.7 billion.[5] Microsoft soon thereafter announced it would sell a tablet computer, named Surface, that will compete against the iPad and serve as an e-reader.[6] Google, already an e-book content provider, also announced after the settlement that it would for the first time sell a tablet, called Nexus 7. The Nexus 7 is designed to compete directly against Amazon's Kindle Fire and bring more business to Google Play, Google's online store that sells e-books and other digital content.[7]

III. STANDARD OF JUDICIAL REVIEW

Under the Tunney Act, proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." 15 U.S.C. § 16(e)(1).

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[5] *See* Shira Ovide & Jeffrey A. Trachtenberg, *Microsoft Hooks Onto Nook*, Wall Street Journal, May 2, 2012; Press Release, Barnes & Noble, *Barnes & Noble and Microsoft Form Strategic Partnership to Advance World-Class Digital Reading Experiences for Consumers*, (April 30, 2012), http://www.barnesandnobleinc.com/press_releases/4_30_12_bn_microsoft_strategic_partnership.html (quoting B&N's CEO as saying that the Microsoft partnership is an important part of the strategy "to solidify our position as a leader in the exploding market for digital content in the consumer and education segments").

[6] *See* Madalit Del Barco, *Microsoft's Surface Tablet to Compete with iPad*, National Public Radio (June 19, 2012), http://www.npr.org/2012/06/19/155337886/microsoft-debuts-surface-tablet-to-compete-with-ipad; Michael Kozlowski, *How Will the Microsoft Surface Tablet Function as an e-Reader*, Good E-Reader (June 20, 2012), http://goodereader.com/blog/electronic-readers/how-will-the-microsoft-surface-tablet-function-as-an-e-reader.

[7] *See* Joanna Stem, *Google Nexus 7 Tablet Move Over, Kindle Fire*, ABC News.com (Jun. 27, 2012), http://abcnews.go.com/blogs/technology/2012/06/google-nexus-7-tablet-move-over-kindle-fire/; Michael Liedtke, *Google, Kindle have tablet showdown*, Charlotte Observer.com (June 28, 2012), http://www.charlotteobserver.com/2012/06/28/3346735/googles-nexus-seven-tablet-challenges.html.

As discussed in more detail below, the public interest inquiry considers the relationship between the allegations in the government's complaint and the proposed remedy, with deference to the United States' role in crafting a settlement.

A. The United States is Entitled to Substantial Deference in Crafting a Settlement

When parties come before the court in a Tunney Act proceeding, they have resolved their dispute with respect to a government antitrust complaint. Accordingly, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *accord United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting *Microsoft*, 56 F.3d at 1460), *aff'd sub nom., United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998); *United States v. KeySpan Corp.*, 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011) (same); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15-16 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).

The question in a Tunney Act proceeding is not whether the reviewing court would have imposed a different decree if liability had been established in litigation. Rather, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *accord KeySpan Corp.*, 763 F. Supp. 2d at 637-38. The United States "need not prove its underlying allegations in a Tunney Act proceeding," as such a requirement "would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act." *SBC Commc'ns*, 489 F. Supp. 2d at 20 (citing 15 U.S.C. § 16(e)(2) for the proposition that the Act does not require a court to hold an evidentiary hearing). Congress intended that the court reach its determination expeditiously, giving due deference to the government's predictions regarding the effect of its proposed remedies. *See Microsoft*, 56 F.3d at 1461.

B. The Court's "Public Interest" Inquiry Should Focus on the Relationship Between the Harm Alleged and the Remedy Selected

The Tunney Act requires the court to consider specific factors in determining whether the proposed Final Judgment is in the "public interest." 15 U.S.C. § 16(e)(1); *see also United States v. Int'l Bus. Mach. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998). Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15. Under the statute, the court should consider the following factors:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B).

In other words, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *Alex. Brown & Sons*, 963 F. Supp. at 238; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Instead, the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case." *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

> The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted); *accord Alex. Brown*, 963 F. Supp. at 238.[8]

IV. THE PROPOSED FINAL JUDGMENT

The purpose of the proposed Final Judgment is to stop collusive conduct by Settling Defendants and mitigate the consequences of their collusion in the sale of e-books. Accordingly, the terms of the proposed Final Judgment are designed to accomplish three things: (1) end the current collusion; (2) restore competition eliminated by that collusion; and (3) ensure compliance.

A. Ending Collusion by Settling Defendants

The function of a decree in a Sherman Act case "includes undoing what the conspiracy achieved." *United States v. Paramount Pictures*, 334 U.S. 131, 171 (1948). Here, defendants achieved higher retail e-book prices in large part by collectively agreeing to wrest control of pricing and other terms from retailers. As explained more fully in the Complaint and CIS, the anticompetitive results of the conspiracy ultimately were ensured by Publisher Defendants' near-simultaneous execution of the Apple Agency Agreements, which included common price schedules and MFN clauses, and which proscribed retail discounting. Accordingly, the proposed Final Judgment requires that Settling Defendants terminate the Apple Agency Agreements. PFJ § IV.A. Courts have long required termination of contracts found to be unlawful under Section 1

[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

of the Sherman Act. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 328 n.4, 363-64 (1947) (approving a decree cancelling unlawful agreements and enjoining further performance); *see also United States v. Delta Dental of R.I.*, No. 96-113P, 1997 WL 527669 (D.R.I. July 2, 1997) (entering decree voiding MFN enforcement).

The proposed Final Judgment also requires that Settling Defendants terminate, as soon as they are contractually permitted to do so, all other agreements that include restrictions on the ability of e-book retailers to compete on price or that may be used to facilitate price fixing. This allows retailers the opportunity to renegotiate those contracts with Settling Defendants unimpeded by collusion. The proposed Final Judgment does not require Settling Defendants to breach any such contracts; rather, it requires Settling Defendants not to extend them, and to take any such steps necessary to terminate the contracts according to their own terms. PFJ § IV.B.

B. Restoring Competition for E-Books With Respect to Settling Defendants

To allow the competition foreclosed by defendants' collusion to reemerge, the proposed Final Judgment requires that Settling Defendants: (a) refrain for two years from entering into contracts containing retail price restrictions and price commitment mechanisms; (b) stop communicating competitively sensitive information to competitors; (c) not retaliate against retailers that exercise discounting authority; and (d) agree not to fix terms or prices with competitors for the provision of e-books. PFJ §§ V.B, V.C, V.D, V.E, and V.F.

It is well established that the remedy for a violation of the Sherman Act may extend beyond the specific agreements that embodied the violation. Once a violation has occurred, "advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market." *United States v. Int'l Salt*,

332 U.S. 392, 400 (1947) (abrogated on other grounds). Consequently, while the scope of the remedy must be clearly related to the anticompetitive effects of the illegal conduct, *Microsoft*, 56 F.3d at 1460, courts are "empowered to fashion appropriate restraints on [the transgressor's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978). Relief may "range broadly through practices connected with acts actually found to be illegal." *United States v. U. S. Gypsum Co.*, 340 U.S. 76, 89 (1950). A court "has broad power to restrain acts which are of the same type or class as [the] unlawful acts" and which "may fairly be anticipated" from the defendant's past conduct. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (internal quotation marks and citation omitted). The relief should "unfetter a market from anticompetitive conduct," and include that which is "necessary and appropriate" in order "to restore competition." *Ford Motor Co. v. United States*, 405 U.S. 562, 573, 577 & n.8 (1972) (internal quotation marks and citations omitted).

In this case, a prohibition on price fixing or the termination of the Apple Agency Agreements standing alone would be insufficient to undo the effects of the conspiracy. By colluding, defendants learned that they shared a common goal to raise e-book prices, agreed to use particular tools to achieve that goal, found those tools to be effective, and found each other reliable in the application of those tools. It is appropriate, therefore, to restrict defendants' ability to use the tools that effectuated the conspiracy. *See, e.g.*, *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973) (barring the use of a patent employed to effect a conspiracy); *Int'l Salt*, 332 U.S. at 400 ("it is not necessary that all of the untraveled roads" to collusion "be left open and that only the worn one be closed"). Thus, retail price restrictions and MFN pricing

clauses are prohibited for two- and five-year periods, respectively. The United States negotiated these limited prohibitions as a means to ensure a cooling-off period and allow movement in the marketplace away from collusive conditions. Such precautions are particularly important in this case, as three defendants have not yet agreed to terminate their collusive behavior. These limitations also are designed not to last long enough to alter the ultimate development of the competitive landscape in the still-evolving e-books industry.

These provisions are tailored to restore a measure of competition to the market, while avoiding harm to other market participants (*e.g.*, retailers) that may have relied on the collusive agreements in effect for more than two years. For example, the proposed Final Judgment specifically permits Settling Defendants to pay for e-book promotion or marketing efforts made by brick-and-mortar booksellers. PFJ § VI.A. Each Settling Defendant also may negotiate a commitment from any e-book retailer to limit its annual discounts, so that each Settling Defendants may ensure that its entire catalog of e-books is not sold by any retailer below its total e-book costs. PFJ § VI.B. Monitoring and enforcement of this provision is left to the discretion of Settling Defendants and the retailers with which they contract.

C. Compliance and Enforcement

To ensure that Settling Defendants abide by the substantive terms of the proposed Final Judgment and decrease the likelihood that they might attempt to collude in other ways, the proposed Final Judgment requires that Settling Defendants: (a) provide the United States with copies of current retail agreements immediately, future contracts quarterly, competitor communication logs quarterly, and notification of new or changing joint ventures as needed; (b) allow the United States to investigate compliance from time to time, as authorized by the

Assistant Attorney General for Antitrust; and (c) provide officers and employees counseling on the requirements of the proposed Final Judgment and the antitrust laws so they may understand their obligations. PFJ §§ IV.C, IV.D, VII.C, VII.I, VIII.A.

These mechanisms are commonly used means of ensuring compliance with a decree, while minimizing administrative costs. *See, e.g.*, Final Judgment at §§ IV.I-O, *United States v. Comcast*, 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106) (requiring quarterly provision of communication logs and retention of twelve categories of documents); Final Judgment at § IV.C, *United States v. Graftech Int'l Ltd.*, No. 1:10–cv–02039, 2011 WL 1566781 at *3 (D.D.C. Mar. 24, 2011) (requiring quarterly and annual provision of contracts and reports). None of these provisions requires the United States Department of Justice ("Department") or the Court to become deeply involved in the daily operation of Settling Defendants' businesses. *Cf. Paramount Pictures*, 334 U.S. at 162 (rejecting provision of a consent decree because it "involves the judiciary so deeply in the daily operation of this nation-wide business").

In this case, the enforcement provisions focus on the specific terms that affected the conspiracy. Current and future agreements must be provided to confirm that retail pricing restrictions and price MFNs are not included. The requirement that Settling Defendants provide logs of communications among publishers will discourage unnecessary and anticompetitive communications, such as those that led to their e-books conspiracy. Likewise, as Publisher Defendants considered forming joint ventures to better coordinate pricing, Compl. ¶¶ 47-49, future joint ventures must be reviewed by the United States. In the event concerns about compliance arise, the proposed Final Judgment allows the United States to investigate. Finally,

in order to empower Settling Defendants to avoid such concerns, antitrust counseling also is required.

V. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

Comments opposing the proposed Final Judgment and those supporting it have at least one element in common: they agree that entry of the decree likely will reduce retail prices for e-books, at least in the short term. Detractors insist that lower pricing will mean reduced profits for bookstores, authors, literary agents, and publishers, and an eventual reduction in quality, service, variety, and other benefits to consumers. Supporters welcome a reduction in e-book prices for consumers, and dismiss any lost benefits to industry participants as undeserved, speculative, or irrelevant.

The comments submitted in opposition to entry of the proposed Final Judgment explored five common themes: (1) the legality of restoring discount authority to retailers; (2) the economic impact on industry participants of restoring discount authority to retailers; (3) the viability of collusive pricing as a defense against perceived monopolization and/or predatory pricing; (4) collusive pricing as protection from free riding and low-cost competition; and (5) the clarity and breadth of the proposed Final Judgment.[9] Section A responds to these themes in

[9] Many of the 868 comments received from the public did not bear on issues related to the antitrust merits of the proposed Final Judgment or on any other issue arguably related to the Court's inquiry under the Tunney Act. While the United States did undertake herein to respond generally or specifically to all germane comments, we do not address those that are wholly outside the scope of Tunney Act proceedings. Following are some examples of the types of issues that arose in comments we determined were not relevant for Tunney Act review: (1) the Complaint should not have been filed, *see, e.g.*, Alicia Wendt (ATC-0314) at 1 (writing "to urge the US Department of Justice to reconsider its complaint and drop the related charges"); (2) the United States should sue Amazon, *see, e.g.*, Nancy L. Cunningham (ATC-0733) (suggesting "the Department of Justice should turn its attention to Amazon, a company that seeks to create a monopoly"); (3) tax reform is needed to require payment by online retailers, *see, e.g.*, Roberta Rubin (ATC-0323) (claiming Amazon is "evading any tax demands in most of the states in

detail. Section B highlights portions of the most detailed comments for individual responses, including comments submitted by B&N, the CFA, the Independent Book Publishers, the ABA, and the Authors Guild. Section C addresses additional comments that presented distinct ideas.[10] Finally, Section D discusses the comment submitted by Apple, which is the only comment submitted by a defendant in this matter. The United States carefully reviewed all of the submitted comments and, after serious consideration, concludes that the proposed Final Judgment is in the public interest and requires no modification.

A. Prominent Themes in Industry Comments

1. A Window for Retail Discounting Eliminates Terms That Facilitated Collusion Without Imposing a Business Model on the Industry

Many comments, including those submitted by B&N, Books-A-Million ("BAM"), the ABA, and the Authors Guild, argue that the proposed Final Judgment inappropriately prohibits the use of an agency sales model. B&N claims that the "[g]overnment should not regulate legal agreements that are independently negotiated by industry participants who are in the best position to determine if the agreements are in their interests." B&N (ATC-0097) at 24. BAM adds that "[i]t is now well-established . . . that vertical restrictions, even vertical price restrictions, are not necessarily anticompetitive." BAM (ATC-0261) at 2.

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which they sell books"); (4) the United States has been improperly influenced by Amazon to bring this lawsuit, *see, e.g.*, Richard Howorth (ATC-0790) at 1 (suggesting that the DOJ was improperly influenced because a former Deputy Attorney General sits on Amazon's board of directors).

[10] For ease of access, all of the comments discussed in Sections B and C have been collected and separately saved, and are available both in Exhibit A in the folder titled "Detailed Comments" and on the Antitrust Division's website, at http://www.justice.gov/atr/cases/apple/index.html, under "Detailed Comments."

As a preliminary matter, the proposed Final Judgment does not impose a business model on the e-book industry. Of course, publishers that were not parties to the conspiracy face no government challenge whatsoever as to agency agreements independently arrived at with e-book retailers. Even Settling Defendants, whose agency contracts were the product of the conspiracy, are not permanently barred from using the agency model. For two years, however, Settling Defendants cannot prohibit retailers from discounting e-books. The United States believes that this limited restriction is necessary to prevent Settling Defendants from continuing to benefit from their conspiracy by insisting that retailers enter new contracts that are identical to the contracts produced through collusion. *See* CIS at 10 ("[T]he proposed Final Judgment will ensure that the new contracts will not be set under the collusive conditions that produced the Apple Agency Agreements.").[11]

Nor are restrictions on agency pricing inappropriate when necessary to prevent furtherance of a conspiracy or when agency contracts were the heart of a conspiracy. As the CFA observed, when B&N and other retailers negotiated agency contracts with publishers, they were "not negotiating with independent publishers" but "with members of a cartel." CFA (ATC-0775) at 9. When "otherwise permissible practices [are] connected with the acts found to be illegal" then they "must sometimes be enjoined" to ensure relief. *United States v. Loew's, Inc.* 371 U.S. 38, 53 (1962); *see also U. S. Gypsum Co.*, 340 U.S. at 89 ("Acts entirely proper when viewed alone may be prohibited," if needed for effective relief). In this case, allowing retail price restrictions to continue without interruption would maintain the collusive status quo in the e-book industry. The limitations placed on the terms of agency contracts entered into by Settling

[11] As one comment put it more colloquially, defendants "maxed out on chutzpah," and now "[t]he only remedy for such blatant collusion is to wipe the slate clean" and let the market sort pricing out. Courtney Milan (ATC-0262).

Defendants for a period of two years will break the collusive status quo and allow truly bilateral negotiations between publishers and retailers to produce competitive results.

2. Consumers, the Victims of the Conspiracy, Will Benefit as Limits on Retail Discounting are Lifted

Many comments maintain that brick-and-mortar booksellers such as B&N, BAM, and ABA member stores will be harmed if the proposed Final Judgment removes barriers to price competition. They contend that higher retail margins produced by the conspiracy ameliorated declines in brick-and-mortar revenues, generated "procompetitive benefits" such as entry by new retail competitors and innovation, and allowed brick-and-mortar booksellers to offer new marketing service and support for e-books. *See, e.g.*, B&N at 13-14, 20; ABA (ATC-0265) at 2-3. Of course, protecting profits attributable to collusion is squarely at odds with a fundamental purpose of the antitrust laws: the promotion of competition. And, many of the so-called "procompetitive benefits" that these commenters believe will be lost if the decree is entered are illusory or cannot be attributed to the collusion.

While the Tunney Act directs the court to consider the impact of the settlement on third parties, these third parties are limited to those "alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e)(1)(B). In this case, the third parties that the Court is directed to consider under the Tunney Act are the consumers of e-books, not the brick-and-mortar booksellers, which admit that they *benefited* from the conspiracy. *See, e.g.*, B&N at 19. The booksellers' objection is not that they were harmed as a result of the violation, but that the proposed Final Judgment ends the collusively-attained equilibrium that provided them with an anticompetitive windfall. This is not the type of impact that the Tunney Act directs the Court to consider. Instead, the Court should consider that consumers who were actually injured by the

conspiracy will benefit as the proposed Final Judgment returns price competition to the market. As the Second Circuit observed when terminating a consent decree despite competitor objections, "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Int'l Bus. Machines Corp.*, 163 F.3d at 741-42 (2d Cir. 1998) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).[12]

In addition, many brick-and-mortar booksellers, as well as the Authors Guild, speculate that collusive limits on retail discounting were instrumental in encouraging new entry into e-book distribution by brick-and mortar booksellers, spurring entry by online distributors, and incentivizing e-reader innovation. To the contrary, brick-and-mortar stores, including B&N, were selling e-books before implementation of the Apple Agency Agreements.[13] Any expansion of brick-and-mortar sales after the Apple Agency Agreements were implemented was limited in its impact because new sellers could not compete by offering discounts. Likewise, online distributors such as B&N and Google had entered or planned to enter the e-book market before the Apple Agency Agreements were signed.[14] Additionally, innovations such as the iPad and

[12] Although the Tunney Act requires a "public interest" determination only to approve a consent decree, the Second Circuit applies the same "consider[ation of] the public interest" when evaluating a termination. *See Int'l Bus. Machines Corp.*, 163 F.3d 737, 740 (citations omitted).

[13] *See, e.g.*, Press Release, The American Booksellers Association, *ABA Indie Bookstores to Sell eContent, Sony Reader* (Aug. 25, 2009), http://www.bookweb.org/about/press/20090825.html (announcing more than 200 independent bookstores will sell ebooks through the ABA's IndieCommerce program).

[14] *See, e.g.*, David Weir, *Amazon v. Sony, et. al., in War of the eBook Giants*, BNet.com (Aug. 18, 2009), http://www.cbsnews.com/8301-505123_162-33243776/amazon-v-sony-etal-in-war-of-the-ebook-giants/?tag=bnetdomain (describing the eBook industry as "a crowded field," noting Google is one of the other "important players in this space," and Apple is expected to enter); Dan Fromer, *Sony to Unveil E-Reader With Wireless in 2 Weeks?*, Business Insider (Aug. 11, 2009), http://articles.businessinsider.com/2009-08-11/tech/30085553_1_sony-reader-e-reader-wireless.

B&N's Nook were either introduced or already planned prior to formation of the Apple Agency Agreements.[15] In the pre-conspiracy competitive market, innovation, discounting, and marketing were robust. In contrast, the conspiracy eliminated any number of potential procompetitive innovations, such as "all-you-can-read" subscription services, book club pricing specials, and rewards programs. *See* Compl. ¶ 98; CIS at 9.

3. Collusion is Not Acceptable, Even in Response to Perceived Anticompetitive Conduct

B&N, BAM, the ABA, the Authors Guild, and other industry participants claim that collusive limits on retail discounting were a necessary response to anticompetitive behavior by Amazon and, thus, should be preserved.[16] B&N claims these limits are necessary to avoid "competition with a potential Amazon below-cost price-point." B&N at 22-23. The ABA suggests that collusive agency pricing "corrects a distortion in the market fostered primarily by Amazon.com." ABA (ATC-0265) at 1. The Authors Guild insists that removing limits on retailer discounting will enable Amazon to use "predatory pricing" to return to a dominant or "monopoly" position and allow the company to charge supracompetitive prices for e-books in the future. *See, e.g.*, The Authors Guild (ATC-0214) at 1-2.

There is no mistaking the fear that many of the commenters have of the prospect of competing with Amazon on price. No doubt Amazon is a vigorous e-book competitor. In

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[15] *See, e.g.*, Jeffrey A. Trachtenberg & Geoffrey A. Fowler, *Barnes & Noble Challenges Amazon's Kindle*, Wall Street Journal (July 21, 2009), *available at* http://online.wsj.com/article/SB124812243356966275.html.

[16] Other comments dispute the benefits of retail price control. As one commenter put it, Publisher Defendants "were out-performed by Amazon" which, in contrast to Publisher Defendants, "did nothing illegal." Phillis A. Humphrey (ATC-0250). Another writes, "I don't want to be forced to pay higher prices" because Publisher Defendants "work together to slow the adoption of this relatively new technology." Kathy Baughman (ATC-0094).

addition to aggressive pricing, it was an early innovator in the e-book market, introducing its Kindle e-reader more than two years before B&N's Nook and Apple's iPad. Of course, low prices, fierce rivalries, and innovation are among the core ambitions of free markets. Contrary to the apparent views of many commenters, "the goal of antitrust law is to use rivalry to keep prices low for consumers' benefit. Employing antitrust law to drive prices up would turn the Sherman Act on its head." *Wallace v. Int'l Bus. Machine Corp.*, 467 F.3d 1104, 1107 (7th Cir. 2006).

Moreover, the notion that Amazon will come to exclude competition in e-books and monopolize the industry is highly speculative at best. Before the collusive Apple Agency Agreements, B&N had entered the market and taken significant share from Amazon. In addition, the e-book industry has attracted participation from the likes of Apple, Microsoft, Google, and Sony. The future is unclear and the path for many industry members may be fraught with uncertainty and risk. But certainly there is no shortage of competitive assets and capabilities being brought to bear in the e-books industry. A purpose of the proposed Final Judgment is to prevent entrenched industry members from arresting via collusion the potentially huge benefits of intense competition in an evolving market.

The United States recognizes that many of the comments reflect a concern that a firm with the heft of Amazon may harm competition through sustained low or predatory pricing. In the course of its investigation, the United States examined complaints about Amazon's alleged predatory practices and found persuasive evidence lacking. As is alleged in the Complaint, the United States concluded, based on its investigation and review of data from Amazon and others, that "[f]rom the time of its launch, Amazon's e-book distribution business has been consistently

profitable, even when substantially discounting some newly released and bestselling titles." Compl. ¶ 30.

Some of the criticism directed at Amazon may be attributed to a misunderstanding of the legal standard for predatory pricing. Low prices, of course, are one of the principal goals of the antitrust laws. *Cf. Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). This is because of the unmistakable benefit to consumers when firms cut prices. *Id.* "Loss leaders," two-for-one specials, deep discounting, and other aggressive price strategies are common in many industries, including among booksellers. This is to be celebrated, not outlawed. Unlawful "predatory pricing," therefore, is something more than prices that are "too low." Antitrust law prohibits low prices only if the price is "below an appropriate measure of . . . cost," and there exists "a dangerous probability" that the discounter will be able to drive out competition, raise prices, and thereby "recoup[] its investment in below-cost pricing." *Brooke Group v. Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). No objector to the proposed Final Judgment has supplied evidence that, in the dynamic and evolving e-book industry, Amazon threatens to drive out competition and obtain the monopoly pricing power which is the ultimate concern of predatory pricing law. The presence and continued investment by technology giants, multinational book publishers, and national retailers in e-books businesses renders such a prospect highly speculative. Of course, should Amazon or any other firm commit future antitrust violations, the United States (as well as private parties) will remain free to challenge that conduct.

Finally, even if there were evidence to substantiate claims of "monopolization" or "predatory pricing," they would not be sufficient to justify self-help in the form of collusion.

When Congress enacted the Sherman Act, it did "not permit[] the age-old cry of ruinous competition and competitive evils to be a defense to price fixing," no matter if such practices were "genuine or fancied competitive abuses" of the antitrust laws. *See United States v. Socony-Vacuum Oil*, 310 U.S. 150, 221-22 (1940); *see also, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-22 (1990) ("[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreements."). Competitors may not "take the law into their own hands" to collectively punish an economic actor whose conduct displeases them, even if they believe that conduct to be illegal. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465 (1986) ("That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467-68 (1941) (rejecting defendants' argument that their conduct "is not within the ban of the policies of the Sherman and Clayton Acts because the practices . . . were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against" practices they believed violated the law (internal quote omitted)); *Am. Med. Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), *aff'd* 317 U.S. 519 (1943) ("Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act."). Thus, whatever defendants' and commenters' perceived grievances against Amazon or any other firm are, they are no excuse for the conduct remedied by the proposed Final Judgment.

4. Protection From Aggressive Competition Does Not Justify Keeping Collusive Agreements Intact

The ABA, B&N, the Authors Guild, and others contend that brick-and-mortar booksellers require agency pricing to insulate themselves from competition from online e-book sellers, and they accuse online competitors of free riding on their efforts.[17] In support of its argument, the ABA claims that online retailers such as Amazon usurp brick-and-mortar store "showrooms," encouraging customers to browse in physical stores but buy online. However, to the extent that free riding occurs, it is just as likely that print book sales by online sellers free ride on the efforts of brick-and-mortar booksellers as e-book sales. The ABA and its members do not distinguish between print and e-book online sales, and they offer no explanation for why e-books allow free riding by online sellers but print books, which are unaffected by the proposed Final Judgment, do not.

Further, to the extent a response to "free riding" by online retailers is desirable, the proposed Final Judgment provides a path for it: Settling Defendants may compensate brick-and-mortar retailers for e-book "marketing or other promotional services." PFJ § VI.A. The CIS elaborates that this provision is intended "to support brick-and-mortar retailers by directly paying for promotion or marketing efforts." CIS at 14. Rather than subsidizing these services with the earnings from collusive e-book profits, Settling Defendants may pay brick-and-mortar stores directly for marketing and promotional support. Of course, retailers are not entitled to the continuation of a collusive equilibrium to maintain the windfall they enjoyed under that

[17] The ABA alleges that Amazon's "free-riding" has been facilitated, in part, by "sales tax avoidance," a strategy that is unavailable to brick-and-mortar booksellers. ABA at 4. A number of brick-and-mortar booksellers echoed the ABA's frustration with this cost advantage; representative comments include: Gayle Shanks (ATC-0251) and Kate Stine (ATC-0455).

collusion. As noted above, the antitrust laws are not intended, after all, to protect firms from the rigors of a competitive market. *See United States v. Visa*, 163 F. Supp. 2d 322, 404-05 (S.D.N.Y. 2001) (rejecting free riding and creation of "equal opportunity" defenses for joint venture rules that prohibited members' issuance of competing credit cards); *see also* Section V.A.3, *supra*.

5. The Proposed Final Judgment is Neither Too Regulatory Nor Too Ambiguous for Enforcement

Comments submitted by B&N, Independent Book Publishers, and others assert that the proposed Final Judgment is too "regulatory" in nature and is overbroad. At the opposite extreme, others maintain that at least one provision, Section VI.B, is vague and unenforceable. B&N argues that the proposed Final Judgment converts the Department into a "regulator of an entire industry," by restricting future agency agreements and the use of MFN clauses, and by imposing enforcement provisions. B&N at 21-22. Mistakenly relying on *SBC Communications*, B&N submits that "when the relief sought in the proposed settlement is unrelated to the violations alleged in the complaint, that relief should not be ordered." *Id*. at 15. B&N adds that, because these remedies are not included in the prayer for relief in the Complaint, they cannot be awarded. *Id*. at 21. In turn, the Independent Book Publishers object that Section VI.B, which allows Settling Defendants to negotiate retailer agreements to limit aggregate retailer discounts, is "[u]nworkable and [u]nenforceable." Independent Book Publishers at 18.

To begin with, the proposed Final Judgment does not transform the Department into a "regulator" of the e-book industry, nor are its provisions any broader than necessary to remedy the harm alleged. Far from being "unrelated" to the harm alleged in the Complaint, most of the provisions in the decree are designed to return the market to the state of competition it enjoyed

before the Apple Agency Agreements were signed. Further, nowhere does the *SBC Communications* court suggest that the Tunney Act requires a one-to-one correspondence between the specific relief requested in a complaint and the details of the remedy required by the consent decree. Instead, it emphasizes that a court must "accord deference to the government's predictions about the efficacy of its remedies." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Gypsum Co.*, 340 U.S. at 89 (holding that relief may "range broadly through practices connected with acts actually found to be illegal"). Additionally, the provisions in the decree designed to facilitate enforcement are narrow, requiring little more than that Settling Defendants provide their current and future contracts to the Department, which will allow the United States to detect violations of the decree. Such a requirement is consistent with past practice, as a number of decrees entered in recent cases have required that contracts be provided to the Department so that it can monitor enforcement. *See, e.g.*, *Graftech Int'l Ltd.*, 2011 WL 1566781 at *3,*5 (requiring contracts and other business documents be provided for a period of ten years). Consent decrees approving much more burdensome enforcement mechanisms have previously been approved by other courts. *See, e.g.*, *Alex. Brown & Sons*, 963 F.Supp. at 237, 239, 242, 246-47 (approving a consent decree that required monitoring of up to seventy hours of phone conversations per week for five years, because it would help to ensure the return of competition). The proposed Final Judgment in this matter is no broader than the relief requested in the Complaint, which includes a request for an injunction against future misbehavior as well as "further relief as may be appropriate." Compl. ¶ 104.

B&N, Independent Book Publishers, and others also contend that the proposed Final Judgment creates "complicated safe harbors that are difficult to implement or administer." B&N

at 22; *see also* Independent Book Publishers at 18. The proposed Final Judgment allows Settling Defendants to limit retailer discounting authority, up to the total commissions a particular retailer earns from the sale of that publisher's e-books. PFJ § VI.B. B&N and other commenters expressed concern that it will be impossible for Settling Defendants to enforce the limits on retail discounting permitted in this Section. However, this provision is entirely voluntary; neither Settling Defendants nor their retailers are compelled to enter any such agreement. Should they choose to do so, nothing in Section VI.B prohibits a Settling Defendant from agreeing with a retailer on reporting and enforcement provisions under which the Settling Defendant can ascertain the extent of the retailer's discounting of its e-books. For example, audit clauses are routinely used in contracts between publishers and retailers to enforce pricing and similar terms. *See* Section V.D.5, *infra* (discussing publishers' use of audit clauses to enforce its contracts with Apple). Significantly, Section VI.B was the product of settlement discussions between the United States and Settling Defendants. Settling Defendants evidently believed, in entering this settlement, that they could successfully implement this limited "safe harbor" for which they negotiated.

B. Individual Responses to Detailed Comments

1. Barnes & Noble, Inc.

B&N, which represents that it is "the largest bookseller in the United States," B&N (ATC-0097) at 8, objects to the proposed Final Judgment primarily because blocking the ability of its retail competitors to discount is "in B&N's economic interests," and entry of the proposed Final Judgment would upset the current collusive equilibrium. *See id*. at 19. In addition to the issues discussed in Section V.A, *supra*, B&N objects that: (a) Section IV.B of the proposed Final Judgment voids all of its agency contracts; (b) returning discount authority to retailers will

have a negative "competitive impact," and (c) the Complaint does not provide sufficient factual support for the remedy.

a. The Proposed Final Judgment Does Not Void Any Third Party Contracts

B&N's assertion that the proposed Final Judgment would "declar[e] as null and void [its] agency contracts," B&N at 18, is inaccurate. The proposed Final Judgment neither voids nor requires the breach of any contract between a Settling Defendant and a third party. Rather, it requires that, for any such contract that restricts the retailer's discounting authority or contains a price MFN and remains in effect 30 days after entry of the Final Judgment, "each Settling Defendant shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended." PFJ § IV.B. In other words, Settling Defendants simply must exit those agreements as provided for by the terms of the contracts themselves. B&N is not, then, simply a company concerned about its contractual rights. Instead, more basically, it is worried that it will make less money after the conspiracy than it collected while collusion was ongoing. *See* B&N at 19 (stating that B&N "enjoy(s) somewhat greater profit margins" under the collusive agency agreements than it "experienced under the wholesale model."). This concern, that the company will lose benefits generated by collusion, is not one that the Tunney Act directs the Court to consider. *See* Section V.A.2, *supra*.

b. Returning Discounting Authority to Retailers is Not Likely to Have a Negative "Competitive Impact"

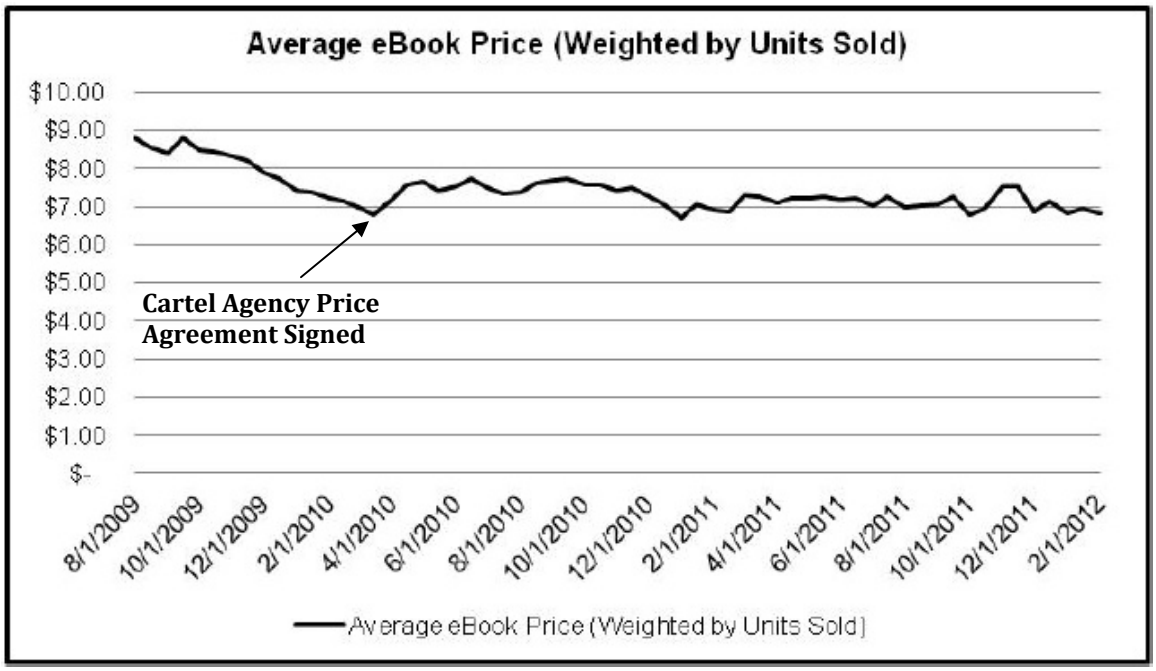
B&N maintains that allowing retailer discounting will, by driving down consumer prices, subject consumers to a variety of anticompetitive effects. But the procompetitive consumer

benefits that B&N alleges are the result of the conspiracy are either not substantiated or are untethered to the conspiracy. B&N does not explain how freeing retailers to compete on price will lead to "uncompetitive," rather than competitive, pricing, and its claim that the return of retail price competition will discourage investment is belied by the fact that, shortly after the proposed Final Judgment was filed in this matter, B&N was able to attract a $300 million investment from Microsoft specifically to "battle with Amazon and Apple in e-books."[18]

B&N also claims that "average" retail and wholesale prices for e-books have declined under the current, collusively-established regime, although it admits that the price of "some e-books" increased following Publisher Defendants' collective shift to agency and the Apple Agency Agreement price points. *See* B&N at 13-15. The United States obtained evidence that demonstrated that the conspiracy led to price increases not only in Publisher Defendants' most popular e-books, but also for "the balance of Publisher Defendants' e-book catalogues, their so-called 'backlists.'" Compl. ¶ 93. Although B&N does not describe the data that underlies its comments, it likely includes the growing volume of inexpensive (and possibly free) e-books from publishers other than Publisher Defendants, which offsets increases in the prices of Publisher Defendants' e-books, reducing "average" retail e-book prices. Further, unlike the United States, B&N does not have access to sales data from competing retailers, so its results

[18] *See* Ingrid Lunden, *Microsoft Makes $300M Investment In New Barnes & Noble Subsidiary To Battle With Amazon And Apple In E-books*, TechCrunch (April 30, 2012), http://techcrunch.com/2012/04/30/microsoft-barnes-noble-partner-up-to-do-battle-with-amazon-and-apple-in-e-books/; Press Release, *Barnes & Noble, Microsoft Form Strategic Partnership to Advance World-Class Digital Reading Experiences for Consumers*, Microsoft News Center (April 30, 2012), http://www.microsoft.com/en-us/news/Press/2012/Apr12/04-30CorpNews.aspx.

only address one retailer's slice of the market.[19] However, as the CFA observed, even with these uncertainties, B&N's own data suggests that the collusive agreement played a role in stabilizing retail e-book prices. CFA at 13. As the CFA points out, just as the collusive agency agreements were taking effect in the spring of 2010, a trend of falling e-book pricing was arrested.[20]



CFA at 13, citing its source for the graph (excluding overlay text) as "Comments of Barnes and Noble, Inc. On the Proposed Final Judgment, Civil Action No. 1:12-CV-2826, June 7, 2012, p. 12."

Finally, many of the benefits that B&N attributes to collusive pricing could be otherwise

[19] Even without access to industry data, readers noticed the price changes and attributed them to the conspiracy. One "avid reader" cites several examples of steep price hikes on books she had purchased, observing that "[s]ince 'agency' pricing was forced on Amazon, book prices have gone up very dramatically." Adrianne Middleton (ATC-0158).

[20] CFA at 13. The CFA also disputes claims by B&N and others that publisher margins declined under agency. CFA observes that cost savings "in the range of 50% to 70%" associated with the production and distribution of e-books have boosted publisher profits. CFA at 15. According to CFA, publishers "took the money that had been put on the table by technological change and put it in their pockets." CFA at 16.

achieved and may be of questionable worth. For instance, the company suggests higher retail prices allow it to invest more in services, stock, and space. However, B&N's claim that it "must meet" e-book prices set by a price leader and cannot maintain higher prices to invest in its stores, B&N at 20, casts doubt on the value that consumers assign to non-price factors when it comes to e-books. In addition, increased profitability is possible not only by raising prices but by lowering costs, which B&N may be free to do should e-book sales continue to increase in volume.[21] The proposed Final Judgment also allows Settling Defendants to subsidize B&N and other brick-and-mortar retailers for the services they provide. PFJ § VI.A. Publishers need not increase retail e-book prices to support bookstores they value; they can support them directly.

c. The Complaint Provides Sufficient Factual Support for Entry of the Proposed Final Judgment, and Delay Will Extend Harm

B&N challenges the "factual basis" for a public interest finding, and calls on the Court to "conduct a searching review" as part of its public interest determination. B&N at 18. The company submits that the proposed Final Judgment "requires close scrutiny because of its potential impact on the national economy and culture, including the future of copyrighted expression . . . ." *Id.* at 16.

The Tunney Act does not require the Court to gather evidence to supplement the facts alleged in the Complaint, no matter how broad an impact the decree may have. Instead, the statute simply *allows* the Court to gather additional evidence, at its discretion. *See* 15 U.S.C. § 16(f) ("In making its determination . . . the court *may*—(1) take testimony . . ." (emphasis added)). Nor is the Court compelled to conduct an evidentiary hearing or permit intervention.

[21] Indeed, cost reduction may be an option for all print booksellers. As one former bookstore manager explains: "[t]raditional publishing is predicated on the expectation of waste," citing the routine destruction of unsold books by bookstores. Heather Ripkey (ATC-0276) at 1. Ms. Ripkey points out that, for e-book sales, "there is no need to factor such extreme waste into the equation. *Id.*

See 15 U.S.C. § 16(e)(2) ("Nothing in this section shall be construed to require the court to conduct an evidentiary hearing . . . ."). This is consistent with legislative history; as Senator Tunney explained: "The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973).

In support of its position, B&N urges the Court to follow the expansive approach taken by the United States District Court for the District of Columbia in *SBC Communications*. But that case differed from this one in the complexity of the harm alleged, the relief imposed, and in the factual detail included in the complaint. *SBC Communications* considered potential anticompetitive effects in dozens of local markets, each including three separate product markets, arising from the merger of two telecommunications companies. 489 F. Supp. 2d at 18-19. The settlement under review in the Tunney Act process called for the divestiture of ten-year leasehold interests that gave the holder the right to use certain telecommunications fibers in 748 individual buildings. *See id.* at 7. In contrast, the United States, in this case, alleged a *per se* violation of the Sherman Act in a single national market, affecting one product area. Further, the conspiracy alleged in this matter was effectuated through the Apple Agency Agreements, the terms of which are not in dispute.[22] In addition, because litigation in this matter is proceeding against the three non-settling defendants, the United States submitted a detailed, thirty-five page complaint in this matter, which included easily verified public events and statements. In contrast, to support the relief requested in *SBC*, where the United States had already reached settlement terms with all

[22] As the *SBC Communications* court observed, the United States "need not prove its underlying allegations in a Tunney Act proceeding." 489 F. Supp. 2d at 20. Requiring it to do so "would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act." *Id.* (citing 15 U.S.C. § 16(e)(2), which states that the Act does not require a court to hold an evidentiary hearing).

parties, the United States submitted a twelve-page complaint typical of cases where the dispute has been wholly resolved. *See id*. at 9. *SBC* did not involve ongoing litigation or discovery. Indeed, in this case, litigating defendants have already admitted key allegations in their answers to the Complaint.[23]

Moreover, the "impact" of the proposed Final Judgment will be limited to restoring competitive conditions that prevailed before collusion ensued—only two years ago. Under these circumstances, detailed fact finding is likely not needed to evaluate the probable effects of the entry of the proposed Final Judgment. Further, delaying entry of the proposed Final Judgment to gather additional factual support will necessarily delay the beneficial impact of its provisions. In *SBC*, the United States moved for Entry of the Final Judgment on April 5, 2006, but the decree was not entered by the court for nearly a year, on March 29, 2007. *See SBC Commc'ns*, 489 F. Supp. 2d at 8, 24. The same delay of entry of the Final Judgment in this case would exceed the period the Court has reserved for litigation with respect to the non-settling defendants. Even a much shorter delay may threaten to disrupt the discovery process for the parties that continue to litigate. Any extension of the collusion that already has persisted for two years is unwarranted, and should be avoided.

[23] *See, e.g.*, Apple Ans. at ¶ 62 ("Given the looming announcement of the iPad, each publisher would have been aware that Apple was necessarily negotiating simultaneously with numerous publishers and was attempting to develop an approach that would attract a sufficient number of publishers in total to warrant Apple's entry."); Penguin Ans. at 33-34 ("Penguin admits that Penguin Group CEO John Makinson on June 16, 2009 attended a social dinner at Picholine along with the CEO of Random House, as well as the CEOs of Hachette, Harper Collins, and Simon & Schuster – but not the CEO of Macmillian. While, in addition to purely social matters, general book industry issues and trends were discussed at high-levels of generality, including the growth of eBooks and Amazon's role therein, Makinson did so pursuant to antitrust legal advice . . . ."); Macmillan Ans. at ¶ 72 (". . . admits that during December 2009 and January 2010, Mr. Sargent placed at least seven calls to the CEOs of other Publisher Defendants, five of which lasted no more than twenty seconds.").

2. Consumer Federation of America

The CFA is the only consumer organization that submitted a comment. It wrote in support of the proposed Final Judgment. The CFA is an association of almost 300 non-profit public interest groups. It frequently is called upon to advise on Internet and digital product issues. CFA (ATC-0775) at 1. The CFA's analysis: (a) debunks the claimed procompetitive benefits of collusive pricing; and (b) concludes the proposed Final Judgment is not overbroad.

a. CFA Explains How Collusive Agency Pricing Harms Consumers

The CFA disputes the "[f]airytale" that collusive agency pricing produced benefits for consumers, reasoning that: (a) collusion on price was not necessary to attract entry; (b) if consumers valued services provided by brick-and-mortar booksellers, they would be willing to pay for those services; and (c) most such benefits are otherwise available.

First, the CFA observes that the e-book "space" experienced significant entry "before and after the advent of the cartel pricing model." *Id*. at 16. The CFA points out that B&N committed to entry before Publisher Defendants and Apple entered into agency contracts, no evidence suggests Apple would have withheld the iPad in the absence of collusion, and "[w]e doubt that Microsoft will now exit the e-book market, or cancel its plans to offer a tablet" should collusive pricing end. *Id*. at 16.

Second, the CFA questions the "carefully concocted, self-serving argument" that the physical book browsing allowed by brick-and-mortar bookstores is essential to the "literary ecosystem" when consumers "are unwilling to pay for" that experience. *Id*. at 3-4. According to the CFA, accepting "cartel agency pricing" in order to maintain physical bookstores improperly

allows "[c]olluding publishers, not the marketplace [to] decide what is good for consumers." *Id*. at 4.

Finally, the CFA points out that many of the benefits of bookstores can be realized digitally. Browsing, for instance, may be more effective online, where search engines and algorithms that personalize recommendations may make readers more inclined to try new authors and titles. *Id*. at 21. Benefits like these may, in fact, be lost if collusion, not competition, guides the market. In sum, the CFA concludes, "[i]f publishers can dictate which business models flourish and which fail, consumers and authors will be worse off," because such a practice confers no advantage on the consumer, and might discourage procompetitive developments in the digital realm. *Id*. at 19.

b. The Remedy Appropriately Addresses the Collusion

The CFA rejects the assertions of B&N that the proposed Final Judgment imposes "an unprecedented, draconian remedy that illegally and unnecessarily interrupts routine business practices . . . ." *Id*. at 11. As the CFA explains, the proposed remedy is consistent "with normal antitrust practices" and is less intrusive than remedies imposed to address antitrust concerns in related industries. *Id*. at 10-11. The CFA also articulates the importance of prohibiting Settling Defendants from restricting retailer discounting of e-books for two years: "without a moratorium on agency contracts for the colluding publishers, the publishers could tear up the offending contracts and immediately sign identical contracts, claiming to act individually to adopt terms and conditions that were worked out by the cartel. Such a remedy would make a mockery of antitrust law and enforcement." *Id*. at 9.[24] The United States shares this concern.

[24] The CFA also notes that the two-year period is shorter than antitrust agencies normally impose to allow a "market to heal." CFA at 8. But a few citizen comments took the contrary position that three to

3. Independent Book Publishers

The "Independent Book Publishers," a group of mid-sized trade publishers consisting of Abrams Books, Chronicle Books, Grove/Atlantic, Inc., Chicago Review Press, Inc., New Directions Publishing Corp., W.W. Norton & Company, Perseus Books Group, The Rowman & Littlefield Publishing Group, Inc., and Workman Publishing, submitted a joint comment.[25] They object to the proposed Final Judgment because they "benefitted significantly from the fact that the Big Six publishers were able to adopt agency pricing arrangements with Amazon." Independent Book Publishers (ATC-0727) at 2. However, to the extent the Independent Book Publishers received benefits from Settling Defendants' conspiracy to raise e-book prices, those benefits were fruits of the conspiracy and that loss is not relevant in a Tunney Act determination. *See* 15 U.S.C. § 16(e)(1)(B).

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six months would provide a sufficient "competitive reset." *See, e.g.*, Catherine Flynn Devlin (ATC-0084).

The United States determined that too short a period of time, such as three to six months, would not allow e-book retailers to stagger sufficiently the termination and renegotiation of their contracts with publishers. Allowing negotiations with multiple publishers at the same time risks continuing the collusion. *See* CIS at 10 ("Additionally, a retailer can stagger the termination dates of its contracts to ensure that it is negotiating with only one Settling Defendant at a time to avoid joint conduct that could lead to a return to the collusively established previous outcome."). Also, if the cooling-off time period were too short, Settling Defendants might simply choose to forgo the sale of e-books through significant retailers in that short period of time, awaiting the opportunity to return to the collusively established agency terms.

[25] These nine publishers also complain that the United States did not contact them during its investigation. Independent Book Publishers (ATC-0727) at 3, 10. However, the United States reached out to a number of other publishers during the course of its investigation, and routinely attempts not to burden industry participants with demands for duplicative or cumulative information. In any event, industry participants that feel they have relevant information are free to contact the United States to share that information. When, as was the case here, the existence of an antitrust investigation is disclosed publicly, interested individuals frequently reach out to the United States to share their views and information. *See, e.g.*, Grant Gross, *DOJ investigating ebook pricing, official says*, Macworld (Dec. 7, 2011), http://www.macworld.com/article/1164113/doj_investigating_ebook_pricing.html.

The Independent Book Publishers do not claim to be concerned about their current e-book contracts with any retailer, as they are not agency agreements. They instead take up the cause of their competitors, the three Settling Defendants, noting that agency agreements are not "inherently unlawful," and complaining that "the proposed settlements . . . would effectively ban the use of the agency model by Settling Defendants for two years." Independent Book Publishers at 13. They believe it would be more appropriate to "void the existing agency agreements" and allow Settling Defendants to enter into "new agency agreements in the absence of collusion." *Id*. at 14. The Independent Book Publishers concede that the proposed Final Judgment does not dictate a business model, but only prohibits agreements that do not allow the retailer to discount prices (subject to the option of contracting to limit discounts to commissions earned over the course of a year). They say that this takes "true agency sales agreement[s]" off the table for two years for Settling Defendants. *Id*. at 14.

As discussed above, the United States determined that terminating existing agency agreements, without imposing limited restrictions on the contracts that would replace them, would allow Settling Defendants to immediately return to the same collusively-established contractual terms. Such an outcome would fail to eradicate the anticompetitive effects of the collusion. Courts are "empowered to fashion appropriate restraints on [the trangressor's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 697; *see also Zenith Radio Corp.*, 395 U.S. at 132-33 (upholding an injunction against the conspiracy to block Zenith's entry into worldwide markets that were not at issue in the litigation, after finding that defendants conspired to block Zenith from entering the Canadian market). While agency agreements are not inherently illegal,

collusive agreements that prevent price competition are, and the settlement is designed to unwind the effects of agency contracts stemming from a collusive agreement.

4. American Booksellers Association and Members

The ABA submitted a detailed comment objecting to the restrictions on agency pricing in the proposed Final Judgment as well as other issues, most of which were discussed above.[26] The ABA raised one unique complaint about the impact of the proposed Final Judgment on agreements between ABA member organization IndieCommerce and Google, which were negotiated after April 2010. ABA (ATC-0265) at 5. The ABA claims that these agreements "occurred long after . . . the dates at issue in the civil complaint," and were not the product of collusion. *Id*. However, the proposed Final Judgment, which addresses only contracts in which Settling Defendants are parties, has no direct or immediate impact on arrangements between ABA member booksellers and Google. Of course, it is certainly possible that Google may seek to modify the terms of its agreements with the bookstores to reflect its new authority to discount the books of the three Settling Defendants.[27] *See also* Section V.A.1, *supra.*

5. Authors Guild and Members

The Authors Guild, representing a collection of writers and literary agents, submitted a comment that addressed the impact of removing collusive pricing restrictions on price

[26] The ABA also solicited its member booksellers to submit comments in opposition to the proposed Final Judgment, outlining its objections. As a result, the United States received approximately 200 comments from bookstores, which largely mirrored the ABA's arguments. Representative examples include Susan Novotny (ATC-0213), Kenneth J. Vinstra (ATC-0216), and Barbara Peters (ATC-0295).

[27] Prior to the filing of the Complaint, Google announced that it was terminating its reseller program in 2013 since it had "not gained the traction" Google had hoped for and because it was "clear that the reseller program has not met the needs of many readers or booksellers." Scott Dougall, *A Change to Our Retailer Partner Program: eBooks Resellers to Wind Down Next Year*, Google Book Search (Apr. 5, 2012), http://booksearch.blogspot.com/2012/04/change-to-our-retailer-partner-program.html.

competition from Amazon. The Authors Guild claims the settlement will "allow e-book vendors to routinely sell e-books at below cost, so long as the vendors don't lose money over the publisher's entire list of e-books over the course of a year." Authors Guild (ATC-0214) at 1. The Authors Guild also asked its members to submit comments, adding that the settlement "needlessly imperils brick-and-mortar bookstores while it backs an online monopolist and discourages competition among e-book vendors and e-book device developers."[28] Many authors and agents took up the torch, submitting comments that paraphrased the arguments laid out by the Authors Guild or, in some cases, simply attached the Authors Guild's email, verbatim.[29]

The Authors Guild's primary argument, that collusion was a justified response to competition from low-priced rivals, and that collusive pricing is necessary to protect brick-and-mortar bookstores, is addressed in Section V.A.3, *supra*. Likewise, the Authors Guild's concerns with Section VI.B of the proposed Final Judgment, which permits (but does not require) Settling Defendants to limit retailer discounting to the aggregate commissions earned by the retailer, are addressed in Section V.A.5, *supra*. The Authors Guild and its members, however, make two unique observations: (a) books are important cultural products and should be protected by price controls despite the antitrust laws; and (b) agency pricing is necessary to protect quality and diversity in books. But, as discussed below, some Guild members submitted comments disagreeing with their association's position, and other self-published authors see

[28] *See The Justice Department's E-Book Proposal Needlessly Imperils Bookstores; How to Weigh In*, THE AUTHORS GUILD (June 4, 2012), http://blog.authorsguild.org/2012/06/04/the-justice-departments-e-book-proposal-needlessly-imperils-bookstores-how-to-weigh-in/; *see also Last Call. Tell DOJ: Don't help Amazon target booksellers*, The Authors Guild (June 22, 2012), http://authorsguild.org/advocacy/articles/last-call-tell-the-justice-department.html.

[29] Representative comments include: T.J. Stiles (ATC-0177), Kristy Athens (ATC-0465), and Mirka Knaster (ATC-0462).

competition by e-book retailers as an opportunity to reach an audience without interference by traditional publishers.

a. The Sherman Act Applies to the Publishing Industry

While the Authors Guild did not make this argument directly, many of its members stated or implied that collusion or price fixing should be permitted in the publishing industry. They make the point that books play an important cultural role in our society. From there, these writers leap to the conclusion that a competitive marketplace cannot properly attract the investment required for books to survive. They posit that, absent an agreement that stops retailers from discounting e-books, declining revenues would undermine the perceived value of all books, reduce author royalties, and put booksellers out of business. A comment typical of this perspective suggests "fixed pricing on books" should be allowed "to protect their value." Rebecca Gardner (ATC-0077) at 1. A literary agent likewise observed that price-fixing models are being adopted "[n]early across the board" in other countries, in response to online retail discounters. Molly Friedrich (ATC-0232) at 2. However, an argument that a particular industry or market deserves a blanket exemption from the antitrust laws should be directed to Congress, rather than the United States or the Court. Otherwise, all industries are subject to "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

b. There is no Support for the Notion that Retail Discounts Will Reduce Quality or Diversity in Publishing

Many authors and agents complained that removing the ability of Settling Defendants to prohibit discounting would dissuade or prevent publishers from investing in "quality" books, or limit the variety of books likely to be published. Many comments state or imply that Publisher

Defendants must stand in the place of consumers to preserve quality. Such a paternalistic view is inconsistent with the intent of the antitrust laws, which reflect a legislative decision to allow competition to decide what the market does and does not value.[30] A market fettered by a collusive agreement cannot properly assign such a value. These comments may also reflect a misunderstanding of the discounting authority granted by the proposed Final Judgment, which requires only that Settling Defendants, for two years, give retailers the authority to compete away their own margins. PFJ §§ V.A, VI.B. The proposed Final Judgment, however, does not otherwise limit how e-books are sold. Publishers would be free, for example, to negotiate a wholesale price with retailers, and require retailers to pay them the same amount per e-book sold, regardless of the discount applied to the sale to the consumer, just as they did prior to the collusive agreements. Thus, the author can be paid out of higher wholesale price, while consumers buy more of the author's books at a lower retail price.

c. The Authors Guild's Opposition to the Settlement is Not Universal

It is worth noting that members of the Authors Guild also wrote in support of the proposed Final Judgment and against the Authors Guild's position. Joe Konrath, author of 46 books, clarifies that letter-writing campaigns by the Authors Guild and the Authors Representatives "did not solicit the views of their members, that they in no way speak on behalf of all or even most of their members." Konrath (ATC-0144) at 1. He observes that agency

[30] Many authors and readers expressed skepticism of the capacity or willingness of Publisher Defendants to protect "quality" of publications. As a retired college librarian put it, "[t]o suggest that only the Big Six are arbiters of quality is belied by much of what they have published," citing the absence of copy editing, long delays in publication, and a short shelf life for most titles. Eric Welch (ATC-0021) at 2. One reader observed anecdotally that Publisher Defendants recently granted an advance to reality television personality "Snooki" for a ghost-written book, implying themove was in response to commercial potential rather than literary quality. Cathy Greiner (ATC-0073).

pricing has slowed global growth and hurt consumers and writers. Lee Goldberg, a published author and member of the Authors Guild writes, "I believe that it's detrimental to authors and readers, as well as to the establishment of a free and healthy marketplace, for publishers to collude with Apple to create artificially inflated prices for ebooks." (ATC-0553). Author Laura Resnick writes, "breaking the law is *not* a reasonable reaction to being faced with aggressive business competition." (ATC-0801).

d. Self-Published Authors Disagree that Collusive Agency Pricing is Necessary to Protect Authors' Interests

Many comments from self-published authors, in particular, expressed appreciation that Amazon opened a path to publication that was immune from Publisher Defendants' hegemony. David Gaughran, writing on behalf of 186 self-published co-signors, writes that "Amazon is creating, for the first time, real competition in publishing" by charting a "viable path" for self-published books. Gaughran (ATC-0125) at 1, 3. Mr. Gaughran observes that "[t]he kind of disruption caused by the Internet is often messy," and those who "do quite well under the status quo" naturally resist change. *Id*. at 2. He compares publishers and literary agents to "[a]ll kinds of middlemen," which have "gone from being indispensible to optional" with the rise of the Internet. *Id.* Writing in support of the proposed Final Judgment, Mr. Gaughran confirms that self-published writers, in particular, see opportunities in a market not subject to collusive pricing.

C. Additional Responses to Comments With Unique Perspectives

1. Brian DeFiore, Literary Agent

Many literary agencies submitted comments in opposition to the proposed Final Judgment, but Mr. DeFiore's submission raised a unique issue.[31] He argues that, by removing limits on retailer discounting, the proposed Final Judgment will allow retailers to apply discounts disproportionately, reducing the retail price of some titles much more than others. He argues that the uneven price cuts undermine the ability of authors to maximize their royalty income and may impact the value of individual author's rights in future books, foreign markets, film, and television. DeFiore (ATC-0242) at 3. However, to the extent that author royalties were buoyed by collusive pricing, that windfall should not be protected at the expense of thwarting the collusion. *See* Section V.A.2, *supra*.

The adequacy of the Final Judgment should be evaluated in light of the antitrust violations alleged in the Complaint, *SBC Commc'ns*, 489 F. Supp. 2d at 14-15, and those allegations explicitly address the contractual relationships between Settling Defendants and retailers. Authors have independent contracts with Settling Defendants that govern their intellectual property licenses, and those agreements are not discussed in the Complaint or addressed by the proposed Final Judgment. Thus, all of the intellectual property rights of authors remain subject to market competition. To the extent Mr. DeFiore's complaint reflects dissatisfaction with the state of that competition, it is not relevant to the proposed Final Judgment.

[31] Simon Lipskar's comment (ATC-0807) is the most detailed of the many comments submitted by literary agents and agencies, but it did not raise unique issues. A less detailed, but typical, comment was submitted by the Association of Author's Representatives (ATC-0003).

2. Bob Kohn, CEO of Royalty Share

Copyright attorney and CEO of RoyaltyShare, Bob Kohn, submitted a lengthy comment that focused largely on his criticisms of the Complaint. Kohn (ATC-0143). Mr. Kohn offers the Court his views of the proper standard it should employ in ruling on a motion to dismiss, even though none of the settling or non-settling defendants (each of which is represented by highly experienced and sophisticated counsel) chose to move to dismiss the Complaint. Similarly, Mr. Kohn suggests a series of dispositive motions that the Court should grant in favor of the defendants, although he does not indicate whether defendants themselves contemplate such motions or explain why the Court should substitute Mr. Kohn's litigation judgments for those of defendants' counsel. Mr. Kohn's determinations that "The Complaint Alleges the Wrong Relevant Market," or "Collective Action by Competitors to Fix Prices is Not Always Illegal," *id*. at 20, 21, reflect a misunderstanding of the role that public comments play in the Court's Tunney Act inquiry. For example, seeing corollaries between this case, copyright law, and the music industry, Mr. Kohn concludes that the proposed Final Judgment is not in the public interest because the "factual allegations in the Complaint are plausibly explained by lawful behavior." *Id*. at 12. However, the Complaint sets forth in considerable detail the basis for a finding that the defendants have engaged in *per se* unlawful conduct. Defendants are, of course, free to dispute that evidence just as they are entitled to settle with the government. It would hardly be in the public interest to exclude settlements of antitrust cases whenever a member of the public asserts that there are possible "plausible" lawful explanations for the defendants' behavior. And it is difficult to see how the Court could reach the same conclusions as Mr. Kohn without the benefit of a full-blown, lengthy and expensive trial, thus substantially undercutting much of the benefit

of the settlements. It is a misreading of the Tunney Act and the role of public comments to suggest that either the government or private parties should be so severely constricted in settling antitrust cases. *Microsoft*, 56. F.3d at 1459.

Mr. Kohn also takes issue with the standard of review articulated in the CIS for a Tunney Act determination. Mr. Kohn submits that, to find a settlement only "within the reaches" of the public interest is inconsistent with the text of the Tunney Act, as amended in 2004. Kohn at 16. He maintains this argument though the same standard was applied in this District as recently as last year in *KeySpan Corp.*,763 F. Supp. 2d at 637. Kohn at 16. Further, the court in *SBC Communications* thoroughly analyzed the legislative intent behind the 2004 amendments and concluded that a settlement should be approved if it lies "within the reaches of the public interest." 489 F. Supp. 2d at 17.

Mr. Kohn also discusses language added to the Tunney Act in 2004 that requires the court to consider the impact of entry of the decree "upon competition in the relevant market or markets." Kohn at 16 (emphasis omitted). However, the legislative history of that amendment does not support Mr. Kohn's argument that the change was designed to expand the court's role in Tunney Act review. Instead, it indicates the opposite, that the change was intended only to focus review on the competitive impact of "the judgment, rather than extraneous factors irrelevant to . . . antitrust enforcement." 150 Cong Rec S 3610, *3618 (statement of Senator Kohl). Accordingly, "the 2004 amendments have left in place the [D.C.] Circuit's holding that this Court cannot look beyond the complaint in making the public interest determination, unless [a] complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Comm'cs*, 489 F. Supp. 2d at 15.

3. Steerads, Inc.

Steerads, Inc. ("Steerads") is a Canadian digital advertising corporation based in Montreal, Quebec.[32] Steerads concludes that the terms of the proposed Final Judgment are "clear and complete, thus enforceable." Steerads (ATC-0374) at 1. The company requests, though, that the United States "insist on the inclusion of a prima facie provision" in the proposed Final Judgment in order to "[e]ase[] recovery of treble damages" by private litigants. *Id*. at 3. Steerads, however, misreads the statute, which allows the use of a "final judgment or decree" as *prima facie* evidence in other proceedings, but not if the "consent judgment or decree[] [is] entered before any testimony has been taken." 15 U.S.C. § 16(a). Because no testimony has been taken in this litigation, the proposed Final Judgment would not constitute *prima facie* evidence in any private litigation, regardless of how the decree is worded. Even if that were not the case, the Supreme Court has long endorsed the value of consent judgments in cases where there is no finding of liability, because they avoid the costs and delays associated with litigation.[33]

4. National Association of College Stores

The National Association of College Stores ("NACS") expressed concern that the Proposed Final Judgment will apply to "the entire e-book universe" including "e-textbooks." NACS (ATC-0845) at 7-8. NACS claims this broad application will injure third parties,

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[32] *See* STEER>ADS.COM, http://www.steerads.com/; Steerads (ATC-0374) at 4.

[33] *See Swift & Co. v. United States*, 276 U.S. 311, 327 (1928) (refusing to vacate injunctive relief in consent judgment that contained recitals in which defendants asserted their innocence); *United States v. Armour and Co.*, 402 U.S. 673, 676, 681 (1971) (interpreting consent decree in which defendants had denied liability for the allegations raised in the complaint); *see also* 18A Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 4443, (2d ed. 2002) ("central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented").

including textbook publishers and textbook retailers, which would be barred from reaping the potential procompetitive benefits they might realize from the use of agency pricing. *Id*. at 9-10. NACS claims the Complaint did not identify harm arising in the e-textbook market, so the Final Judgment should be modified to exclude e-textbooks from the prohibition of limits on retail discounting in the decree. *Id*. at 11-12. However, it was not necessary to expressly exclude e-textbooks from the proposed Final Judgment because none of the Settling Defendants sell e-textbooks, and the Complaint already makes it clear that "e-books" in the context of this case does not encompass "[n]on-trade e-books includ[ing] . . . academic textbooks . . . ." Compl. ¶ 27 n.1; *see also* Compl. ¶ 99.

5. American Specialty Toy Retailing Association

The American Specialty Toy Retailing Association ("ASTRA") writes that the proposed Final Judgment will have a chilling effect on the use of agency pricing in other markets. It reasons that the decree "could create an environment in which manufacturers are uncertain about the legality of an important pro[]competitive pricing policy." ASTRA (ATC-0228) at 1. However, the proposed Final Judgment is limited to the three Settling Defendants, none of which sells toys. Further, because the CIS expressly states that agency pricing is permissible when unpaired with anticompetitive conduct, there seems to be no plausible risk of confusion.

D. Apple, Inc.

Apple, a non-settling defendant and party to the conspiracy described in the Complaint, opposes Court entry of the decree. Apple complains that the proposed Final Judgment: (1) treats Apple unfairly; (2) "seeks to impose a business model," rather than letting market forces play out; and (3) "will enable the retrenchment of Amazon's e-book monopoly." Apple (ATC-0703)

at 1, 7. While much of what Apple offers in its comment merely echoes the same points other commenters have made and should be rejected for the reasons noted above, the United States offers a detailed response to Apple because of its central role in the events leading to the underlying enforcement action. As set forth below, Apple's protests are based on factual errors and on an unsound view of Tunney Act jurisprudence.

1. The Proposed Final Judgment Reasonably Requires the Termination of the Apple Agency Agreements

Apple argues that it has been improperly "singled out" for "uniquely punitive restrictions on its ability to negotiate agreements." *Id*. at 2. The requirement that the Apple Agency Agreements be terminated is reasonable, though, given the role of those agreements in cementing the terms of the conspiracy alleged. Further, stripped of Apple's rhetoric, there are only two substantive distinctions between Settling Defendants' required conduct as to Apple (governed by Section IV.A) and their required conduct as to all other e-book retailers (governed by Section IV.B), and those distinctions are both modest and necessary.

The agency agreements between Apple and Settling Defendants must be terminated within seven days of entry of the proposed Final Judgment, while Settling Defendants have thirty days to "take each step required" to terminate agreements with other retailers that include prohibited terms. *See* PFJ §§ IV.A, IV.B. However, as the Complaint alleges, the Apple Agency Agreements did not arise from bilateral negotiations between a retailer and a number of publishers, but from a conspiracy encompassing Apple and Publisher Defendants. Apple alone among e-book retailers was at the bargaining table when these collusive agency contracts were agreed to. Further, the Apple Agency Agreements also require immediate termination because they form the bedrock of the conspiracy and restrain trade directly. *See, e.g., Paramount*

Pictures, 334 U.S. at 149 (ordering the termination of contracts used in collusion); *Nat'l Lead Co.*, 332 U.S. at 328 (upholding termination of patent cross licenses that allowed the patents to be "forged into instruments of domination of an entire industry.").

In addition, Apple's claim that it "will have to quickly negotiate new agreements with these publishers under a dark cloud of uncertainty in just seven days," Apple at 5, ignores that more than three months have already passed since the proposed Final Judgment was filed, during which time Apple has been free to pursue its negotiations with Settling Defendants. Indeed, even under Apple's existing contracts with each Settling Defendants, each publisher has rights to terminate its own agreement. Likewise, Apple too has the right to terminate its agreement with each Settling Defendant on thirty to sixty days' notice.[34] Both Apple and Settling Defendants have been free even to execute new agreements during this period, so long as such agreements comply with the proposed Final Judgment. It is, in fact, quite typical that parties to a proposed Final Judgment execute their provisions or prepare to do so prior to entry of the decree.[35]

[34] For instance, Apple's agreement with Hachette, signed Jan. 24, 2010, reads: "'Term' means the period beginning on the Effective Date and continuing for one (1) year, and renewing for one-month successive periods unless . . . terminated at any time after the first year period *by either Party* upon advance written notice of not less than thirty (30) days." EBOOK AGENCY DISTRIBUTION AGREEMENT, § 1(m), APPLETX00018481 at -18482 (emphasis added). This was the case when the proposed Final Judgment was being negotiated (and the United States has no reason to believe this has changed).

[35] For example, in *United States v. Graftech Int'l Ltd.*, GrafTech implemented, prior to entry of the decree, a requirement that it execute new contracts with its supplier. *See GrafTech*, 2011 WL 1566781 at *2 (requiring that "[d]efendants shall not consummate the Merger until the Supply Agreements have been modified in a manner consistent with this Final Judgment."). Divestitures required for consummation of proposed mergers are also commonly executed and approved by the United States prior to entry of the Final Judgment.

2. The Proposed Final Judgment Does Not "Impose a Business Model"

Apple asserts twice in a single page that the proposed Final Judgment would "dictate business models." Apple at 7; *see also id.* at 1 ("impose a business model"). Apple fails, however, to explain what business model the proposed Final Judgment would dictate. That is because the proposed Final Judgment does nothing of the sort. Apart from the specific and limited proscriptions necessary to ensure the effectiveness of the consent decree, the proposed Final Judgment leaves open all possible legal business arrangements. Indeed, even Apple recognizes that "[t]he Proposed Judgment modifies only two terms in Apple's agreements with the Settling Defendants—the MFN and Apple's pricing discretion under the agency agreement." *Id*. at 4.

To the extent the proposed Final Judgment requires changes to the business relationship between retailers such as Apple and Settling Defendants, it ensures that retailers have more flexibility, not less. Apple's stated position on this point is that "eBook retailers such as Apple and Barnes & Noble should be free to continue with the agency model without Government-mandated changes." *Id*. at 3. They are indeed free to do so. Nothing in the proposed Final Judgment would force Apple or B&N to exercise discounting authority—they are free to carry out their own businesses exactly as before. What they may not do is continue to rely on a conspiracy to restrain their competitors.

3. The Proposed Final Judgment Will Help to Restore Competition, Not End It

Apple also insists that the proposed Final Judgment "puts Apple, and every other eBook distributor [except Amazon], in peril." Apple at 7. This is so, Apple claims repeatedly, because the proposed Final Judgment will "allow an eBook agent a nearly unfettered ability to discount a

Settling Defendant's title." *Id.* at 2, 6. That is, Apple objects that the goal of the conspiracy—to raise e-book prices by wresting discount authority from retailers—will be undone by the proposed Final Judgment, at least with respect to Settling Defendants. Under such conditions, Apple worries, some "retailers . . . may be unable to continue to do business," *id.* at 2, "dramatic and irreversible" consequences may limit innovation and diversity, *id.* at 3, and Amazon will be able to "charge monopoly prices into perpetuity." *Id.* at 4.

First, Apple is not entitled to retain the benefits of any collusive agreement, much less one it participated in directly. As has been noted throughout, it is black letter law that that the Sherman Act was "enacted for 'the protection of competition, not competitors.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.*, 370 U.S. at 320)). Indeed, the Supreme Court has expressly recognized that the type of "robust competition" protected by the Sherman Act could well expose individual competitors to commercial harm. *Copperweld Corp.*, 467 U.S. at 767-68. If the proposed Final Judgment were expected to lead to a more intense competitive environment, that would be cause to embrace the proposed Final Judgment, not reject it. The same competitive forces that would pressure retailers would benefit consumers.

Further, the Tunney Act is not designed to be a weapon that is wielded by competitors seeking to forestall competition. The Act directs the Court to consider the impact of a proposed decree not on the participants in the anticompetitive conduct, but on those "alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e)(1)(B); *see also Int'l Bus. Machines Corp.*, 163 F.3d at 740-42 (finding termination of a decree was in "the public interest,"

despite competitor objections, because "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." (quoting *Spectrum Sports, Inc.*, 506 U.S. at 458). As neither the antitrust laws nor the Tunney Act purport to remedy the loss of ill-gotten gains, Apple's complaints need not be considered by the Court.

Second, Apple's claim, that the settlements will result in imminent retail exitings and lessened industry innovation, is not supported by any evidence. In fact, what the evidence does show, is to the contrary. As noted above, since the proposed Final Judgment was filed, Microsoft has made a significant investment in the industry. *See* Section II, footnote 6, *supra*. The investment is likely a boon to Apple's largest brick-and-mortar retail competitor, B&N. *See* Section V.B.1.b, footnote 18, *supra*. Google, too, rather than retiring from the e-book field, recently has announced a new investment in a tablet computer intended to promote its own e-book sales, through GooglePlay. *See* Section II, footnote 7, *supra*.

Third, like other retailers with an interest in high consumer prices and protected distributor margins, Apple makes the argument that the ability to compete on price "will enable Amazon to charge monopoly prices into perpetuity." Apple at 4. That argument assumes, without support, that Amazon could or would exercise such market power, even in the face of significant share erosion, which was already significant prior to Apple's entry. Further, the entire conspiracy alleged here was, for Publisher Defendants, about increasing the retail price of e-books. As the Complaint alleges repeatedly, the shared goal of Publisher Defendants was to "act collectively to force up Amazon's retail prices." Compl. ¶ 37. Publisher Defendants would have welcomed monopoly-like pricing with open arms; what they feared was the exact

opposite—that the Amazon-led $9.99 price would stick, to the benefit of consumers and the perceived detriment of Publisher Defendants.[36] *See also* Section V.A.3, *supra*. The proposed Final Judgment will, of course, do nothing to undermine existing law prohibiting exclusionary conduct.

4. Apple Misstates the Standard of Review Under the Tunney Act

Apple also argues that the proposed Final Judgment "ignores an important rule of law" that a remedy must be "directly related to the violations alleged in the Complaint." Apple at 6 (citing *SBC Communications*). But *SBC Communications* says no such thing. Instead, that court made clear that "[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17. Furthermore, a court "may not require that the remedies perfectly match the alleged violations." Instead, the court must defer "to the government's predictions about the efficacy of its remedies." *Id*. Indeed, Apple's interpretation would suggest that a consent decree must be more narrowly tailored than judgments entered after trial, which often include much broader relief. *See, e.g.*, *U.S. Gypsum Co.*, 340 U.S. at 89 (holding that relief may "range broadly through practices connected with acts actually found to be illegal").

Apple's reliance on *SBC Communications* also is misplaced given that the court in that case entered the government's Proposed Final Judgment, notwithstanding arguments by *amici* that purchasers of the divested telecommunications assets were unlikely to fully replace the competition lost in the merger of two large telecommunications companies. The court

[36] As Steve Jobs said, "the customer pays a little more, but that's what you want anyway." Comp. ¶ 6.

acknowledged the purchasers' shortcomings had the potential to "reduce the effectiveness of the proposed settlements," but concluded that "the government ha[d] presented a reasonable basis for concluding that the proposed settlements . . . are reasonably adequate, and thus within the reaches of the public interest." *SBC Commc'ns*, 489 F. Supp. 2d at 21. Although the United States believes that the settlement reached in *SBC Communications* fully restored competition in the alleged relevant market, the case confirms that the United States is obligated only to show that the settlement was reasonable and within the reaches of the public interest.

5. Apple's Suggested Changes to the Proposed Final Judgment Are Self-Serving and Contrary to the Public Interest

Contrary to Apple's assertions, the terms of the proposed Final Judgment are not novel, and the provisions are closely tailored to address the harm alleged in the Complaint. *See* Section V.A.5. Apple's requested modifications to the proposed Final Judgment, on the other hand, would serve only to undermine the proposed Final Judgment's effectiveness, reducing the value of the settlement to consumers.

Apple proposes that Section VI.B be altered to "allow retailers to discount from their commissions on a per unit and not an aggregate basis." Apple at 3. That suggested modification, however, is a naked attempt by Apple to have its competitors' ability to compete on price constrained—to take away the "nearly unfettered ability to discount," *id*. at 2, 6, that a retailer who desires to compete would embrace but Apple fears. For example, Apple's modification would effectively prohibit retail innovations that benefit consumers, such as loss leading, "buy one get one free," or subscription services. Apple has provided no basis to conclude that a "per unit" constraint would better serve the public interest than an aggregate constraint, and its enforceability argument is pure makeweight. Section VI.B, which is permitted

not required conduct, contemplates voluntary agreements between Settling Defendants and retailers, and permits Settling Defendants to negotiate their own enforcement mechanisms with retailers, including Apple. That these sophisticated parties are capable of designing terms to enforce contractual obligations is demonstrated by the Apple Agency Agreements themselves, which provide an audit mechanism to verify proceeds due to the publisher on e-book sales.[37]

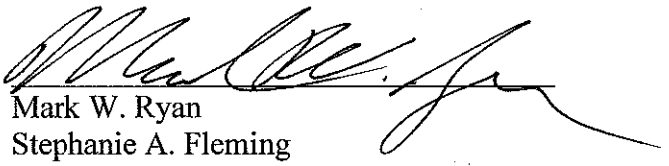
VI. CONCLUSION

The issues raised in the public comments were among the many considered by the United States when it evaluated the sufficiency of the proposed remedy. The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments are published on the Department's website and this Response to Comments is published in the Federal Register.

[37] "Publisher, at its expense, may audit directly applicable records of Apple . . . . [No] audit shall be conducted for a period spanning less than six (6) months." EBOOK AGENCY DISTRIBUTION AGREEMENT, § 12(b), APPLETX00018481 at -18488.

Dated: July 23, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on July 23, 2012, I caused a copy of the United States' Response to Public Comments to be served by the Electronic Case Filing System, which included the individuals listed below. Copies of all Public Comments, collected as digital files in a compact disc entitled "Exhibit A," have also been sent via overnight delivery to the same individuals.

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EXHIBIT “C”

EUROPEAN COMMISSION
Competition DG

CASE COMP/AT.39847-E-BOOKS

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 12/12/2012

EUROPEAN COMMISSION

Strasbourg, 12.12.2012
C(2012) 9288 (consolidated version)

PUBLIC VERSION

COMMISSION DECISION

of 12.12.2012

addressed to:
- Hachette Livre SA,
- HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C.,
- Georg von Holtzbrinck GmbH & Co. KG, Verlagsgruppe Georg von Holtzbrinck GmbH,
- Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc.,
- Apple, Inc.
relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement
Case COMP/39847 - E-BOOKS

(Text with EEA relevance)

(Only the English text is authentic)

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(Text with EEA relevance)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], in particular Article 9(1) thereof,

Having regard to the Commission Decision of 1 December 2011 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 13 August 2012,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

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[1] OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. SUBJECT MATTER

(1) This Decision is addressed to Hachette Livre SA ("Hachette"), HarperCollins Publishers Limited and HarperCollins Publishers L.L.C. (collectively "Harper Collins"), Georg von Holtzbrinck GmbH & Co. KG and Verlagsgruppe Georg von Holtzbrinck GmbH (collectively "Holtzbrinck/Macmillan"), Simon & Schuster, Inc., Simon & Schuster (UK) Ltd and Simon & Schuster Digital Sales Inc. (collectively "Simon & Schuster") and Apple, Inc. ("Apple") and concerns the conduct of these parties in relation to the sale of e-books to consumers.

(2) Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster are collectively referred to as the "Four Publishers".

(3) In its Preliminary Assessment of 13 August 2012 ("Preliminary Assessment"), the Commission provisionally concluded that certain aspects of the global strategy of the Four Publishers and Apple regarding the sale of e-books, pursued with the aim of raising retail prices (or avoiding lower retail prices in the first place), raised concerns as to their compatibility with Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("EEA Agreement").

2. THE PARTIES

(4) Hachette is a publishing group owned by Lagardère SCA, a company listed on the Paris stock exchange. The Hachette group is mainly active in France, the United Kingdom, Spain and the United States. The Hachette group publishes titles mainly in French, English and Spanish.

(5) Harper Collins is a publishing group owned by News Corporation, an international media corporation with headquarters in the US. Harper Collins is mainly active in the United Kingdom and in the United States and publishes titles mainly in English.

(6) Holtzbrinck/Macmillan is a German publishing group which is active in Germany, the United Kingdom, the United States and in other countries. The ultimate parent company of the Holtzbrinck/Macmillan group is Georg von Holtzbrinck GmbH & Co. KG, a holding company. In Germany, the Holtzbrinck/Macmillan group is active through seven imprints (two of which are Rowohlt and S. Fischer). The group includes Macmillan UK, the holding company for all publishing activities of the Holtzbrinck/Macmillan group outside Germany and the United States. In the United Kingdom, Macmillan UK is active through Pan Macmillan (fiction and non-fiction literature), Palgrave Macmillan (academic literature) and Macmillan Education (schoolbooks).

(7) Simon & Schuster is a publishing group owned by CBS Corporation, a media corporation based in the United States. Its divisions in the United States include

Simon & Schuster Adult Publishing, Simon & Schuster Children's Publishing, Simon & Schuster Audio and Simon & Schuster Digital Sales, Inc. In the United Kingdom, Simon & Schuster is active through Simon & Schuster (UK) Ltd.

(8) Apple is a technology company based in the United States. As regards the sale of e-books in the EEA, Apple acts through its subsidiary, iTunes EU S.a.r.l., which has its principal place of business in Luxembourg.

3. PROCEDURAL STEPS PURSUANT TO REGULATION (EC) NO 1/2003

(9) On 1 December 2011 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.

(10) On 13 August 2012, the Commission adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's competition concerns[2]. Those concerns related to a concerted practice between and among Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster and Apple in relation to a common global strategy, including in the EEA, for the sale of e-books with the aim of raising retail prices or avoiding lower retail prices.

(11) On 12 September 2012, Harper Collins, on 13 September 2012, Hachette, on 14 September 2012, Simon & Schuster and Apple, and on 18 September 2012, Holtzbrinck/Macmillan submitted initial commitments ("the Initial Commitments") to the Commission in response to the concerns expressed in the Preliminary Assessment.

(12) On 19 September 2012, a notice[3] was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to submit their observations on the Initial Commitments within one month following publication.

(13) On 23 and 24 October 2012, the Commission informed the Four Publishers about the observations received from interested third parties following the publication of the notice, and on 24 October 2012, the Commission informed Apple about those observations.

(14) On 31 October 2012, Holtzbrinck/Macmillan, on 6 November 2012, Hachette, on 8 November 2012, Harper Collins, and on 12 November 2012, Simon & Schuster and Apple submitted amended commitments (the "Final Commitments").

(15) On 27 November 2012, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 27 November 2012, the Hearing Officer issued his final report.

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[2] The Commission also opened proceedings against Pearson plc ("Pearson"). Pearson is the parent company of the Penguin group ("Penguin"), one of the largest English-language trade book publishers in the world. Pearson was, however, not an addressee of the Preliminary Assessment. The Commission is still examining Pearson's conduct and its compatibility with Article 101 of the Treaty. Pearson remains, therefore, a party to the proceedings in case COMP/39.847/E-Books.

[3] OJ C 283, 19.9.2012, p. 7.

4. PRELIMINARY ASSESSMENT

4.1. Background

4.1.1. The e-book industry

(16) An electronic book or e-book is an electronically formatted book designed to be read on a computer, a handheld device or other electronic devices capable of visually displaying e-books.

(17) Consumers can purchase e-books through websites of e-book retailers or through applications installed on their e-reading devices. Electronic distribution allows retailers to avoid certain expenses inherent in the distribution of print books, including most of the warehousing and distribution expenses.

(18) While the first e-books were already available in the early 1990s, a non-negligible demand for e-books only started to emerge after Amazon, an on-line retailer based in the United States, launched in November 2007 its Kindle e-book platform in the United States.

(19) From 2007 until Spring 2010, publishers sold e-books to retailers mainly under wholesale arrangements, also referred to as the wholesale or reseller model.

(20) Under the wholesale model, e-books were sold to the retailer at a wholesale price below the suggested retail price determined by the publishers (the "list price"). At least in the United States, the United Kingdom and Germany, wholesale prices were generally up to 50% of the e-book list price.

(21) In the United States and certain countries of the EEA where there was no legislation allowing or obliging publishers to independently set retail prices for print books and/or e-books (so called retail price maintenance ("RPM") laws), retailers were free to set the retail prices charged to consumers.

4.1.2. Amazon's USD 9.99 pricing policy

(22) In 2007, Amazon started to offer in the United States, and as of October 2009, internationally (therefore also in the EEA), certain newly released English-language bestselling e-books to consumers for USD 9.99. This retail price set by Amazon was generally significantly below the e-book list price, as well as at, or below, the e-book wholesale price set by publishers. Other major United States e-retailers often matched or approached Amazon's USD 9.99 prices for these titles.

(23) No later than 2008, at least the Four Publishers started to be concerned about, *inter alia,* Amazon's e-book pricing policy and its spread outside the United States (including to the EEA), as well as Amazon's growing market share in the United States and potentially globally. In the Preliminary Assessment, the Commission took the preliminary view that the Four Publishers expressed to each other the desire to increase retail prices of e-books above the levels set by Amazon and stop the spread of those lower retail prices, as well as to stop Amazon's growth in the United States and other markets, including in the EEA.

4.1.3. The Four Publishers' search for a collective and global response

(24) Each of the Four Publishers sold a significant amount of its e-books through Amazon.

(25) In the Preliminary Assessment, the Commission's preliminary view was that each of the Four Publishers understood that, rather than independent action, a common approach against Amazon was necessary to succeed in moving Amazon away from its USD 9.99 pricing policy.

(26) The Commission's preliminary view was that faced with Amazon's global reach and the USD 9.99 pricing policy, expected to be followed by Amazon internationally, the Four Publishers pursued a global approach. Their digital plans and strategies were formulated globally and group-wide.

(27) Throughout 2009, several of the Four Publishers considered a number of potential approaches to force Amazon to raise retail prices. These included: (i) raising the wholesale prices of their e-books to match those of print books; (ii) exploring the possible establishment of joint e-book platforms; (iii) considering ways of taking control of retail prices of e-books either through using the agency model[4] or RPM arrangements with retailers, and/or through lobbying for national RPM laws; and (iv) delaying, in the United States, the release of e-book editions of certain new release titles ("windowing") in order to put pressure on Amazon to accept an agency model with higher retail prices.

4.2. Practices raising concerns

4.2.1. Common global plan to convert the sale of e-books to an agency model with the same key pricing terms

(28) In December 2009, Apple contacted at least the Four Publishers, on an individual basis, regarding its intention to begin selling e-books.

(29) The Commission's preliminary view was that, in parallel to those initial contacts with Apple in December 2009, some of the Four Publishers engaged in direct contacts with each other regarding their respective discussions with Apple and/or the envisaged commercial model for the sale of e-books to consumers.

(30) The Commission's preliminary view was that Apple at first considered entering the market under a wholesale model. When some of the Four Publishers proposed an agency model for the sale of e-books and asked Apple to propose retail prices, Apple concluded that the agency model was indeed the preferred business model to achieve both its goal of eliminating meaningful retail price competition with Amazon, and the goal of each of the Four Publishers of raising retail prices above Amazon's retail prices. Apple, therefore, simultaneously informed at least the Four Publishers in early January 2010 that it was proposing to sell e-books under an agency model. The terms that Apple proposed to at least the Four Publishers, including pricing terms,

[4] Under an agency model, as opposed to a wholesale or reseller model, e-books are sold directly from the publisher to the consumer. The agent is empowered to negotiate and/or conclude contracts on behalf of its principal, either in its own name or in the name of the principal. The agent is usually remunerated for the agency services it provides by payment of a commission.

were identical, and included a statement that all resellers of new titles would have to be on the agency model.

(31) Shortly afterwards, Apple simultaneously submitted its proposed draft agency agreement to at least the Four Publishers. The draft agency agreements contained, among other things, a retail price most favoured nation ("MFN") clause. This clause replaced Apple's earlier requirement that each of the Four Publishers adopt the agency model with each of its retailers. The retail price MFN clause provided that, in the event another retailer were to offer a lower price for a particular e-book, including in situations where that retailer was operating under a wholesale model and thus was free to set retail prices, the publisher would have to lower the retail price of that e-book in the iBookstore to match that other lower retail price.

(32) Each of the draft agreements contained maximum retail price grids for new release e-books. These price grids were set above the retail prices charged by Amazon at the time. The Commission's preliminary view is that the Four Publishers' efforts to negotiate higher maximum retail price points with Apple show that they understood that the actual future retail e-book prices for newly released bestsellers were likely to be the same as the "maximum" retail prices proposed in each of the draft agency agreements for e-books. Each of the Four Publishers and Apple further understood that Apple's proposed pricing and commission level would result in a lower margin for each of the Four Publishers than that under the existing wholesale model.

(33) The Commission's preliminary view is that Apple ensured, from the outset and throughout the negotiations with at least each of the Four Publishers, that each of the Four Publishers knew that (i) at least each and every one of the Four Publishers was also negotiating with Apple on the same key pricing terms, and (ii) Apple considered it necessary to reach an agreement with a critical number of publishers in order to launch its iBookstore. Apple also kept at least the Four Publishers informed of the status of the negotiations with at least each and every one of them, including with how many of each of the Four Publishers it had successfully concluded negotiations.

(34) In addition to Apple's assurances and information, in its Preliminary Assessment, the Commission took the preliminary view that the Four Publishers engaged, throughout their respective negotiations with Apple, in direct contacts with each other whereby they disclosed and received information about the course of conduct contemplated and/or adopted by each of them, particularly with respect to pricing.

(35) The Commission's preliminary view was also that during the negotiations with at least the Four Publishers in the United States, Apple informed each of the Four Publishers that while it was initially launching the iBookstore in the United States and Canada, it subsequently intended to roll out the iBookstore in other countries, including in the EEA. Each of the Four Publishers therefore understood that Apple was likely to enter the e-books business on a global scale, including in the EEA, and on the basis of the same agency model and with the same key pricing terms. Therefore, the Four Publishers prepared for the implementation of the agency model outside the United States, and most notably in the EEA, in parallel to the implementation in the United States.

4.2.2. Implementation of the common global plan in the United States

4.2.2.1. The agency agreements between each of the Four Publishers and Apple

(36) Between 24 and 26 January 2010, each of the Four Publishers signed agency agreements with Apple in the United States, each containing the same key terms, including the payment of a commission to Apple equal to 30 % of the retail price paid by a consumer for an e-book purchased from the iBookstore, maximum retail price grids, and a retail price MFN clause for newly released e-books, referred to in recital (31). The retail price MFN obligation became effective with regard to each of the Four Publishers on 3 April 2010, the launching date of the iBookstore.

(37) Each agreement provided that each of the Four Publishers is, in principle, free to set the retail price for its e-books titles. However, as regards newly released e-books , each agreement contained identical price grids with maximum retail price points, pegged to suggested hardcover retail prices, beyond which none of the Four Publishers could go. In addition, as regards newly released e-books that appear on the bestseller lists published by the New York Times, each agreement also contained identical maximum retail price points depending on the suggested retail price for the corresponding hardcover edition.

4.2.2.2. The conversion of Amazon and other retailers to the agency model

(38) The Commission's preliminary view was that Apple and each of the Four Publishers understood that both Apple's goal of eliminating retail price competition with Amazon, and the Four Publishers' goal of raising retail prices above those of Amazon could be achieved only if the Four Publishers were able to impose an agency model on all retailers including Amazon. Apple and each of the Four Publishers understood that the retail price MFN clause created a strong incentive for each of the Four Publishers to convert Amazon (and other major retailers) to the agency model in order to avoid the costs of having to match Amazon's lower retail prices under the Apple agency contract. The Commission's preliminary view was that the retail price MFN clause acted as a joint "commitment device" whereby each of the Four Publishers was in a position to force Amazon to accept a change to the agency model or otherwise face the risk of being denied access to the e-books of each of the Four Publishers, assuming that at least all Four Publishers had the same incentive during the same time period, and that Amazon could not sustain simultaneously being denied access even to only a part of the e-books catalogue of at least each of the Four Publishers.

(39) Shortly before each of the Four Publishers signed an agency agreement with Apple in the United States, each of the Four Publishers separately announced to Amazon its intention to change its business terms and move to an agency model in the United States. Amazon initially refused to move to the agency model and even stopped selling both print and e-book editions of Holtzbrinck/Macmillan's titles on its United States website for a short period of time, but ultimately gave in. By 3 April 2010, the launching date of the iBookstore in the United States and the starting date of the MFN obligation upon the Four Publishers, each of the Four Publishers had signed an agency agreement with Amazon in the United States. The Four Publishers subsequently converted other retailers to the agency model.

4.2.3. Implementation of the common global plan in the EEA

4.2.3.1. The agency agreements between each of the Four Publishers and Apple

(40) Between March and December 2010, each of the Four Publishers entered into negotiations with Apple concerning the signature of agency agreements in the United Kingdom, France and/or Germany.

(41) In the Commission's preliminary view, when negotiating those agency agreements and in light of their global strategy, each of the Four Publishers and Apple used their United States agency agreements as a template.

(42) The Commission's preliminary view was that, in light of the global strategy adopted by each of the Four Publishers, the executives of each of the Four Publishers in the United Kingdom were directed by their superiors and/or counterparts in the United States to enter into an agency agreement with Apple in respect of United Kingdom book titles the rights to which are held by each of the Four Publishers in the United Kingdom ("UK titles").

(43) Between mid-May 2010 and end of August 2010, each of the Four Publishers signed an agency agreement with Apple for UK titles. As set out in recitals (46) to (48), the agency agreements between each of the Four Publishers and Apple contain the same key pricing terms as their respective United States agreements; namely, the retail price MFN clause, maximum retail price grids, and the payment of a commission to Apple equal to 30% of the retail price.

(44) In 2010, only one of the Four Publishers had operations in French language titles (Hachette) and only one other in German language titles (Holtzbrinck/Macmillan). Hachette signed an agency agreement with Apple for French language titles the rights to which are held by Hachette in France ("French titles") in May 2010. Holtzbrinck/Macmillan signed an agency agreement with Apple for German language titles the rights to which are held by Holtzbrinck/Macmillan's German entities in Germany ("German titles") in December 2010. The Commission's preliminary view was that Hachette and Holtzbrinck/Macmillan engaged in direct contacts with other local French and German publishers, respectively, with the aim of persuading such publishers to enter into agency agreements with Apple on the same key pricing terms.

(45) Apple launched its iPad and iBookstore in the United Kingdom, France and Germany on 28 May 2010. The Commission's preliminary view is that it was understood by the Four Publishers that this was only the first step by Apple, as Apple had informed them of its intention to launch the iBookstore in the rest of the EEA shortly thereafter.

4.2.3.2. Common features of each of the agency agreements for UK, French and German titles

(46) The Commission's preliminary view was that the agency agreements between each of the Four Publishers and Apple for UK, French and German titles contain the same key pricing terms, including the same retail price MFN clause, found in the United States agency agreements, substantially similar maximum retail price grids for each of UK, French and German titles, and the same commission to Apple equal to 30%

of the retail price. The agency agreements concluded for UK, French and German titles further contain a "phase-in" period between the date of entry into force of the agreements and the date of applicability of the retail price MFN clause.

(47) Each publisher appointed Apple as a non-exclusive agent to sell e-book versions of its titles either throughout the whole of the EEA, or, as is the case for two of these agreements, only in the United Kingdom or only in Germany and Austria.

(48) The agency agreements establish that the publisher is, in principle, free to set the retail price for its e-books titles. However, similarly to the United States agency agreements, each agency agreement contains maximum retail price points either for all titles, as is the case for UK and German titles, or for newly released e-books , as is the case for French titles. The Commission's preliminary view was that these maximum retail prices are substantially similar or even identical across the agency agreements concluded between Apple and the Four Publishers for UK titles, across the agency agreements concluded between Apple and Hachette as well as between Apple and a number of other publishers for French titles, and across the agency agreements concluded between Apple and Holtzbrinck/Macmillan as well as between Apple and a number of other publishers for German titles.

4.2.3.3. The conversion of Amazon and other retailers to the agency model for UK titles and the adoption of that model for French and German titles.

United Kingdom

(49) At the time of Apple's launch of its iPad and iBookstore in the United Kingdom on 28 May 2010, Amazon had been selling, since October 2009, English language e-books in the United Kingdom through its .com website operating under the wholesale model. On 10 August 2010, Amazon launched a Kindle store targeting the United Kingdom. Sales from this store were also initially made on the basis of a wholesale model, where Amazon determined the retail prices of e-books.

(50) The Commission's preliminary view was that Apple and each of the Four Publishers understood that, just like for the United States titles, the retail price MFN clause created a strong incentive for each of the Four Publishers to convert Amazon (and other major retailers for UK titles) to the agency model in order for each publisher to be able to increase retail prices above those set by Amazon. The retail price MFN clause also meant that had Amazon refused to convert to the agency model for UK titles, each of the Four Publishers had strong incentives to delay or withhold e-book new releases from Amazon.

(51) Between […] and […], three of the Four Publishers separately announced to Amazon their intention to change their business terms and move to an agency model. The fourth publisher made its announcement in […]. Each publisher understood that it would not be the only one telling Amazon that it was moving to the agency model over approximately the same period of time.

(52) As a consequence of the move to the agency model in the United States, the Commission's preliminary view was that Amazon expected each of the Four Publishers to request it to move to the agency model for UK titles and did not resist as it had done in the United States. The Commission's preliminary view was that also

Amazon and the Four Publishers expected that their United States agency agreements would serve as a template for the agency agreements regarding UK titles.

(53) By the end of […], three of the Four Publishers had signed an agency agreement with Amazon regarding UK titles. No later than […], the fourth publisher suspended its on-going negotiations with Amazon on an agency agreement after the UK Office of Fair Trading ("OFT") had started an investigation into e-books in the United Kingdom.

France

(54) At the time of Apple's launch of its iPad and iBookstore in France on 28 May 2010, newly released French language e-books were mainly sold through the website of Fnac, a French retailer, and under an agency agreement with Hachette having substantially different terms from those of Hachette's agreement with Apple in the United States. Although certain e-books were available to French consumers through Amazon's .com website, very few newly released French language e-books were available.

(55) The Commission's preliminary view is that Apple and Hachette, the only one of the Four Publishers that had signed an agency agreement with Apple in the US and was also selling French titles, understood that the retail price MFN clause created a strong incentive for Hachette to allow Amazon (and other major retailers) to sell French titles only under the agency model, in order to avoid potential discounting of its suggested retail prices and maximise its profits under the agency agreement with Apple.

(56) The Commission's preliminary view is that Amazon and Hachette used their United States agency agreement as a template for their agency agreement for French titles.

(57) Amazon and Hachette signed an agency agreement for French titles in […]. Subsequently, in October 2011, Amazon launched a Kindle store targeting France.

Germany

(58) At the time of Apple's launch of its iPad and iBookstore in Germany on 28 May 2010, newly released German language e-books were sold mainly through five retailers. Although certain e-books were also available through Amazon's .com website, very few newly released German language e-books were available.

(59) The Commission's preliminary view is that Apple and Holtzbrinck/Macmillan, the only one of the Four Publishers that had signed an agency agreement with Apple in the US and was also selling German titles, understood that the MFN clause was a strong incentive for Holtzbrinck/Macmillan to allow Amazon (and any other retailer) to sell German titles only under the agency model (and to convert other major retailers to an agency agreement), in order to avoid potential discounting of its retail prices and to maximise its profits under the agency agreement with Apple.

(60) The Commission's preliminary view is that Amazon and Holtzbrinck/Macmillan used their United States agency agreement as a template for their agency agreement regarding German titles.

(61) Amazon and Holtzbrinck/Macmillan signed an agency agreement for German titles in […]. Subsequently, in April 2011, Amazon launched a Kindle store targeting Germany.

4.2.4. The likely consequences for the retail price of e-books in the EEA

(62) Evidence collected by the OFT in the context of its United Kingdom investigation regarding […] weekly retail prices suggests that each of the Four Publishers that implemented the conversion to the agency model with […] in the United Kingdom increased the retail prices for their e-books relative to other publishers.

(63) Based on quantitative evidence regarding the impact of the conversion to an agency model in the United Kingdom, the Commission's preliminary view is that the likely consequence of the conduct was to increase the retail price of e-books in the United Kingdom.

4.3. Preliminary legal assessment

(64) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements, decisions and concerted practices which may affect trade between Member States and/or between Contracting Parties and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market and/or the EEA.

4.3.1. Concerted practice

4.3.1.1. Principles regarding the existence of a concerted practice

(65) A concerted practice is a form of co-ordination where undertakings knowingly substitute practical cooperation between them for the risks of competition.[5] In line with the case-law of the Union Courts, the criteria of cooperation and coordination necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each trader must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.[6]

(66) While this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, preclude any direct or indirect contact between traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market.[7] This precludes any direct or indirect contact between competitors, the object or effect of which is to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of

[5] Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 64.
[6] Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 86.
[7] Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 87.

conduct which they themselves have decided to adopt or contemplate adopting on the market in question.[8]

(67) Moreover, a concerted practice in the form of an exchange of information does not have to be reciprocal in order to constitute a concerted practice within the meaning of Article 101(1) of the Treaty: *"[i]t follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information."*[9] When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it can show *"proof to the contrary"*.[10]

(68) The assessment of the existence of a concerted practice is not affected by the fact that an undertaking may be active on a level of trade different from that of other participants in a concerted practice. Rather, it is sufficient that there is a "*joint intention [of the undertakings] to conducting themselves on the market in a specific way*."[11] Thus, the relevant market on which a member of a concerted practice is active does not need to be the same as the market on which that concerted practice is deemed to materialise.[12]

(69) Finally, where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for an undertaking to prove circumstances which cast the facts established by the Commission in a different light and thus allow another 'plausible explanation' of the facts to be substituted for the one adopted by the Commission.[13]

4.3.1.2. Application in this case

Parallel behaviour

(70) In light of section 4.2, the Commission's preliminary view is that there exists parallel behaviour in the United States and the EEA between the Four Publishers and Apple including, *inter alia*, in relation to the process of negotiation and the content of the agency agreements between the Four Publishers and Apple in both the United States and the EEA.

Direct and indirect contacts between the Four Publishers and Apple

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8 Joined Cases 40 to 48, 50, 54-56, 111, 113 and 117/73, *Coöperative Vereniging 'Suiker Unie' and others v Commission* [1975] ECR 1663, paragraph 173 *et seq*; Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 117.

9 Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 51; Case T-377/06 *Comap v Commission*, judgment of 24 March 2011, paragraph 70.

10 Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 162; Case C-49/92 P *Anic Partezipazioni* [1999] ECR I-4125, paragraph 121.

11 Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 67.

12 Case T-99/04 *AC-Treuhand AG* [2008] ECR II-1501, paragraph 122.

13 Case T-36/05 *Coats Holdings v Commission* [2007] ECR 11-110, paragraph 72.

(71) The Commission's preliminary view was that there were direct and indirect contacts between the Four Publishers and Apple, disclosing the course of conduct which each of the Four Publishers and Apple had decided to adopt or contemplated adopting on the market, in order to influence the future course of conduct of at least the Four Publishers.

(72) The Commission's preliminary view was that no later than December 2009, each of the Four Publishers engaged in direct and indirect (through Apple) contacts aimed at either raising the retail prices of e-books above those of Amazon (as was the case in the United Kingdom) or avoiding the arrival of those prices altogether (as was the case in France and Germany) in the EEA. In order to achieve that aim, the Four Publishers, together with Apple, planned to jointly convert the sale of e-books from a wholesale model to an agency model on a global basis and on the same key pricing terms, first with Apple and then with Amazon and other retailers.

(73) The Commission's preliminary view was that to make that joint conversion possible, each of the Four Publishers disclosed to, and/or received information from, the rest of the Four Publishers and/or Apple, regarding the Four Publishers' future intentions with respect to entering into an agency agreement with Apple in the United States and the key terms under which each of the Four Publishers would enter into that agency agreement with Apple in the United States, including the retail price MFN clause, the maximum retail price grids and the level of commission to be paid to Apple.

(74) The Commission's preliminary view was that Apple's goal was to find a way to have retail prices at the same level as Amazon's while still achieving its desired margin. Apple would have known that this goal and the goal of each of the Four Publishers, that of raising retail prices above the level set by Amazon (or avoiding the introduction of lower prices by Amazon), could be achieved if Apple followed the suggestion by at least some of the Four Publishers that it enter the market for the sale of e-books under an agency model rather than a wholesale model and informed each of the Four Publishers about whether at least any of the other Four Publishers were entering into an agency agreement with Apple in the United States under the same key terms.

(75) The Commission's preliminary view was that Apple and the Four Publishers understood that Apple's entry in the market for e-books on the agreed key agency terms would provide the global scale and framework needed for at least the Four Publishers to convert the sale of e-books to the agency model on a global basis, first in the United States and then in the EEA.

Conditions of competition which do not correspond to normal conditions thereof

(76) The Commission's preliminary view was that the concerted practice between and among the Four Publishers and Apple has led to conditions of competition which do not correspond to normal conditions.

(77) Under normal conditions of competition, each of the Four Publishers would have been unaware of whether at least each of the other Four Publishers intended to enter into an agency agreement with Apple, and of the key pricing terms of that agreement.

(78) The Commission's preliminary view was that the direct and indirect contacts between the Four Publishers and Apple eliminated the risks associated with normal competition and led to the signing of agency agreements, first in the United States and subsequently in the EEA, between each of the Four Publishers and Apple on the same key pricing terms and on a global basis.

No alternative plausible explanation

(79) The Commission's preliminary view was that the decision of each of the Four Publishers to enter into an agency agreement with Apple, first in the United States and then in the EEA, on the same key pricing terms described, cannot plausibly be explained other than by a concerted action.

(80) The Commission's preliminary view was that each of the Four Publishers knew that by entering into agency agreements with Apple, first in the United States and then in the EEA, containing the retail price MFN clause, maximum retail price grids and a commission of 30% of the retail price payable to Apple, there was the risk of substantially lower revenues if other retailers, such as Amazon, were allowed to continue setting retail prices. Entering into those agreements would therefore not be in the economic interest of each of the Four Publishers individually, unless a sufficient number of the other major international publishers were following suit, thereby substantially increasing the credibility and effectiveness of the threat of each of the Four Publishers withholding e-books from retailers like Amazon if those retailers refused to convert to the agency model with higher retail prices.

4.3.1.3. Conclusion

(81) In light of the above, the Commission's preliminary view was that by jointly converting the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis, the Four Publishers and Apple engaged in a concerted practice to either raise retail prices of e-books in the EEA or to prevent the emergence of lower prices for e-books in the EEA.

4.3.2. Restriction of competition

4.3.2.1. Principles

(82) According to the case law of the Union Courts, when assessing whether a concerted practice is anti-competitive, regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context.[14] While the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, nothing prevents the Commission from taking it into account.[15]

(83) As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the

[14] Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraph 25; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 27.

[15] Id.

prohibition in Article 101(1) of the Treaty. The alternative nature of that requirement, indicated by the conjunction 'or', means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued.[16]

(84) In addition, when deciding whether a concerted practice is prohibited by Article 101(1) of the Treaty, there is no need to take into account its actual or potential effects once it is apparent that its object is to prevent, restrict or distort competition within the internal market.[17] The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[18]

4.3.2.2. Application in this case

(85) The Commission's preliminary view is that the objective of the concerted practice between and among the Four Publishers and Apple, in the economic context in which it was pursued, was to raise the retail prices of e-books in the EEA or prevent the emergence of lower retail prices for e-books in the EEA.

(86) In the Commission's preliminary view, in order to achieve this objective on a global basis, including in the EEA, the Four Publishers and Apple jointly converted the sale of e-books from a wholesale model to an agency model with the same key terms (including the retail price MFN clause, the maximum retail pricing grids and the same 30% commission payable to Apple) with the intention of raising retail prices above the level of those offered by Amazon or preventing the emergence of such lower retail prices.

4.3.2.3. Conclusion

(87) A concerted practice, as examined in this case, which aims to raise retail prices or to prevent the introduction of lower retail prices has, by its very nature, the potential to restrict competition.

(88) Therefore, the Commission's preliminary view is that the concerted practice between and among the Four Publishers and Apple had the object of preventing, restricting or distorting competition for e-books in the EEA.

4.3.3. Effect on trade between Member States

4.3.3.1. Principles

(89) According to the case law of the Union Courts, in order to find that a concerted practice may affect trade between Member States, it must be possible to foresee with

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16 Case 56/65 LTM [1966] ECR 235, 249; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 28.

17 Case C 105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I 8725, paragraph 125; and Case C 209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I 8637, paragraph 16.

18 Case C 209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I 8637, paragraph 17; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29.

a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have a direct or indirect, actual or potential influence on the pattern of trade between Member States.[19] Moreover, the effect on trade should not be insignificant.[20]

(90) Thus, the effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.[21]

4.3.3.2. Application in this case

(91) The Commission's preliminary view was that the effect on trade of the concerted practice was appreciable given that the conversion to the agency model by the Four Publishers and Apple formed part of a global strategy that was intended to be, and was, implemented in the EEA.

(92) In particular, given the nature of the product in question, the position and importance of the undertakings concerned and the scope of the agency agreements entered into between each of the Four Publishers and Apple in the United Kingdom, France and Germany, the pattern of trade was potentially affected by the concerted practice which covered a substantial part of the EEA.

4.3.3.3. Conclusion

(93) In light of the above, the Commission's preliminary view is that the concerted practice between and among the Four Publishers and Apple is likely to have an appreciable effect on trade between Member States within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

4.3.4. Article 101 (3) of the Treaty and Article 53 (3) of the EEA Agreement

(94) The Commission's preliminary view is that Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement do not apply in this case because the cumulative conditions set out in those provisions are not met.

5. PROPOSED COMMITMENTS

(95) The Four Publishers and Apple do not agree with the Commission's Preliminary Assessment of 13 August 2012. Nevertheless, in order to address the Commission's concerns as set out in that Preliminary Assessment, they have offered an initial set of commitments (the "Initial Commitments") and subsequently a final set of commitments (the "Final Commitments") pursuant to Article 9 of Regulation (EC) No 1/2003.

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[19] Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and others v Commission* [2009] ECR I-8681, paragraph 36.

[20] Ibid.

[21] C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 35.

5.1. Initial Commitments offered by the Four Publishers

(96) The key elements of the Initial Commitments offered by each of the Four Publishers (by Harper Collins on 12 September 2012, by Hachette on 13 September 2012, by Simon & Schuster on 14 September 2012 and by Holtzbrinck/Macmillan on 18 September 2012) are set out in recitals (97) to (102).

5.1.1. Termination of existing agency agreements

(97) Each of the Four Publishers will terminate their respective agency agreements for the sale of e-books in the EEA concluded with Apple, not later than fourteen days following the date of the Commission decision making that commitment binding under Article 9(1) of Regulation 1/2003.

(98) As regards other agency agreements for the sale of e-books in the EEA that: (a) restrict, limit, or impede an e-book retailer/agent's ability to set, alter, or reduce the retail price or to offer any other form of promotions; or (b) contain an MFN clause regarding price as specified in the Initial Commitments, each of the Four Publishers will promptly notify the e-book retailer or agent that the latter may terminate the agreement with thirty-days notice and shall, within thirty days after the e-book retailer provides such notice, release the e-book retailer/agent from the agreement. In respect of any such agreement which would not be so terminated by the retailer, at the latest within seventy days of the notification of the Commission decision making binding the commitments under Article 9(1) of Regulation 1/2003, each of the Four Publishers must take the steps required under the agreement to cause that agreement to be terminated.

5.1.2. Price-setting discretion for retailers during a period of two years ("cooling-off period")

(99) For a period of two years, each of the Four Publishers undertakes not to restrict, limit or impede an e-book retailer's ability to set, alter or reduce retail prices of e-books and/or to restrict, limit or impede an e-book retailer's ability to offer price discounts or any other forms of promotions.

(100) In the event that, after termination of the agreements referred to in recitals (97) and (98), any of the Four Publishers enters into an agency agreement with an e-book retailer, that e-book retailer will be able to reduce, for a period of two years, the retail prices of e-books by an aggregate amount equal to the total commissions that the publisher pays to that e-book retailer over a period of at least one year, in connection with the sale of its e-books to consumers, and/or to use that amount to offer any other forms of promotions.

5.1.3. Ban on MFN clauses for a period of five years

(101) For a period of five years, each of the Four Publishers undertakes not to enter into any agreement for the sale of e-books in the EEA that contains any type of MFN clause specified in the Initial Commitments of each of the Four Publishers.

(102) The ban on MFN clauses as proposed by each of the Four Publishers in their Initial Commitments, is defined so as to cover three price MFN clauses and one business model MFN clause:

(i) a retail price MFN clause, providing that the retail price at which an E-book Retailer or, under an Agency Agreement, a publisher, sells an e-book depends on the retail price at which any other e-book retailer or that publisher under an agency agreement through any other e-book retailer, sells the same e-book(s) to consumers;

(ii) a wholesale Price MFN clause under which the wholesale price at which a publisher sells an e-book to, or through an e-book retailer, depends on the wholesale price at which that publisher sells the same e-book to, or through any other e-book retailer;

(iii) a commission/revenue share MFN clause, under which the commission or revenue share that an e-book retailer receives from a publisher in connection with the sale of one or more e-books to consumers depends in any way on the commission or revenue share that (a) any other e-book retailer receives from that publisher in connection with the sale of the same e-book(s) to consumers, or (b) that e-book retailer receives from any other e-book publisher in connection with the sale of one or more of the other e-book publisher's e-books; and

(iv) a business model MFN clause, under which the type of business arrangement for the distribution or sale of e-books that an e-book retailer or agent may enter into with a publisher depends on the type of business arrangement for the distribution or sale of e-books that a publisher enters into with any other e-book retailer.

5.2. Initial Commitments offered by Apple

(103) The key elements of the Initial Commitments offered by Apple on 14 September 2012 are set out in recitals (104) to (107).

5.2.1. Termination of existing agency agreements

(104) Apple will terminate the agency agreements for the sale of e-books in the EEA concluded with each of the Four Publishers not later than fourteen days from the date of the Commission decision making that commitment binding under Article 9(1) of Regulation (EC) No 1/2003.

(105) Apple will also notify Pearson, informing Pearson that it can immediately terminate its agency agreement concluded with Apple for the sale of e-books in the EEA. In the event Pearson does not provide Apple with a notice of termination, Apple will terminate the agency agreement in accordance with the conditions laid down therein.

5.2.2. Ban on retail price MFN clauses for a period of five years

(106) For a period of five years, Apple undertakes not to enter into any agreements for the sale of e-books in the EEA which contain retail price MFN clauses dictating that the retail price at which an e-book Retailer or, under an Agency Agreement, a publisher, sells an e-book depends on the retail price at which any other e-book retailer or that publisher under an agency agreement through any other e-book retailer, sells the same e-book to consumers, as specified in Apple's Initial Commitments.

(107) Within seven days following the date of notification of the Commission decision under Article 9(1) of Regulation 1/2003, Apple will inform any publisher with which it has an agency agreement for the sale of e-books in the EEA that for a period of

five years it will not enforce any retail price MFN clauses contained in those agreements.

6. COMMENTS RECEIVED IN RESPONSE TO THE COMMISSION'S NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

6.1. Introduction

(108) In response to the publication on 19 September 2012 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "Market Test"), the Commission received observations from 14 interested third parties, including from e-book publishers, e-book retailers, trade associations and one private citizen.

(109) The observations received mainly related to the termination of existing agency agreements, the cooling-off period, the scope of the ban on price MFN clauses as set out in the Initial Commitments, as well as non-circumvention and compliance terms.

(110) Some observations related to the definition of "eBook" and "Online eBook Store Provider" in Apple's Initial Commitments.

6.2. Termination of relevant agency agreements

(111) Only one respondent commented on the termination of the agency agreements as proposed in the Initial Commitments by each of the Four Publishers. According to that respondent, if the time period allowed for termination by the Initial Commitments is not sufficient, the Initial Commitments could cause significant disruptions in the consumer offering for existing e-book retailers. The respondent did not take a position regarding whether the time period allowed by the Initial Commitments for termination would or would not be sufficient.

(112) That same respondent also stated that to the extent that each of the Four Publishers would spend a significant period of time renegotiating with their largest retailers, this would leave limited time available for renegotiations with smaller retailers and would put significant pressure on those smaller retailers. That respondent took no position regarding whether and to what extent each of the Four Publishers might act as suggested.

6.3. Scope of the prohibition on MFN clauses

(113) Approximately half of the respondents did not comment specifically on the scope of the proposed ban on MFN clauses. None of the respondents that commented specifically on the price MFN ban, commented on its proposed duration. Regarding the scope of the price MFN ban, no respondent suggested that the retail price MFN ban should be removed.

(114) Regarding the ban on wholesale price and commission or revenue share MFN clauses, it was argued that a ban on these clauses should not be included because commission or revenue share MFN clauses are generally pro-competitive in nature. In particular, it was argued that wholesale price and commission or revenue share MFN clauses allow retailers to offer lower retail prices, and to innovate, because they protect against discrimination and/or retaliation by publishers.

(115) It was also argued that in countries with national RPM laws, retail price and wholesale price MFN clauses would not have any significant effect and retailers in those countries have to compete on terms other than price.

(116) Regarding specifically the business model MFN ban, the Commission has received observations arguing both for and against the inclusion of that ban.

(117) Arguments put forward against the business model MFN ban point to a risk of discrimination by publishers against certain retailers as regards the choice between the agency and the wholesale model. Specifically, retailers would be concerned about being forced by publishers to accept a model, possibly in retaliation for discounting, while other retailers would remain on a different, more advantageous model. Furthermore, it was argued that allowing retailers to choose the model under business model MFN clauses could lead to more retailers operating under the wholesale model which would create a greater potential for price competition.

(118) In favour of a ban on business model MFN clauses, it was argued that such a ban would incentivise innovation for development of new business models for the distribution of e-books. In addition, if business model MFN clauses were not banned, only larger retailers with greater bargaining power would benefit from those clauses and their resulting protection.

6.4. Cooling-off period

(119) Approximately half of the respondents submitted observations on the cooling-off provision or its effects.

(120) One respondent argued that allowing pricing discretion for retailers would render the Initial Commitments disproportionate because domestic third party retailers in Member States with national RPM laws would be negatively affected and the mere termination of the relevant agency agreements would be sufficient to remove the effects of any possible concerted practice. That respondent stated that domestic retailers situated in Member States with national RPM laws would be prohibited from discounting due to those laws while large foreign retailers, to which those laws do not apply, would enjoy discounting discretion, thereby putting domestic retailers at a disadvantage. Another respondent argued that publishers in Member States with national RPM laws would not be able to benefit from those laws because they would face price competition from titles offered by large foreign retailers who could exercise discounting discretion in accordance with the Initial Commitments. Both respondents argued that the cooling-off period should be removed from the final version of the Commitments, or alternatively, the cooling-off provision should be amended to ensure that foreign retailers or agents would not have pricing discretion in countries with national RPM laws.

(121) As regards the scope of the retail price discretion during the cooling-off period, one respondent questioned whether the ability of retailers to discount should be capped in any manner, in particular as it may be difficult to ensure that a cap is not exceeded, for example when promotions would involve e-books of more than one publisher. That respondent also argued that the proposed cap would impose an accounting burden and may, depending on the terms of the agreement, entail a legal obligation on the agent.

(122) Another respondent argued that pricing discretion should be calculated on a title-by-title basis rather than across a whole catalogue. In particular, calculating pricing discretion across a whole catalogue would disproportionally benefit large retailers who would be able to offer greater discounts than smaller retailers, because the larger retailers would have larger catalogues and/or could off-set lower margins from e-books with other revenue sources.

(123) Only two respondents commented on the duration of the cooling-off period. One respondent questioned whether a two year duration for the cooling-off period would be appropriate in light of a five year duration for the MFN ban, and stated that a longer duration for the cooling-off period would be desirable. The other respondent, however, argued that a two-year duration would be too long, as it would result in irreparable changes for domestic retailers in countries with national RPM laws, thus favouring large international retailers.

6.5. Definitions

(124) A few respondents commented on some of the definitions in the Initial Commitments by Apple, and the difference between those definitions and the definitions of the same terms established in the Initial Commitments by each of the Four Publishers, namely, the definitions of "eBook" and "Online eBook Store Provider".

(125) One respondent argued that it was not clear whether aggregators would be covered by the definition of "eBook Retailer" in the Initial Commitments by each of the Four Publishers.

6.6. Non-retaliation, compliance terms and deterrence

(126) One respondent suggested that the Initial Commitments by each of the Four Publishers and Apple should be amended, in order to moderate their future behaviour. Most notably, that respondent suggested that the Commitments by each of the Four Publishers should include a prohibition on retaliation against retailers engaging in conduct which each of the Four Publishers is prohibited from restricting. That respondent also suggested that the Final Commitments by each of the Four Publishers and Apple should include an undertaking to abstain from any collusive conduct related to the sale of e-books, as well as measures ensuring deterrence and compliance with that undertaking.

6.7. Market power, cultural diversity and the agency model

(127) A number of respondents submitted in their observations other considerations which are, however, not directly related to the competition concerns identified by the Commission in its Preliminary Assessment. Those considerations concerned Amazon's strong position in the EEA, the impact of the Initial Commitments on cultural diversity and the advantages and disadvantages of using the agency model for the sale of e-books.

7. SUBMISSION OF THE FINAL COMMITMENTS BY EACH OF THE FOUR PUBLISHERS AND APPLE

(128) Following the end of the Market Test, on 31 October 2012, Holtzbrinck/Macmillan, on 6 November 2012, Hachette, on 8 November 2012, Harper Collins, and on 12 November 2012, Simon & Schuster and Apple submitted amended versions of their commitments. These Final Commitments differ from the proposed Initial Commitments in the following aspects:

(i) Apple has aligned the definition of "eBook" with that used by each of the Four Publishers and has removed the characterisation of itself as "Online eBook Store Provider"; and

(ii) each of the Four Publishers removed the ban on business model MFN clauses.

8. ASSESSMENT OF THE FINAL COMMITMENTS IN LIGHT OF THE OBSERVATIONS RECEIVED IN RESPONSE TO THE COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

8.1. Purpose of the Final Commitments

(129) In its Preliminary Assessment, the Commission expressed the preliminary view that the possible concerted practice among and between the Four Publishers and Apple had the object of preventing, restricting or distorting competition in the EEA. In order to remove those concerns, the Commission considers that the conditions of competition that existed in the EEA prior to the possible concerted practice should be substantially re-established ("competitive reset").

(130) Each of the Four Publishers and Apple have proposed to bring about that competitive reset by causing the termination of relevant agency agreements and by agreeing to certain restraints when renegotiating their commercial arrangements for e-books, as set out in the Final Commitments. Those restraints include a retail price MFN ban, price MFN bans and, as regards the Four Publishers, a cooling-off period.

(131) The Commission considers that the Final Commitments offered by each of the Four Publishers will substantially reduce the possibility that each of the Four Publishers and Apple could recreate the effects of the retail price MFN clause, which, in the Commission's preliminary view, acted as a commitment device and enabled the joint conversion to the agency model with the same key terms. The Commission also considers that the Final Commitments by each the Four Publishers will provide a level of pricing discretion for retailers and/or agents which is reasonably comparable to that which existed before the possible concerted practice.

(132) The Commission considers that, in addition to the Final Commitments by each of the Four Publishers, the Final Commitments by Apple will also lead, either immediately or in accordance with the conditions laid down in Apple's agency agreement, to the termination of that agreement with Pearson.

(133) The Commission considers that Final Commitments by Apple will also lead to the removal of retail price MFN clauses contained in agreements between Apple and any other e-book publisher, thereby no longer requiring publishers to match lower prices

from a competing retailer, in particular from a retailer operating on the wholesale model. The Commission considers that the Final Commitments offered by Apple will, as a result, eliminate a significant financial incentive for other publishers to have other retailers under the agency model.

(134) The Commission considers that the Final Commitments offered by each of the Four Publishers and Apple, taken together, will create, over a sufficient period of time, conditions for a competitive reset in the EEA. This would result in sufficient uncertainty regarding the future intentions of publishers and retailers regarding the choice of business models (that is to say, wholesale, agency or a novel model) and the pricing terms used therein. The Final Commitments offered by each of the Four Publishers and Apple will also decrease incentives for each of the Four Publishers to renegotiate agreements for e-books with the same key terms.

(135) The Commission therefore considers that the Final Commitments offered by each of the Four Publishers and Apple are adequate to remove the Commission's concerns expressed in its Preliminary Assessment.

8.2. Termination

(136) Regarding the potential risk that smaller retailers (as compared to larger retailers) would be under significant pressure as a result of the possible renegotiation of future e-book arrangements within a limited period of time, the Commission considers that such a potential risk is likely to result from the greater bargaining power of each of the Four Publishers as well as the larger retailers, rather than from the time period allowed for termination under the Final Commitments. That greater bargaining power of each of the Four Publishers and larger retailers exists under normal conditions of competition and can therefore not be attributed to the Final Commitments.

(137) The Commission considers that, in light of the termination notice periods previously negotiated by each of the Four Publishers in their relevant agency agreements, the manner and time periods proposed for termination of relevant agency agreements in the Final Commitments strike a reasonable balance between the need to remove the effects of the possible concerted practice and the need to provide a reasonably workable period for renegotiation of the commercial arrangements for e-books.

8.3. Scope of the prohibition on MFN clauses

(138) With respect to the suggestion to narrow the scope of the price MFN ban, the Commission considers that the combined use of wholesale price and commission or revenue share MFN clauses in an agreement between any of the Four Publishers and Apple may result in effects similar to those of the retail price MFN clause. As a result, the ban on wholesale price and commission or revenue share MFN clauses in the Final Commitments of each of the Four Publishers is necessary to remove the possibility that any of the Four Publishers and Apple could recreate the effects of the retail price MFN clause.

(139) The business model MFN clause would not have resulted in effects similar to those of either a retail price MFN clause, or a combined use of commission or revenue share and wholesale price MFN clauses. As for the ban on a business model MFN clause, which each of the Four Publishers removed from its Final Commitments, the

Commission considers that such a ban would not have addressed the Commission's concerns as expressed in the Preliminary Assessment.

8.4. Cooling-off period

(140) As regards the impact of the cooling-off period on domestic retailers operating in countries with national RPM laws applicable to e-books, the Commission considers that in absence of the possible concerted practice between the Four Publishers and Apple, it is likely that those domestic retailers would be facing price competition from foreign retailers operating under the wholesale model. Moreover, the Commission considers that in countries having national RPM laws, the possible concerted practice may have had the effect of allowing publishers to constrain price competition by foreign retailers, and that this effect will be adequately removed by the Final Commitments. The potentially disparate abilities of domestic retailers bound by national RPM laws to compete on price against foreign retailers that are not bound by those laws is therefore attributable to the national RPM laws themselves, rather than to the Final Commitments.

(141) Regarding the impact of the cooling-off period on third-party publishers operating in countries with national RPM laws applicable to e-books, the Commission considers that those laws mainly aim at restricting "intra-brand" price competition between retailers for titles from a certain publisher, not at restricting "inter-brand" price competition between competing publishers. As a result, publishers other than the Four Publishers operating in countries with national RPM laws applicable to e-books will still have to face "inter-brand" price competition from competing retailers. In any event, the Final Commitments are without prejudice to national RPM laws for e-books.

(142) With respect to the argument that termination of the relevant agreements would be sufficient to address the Commission's concerns, the Commission considers that mere termination of those agreements would not be sufficient to remove the possibility that the Four Publishers and Apple could replicate the pricing terms resulting from their possible concerted practice or use them as reference points in subsequent renegotiations.

(143) Regarding the comment that a retailer's discounting discretion should not be capped, the Commission considers that the cap proposed by each of the Four Publishers in their Final Commitments creates enough uncertainty and risk regarding the future intentions of competing publishers and retailers concerning retail prices, to substantially remove the possibility that the pricing terms of the possible concerted practice between the Four Publishers and Apple will be replicated or used as reference points in the future.

(144) Furthermore, the Commission considers that capping the pricing discretion during the cooling-off period does not impose a disproportionate burden on retailers due to possible obligations to ensure that such amount is not exceeded. Publishers and retailers are in a position to devise practical business arrangements to implement this type of commitment. The Final Commitments by each of the Four Publishers also prohibit each of the Four Publishers from imposing accounting obligations upon retailers which restrict, limit or impede the ability of retailers to engage in promotional activities.

(145) As regards the suggestion that the cap on a retailer's discretion during the cooling-off period should be calculated on a title-by-title basis because a catalogue-wide basis would disadvantage smaller retailers, the Commission considers that although larger retailers may potentially negotiate a greater total amount to be used for discounting, under normal conditions of competition, larger retailers may in any event use efficiencies of scale to offer greater discounts than their smaller competitors. As a result, any disparity between retailers with respect to their ability to discount is predominantly attributable to certain efficiencies resulting from size rather than to the Final Commitments.

(146) Finally, regarding the suggestion that the duration of the cooling-off period should be generally longer or shorter, the Commission considers that a duration of less than two years would not create sufficient uncertainty to allow for an effective competitive reset of the market. Therefore, there would be the risk that the effects of the possible concerted practice could be replicated at the end of the cooling-off period. On the other hand, the Commission considers that a period longer than two years risks over-regulation of an emerging and fast moving sector.

8.5. Definitions

(147) In view of the comments received with regard to certain definitions in the Initial Commitments, the Commission notes that Apple has amended its Initial Commitments so that terms used both in its Final Commitments and the Final Commitments of each of the Four Publishers are defined in the same way.

(148) As for the scope of the definition of “aggregators”, the Commission considers that the definition of "ebook Retailer" as set out in the Initial Commitments by each of the Four Publishers includes aggregators.

8.6. Non-retaliation and compliance terms and deterrence

(149) With regard to non-retaliation, compliance terms and deterrence, the Commission considers that the obligations under Article 101 of the Treaty, together with the Final Commitments, will be sufficient to deter the Four Publishers and Apple from repeating their possible concerted practice in the future.

(150) Furthermore, a breach of the Final Commitments could lead to the application of a number of measures contemplated by Regulation (EC) No 1/2003 namely reopening of the proceedings pursuant to Article 9(2), and/or a fine pursuant to Article 23(2)(c) and/or the imposition of periodic penalty payments pursuant to Article 24(1)(c).

8.7. Market power, cultural diversity and the agency model

(151) The Commission considers that the size of e-book retailers active in the EEA varies and that under normal conditions of competition, which the Final Commitments offered by each of the Four Publishers and Apple are intended to re-establish, larger retailers may have certain advantages over smaller retailers, including economies of scale. Should these possible advantages for larger retailers give rise to concerns, the Commission may investigate these concerns in accordance with Union competition rules.

(152) Furthermore, the Commission notes that in accordance with Article 167(4) of the Treaty, when applying Union competition legislation in the publishing sector, it should "*take cultural aspects into account in its action […] in order to respect and to promote the diversity of […] cultures*." The purpose of the Final Commitments by each of the Four Publishers and Apple is to restore as much as possible the conditions of competition that existed prior to the possible concerted practice. The Commission considers that in making those commitments binding, it is not adversely affecting cultural diversity in the EEA.

(153) Regarding the advantages and disadvantages of using the agency model for the sale of e-books in the EEA, the Commission notes that its concerns identified in the Preliminary Assessment do not relate to the legitimate use of the agency model for the sale of e-books. Each of the Four Publishers and Apple remain free to enter into agency agreements in line with the Final Commitments in so far as those agreements and their provisions do not infringe Union competition legislation.

8.8. Duration of the Final Commitments

(154) The Final Commitments will be binding for a total period of five years, except for the cooling-off period which will be binding for a total period of two years from the date of notification of this Decision. The duration of the Final Commitments is adequate. If the Final Commitments were to be binding for a shorter period, such a period would be insufficient to address the competition concerns identified by the Commission in its Preliminary Assessment.

9. PROPORTIONALITY OF THE FINAL COMMITMENTS

9.1. Principles

(155) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[22]

(156) In the context of Article 9 of Regulation (EC) No 1/2003, the application of the principle of proportionality requires the Commission to assess, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately. When carrying out this assessment, the Commission must take into consideration the interests of third parties.[23]

9.2. Application in this case

(157) The Final Commitments offered by the Four Publishers and Apple, set out in Section 8, adequately address the Commission's concerns expressed in the Preliminary Assessment.

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[22] See for instance, Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, paragraph 144 and Case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-4653, paragraph 201.

[23] Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paragraph 41.

(158) Neither Apple nor any of the Four Publishers have offered less onerous commitments which also adequately address the Commission's concerns as expressed in the Preliminary Assessment.

(159) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the notice published on 19 September 2012 pursuant to Article 27(4) of Regulation (EC) No 1/2003.

10. CONCLUSION

(160) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Final Commitments, offered by each of the Four Publishers and Apple to address the Commission's concerns expressed in its Preliminary Assessment, binding upon them. Recital 13 of Regulation (EC) No 1/2003 provides that the decision should not conclude whether or not there has been or there still is an infringement.

(161) The Commission's assessment of whether the Final Commitments offered by each of the Four Publishers and Apple are adequate to address its concerns expressed in its Preliminary Assessment, represents the preliminary view of the Commission based on its underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) 1/2003.

(162) In light of the Final Commitments offered by each of the Four Publishers and Apple, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end with respect to the addressees of the present Decision.

(163) The Commission retains full discretion to investigate and open proceedings pursuant to Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Final Commitments listed in the Annex shall be binding on Hachette, Harper Collins, Simon & Schuster, Holtzbrinck/Macmillan and Apple for a period of five years from the notification of this Decision.

Article 2

It is hereby concluded that there are no longer grounds for action in this case with regards to Hachette, Harper Collins, Simon & Schuster, Holtzbrinck/Macmillan and Apple.

Article 3

This Decision is addressed to:

Hachette Livre S.A.

43, Quai de Grenelle

75905 Paris Cedex 15

France

HarperCollins Publishers Limited

77-85 Fulham Palace Road

Hammersmith

London W6 8JB

United Kingdom

HarperCollins Publishers, L.L.C.

10 East 53rd Street

New York, NY 10022

U.S.A.

Georg von Holtzbrinck GmbH & Co. KG

Gänsheidestraße 26

70184 Stuttgart

Germany

Verlagsgruppe Georg von Holtzbrinck GmbH

Gänsheidestraße 26

70184 Stuttgart

Germany

SIMON & SCHUSTER (UK) LTD

222 Gray's Inn Road

London

WC1X 8HB

United Kingdom

SIMON & SCHUSTER, INC.

1230 Avenue of the Americas

New York, NY 10020

U.S.A.

SIMON & SCHUSTER DIGITAL SALES INC.

1230 Avenue of the Americas

New York, NY 10020

U.S.A.

Apple, Inc.

1 Infinite Loop

MS 36-3SU

Cupertino, CA 95014

U.S.A.

Done at Strasbourg,

For the Commission
[…]

Vice-President

ANNEXES

Annex I: Final Commitments – Apple

Annex II: Final Commitments – Hachette

Annex III: Final Commitments – HarperCollins

Annex IV: Final Commitments – Holtzbrinck/Macmillan

Annex V: Final Commitments – Simon & Schuster

EXHIBIT “D”

Annex II

Final Commitments – Hachette

hachette LIVRE

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November 6, 2012

COMMITMENTS OF HACHETTE

CASE COMP/39.847 – E-BOOKS

In accordance with Article 9 of Regulation 1/2003, Hachette offers the following commitments (the "Commitments") to address the preliminary competition concerns identified by the European Commission (the "Commission") in Case COMP/39.847 *E-books* in the Commission's preliminary assessment dated August 13, 2012 (the "Preliminary Assessment"), and to enable the Commission to adopt a decision confirming that the Commitments meet its concerns ("Commitments Decision").

Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action in relation to E-books and will close the proceedings opened on December 1, 2011 in relation to Hachette's arrangements for the sale of E-books. For the avoidance of doubt, these Commitments are offered without admission of liability. They do not constitute a recognition that Hachette has engaged in unlawful conduct contrary to Article 101 of the Treaty on the Functioning of the European Union or Article 53 EEA Agreement or any other aspect of European Union or EEA competition law. They are without prejudice to Hachette's position should the Commission or any other party conduct proceedings or commence any other legal action against Hachette.

I. DEFINITIONS

For the purposes of these Commitments, the terms listed below shall have the following meaning:

"Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which (i) the E-book Publisher Sells E-books to Consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid an Agent Commission in connection with the Sale of one or more of the E-book Publisher's E-books, and (ii) the E-book Publisher sets the Digital List Price.

"Agent Commission" means the percentage of the Digital List Price of an E-book received by an E-book Retailer under an Agency Agreement in connection with the Sale of this particular E-book.

"Apple" means (i) Apple, Inc., a California corporation with its principal place of business in Cupertino, California, and (ii) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint-ventures, and their directors, officers, managers, agents, and employees.

"Consumer" means an individual who purchases an E-book for personal use.

"Digital List Price" means the price established by the E-book Publisher for the Sale of an E-book to Consumers under the terms of an Agency Agreement. For the

avoidance of doubt, the amount that Hachette shall be entitled to receive in respect of each E-book title Sold through an Agency Agreement shall be based on the Digital List Price for that E-book, net of VAT.

"Discount" means the amount which an E-book Retailer in the case of an Agency Agreement may deduct from the Digital List Price of a Hachette E-book, as well as any other form of promotions, for the purposes of a Sale to Consumers to encourage Consumers to Purchase one or more E-books in the EEA. In the case of an Agency Agreement, the Discount shall be subject to the "Agreed Funds" as defined in Section V below.

"E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For the purposes of these Commitments, the term E-book does not include (i) an audio book, even if delivered and stored digitally; (ii) a standalone specialized software application or "app" sold through an "app store" rather than through an E-book store (e.g., through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; (iii) a media file containing an electronically formatted book for which most of the value to Consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (iv) self published E-books; (v) electronic versions of children's picture books; or (vi) educational and scholarly titles as well as electronically formatted books that are sold through educational and/or library channels.

"E-book Publisher" means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book to E-book Retailers and to permit such E-book Retailers to Sell the E-book to Consumers in the EEA. Hachette is an E-book Publisher. For the purposes of these Commitments, an E-book Publisher is not an E-book Retailer except when it lawfully Sells (or seeks to lawfully Sell) directly E-books to consumers for another E-book Publisher, or acts as an agent under an Agency Agreement for another E-book Publisher.

"E-book Retailer" means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to Consumers in the EEA, or through which an E-book Publisher, under an Agency Agreement, Sells E-books to Consumers in the EEA. For the purposes of these Commitments, unless otherwise provided, Hachette and all other Persons whose primary business is book publishing are not E-book Retailers. For the purposes of these Commitments, Apple is an E-book Retailer.

"EEA" means those countries participating in the European Economic Area as of the Effective Date and at any time thereafter during the term of these Commitments.

"Effective Date" means the date upon which Hachette receives formal notification of a Commitments Decision by which the Commission makes the Commitments binding on Hachette.

"Hachette" means Hachette Livre SA, its successors and assigns, subsidiaries, divisions, and groups, as well as its connected undertakings except where such connected undertaking engages in E-book publishing activity which is merely incidental to its other primary business activity.

"Implementation Date" means the earlier of (i) the termination of an agreement between Hachette and the E-book Retailer that restricts, limits or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer Discounts in the EEA; or (ii) the date on which Hachette notifies the E-book Retailer in writing that Hachette will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books or from offering Discounts in the EEA.

"Including" means including, but not limited to.

"Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

"MFN" means a term in an agreement between Hachette and an E-book Retailer under which:

(i) the Retail Price at which an E-book Retailer or, under an Agency Agreement, Hachette, Sells one or more E-books to Consumers, depends in any way on the Retail Price, or Discounts from the Digital List Price, at which any other E-book Retailer or Hachette under an Agency Agreement through any other E-book Retailer, Sells the same E-book(s) to Consumers; or

(ii) the Wholesale Price at which Hachette sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price at which Hachette sells the same E-book(s) to or through any other E-book Retailer; or

(iii) the revenue share or Agent Commission that an E-book Retailer receives from Hachette in connection with the Sale of one or more E-books to Consumers depends in any way on the revenue share or Agent Commission that (a) any other E-book Retailer receives from Hachette in connection with the Sale of the same E-book(s) to Consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

"Purchase" means a Consumer's acquisition of one or more E-books as a result of a Sale.

"Retail Price" means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a Consumer.

"Sale" means delivery of access on a permanent basis to a Consumer to read one or more E-books (Purchased alone, or in combination with other goods or services) in exchange for payment; "Sell" or "Sold" means to make or to have made a Sale of an E-book to a Consumer.

"Wholesale Price" means (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to Hachette for an E-book that the E-book Retailer Sells to Consumers; or (ii) under an Agency Agreement, the Digital List Price minus the

Agent Commission or other payment that Hachette pays to the E-book Retailer in connection with, or that is reasonably allocated to, that Sale.

II. REQUIRED CONDUCT

A. At the latest, within seven days after the Effective Date, Hachette shall send a letter to Apple confirming that (i) it waives the notice period contained in any agreement with Apple that concerns the distribution of E-books within the EEA and (ii) it agrees to rescind (terminate) such agreements no later than fourteen days from the date of the Commitments Decision. A copy of such letter should be provided to the Commission at the same time.

B. For each Agency Agreement relating to the Sale of E-books within the EEA between Hachette in its capacity as E-book Publisher and an E-book Retailer other than Apple entered into prior to the Effective Date, that:

(i) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer Discounts; or

(ii) contains an MFN,

Hachette shall notify the E-book Retailer, at the latest, within ten days of the Effective Date, that the E-book Retailer may terminate the agreement with thirty-day notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that has not been so terminated, at the latest within seventy days of the Effective Date, Hachette shall, as soon as permitted under the agreement, take each step required under the agreement to cause such agreement to be terminated, and not renewed or extended.

C. Hachette shall provide the Commission (i) within seven days after the Effective Date, with one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Hachette and any E-book Retailer relating to the Sale of E-books within the EEA, and, (ii) thereafter, on a quarterly basis, with each such agreement executed, renewed, or extended since Hachette's previous submission of agreements to the Commission. Where Hachette enters into a non-disclosure agreement with another E-book Publisher or an E-book Retailer, this non-disclosure agreement shall not prevent Hachette from providing to the Commission any kind of relevant information.

III. PROHIBITED CONDUCT

A. With regard to the territories within the EEA covered by any of the agreements terminated in accordance with Sections II.A and II.B above:

(i) For two years, Hachette in its capacity as E-book Publisher shall not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer Discounts, such two-year period to run separately for each E-book Retailer, at the option of Hachette, from either:

(a) the termination of an agreement relating to the sale of E-books within the EEA between Hachette and the E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to set,

alter, or reduce the Retail Price of any E-book or to offer Discounts; or

(b) the date on which Hachette notifies the E-book Retailer in writing that Hachette will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit or impede the E-book Retailer from setting, altering, or reducing the Retail Price of any E-book or from offering Discounts.

Hachette shall notify the Commission of the option it selects for each E-book Retailer within seven days of making its selection.

(ii) For two years from the termination of the agreements provided for in Section III.A.(i).(a) or from the notification provided for in Section III.A.(i).(b), or from the Effective Date, whichever is the soonest, Hachette in its capacity of E-book Publisher shall not enter into any agreement relating to the Sale of E-books within the EEA with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any E-book or from offering Discounts.

B. Hachette shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books in the EEA that contains an MFN.

IV. NON-CIRCUMVENTION

A. Hachette shall not in any way circumvent, by actions and/or omissions, any commitments contained in this document.

B. For the avoidance of doubt, Section IV.A shall not prevent Hachette, acting in good faith, from not entering into or not remaining in business with an E-book Retailer.

C. After the expiration of the commitments in Sections III.A of these Commitments, Section IV.A shall not prevent Hachette from independently entering into or enforcing any Agency Agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to alter or reduce the Retail Price of any E-book, and/or offer Discounts.

D. For the avoidance of doubt and without limitation, the following shall not be prohibited under these Commitments:

(i) Hachette's good faith decision not to pursue a promotional program or arrangement, or price grid proposed by an E-book Retailer; or

(ii) Hachette's good faith decision to offer its own promotional program or arrangement with one of more E-book Retailers.

V. PERMITTED CONDUCT

A. Nothing in these Commitments shall prohibit Hachette unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Section III.A of these Commitments, Hachette may enter into Agency Agreements with E-book Retailers in relation to the EEA. Under these Agency Agreements, the aggregate value of the Discounts (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Hachette' E-books) may be restricted, provided that:

(i) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Hachette's E-books by an aggregate amount equal to the total Agent Commissions Hachette pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Hachette's E-books to Consumers (the "Agreed Funds");

(ii) Hachette shall not restrict, limit, or impede the E-book Retailer's use of the Agreed Funds to offer Discounts; and

(iii) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity.

VI. NATIONAL LAWS

For the avoidance of doubt, these Commitments are without prejudice to restrictions imposed by national law related to E-books that restricts, limits, or impedes the implementation of Sections III.A and V.B above.

VII. DURATION

Unless otherwise provided the Commitments shall remain in force for a period of five years from the Effective Date.

In addition to the requirements set out in Section II.C, throughout the duration of the Commitments, Hachette shall provide the Commission with an annual written report on the implementation of these Commitments during the relevant year. It will also address any disputes or written complaints made by retailers relating to the implementation of the Commitments. The report relating to 2012 shall be provided by March 1, 2013, and further reports shall be provided on March 1 of each year up to and including 2017.

VIII. REVIEW CLAUSE

Without prejudice to the general provision of Article 9(2) of Regulation 1/2003, Hachette may request the Commission to reopen proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitments Decision was based.

Signed on November 6, 2012

Duly authorized for and on behalf of Hachette

Arnaud Nourry
Chairman & CEO

EXHIBIT “E”

Annex V

Final Commitments – Simon & Schuster

CASE COMP 39.847 - E-BOOKS

COMMITMENTS OFFERED TO THE EUROPEAN COMMISSION BY SIMON & SCHUSTER

UNDER ARTICLE 9 OF COUNCIL REGULATION (EC) NO 1/2003

In accordance with Article 9 of Council Regulation No 1/2003, S&S gives the following commitments ("**Commitments**") to address the preliminary competition concerns identified by the European Commission ("**Commission**") in Case *39.847* E-books, which are expressed in the Commission's preliminary assessment dated 14 August 2012 and to enable the Commission to adopt a decision confirming that the Commitments meets its concerns ("**Commitments Decision**").

S&S strongly disagrees with the Commission's preliminary assessment regarding both the factual and legal elements, and denies the allegations against it. Notwithstanding this disagreement and denial, S&S has, nevertheless, offered these Commitments pursuant to Article 9 of Regulation 1/2003, to meet the Commission's competition concerns. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action in relation to S&S' arrangements for the sale of E-books and will close proceedings opened on 1 December 2011 against S&S in relation to S&S's arrangements for the sale of E-books.

For the avoidance of doubt S&S strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 of the EEA Agreement or any other aspect of European Union or EEA competition law and these Commitments are without prejudice to S&S's position should the Commission, or any other party, decide to open proceedings or to commence any other legal action against S&S and are offered without any admission of liability.

1 DEFINITIONS

For the purpose of these Commitments, the terms listed below shall have the following meaning:

"**Agency Agreement**" means an agreement between an E-book Publisher and an E-book Retailer under which (i) the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books; and (ii) the E-book Publisher sets the Publisher Price.

"**Apple**" means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California; and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

"**E-book**" means those electronically formatted books designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For the purposes of these Commitments, the term E-book does not include (1) educational and scholarly titles as well as electronically formatted books that are sold through educational and/or library channels; (2) an audio book, even if delivered and stored digitally; (3) a standalone specialised software application or "app"

sold through an "app store" rather than through an e-book store (e.g., through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; (4) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (5) electronic versions of children's picture books; or (6) self-published books in electronic format.

"**E-book Publisher**" means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the EEA. S&S is an E-book Publisher. For the purposes of these Commitments, an E-book Publisher is not an E-book Retailer except when it lawfully Sells (or seeks to lawfully Sell) directly E-books to consumers for another E-book Publisher, or acts as an agent under an Agency Agreement for another E-book Publisher.

"**E-book Retailer**" means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the EEA, or through which an E-book Publisher, under an Agency Agreement, Sells E-books to consumers in the EEA. For the purposes of these Commitments, unless otherwise provided, S&S and all other Persons whose primary business is book publishing are not E-book Retailers. For the purposes of these Commitments, Apple is an E-book Retailer.

"**EEA**" means those countries participating in the European Economic Area as of the Effective Date and at any time thereafter during the term of these Commitments.

"**Effective Date**" means the date upon which S&S receives formal notification of a decision pursuant to Article 9 of Regulation 1/2003 by which the Commission makes the Commitments binding on S&S.

"**Including**" means including, but not limited to.

"**Implementation Date**" means either:

(a) the termination of an agreement between S&S and an E-Book Retailer that restricts, limits, or impedes the E-book Retailers ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to purchase one or more E-books in the EEA; or

(b) the date on which S&S notifies the E-book Retailer in writing that S&S will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA.

"**Person**" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

"**Price MFN**" means a term in an agreement between S&S and an E-book Retailer under which:

(a). the Retail Price at which an E-book Retailer or under an Agency Agreement, S&S, Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or S&S under an Agency Agreement through any other E-book Retailer Sells the same E-book(s) to consumers; or

(b) the Wholesale Price at which S&S Sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price at which S&S Sells the same E-books to or through any other E-book Retailer; or

(c) the revenue share or commission that an E-book Retailer receives from S&S in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from S&S in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

"**Publisher Price**" means the price for sales to consumers set by S&S from time to time for a specific E-book title under the terms of an Agency Agreement.

"**Purchase**" means a consumer's acquisition of one or more E-books as a result of a Sale.

"**Retail Price**" means the price at which an E-book Retailer, or under an Agency Agreement, an E-book Publisher, Sells an E-book to a consumer.

"**Sale**" means delivery of access on a permanent basis to a consumer to read one or more E-books (Purchased alone, or in combination with other goods or services) in exchange for payment; "Sell" or "Sold" means to make, or to have made, a Sale of an E-book to a consumer.

"**S&S**" means (1) Simon & Schuster Inc.; (2) Simon & Schuster Digital Sales Inc.; and (3) Simon & Schuster (UK) Limited, and their successors and assigns, subsidiaries, divisions and groups.

"**Wholesale Price**" means (1) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to S&S for an E-book that the E-book Retailer Sells to consumers; or (2) the Publisher Price at which S&S, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that S&S pays to the E-book Retailer in connection with, or that is reasonably allocated to, that Sale.

2 REQUIRED CONDUCT

2.1 At the latest, within seven (7) days after the Effective Date, S&S shall send a letter to Apple confirming that (1) it waives the notice period contained in any agreement with Apple that concerns the distribution of E-books within the EEA; and (2) it agrees to terminate such agreements no later than fourteen (14) days from the date of the Commitments Decision. A copy of such letter should be provided to the Commission at the same time.

2.2 To the extent that any Agency Agreement between S&S and an E-book Retailer other than Apple was executed prior to the Effective Date and relates to the Sale of E-books within the EEA and that agreement:

(a) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or

(b) contains a Price MFN,

S&S shall notify the E-book Retailer, at the latest, within ten (10) days of the Effective Date, that the E-book Retailer may terminate the agreement with thirty (30) days' notice and shall,

thirty (30) days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. In respect of each such agreement where S&S has not received such written notice of termination, S&S shall within seventy (70) days of the Effective Date, take each step required under the agreement to cause such agreement to be terminated and not renewed or extended as soon as permitted under the agreement.

3 PROHIBITED CONDUCT

3.1 With regard to those territories within the EEA covered by any of the agreements terminated in accordance with paragraphs 2.1 and 2.2 above:

(a) For two (2) years from the Implementation Date, S&S shall not restrict, limit, or impede an E-book Retailer's ability to set, alter or reduce the Retail Price of any E-book, or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books. Such two (2) year period runs separately for each E-book Retailer at the option of S&S. S&S shall notify the Commission of the option it selects for each E-book Retailer within seven (7) days of making its selection.

(b) For two (2) years from the relevant Implementation Date or the Effective Date, whichever is earlier S&S shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA.

3.2 S&S shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books within the EEA that contains a Price MFN.

4 NON-CIRCUMVENTION

4.1 S&S shall not in any way circumvent, by actions and/or omissions, any commitments contained in this document.

4.2 For the avoidance of doubt the following shall not be prohibited under these Commitments:

(a) S&S' good faith decision not to pursue a promotional programme, arrangement or price grid proposed by an E-book Retailer; or

(b) S&S' good faith decision to offer its own promotional programme or arrangement with one or more E-book Retailers: or

(c) S&S' good faith decision not to enter into, or not to remain, in business with an E- book Retailer.

4.3 After the expiration of the prohibitions in paragraph 3.1 of these Commitments, S&S may unilaterally enter into or enforce any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of S&S' E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of S&S's E-books.

5 PERMITTED CONDUCT

5.1 Nothing in these Commitments shall prohibit S&S unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing, or other promotional services rendered.

5.2 Notwithstanding paragraph 3.1 of these Commitments, S&S may enter into Agency Agreements with E-book Retailers in relation to the EEA under which the aggregate value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of S&S's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to S&S's E-books) is restricted, provided that:

(a) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to Purchase S&S's E-books by an aggregate amount equal to the total commissions S&S pays to the E-book Retailer, over a period of at least one (1) year, in connection with the Sale of S&S's E-books to consumers;

(b) S&S shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and

(c) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

5.3 Details of paragraph 5.2 above will be subject to individual bi-lateral negotiations between S&S and each prospective E-book agent. For the avoidance of doubt, S&S shall be entitled to require from the E-book Retailer such information as may reasonably be required to enable S&S to assess and verify the aggregate amount referred to in clause 5.2(a) above.

5.4 For the avoidance of doubt, the amount that S&S shall be entitled to receive in respect of each E-book title Sold through an Agency Agreement shall be based on the Publisher Price for that E-book, net of VAT.

6 NATIONAL LAWS

6.1 These Commitments are without prejudice to restrictions imposed by national law related to E-books that restrict, limit, or impede the implementation of paragraphs 3.1 and 5.2 above.

7 DURATION AND REPORTING

7.1 Unless provided otherwise, these Commitments shall remain in force for a period of five (5) years from the Effective Date.

7.2 In addition to the requirements set out in paragraph 2.1, throughout the duration of the Commitments, S&S shall provide the Commission with an annual written report on the implementation of these Commitments during the relevant year. It will also address any disputes or written complaints made by retailers relating to the implementation of the Commitments. The report relating to 2012 shall be provided by 1 March, 2013 and further reports shall be provided on March 1 of each year up to and including 2017.

7.3 S&S commits to provide the Commission (1) within seven days of the Effective Date, with one complete copy of any agreement, executed, renewed, or extended on or after 1 January, 2012, between S&S and any E-book Retailer relating to the Sale of E-books within the EEA.; and (2) thereafter, on a quarterly basis, with any such agreement executed, renewed, or extended since S&S' previous submission of agreements to the Commission.

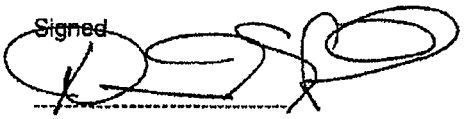
7.4 Where S&S enters into a non-disclosure agreement with another E-book Publisher or an E-book Retailer, this non-disclosure agreement shall not prevent S&S from providing to the Commission any kind of relevant information.

8 REVIEW CLAUSE

8.1 Pursuant to Article 9(2)(a) of Regulation 1/2003, S&S may request the Commission to reopen proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitments Decision was based.

Dated: 12 November 2012

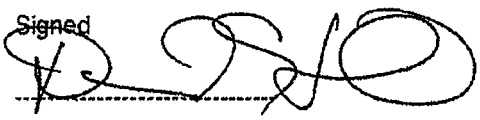
Signed



David Hillman, Executive Vice President & General Counsel

Duly authorised to sign on behalf of **SIMON & SCHUSTER, INC.**

Signed



David Hillman, Executive Vice President & General Counsel

Duly authorised to sign on behalf of **SIMON & SCHUSTER DIGITAL SALES INC.**

Signed

Ian Chapman, Managing Director and CEO

Duly authorised to sign on behalf of **SIMON & SCHUSTER (UK) LTD**

EXHIBIT “F”

Annex III

Final Commitments – HarperCollins

November 8, 2012

COMMITMENTS OF HARPERCOLLINS

CASE COMP/39.847 – EBOOKS

In accordance with Article 9 of Council Regulation (EC) No 1/2003 ("Regulation 1/2003"), HarperCollins offer the following commitments (the "Commitments") to address the preliminary competition concerns identified by the European Commission (the "Commission") in Case COMP/39.847 *Ebooks*, in its Preliminary Assessment dated August 13, 2012 (the "Preliminary Assessment"), and to enable the Commission to adopt a decision confirming that the Commitments meet its concerns (the "Commitments Decision").

Nothing in these commitments may be construed as implying that HarperCollins agrees with the concerns expressed in the Preliminary Assessment. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action and will close the proceedings opened on 1 December 2011 in relation to HarperCollins' arrangements for the Sale of E-books. For the avoidance of all doubt, HarperCollins strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 EEA Agreement or any other aspect of European Union or EEA competition law. These Commitments are thus without prejudice to HarperCollins' position should the Commission or any other party conduct proceedings or commence other legal action against HarperCollins and are offered without any admission of liability.

I. DEFINITIONS

"Agency Agreement" means an agreement between an E-book Publisher and an E- book Retailer under which the E-book Publisher Sells E-books to consumers through the E- book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E- books. For the avoidance of doubt, the amount that HarperCollins shall be entitled to receive in respect of each E-book Sold under an Agency Agreement shall be based on the Retail Price set by HarperCollins for that E-book, net of VAT.

"Apple" means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California; and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and

employees.

"E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For the purposes of these Commitments, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store (e.g., through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (4) self-published E-books; (5) electronic versions of children's picture books; or (6) educational and scholarly titles, as well as E-books sold through educational and/or library channels.

"E-book Publisher" means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the EEA. HarperCollins is an E-book Publisher. For the purposes of these Commitments, an E-book Publisher is not an E-book Retailer except when it lawfully Sells (or seeks to lawfully Sell) directly E-books to consumers for another E-book Publisher, or acts as an agent under an Agency Agreement for another E-book Publisher.

"E-book Retailer" means any Person that lawfully Sells (or seeks to lawfully Sell) E- books to consumers in the EEA, or through which an E-book Publisher, under an Agency Agreement, Sells E-books to consumers in the EEA. For the purposes of these Commitments, unless otherwise provided, HarperCollins and all other Persons whose primary business is book publishing are not E-book Retailers. For the purposes of these Commitments, Apple is an E-book Retailer.

"EEA" means those countries participating in the European Economic Area as of the date of the notification of the Commitments Decision and at any time thereafter during the term of these Commitments.

"HarperCollins" means (1) HarperCollins Publishers Limited and (2) HarperCollins Publishers LLC and their successors and assigns, subsidiaries, divisions and groups.

"Including" means including, but not limited to.

"Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

"Price MFN" means a term in an agreement between HarperCollins and an E-

book Retailer under which:

1. the Retail Price at which an E-book Retailer or, under an Agency Agreement, HarperCollins Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or HarperCollins under an Agency Agreement through any other E- book Retailer Sells the same E-book(s) to consumers; or

2. the Wholesale Price at which HarperCollins Sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price at which HarperCollins Sells the same E-book(s) to or through any other E-book Retailer; or

3. the revenue share or commission that E-book Retailer receives from HarperCollins in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from HarperCollins in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

"Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

"Retail Price" means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a consumer.

"Sale" means delivery of access on a permanent basis to a consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; "Sell" or "Sold" means to make or to have made a Sale of an E-book to a consumer.

"Wholesale Price" means (1) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to HarperCollins for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which HarperCollins, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that HarperCollins pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

II. REQUIRED CONDUCT

A. At the latest, within seven days after the notification of the Commitments Decision, HarperCollins shall send a letter to Apple confirming that (1) it waives the notice period contained in any agreement with Apple that concerns the distribution of E-books within the EEA and (2) it agrees to rescind (terminate) such agreements no later than fourteen days from the date of the Commitments

Decision. A copy of such letter should be provided to the Commission at the same time.

B. For each Agency Agreement relating to the Sale of E-books within the EEA between HarperCollins and an E-book Retailer other than Apple that was executed prior to the date of the notification of the Commitments Decision that (1) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the final price paid by consumers of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or (2) contains a Price MFN, HarperCollins commits to notify the E-book Retailer, at the latest within ten days of the notification of the Commitments Decision, that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated, at the latest within seventy days after the notification of the Commitments Decision, HarperCollins commits to, as soon as permitted under the agreement, take each step required under the agreement to cause such agreement to be terminated and not renewed or extended.

C. HarperCollins commits to provide the Commission (1) within seven days after the notification of the Commitments Decision, with one complete copy of any agreement executed, renewed, or extended on or after January 1, 2012, between HarperCollins and any E-book Retailer relating to the Sale of E-books within the EEA, and, (2) thereafter, on a quarterly basis, with any such agreement executed, renewed, or extended since HarperCollins' previous submission of agreements to the Commission. Where HarperCollins enters into a non-disclosure agreement with another E-book Publisher or an E-book Retailer, this non-disclosure agreement shall not prevent HarperCollins from providing to the Commission any kind of relevant information.

III. PROHIBITED CONDUCT

A. With regard to the territories within the EEA covered by any of the agreements terminated in accordance with Sections II.A and II.B above:

1. For two years, HarperCollins commits not to restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the final price paid by consumers of any E- book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books, such two-year period to run separately for each E-book Retailer, at the option of HarperCollins, from either:

   i. the termination of an agreement relating to the Sale of E-books within the EEA between HarperCollins and the E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to set, alter,

or reduce the final price paid by consumers of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or

ii. the date on which HarperCollins notifies the E-book Retailer in writing that HarperCollins will not enforce any term(s) in its agreement relating to the Sale of E-books within the EEA with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the final price paid by consumers of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

HarperCollins commits to notify the Commission of the option it selects for each E- book Retailer within seven days of making its selection.

2. For two years from the termination of the agreements provided for in Section III.A.1.i or from the notification provided for in Section III.A.1.ii, or from the notification of the Commitments Decision, whichever is the soonest, HarperCollins commits not to enter into any agreement relating to the Sale of E-books within the EEA with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the final price paid by consumers of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

B. HarperCollins commits not to enter into any agreement within the EEA with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

IV. NON-CIRCUMVENTION

A. HarperCollins shall not in any way circumvent, by actions and/or omissions, any commitments contained in this document. After the expiration of the commitments in Section III.A of these Commitments, this Section IV.A shall not prevent HarperCollins from unilaterally entering into or enforcing any agreement with an E- book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the final price paid by consumers of any of HarperCollins' E- books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of HarperCollins' E-books.

B. In particular and for the avoidance of doubt, the following conduct shall not be prohibited under these Commitments:

(1) HarperCollins' good faith decision not to pursue a promotional program or arrangement or price grid proposed by an E-book Retailer; or

(2) HarperCollins' good faith decision to offer its own promotional program or arrangement with one of more E-book Retailers

V. PERMITTED CONDUCT

A. Nothing in these Commitments shall prohibit HarperCollins unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Section III.A of these Commitments, HarperCollins may enter into Agency Agreements with E-book Retailers in relation to the EEA under which the aggregate value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of HarperCollins' E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to HarperCollins' E-books) is restricted; provided that (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase HarperCollins' E-books by an aggregate amount equal to the total commissions HarperCollins pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of HarperCollins' E-books to consumers; (2) HarperCollins commits to not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

C. Details of Section V.B above will be subject to individual bilateral negotiations between HarperCollins and each prospective E-book agent.

D. For the avoidance of doubt, HarperCollins shall be entitled to require from the E-book Retailer such information as may reasonably be required to enable HarperCollins to assess and verify compliance with Section V.B.

VI. NATIONAL LAW

For the avoidance of doubt, these Commitments are without prejudice to restrictions imposed by national law related to E-books that restricts, limits, or impedes the implementation of Sections III.A and V.B above.

VII. REVIEW

Pursuant to Article 9(2)(a) of Regulation 1/2003, HarperCollins may request the Commission to re-open the proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitment Decision was based.

VIII. DURATION

Unless provided otherwise, the term of these Commitments will be five years from the date of the notification of the Commitments Decision.

In addition to the requirements set out in Section II.C, throughout the duration of the Commitments, HarperCollins shall provide the Commission with an annual written report on the implementation of these Commitments during the relevant year. It will also address any disputes or written complaints made by retailers relating to the implementation of the Commitments. The report relating to 2012 shall be provided by March 1, 2013, and further reports shall be provided on March 1 of each year up to and including 2017.

November 8, 2012

Duly authorised for and on behalf of HarperCollins Publishers Limited

Duly authorised for and on behalf of HarperCollins Publishers LLC

EXHIBIT “G”

Annex IV

Final Commitments – Holtzbrinck/Macmillan

31 October 2012

FOR SETTLEMENT PURPOSES ONLY
WITHOUT PREJUDICE

COMMITMENTS OF HOLTZBRINCK

CASE COMP/39.847 – *E-Books*

In accordance with Article 9 of Council Regulation No 1/2003, Holtzbrinck gives the following commitments ("**Commitments**"), to address the preliminary competition concerns identified by the European Commission ("**Commission**") in Case 39.847 – *E-Books* and set out in the Commission's preliminary assessment dated 13 August 2012, and to enable the Commission to adopt a decision confirming that the Commitments meet its concerns ("**Commitments Decision**").

These Commitments are provided on a without prejudice basis and do not constitute any admission by Holtzbrinck of infringement or liability. Holtzbrinck understands that, consistent with Article 9 of Regulation 1/2003, if the Commitments are ultimately accepted by the Commission, they will serve to close the Commission's proceedings opened on 1 December 2011 against Holtzbrinck's arrangements relating to the sale of E-books.

For the avoidance of doubt, Holtzbrinck strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 of the EEA Agreement or any other aspect of European Union or EEA competition law. These Commitments are therefore without prejudice to Holtzbrinck's position should the Commission or

any other party decide to open proceedings or to commence any other legal action against Holtzbrinck.

I. DEFINITIONS

A. "**Agency Agreement**" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. "**Agreed Funds**" means the aggregate amount equal to the total commissions which Holtzbrinck pays to an E-book Retailer, over a period of at least one year, in connection with the Sale through that E-book Retailer of Holtzbrinck's E-books to consumers.

C. "**Apple**" means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California, and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, their successors and assigns, their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. "**E-book**" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of these Commitments, the term E-book does not

include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store *(e.g.,* through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book device; (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (4) self published E-books; and (5) electronic versions of children's picture books or (6) educational and scholarly titles as well as electronically formatted books that are sold through educational and/or library channels.

E. **"E-book Publisher"** means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the EEA. Holtzbrinck is an E-book Publisher. For the purposes of these Commitments an E-book Publisher is not an E-book Retailer except when it lawfully Sells (or seeks to lawfully Sell) directly E-books to consumers for another E-book Publisher or acts as an agent under an Agency Agreement for another E-book Publisher.

F. **"E-book Retailer"** means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the EEA, or through which an E-book

Publisher, under an Agency Agreement, Sells E-books to consumers in the EEA. For the purposes of these Commitments unless otherwise provided, Holtzbrinck and all other Persons whose primary business is book publishing are not E-book Retailers. For the purposes of these Commitments, Apple is an E-book Retailer.

G. "**EEA**" means those countries participating in the European Economic Area as of the date of the notification of the Commitments Decision and at any time thereafter during the term of these Commitments.

H. "**Effective Date**" means the date upon which Holtzbrinck receives formal notification of a Commitment Decision by which the Commission makes the Commitments binding upon Holtzbrinck.

I. "**Holtzbrinck**" means Verlagsgruppe Georg von Holtzbrinck GmbH and Georg von Holtzbrinck GmbH & Co. KG and their successors and assigns, subsidiaries, divisions and groups as well as their connected undertakings except where such connected undertaking engages in E-book publishing activity which is merely incidental to its other primary business activity.

J. "**Implementation Date**" means the earliest of

1. the termination of an agreement between Holtzbrinck and an E-book Retailer that restricts, limits, or impedes that E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book, or to deviate from the List Price of any E-book, and/or to offer price discounts or, subject to Section III.A.3, any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA;

2. the date on which Holtzbrinck notifies an E-book Retailer in writing that Holtzbrinck will not enforce any term(s) in its agreement with that E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books , or from deviating from the List Price of any E-book, and/or from offering price discounts or any other form of promotion to encourage consumers to Purchase one or more E-books in the EEA.

K. "**Including**" means "including, but not limited to".

L. **"List Price"** means the price set by Holtzbrinck for the Sale to consumers of a specific E-Book title under the terms of an Agency Agreement.

M. "**Person**" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

N. "**Price MFN**" means a term in an agreement between Holtzbrinck and an E-book Retailer under which

1. the Retail Price at which that E-book Retailer or, under an Agency Agreement, Holtzbrinck, Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the List Price, at which any other E-book Retailer, or Holtzbrinck under an Agency Agreement with any other E-book Retailer, Sells the same E-book(s) to consumers ; or

2. the Wholesale Price at which Holtzbrinck Sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price

at which Holtzbrinck Sells the same E-book(s) to or through any other E-book Retailer; or

3. the revenue share or commission that an E-book Retailer receives from Holtzbrinck in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from Holtzbrinck in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

O. "**Purchase**" means a consumer's acquisition of one or more E-books as a result of a Sale.

P. "**Retail Price**" means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a consumer.

Q. "**Sale**" means delivery of permanent access to a consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; "Sell" or "Sold" means to make or to have made a Sale of an E-book to a consumer.

R. "**Wholesale Price**" means (1) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to Holtzbrinck for an E-book that the E-book Retailer Sells to consumers; or (2) the List Price at which Holtzbrinck, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer,

minus the commission or other payment that Holtzbrinck pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

II. REQUIRED CONDUCT

A. At the latest, within seven (7) days after the Effective Date, Holtzbrinck shall send a letter to Apple confirming that (1) it waives the notice period contained in any E-book distribution agreement with Apple that concern the distribution of E-books within the EEA and (2) it agrees to rescind (terminate) such agreements no later than fourteen (14) days from the date of the Commitments Decision. A copy of such letter should be provided to the Commission at the same time.

B. For each Agency Agreement entered into prior to the Effective Date between Holtzbrinck and an E-book Retailer other than Apple relating to the Sale of E-Books within the EEA that (1) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book below the List Price or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books, or (2) that contains a Price MFN, Holtzbrinck shall notify the E-book Retailer, at the latest within ten days of the Effective Date, that the E-book Retailer may terminate the agreement on thirty days' notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not given notice to terminate within seventy days after the Effective Date, Holtzbrinck shall, as soon as

permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Holtzbrinck shall furnish to the Commission (1) within seven days after the Effective Date, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Holtzbrinck and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since Holtzbrinck's previous submission of agreements to the Commission. Where Holtzbrinck enters into a non-disclosure agreement with another E-book Publisher or an E-book Retailer, this non-disclosure agreement shall not prevent Holtzbrinck from providing to the Commission any kind of relevant information.

III. PROHIBITED CONDUCT

A. With regard to the territories within the EEA covered by any of the agreements terminated in accordance with Sections II.A and II.B of these Commitments:

1. For two years from the earlier of the Effective Date and the Implementation Date, Holtzbrinck shall not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book, or to deviate from the List Price of any E-book, and/or to offer price discounts or, subject to Section III.A.3, any other form of promotions to encourage consumers to Purchase one or more E-books; such two-year period shall run separately for each E-book

Retailer. Holtzbrinck shall notify the Commission of such Date for each E-book Retailer within seven days.

2. For two years from the earlier of the Effective Date and the Implementation Date, Holtzbrinck shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or to deviate from the List Price of any E-book, and/or from offering price discounts or subject to Section III.A.3 any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA.

3. The ability of an E-Book Retailer to offer any non-price promotion in accordance with paragraphs 1 and 2 is subject to Holtzbrinck's contractual obligations allowing Holtzbrinck to withhold an E-book due to a specific request made by its author or other content creator.

B. Holtzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

IV. NON-CIRCUMVENTION

A. Holtzbrinck shall in any way not circumvent by actions and/or omissions any commitments contained in this document.

B. After expiration of the prohibitions in Sections III.A of these Commitments, Holtzbrinck shall not be prohibited from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the

E-book Retailer from setting, altering, or reducing the Retail Price of any of Holtzbrinck's E-books or from deviating from the List Price or from offering price discounts or any other form of promotion to encourage consumers to Purchase any of Holtzbrinck's E-books.

C. For the avoidance of doubt and without limitation, the following shall not be prohibited under these Commitments:

1. Holtzbrinck's good faith decision not to pursue a promotional programme or arrangement proposed by an E-book Retailer;

2. Holtzbrinck's good faith decision to offer its own promotional programme or arrangement with one or more E-book Retailers; or

3. Holtzbrinck's good faith decision not to enter into, or not to remain, in business with an E-book Retailer.

V. PERMITTED CONDUCT

A. Nothing in these Commitments shall prohibit Holtzbrinck from unilaterally

1. compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered; or

2. setting a List Price as the basis of the amount Holtzbrinck will be entitled to receive in respect of each Sale of an E-Book title through an E-Book Retailer.

B. Notwithstanding Section III.A of these Commitments, Holtzbrinck may enter into Agency Agreements with E-book Retailers in relation to the EEA under which the aggregate value of the price discounts or any other form of promotion to encourage consumers to Purchase one or more of Holtzbrinck's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Holtzbrinck's E-books) is restricted; *provided that* for the two year period as defined in Section III.A (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the Retail Price for any of Holtzbrinck's E-books below the List Price by using the Agreed Funds; and (2) Holtzbrinck shall not restrict, limit, or impede the E-book Retailer's use of the Agreed Funds to offer price discounts or, subject to Section III.A.3, any other form of price promotion to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

C. The details of any agreements reflecting the principles set out in subparagraphs V.B above will be subject to individual bilateral negotiations between Holtzbrinck and the intending E-book Retailer.

VI. NATIONAL LAW

These Commitments are without prejudice to restrictions imposed by national law related to E-books that restricts, limits, or impedes the implementation of Section III.A and Section V.B above.

VII. DURATION OF COMMITMENTS

Unless provided otherwise, these Commitments shall remain in force for a period of five years from the Effective Date.

VIII. REPORTING

In addition to the requirements set out in Section II.C, throughout the duration of the Commitments, Holtzbrinck shall provide the Commission with an annual written report on the implementation of these Commitments during the relevant year. In such reports, it will also address any unresolved disputes or written complaints made by retailers relating to the implementation of the Commitments in executed agreements. The report relating to 2012 shall be provided by [March 1, 2013], and further reports shall be provided on March 1 of each year up to and including 2017.

IX. REVIEW CLAUSE

A. Without prejudice to the general provision of Article 9(2) of Regulation 1/2003, Holtzbrinck may request that the Commission reopens

proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitments Decision was based.

31 October 2012

Dr. Kathrin Westermann, Noerr LLP

[Duly authorized for and on behalf of Verlagsgruppe Georg von Holtzbrinck GmbH and Georg von Holtzbrinck GmbH & Co. KG]

EXHIBIT “H”

Free is not the magic number: New trends in ebook pricing

By Laura Hazard Owen
May. 30, 2013 - 2:49 PM EST May. 30, 2013 - 2:49 PM EST

13 Comments

Summary:
Ebook pricing strategies are changing fast as the market evolves and retailers and publishers amass more data. Here are some new tips.

Ebook pricing strategies are changing rapidly as the digital market grows. Self-published authors continue to shake things up, but what might have been best practice a couple of years ago is not necessarily relevant in 2013 — and as retailers amass

more data and publishers experiment, there's a new set of tips for publishers and authors to pay attention to.

Are ebook prices falling? Sometimes…

"Pricing for us is a daily, hourly, minute-by-minute discipline," Michael Tamblyn, Kobo's chief content officer, said in an IDPF panel at BookExpo America on Thursday. Year on year, Kobo sees an eight percent decline in the prices worldwide that consumers are paying for ebooks, but it is "by no means a straight line." In the first quarter of this year, the *global* average sales price of a Kobo ebook was $7.50.

The downward trend is driven largely by self-published authors, Tamblyn said, stressing that the global prices of traditionally published ebooks have remained roughly stable, with prices varying by about $0.50. Following big publishers' settlements with the Department of Justice in the ebook pricing case, the prices of their ebooks have settled as well — "slightly north of pre-agency" prices, Tamblyn said. "Almost all the change that we see in overall global price point today is coming from self-publishing…it's the primary pole that has been rooting price downward over time." (And it is a significant part of the business: Kobo says that self-published titles represent 20 percent of its unit sales, with about half of those coming from authors publishing directly through Kobo's own platform, Writing Life.)

Kobo's finding that traditionally published ebook prices are holding stable appears to directly contradict data presented by Dan Lubart at the Publishers Launch conference on Wednesday. Lubart, who founded technology services company Iobyte Solutions and is now the SVP of sales analytics at HarperCollins, compiles Digital Book World's weekly ebook bestseller list, which is divided by price bands. Lubart draws his conclusions using publicly available data from the U.S. Kindle and Nook bestseller lists. He said that the average price of a Kindle bestseller dipped starting in the 2012 holiday season and and has remained lower since, even when works below $4 (which tends to include self-published books or traditionally published books undergoing price promotions) were filtered out. Publishers "have to start lowering our prices ahead of market realities that we see coming," Lubart said.

…and in some places

I asked Tamblyn why Lubart's data shows traditionally published ebook prices coming down while Kobo's data shows them rising. Tamblyn stressed that just looking at a retailer's bestseller list can produce a "wildly distorted" picture, in part because midlist and backlist ebooks are a much larger part of the market than they were two years ago. He also reminded me that Kobo is looking at global data, not just data from the U.S.

So how do average ebook prices compare globally? "The U.S. is neither the most nor the least price-competitive market in which we operate," Tamblyn said. "There are very different prices that customers are used to paying and willing to pay on a market by market basis." The average selling price of a Kobo ebook in the U.S. is about $7.20; in Canada, it's $8.12. In the U. K. — "for our money, the most ferociously competitive price market in the English language" — the average selling price of a Kobo ebook is $5.76. Consumers in the E.U., meanwhile, appear willing to pay more for ebooks whether their country has price protection laws (Germany: average price $9.90; France: $10.40) or not (the average selling price in the Netherlands, where ebook prices are not fixed, is $11.29).

Free sometimes drives sales, but it's not worth it for everyone

Both traditional publishers and self-published authors are increasingly experimenting with offering temporary price slashes on their titles. Josh Schanker is the founder of BookBub, a site that sends its members daily email newsletters alerting them to ebook sales, and he presented some of his company's findings in the IDPF panel alongside Tamblyn. "The greater percentage discount the publisher offers, the greater the response rate," Schanker said. BookBub has found that ebooks discounted by 90 to 99 percent saw 300 percent more click-throughs and purchases than ebooks discounted by 60 percent.

BookBub has found that ebooks that are discounted more steeply sell more copies once they are returned to full price. "The more that people take advantage of an author," Schanker said, "the more they will buy books by the same author." And

BookBub finds “publishers, on average, will ultimately sell a lot more books when they do a free giveaway.”

The power of free depends a lot on the author whose book is being discounted, though, Tamblyn said. “Giving away books for free if you are a bestselling author with a really well-established brand…doesn’t have nearly the effect that it does when you are a self-published author trying to get books into the hands of people who have never heard of you before.”

Readers probably won’t chase retailers for ebook sales

In July 2012, Sony began running a promotion in its U.K. store where it sold ebooks for just 20 pence (USD $0.30). (The promotion ended in March.) Many other retailers, including Kindle U.K., matched those prices; Kobo didn’t. “We actually saw no change in our market share as those promotions were running,” Tamblyn said. “Mostly, retailers sold 20-pence books to their own customers and didn’t generally take anyone else’s customers. They essentially did a massive margin write-down to themselves…it was an interesting lesson in the relative stability of customer bases, and customers’ loyalty to a particular platform once they’ve joined it.”

By Laura Hazard Owen
May. 30, 2013 - 2:49 PM EST
Like this post? Share it!

1.

lanceschaubert
Thursday, May 30 2013

"They essentially did a massive margin write-down to themselves."

Hilarious. Nice piece, guys.

Share Cancel

Share this comment

1.

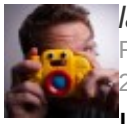
David Thomas
Friday, May 31 2013

Agree.

Marvelous summary reporting, with the most telling coda: for all the squawk about price being the key to mitigate the risk of purchasing an e-book, there is an indication

that it may all simply be consumer habit and effort. This suggests there is a minimum price threshold where the consumer is indifferent and the only positive influence is relative to demand — the name brand, the pr, or the serial narrative. The next step to gain market share will be the intermediaries to differentiate with exclusive content.

Share this comment Share Cancel

1. 
lanceschaubert
Friday, May 31 2013
Like the difference between Hershey's chocolate and any other

chocolate — essentially the same stuff, but you'll pay fifty cents more for the name of the first.

Share this comment Share Cancel

2.

Jeremy Greenfield
Thursday, May 30 2013

Hey Laura–

Great post.

I'd just like to point out one key thing about our combined list (data from Kindle, B&N, Kobo, Google and Sony): Our average price is for the top-25 best-selling ebooks. So, we're just looking at the books most people are buying and the books most people are

seeing advertised when they look at best-seller lists. We know that it's a flawed measure in a way.

I'm not sure what Kobo's methodology is, but if it's pricing across the entire list, it's not that useful in my opinion. Now, if it's total revenue divided by total units sold (which Kobo could do), that would be very accurate and very useful and it would suggest to me that while best-seller prices are going down in aggregate, back- and mid-list prices are holding steady or even rising in some cases.

Thanks for this post!

best,

Jeremy Greenfield

Editorial Director, Digital Book World

Share Cancel

Share this comment

1.

Michael Tamblyn

Friday, May 31 2013

Thanks Laura for a great article and thanks Jeremy for the question. All of the numbers I discussed were the weighted average selling price based on all unit sales and actual selling prices of those sales. You're right that the average in the catalog wouldn't tell us much. No criticism intended to Dan Lubart's good work on bestseller pricing, but unlike a few years

ago the mid and back list has become a much more substantial part of the business as heavy readers expand their collections and we all get better at discovery and recommendation. It's a good thing for the business and it does mean there is a lot of action happening in pricing down below the top 500.

Michael Tamblyn
Chief Content Officer
Kobo

Share this comment Share Cancel

3.

carmen webster buxton
Thursday, May 30 2013 It's

not just the author's name that matters. Giving away a book for free is a great strategy if it's the first book in a series. If you only have one book on the market, the only real benefit to giving the book away is that it can get you reviews and it can get your book into people's "buying" histories, feeding the "People who bought this book also bought…." algoriothm.

But so many people are giving away books now that it's hard to get really good numbers. Promotions like the ones Bookbub offers can get excellent returns (I gave away more than 15,000

copies this month, thanks to Bookbub!), but you need to be sure you can benefit from giving a book away before you pay money to tell people it's free. Marking a book down to 99 cents might be a better strategy if it's your only title.

Share Cancel

Share this comment

4.

Dougie Brimson
Friday, May 31 2013

I write both non-fiction and fiction and when I came to ebooks in 2011, had a backlist of 12 titles so the idea to give away my two biggest sellers was solely to act as loss leaders. In that sense they have

worked brilliantly.

However, as someone who focusses more on screenwriting these days, one benefit I hadn't considered was that free books also act as amazing calling cards. For me, this has resulted in three movie deals in the last six months including an adaptation of one of my own novels which will enter pre-production next month.

The point I'm making is that authors give away books for all kinds of reasons and if I've learnt one thing over the last 18 months, it's that when it comes to publishing, these days there is no 'way',

only ‘ways’.

Share this comment Share Cancel

5.

Dominic Tor
Friday, May 31 2013

The coming of ebooks has massively inflated self-publishing. Most fiction readers want to read best sellers or near. But there are a large number of readers who want to find the really good fiction (of all categories) that have been overlooked in the mass of indifferent or frankly bad books now swamping the ebook market often at $0 or $0.99.

Sometimes excellent or very good fictional works

suffer from being needles in the haystack: these can still be found with magnet (i.e. by discerning professional readers of the genre of fiction), sometimes the problem is the pervasive self-censorship of the media, publishers included, who just don't want to touch some politically or socially "delicate" subject.

If we are not going to lose some books of real merit then we need to arrange some way o finding them – and perhaps making it worth while to find them. Which means teams of readers for each category of fiction. Starting with publications in English,

there could be teams for UK and for US for example. And press reviewers could take part, as well as publishers readers. Those who found a book in the haystack each month and sparked it into life could then be rewarded by he author or resultant commercial publisher. There would be kudos too, for the reader who had the perception to recognise a worthwhile book .dominictorr1@gmail.com

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1. 

David Thomas
Friday, May 31 2013

Couple of problems here: creating teams of cultural

arbiters charged with finding the needles –> that is already in place (Pulitzer, NBA, Booker, book reviewers etc.) and it is sometimes controversial depending on the make up of the judges. Who chooses to whom to be the arbiters of the teams? Second, the reward system: if anyone could devise such a system that would resist corruption and not subvert the intention of finding the true gold, they would win a Nobel prize.

Discovery can be improved, but only as an approach to efficiency. A book is a

complex media form unlike a song or visual narrative — even sampling requires more effort. Satisfaction guaranteed for every purchase is really a tough thing to accomplish with books.

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6.

IPornographerbooks Com

Friday, May 31 2013

I find that books priced at $5 to $7 sell best if published in several volumes especially if you just give away the first volume because if readers enjoy the first freebie they will pay for volume 2.

http://www.amazon.co.uk/Michael-J.-Freeman/e/B001K8WIMY/ref=sr_tc_2_0?qid=1369988819&sr=1-2-ent

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Friday, May 31 2013

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Read comment above:

http://www.amazon.com/Michael-J.-Freeman/e/B001K8WIMY/ref=sr_tc_2_0?qid=1370000436&sr=1-2-ent

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❍ ❍ ❍ ❍ ❍

8.

Dave Ball
Friday, May 31 2013

It is so much fun to watch the book business learn the lessons that we who grew up in the magazine world learned decades ago. The principles of direct marketing don't change much, regardless of medium.

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9.

Dominic Mitchell
Tuesday, June 4 2013

Some interesting comparative research here too: http://blog.smashwords.com/2013/05/new-smashwords-survey-helps-authors.html

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EXHIBIT “I”

Agency, Pricing and the Seven Things Publishers Need to Remember

Posted by Kobo Help - February 01, 2010

Publishing is usually an industry of steady, small-scale drama — the poaching of authors, the movement of editors from house to house, a libel suit or injunction, the occasional merger or bankruptcy. But every once in a while, the ground shakes and the industry starts to remake itself. In five days, we saw a great new device unveiled (the iPad), a major publisher propose a new business model for its retailers (Macmillan), and a big retailer retaliate by pulling all of Macmillan's books (Amazon). Now that's entertainment!

If you're an industry insider, you've been following this closely for the last few days. If you're just catching up, you can get the background here and the color commentary here. Short version: Publishers are contemplating moving to an *agency model** for ebook sales. Macmillan's suggestion of agency to Amazon was what led to this weekend's de-listing and subsequent twitterfrenzy.

It it a great idea? A bad idea? We'll see. And more importantly, the consumer gets to decide.

While publishers sort through their options, we wanted to set out a few, simple ideas that are important to us and to our customers. A publisher working on new business models could do worse than to keep them in mind.

1. eBooks are the future. In the battle for ever-scarcer leisure time, they represent the best offense for the written word. They mean more people reading more often throughout the day, in more countries, all over the world. They mean carrying the world's largest bookstore around in your pocket wherever you go. They mean buying instantly and carrying your whole library around with you always. They aren't going away. (We know you know that, but it's worth saying.)

2. eBooks should be priced less than their physical counterparts. Not free. But much cheaper. For all kinds of reasons, consumers expect that an ebook should be substantially less expensive than the print edition, and then get even cheaper over time. The agency model shows that publishers are starting to figure this out on new releases. The same will hopefully be true later in the ebook's lifespan.

3. eBooks should be released simultaneously with print. Many ebook buyers have made a format choice — this is how they want to read. eBook consumers aren't going to buy the hardcover because they're prevented from buying the ebook. They're going to buy something else (and maybe not a book at all!) And by the time that delayed ebook comes along 60 or 90 days later, the buzz may be gone, the author isn't doing media, and there is something else that is top-of-mind. The result: lost sales for everyone. Which makes us sad, because we love selling books. Truly.

4. eBook list prices should be set by the publisher or author. Each publisher has to make the economics of each title work for them. If they can't, it means fewer books published, fewer voices heard and fewer stories told. Not good.

5. Retailers should, as they always have, be able to drive sales and reward customers. Retailers have spent decades figuring out how to turn browsers into customers, how to surprise

and delight them, reward and motivate them. That's what we do. We should be able to continue to use all of the tactics that we've developed to grow the business — discounts, promotions, bundling, loyalty programs, and more. It would be a mistake to think that customers show up just because the books are on the shelves, virtual or otherwise.

6. $9.99 is not the only price. If publishers start having more say in the sale price of books, there is always one thing they can't control: what the customer is willing to pay. Right now, we sell a lot of books at $9.99, even more below $9.99, and a fair number above $9.99 as well. That's unlikely to change. The right price is one that allows a retailer to eke out a living, the publisher to cover costs and pay the author, and the reader to feel that they have enough change left over to buy another book soon. We'll get there.

7. A locked-in book is a less valuable book. Want to preserve the value of ebooks? Avoid proprietary formats. Readers should be able to buy their books from any retailer and read them on any device. Does anyone really believe they'll be reading on hardware from the same manufacturer thirty years from now? That's like saying "I will only store my books on these IKEA Billy shelves I bought as a college student. If I ever choose to buy non-IKEA shelves, I will throw out all of my books and start over." A reader should never have to worry about "leaving books behind" or "losing their library". If you can't download it and move it somewhere else, it's worth less. Seriously. They're books, not Atari 2600 video game cartridges.

If we can keep these seven basic ideas in mind, I have no doubt we can find a model that works. Over the next few months, we'll be working with publishers to strike agreements that are both sustainable for the industry and affordable for the reader. We won't be pulling anyone's books from Kobo. We're all grownups here. In the meantime, we'll keep doing what we've been doing — providing two million ebooks in more than 200 countries with a solution that lets customers read on the devices they choose. We'll make reading better on smartphones, tablets, eInk devices, netbooks, and desktops. Along the way, you'll tell us whether its working through your decision to keep buying ebooks from Kobo. And that's all we ask.

——footnotes——

* In the agency model, the publisher sets the price (probably USD $12.99 for bestsellers, 12.99 to 14.99 for other new releases). Retailers get a fixed cut of sales (about 30%). Every retailer sells for the same price. We all compete on everything else: our ability to merchandise well, develop cool apps, support great devices, have excellent titles available. The publisher may end up making less money**, but at least the perceived value of a book is several dollars higher and they don't have to worry about retailers coming back at them to support a money-losing pricing model.

Why "Agency"? It's about who has the power to set the price. In the traditional wholesale/retail model, the publisher sets a list price, sells books to the retailer at a given margin, and then the retailer can price it however they want as long as the publisher gets their percentage of the original list price. In the agency model, the retailer is acting as an "agent" of the publisher, passing the book along to the consumer at a pre-agreed price. It's like a real estate agent selling your house. You set the price, they sell it for you. You give them a commission. The agent never owns your house. They just helped out.

** Side note on the agency model. It isn't really a revenue grab for publishers. In most cases, the publisher makes less. That $35.00 Under the Dome that the publisher made $17.00 on? With agency, they might make $10.50. But they won't run the risk of some retailer forcing them to price it at $15 and making $7.50.

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Recent Surprises in the eBook World

Posted by Kobo - February 12, 2010

The Plastic Logic Que debuted at CES, along with 100 other eReaders, at astronomic prices. How much do you think $799 eInk readers will be selling for on eBay next year?

Kindle Apps! Developers drop Android and start coding hot new Sudoku apps with the Kindle Development Kit. Really? That seemed like a good idea? Clearly more to the story.

Random Nook Sightings have moved from blog lore to reality. There are a few of them out there now, making it a neck and neck race with the Daily Edition from Sony.

[Shameless Plug] Kobo announces tablet apps coming in February, and an iPad app in March/April.

And then there was the introduction of The JesusTablet. With tremendous fanfare, we all watched Steve Jobs surf the web on it for 20 minutes. We can't wait to get one! Our app is well into development.

And with it comes the iBookstore – There's an app for that! (But only on Apple devices, and maybe only the iPad.)

Ali vs. Frasier. Tyson vs. Holyfield. Amazon vs. MacMillian! Agency vs. eCommerce. Amazon pulled the buy buttons for MacMillan books in a shot across the Agency model bow. (MacMillian landed the knock out punch, at least according to the media)

Harper, Hachette and others announced that they would move towards agency, making eBooks more expensive for consumers.

At least one publisher had the guts to proclaim that they would make $29.99 eBooks available – significantly raising prices. The SuperExtendaMixEbook, loaded with extra videos of the author describing how exciting it was to write their latest book. Yawn.

So, what's next? Change. In a couple days, I'll post my predictions for what we'll see in the next five weeks, which will make today feel like a distant memory.

Kobo continues to grow at a rapid pace – check out our new Jobs page at: www.kobobooks.com/jobs

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Countdown to Agency (and Party Like it’s $9.99!)

Posted by Kobo Reads - March 29, 2010

From next week onward, April Fool’s Day will also be known as Agency Day or “The Day We Turned the eBook Market Upside Down and Shook It Until It Rattled”. Not that this will necessarily be a bad thing, but there will definitely be some changes. We’ve been blasting through new contract paper for agency publishers at a fairly frantic pace*. When the dust settles, it’s going to be a different world, whether you’re an ebook reader, industry watcher, publisher, or retailer. So to get you ready, here are some of the things you’ll notice starting April 1.

We’re Going to Party Like it’s $9.99

Or less! It’s the Last Days of Discount. We’ll have some great last minute promotions before they go away. **How’s this: $2 off every ebook you buy between now and midnight on March 31st!** Use this code: **`2party`** and share it around!

Some Prices Will Go Up

No two ways about it. Bestseller prices are going to rise from many major publishers and we can expect more to follow. In the US, a lot of $9.99's are going to become $12.99's and some will be more. Not much we can do about it — we aren't allowed to discount them. It's pretty much a case of take the publisher's price or lose the books.

Some Prices Will Stay the Same or Go Down

Not all publishers are doing agency (for now). So you'll still see some books that are discounted (including from some major publishers). And we'll be doing our best to be competitive everywhere we can.

Comparison Shopping Goes Away (Sort of)

Hunting for the best price is going to be a thing of the past, at least for titles from "The Agency 5". The price will be the same everywhere that those books are sold. The new fight will be on shopping experience, reading experience, device coverage, and how much freedom the user has with the books they've been given. (That's something we're feeling pretty good about.)

Promotions, Discounts and Most Loyalty Programs Go Away

With agency, the price is the price. We lose most of our ability to issue coupons, promotions, special discounts, kickbacks, buy-X-get-one-free. We could still do it for non-agency titles, but then we end up in a weird situation of "Get $1 off, but only on these books, and definitely not on these other ones." That's not fun. And worse, it's confusing to consumers. We're sad about that, obviously. Not just because they're a great way for us to drive sales, but because they help us focus attention on specific great books, reward our loyal customers, and celebrate the launch of new features, apps or services.

Marketing Wars

With price competition going away, expect to see a lot of focus in the ebook space on brand building. When prices are the same, the fight becomes on attracting customers on each service's merits. Expect to see TV ads with people reading on devices under trees, on beaches, while bouncing joyously on trampolines, on bearskin rugs.

Random Acts

There is definitely going to be some weirdness in the coming weeks and months. Retailers are going to be trying to figure out what they can and can't do, and occasionally making some missteps along the way. Publishers are going to be holding the pricing levers for the first time, so we can expect a bit of lurching there.

Some Delistings

As we've already seen, some retailers and wholesalers may not make the transition to agency in time. Publishers may not be able to close all deals by the beginning of April. Retailers may find themselves presented with terms they can't agree to. There are a lot of system changes that have to be made on just a few days/weeks notice. We may see some books disappearing (temporarily, we hope) from some ebook retailers come April 1st.

One thing is for certain — this is the first time a media industry has raised the price on an existing format across all retail channels simultaneously. One way or another, business students and marketing junkies will be studying this for years to come. We're going to be watching closely, working with publishers, sharing data, and generally trying to make this transition as smooth as possible.

** To give some sense of pacing, the first time we negotiated with some of these publishers it took us 4-6 months to close agreements. We will have renegotiated every agency publisher we're working with in 20 business days. Extreme!*

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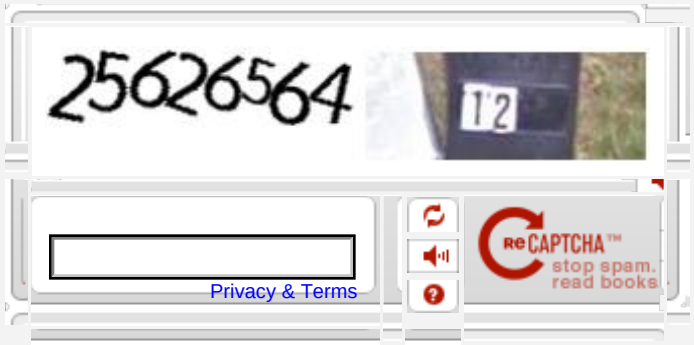

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Party Like It’s $9.99 Pre-Agency Update!

Posted by Kobo Reads - March 31, 2010

The response to our Last Days of Discount has been fantastic. Yesterday was our **best sales day ever** as Kobo customers made the most of these final pre-agency days. It’s looking like today is going to be even better! And we saw a surge of new users trying out Kobo for the first time*. Welcome! To customers new and old, you still have until midnight ET tonight to make use of the **$2-off-as-many-books-as-you-like discount code: `2party`**

A quick update on the agency roll-out. We’ll see three of the Agency 5 go live tonight at midnight with their new pricepoints. One of those will include a rollout in Canada. The other two publishers will go on live in the US on April 3rd. (Apparently there’s some kind of hardware launch that day. Who knows what that’s all about. Oh wait, we do!)

(As a side note, we’re also seeing some terrific pre-order traffic for the new Kobo eReader. If you want something on which to read all those great books you just bought, take a look at this.)

** And considering the spike in "How do I put an epub on my _____ device?" customer care calls, a lot of those people are switching to Kobo on eInk readers they already own. I guess this read-on-any-device thing has some legs!*

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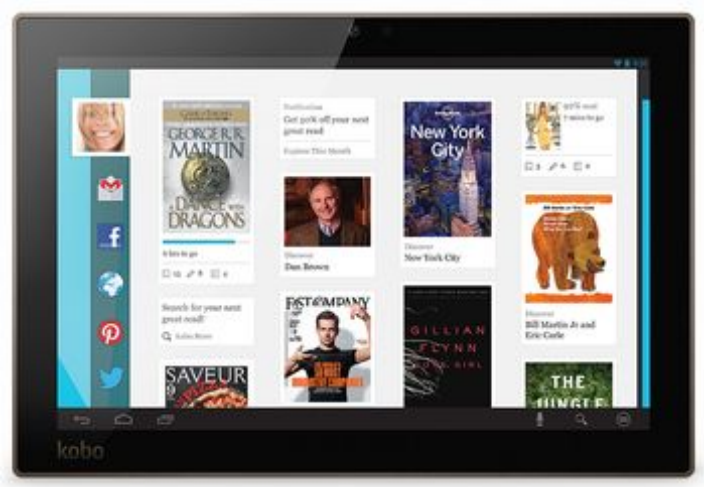

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Kobo goes 5 for 5! All Agency Publishers Signed

Posted by Kobo Reads - April 02, 2010

It's been a busy month at Kobo HQ. In addition to readying our iPad application and announcing a new device, we have had to renegotiate contracts with five of our biggest publishers to adhere to the new agency model. I'm very happy to say that we have the "Agency 5" deals done with Hachette, HarperCollins, Macmillan, Penguin and Simon & Schuster. It means that you should see all the great books you're used to finding at Kobo. Some of our competition, on the other hand, could look a little bare*.

This new model is going to take some time to settle in. Prices will change, systems will get upgraded, and we will continue to make sure that every book you want is available on Kobo. There will certainly be a few bumps as we get all of this new data processed for the first time.

I'd write more, but I have feed Red Bull to our content processing team to get everything up in

time for tomorrow. In the meantime, if you find yourselves in line for an iPad tomorrow in San Francisco (flagship store) or Buffalo (closest store to us in Toronto), keep an eye out for Kobo staff who may just have a treat for you (assuming Apple does the right thing and lets the Kobo iPad awesomeness be revealed.)

** Not necessarily because of any fault or nefariousness — these deals have been incredibly difficult to assemble in time. And the systems side has been a killer. Yesterday the Wall Street Journal reported that a certain Seattle-based retailer had just two deals done. And you can only imagine how many lawyers they have to put on this* ;-)

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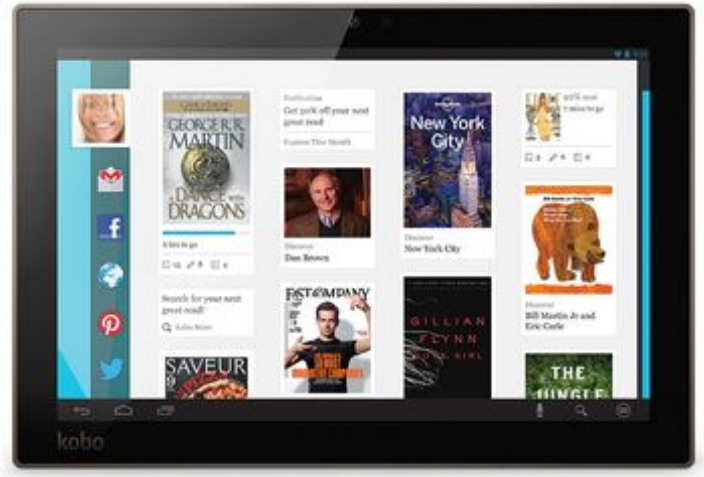

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Canadian dollar at par = $9.99 CAD bestsellers!!!

Posted by Kobo Reads - April 07, 2010

Our exchange rate ticker reads 1 CAD = 0.9993 USD this morning. With a little rounding, that looks like the Canadian and US dollars are at par to me; and we are celebrating with eBook deals for Canadians!

Through economic meltdown, bank bailouts, and rising and falling oil prices, the Loonie has been chasing greenback, clawing its way from the $0.76 doldrums of early ‘09, nipping at its $0.95 heels through the Fall and Winter, and now within mere hundredths of a cent of the magic $1CAD=$1USD. Americans may not make much of this — such is life for the world’s preferred currency. But for Canadians, there is a lot of psychology tied up in dollar parity. A victory of sorts. A vindication. And lots of cross-border deal-hunting!

But why leave home? To celebrate our powerful, colourful currency, we are offering $9.99

Globe and Mail bestsellers*. This may not last long — the tides of foreign exchange are sudden and mysterious, we may see more publishers take up agency price-setting, so get in while the getting's good.

** Where publishers allow. Publishers working with us through agency agreements set their own prices directly.*

Aboard the Kobo Rocketship!

Posted by Michael Serbinis - August 18, 2010

I was recently sharing some of our growth stats with a key partner while he was driving to a meeting. He nearly drove off the road. It's only been 8 months and 3 days since we launched Kobo last December, and we have experienced tremendous changes in the market and unbelievable growth for any startup. Here are some highlights:

#1 WORLD DOMINATION, THE BEGINNING…

We have now launched 4 of the largest bookseller chains worldwide – Borders (US), Indigo (CA), Borders (AU), Angus & Robertsons (AU) and Whitcoull's (NZ). They each have an integrated web experience, mobile applications for iPad, iPhone, Blackberry, Android and Desktop. They also sell our Kobo eReader in stores and online.

Meanwhile, our direct business at Kobobooks.com is rocking and we've delivered ebooks into 200 countries from Azerbaijan to Vanuatu – we're making books available in more places to

more people than ever before.

#2 CONTENT IS KING

We now have 2.2 million eBooks, and local content in Canada, UK, Australia, New Zealand in addition to the US. We have 95% of New York Times bestselling titles available in digital format (even kids books!) and 90% of Globe & Mail bestsellers, with more arriving every day. We are actively acquiring content around the world, and this goes beyond black & white text, beyond plain ole' ebooks. As we announce new distribution channels, we will give a deeper update here.

#3 KOBO EREADER STARTED A TREND

We're amazed at how many customers we've turned on to our Kobo eReader in the last 100 days. It's affordable, stylish, easy to use positioning definitely struck a chord with customers and started a trend for lower priced eReaders (you're welcome!). For competitive reasons, we can't tell you just how many are out there, but it is fact that many of our global retail distributors have been out of stock too often. We thought they would be popular – but we didn't think they'd be **that** popular. It's the best bad problem a device-maker can have. We like to think that we convinced the world that yes, in fact ereaders are for everyone. Not just tech people. Not just people with lots of money to spend.

Just last week we announced that Fairmont Hotels will start providing Kobo eReaders to guests in select hotels. We knew we were stylish, but we didn't know we'd be in The Plaza… nice!

#4 THE FIRST ON ANDROID

We launched a new Android app last month that we are hugely excited about – we think Android has a big future. We started the "any device" mantra, and guess what? The industry has caught on. We have recently launched updates our popular apps for iPhone, iPad and Blackberry. Our desktop app for Mac/Windows ships with our eReader but we will make that available to everyone shortly.

#5 OVER 1 MILLION SERVED (LAST MONTH)

Across web, mobile, devices, direct, channel…we served 1 million people last month.

There are more of you, buying at a higher frequency, staying longer, and building their libraries. We now have customers with ~400 books in their libraries! Prices have continued to come down, despite concerns many had with agency pricing. Our average price is now $8USD. Even those who buy eBooks download a lot of free eBooks, loving our 1.8MM++ FREE titles!

#6 OUR GROWTH BEATS THE MARKET

You can check the IDPF growth numbers here. We're beating them, probably more than anyone, on a % growth basis. Now for our version of directional, relative, growth stats: In Q1, we sold over 10X the ebooks as we did in Q4 (when we were still in pilot-mode). In Q2, we nearly tripled Q1. Comparing that to the first half of 2009, when we launched in pilot-mode, that's more than 130X growth. In mid Q2, we started selling Kobo eReaders too and that drove total sales more than 10 times in Q2.

#7 THE KOBO COMMUNITY IS AWESOME

I love our Kobo customers and can only stand back and marvel at all the passion pouring from our community. Our "Where are You Reading Campaign" drove some awesome photos of people reading eBooks….and recently I saw a picture of two Kobo customers' wedding and the groom is reading the wedding wows on his Kobo eReader!

We are rocking. We're a David among many Goliaths, building a global business, developing the market for eReading. We're not a billion-dollar company (yet), but this is all we do and we are scrappy. We have no other business to lose any sleep over or steal our focus. We are in this both because we want to win and because we think reading can be better. This is the first time in 500 years that the book has had a major change. This is bigger than **all** of us and we have immense respect for the impact that these changes will have on our traditions, our culture, and the way we think about the written word.

Thank you for your continued support, enthusiasm and patience in our quest to build a global eReading juggernaut. As we approach fall, and growing competition, Annabel Lyon's "Golden Mean" (which I loved) reminds me of my roots, and Alexander's wars.

Watch out Darius, here we come.

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@Kobo on Twitter

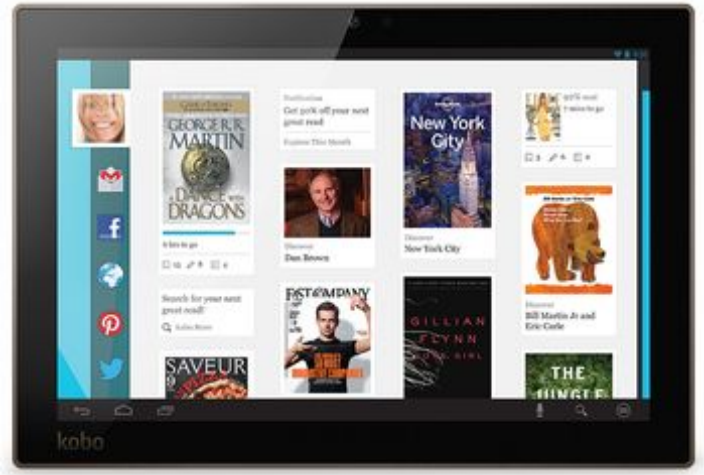
Feb 28 - It's the last day of the month, how many books did you read in February? #QOTD

@KoboHelp on Twitter

Feb 27 - @FrancoVanBaste1 It's able to work fine on your phone's hotspot? Okay, when you have chance, confirm it working on other wifi. Let us know.

Check us out:

Image



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