

# PUBLIC VERSION

File No. CT-2014-

## 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 *Competition 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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE
<b>FILED / PRODUIT</b> CT-2014-002 February 21, 2014 Jos LaRose for / pour REGISTRAR / REGISTRAIRE
OTTAWA, ONT
# 4

**KOBO INC.**

Applicant/Moving Party

- 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 CANADA HOLDINGS CO.**

Respondents/Responding Parties

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**MOTION RECORD**

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# PUBLIC VERSION

Date: February 21, 2014

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# PUBLIC VERSION

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# TAB 1

File No. CT-2014-

**COMPETITION TRIBUNAL**

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**BETWEEN:**

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Applicant/Moving Party

- and -

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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.**

Respondents/Responding Parties

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the Applicant will make a motion to the Competition Tribunal (“**Tribunal**”) on a date and time to be set by the Tribunal at Ottawa, Ontario.

**THE MOTION IS FOR:**

1. An Order staying the registration of the Consent Agreement between the Commissioner of Competition (“**Commissioner**”) 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. (collectively, the “**Consenting Publishers**”) filed and registered with the Competition Tribunal on February 7, 2014 (“**Consent Agreement**”), under section 105 of the *Competition Act* pending the determination of the Moving Party’s Application under section 106 of the *Competition Act*; and
2. Such further and other final or interim orders as the Tribunal deems just.

**THE GROUNDS FOR THE MOTION ARE:**

**A. Kobo has Applied for Relief Pursuant to Section 106(2)**

3. Concurrent with the filing of this Notice of Motion, Kobo Inc. (“**Kobo**”) is filing an Application (“**Application**”) pursuant to s. 106(2) of the *Competition Act*, which states:

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

4. Pursuant to its Application, Kobo is asking the Tribunal to rescind or vary the Consent Agreement on the grounds as set out in its Statement of Grounds and Material Facts.

**B. The Application Raises Serious Issues**

5. The main question that must be answered on Kobo's Application is whether the Consent Agreement is based on terms that could be the subject of an order of the Tribunal and whether, if not, the Tribunal should rescind or vary the Consent Agreement.
6. This raises several sub-issues, most of which have never been addressed by the Tribunal. Those that have been considered have only been considered in one case, in an entirely different context (a merger). The sub-issues include the following:
  - (a) Can a Consent Agreement based on s. 90.1 be rescinded or varied on the basis that it fails to identify or allege an anticompetitive agreement or arrangement that could be the subject of a s. 90.1 order?
  - (b) Must or should the Commissioner include in its consent agreements sufficient detail of the alleged anticompetitive agreement or arrangement so as to permit the Tribunal to assess whether it would have the jurisdiction to make the orders contained in the Consent Agreement?
  - (c) Can an affected third party succeed in an application under s. 106(2) if it can prove that there is no arrangement or agreement that could form the basis of an order under s. 90.1?
  - (d) Can an affected third party succeed in an application under s. 106(2) if it can prove that the prohibition orders contained in the consent agreement do not relate to activity that is the result of an agreement or an arrangement between competitors?
  - (e) Is the Tribunal satisfied that the prohibition orders contained in the Consent Agreement relate to activity that resulted from an agreement or arrangement between competitors?
  - (f) Can a vertical agreement or arrangement (i.e., between a retailer and a publisher) be the subject of an order under s. 90.1?
  - (g) Can a horizontal agreement or arrangement that has been terminated or ended be the subject of an order under s. 90.1?
7. These issues, as further described in Kobo's Statement of Grounds and Material Facts, are serious issues to be tried in the Application.

**C. Kobo Will be Irreparably Harmed Absent a Stay**

8. Kobo's distribution agreements with the Consenting Publishers will be immediately affected by the Consent Agreement. If Kobo refuses to accede to the Consenting

Publishers' attempts to comply with the Consent Agreement and the Consenting Publishers terminate their agreements with Kobo, the effect on Kobo will be devastating. Conversely, if Kobo accepts the amendments, it will suffer significant unrecoverable losses.

9. The Consent Agreement will have an immediate and substantial impact on Kobo's business operations and competitiveness in the Canadian market. Given that the Consent Agreement mirrors similar settlements in the United States, the deleterious and prejudicial impact of those settlements can be looked to as a predictor of the harm Kobo would suffer if a stay is not granted.
10. The harm Kobo would suffer could not be remedied. There is no mechanism by which Kobo could recover its (significant) losses from the Commissioner, or any other source, if Kobo is ultimately successful in the Application.
11. Further, the harm to Kobo will be immediate. The Consent Agreement requires action by the Consenting Publishers within 40 days of its February 7, 2014 filing. Kobo has already received letters from Consenting Publishers seeking to implement the Consent Agreement. Irreparable injury to Kobo's financial and market positions will occur before the disposition of its Application.
12. In addition, the implementation of the Consent Agreement to eliminate certain terms of the contractual relationship between Kobo and the Consenting Publishers will result in immediate changes to the market landscape and accordingly will also result in an irreversible shift in expectations of consumers, which will prevent Kobo from reintroducing such contractual terms if it is successful on its Application.

**D. The Balance of Convenience Favours the Granting of a Stay**

13. The balance of convenience favours Kobo. The irreparable harm Kobo is poised to suffer if a stay is denied is far greater than any arguable harm to the market if a stay is granted.
14. The market itself may be harmed if a stay is not granted, as the experience in the United States has demonstrated that near-identical settlements in that jurisdiction have led to the exit of competitors from the market and the significant competitive diminishment of other competitors. If the Application is successful, and it is found that the Consent

Agreement should be varied or rescinded, such damage to the market would be irreversible.

15. In this case, the terms of the Consent Agreement are time-limited, especially with respect to the prohibition on Agency terms, which is ordered to last 18 months. By the time Kobo obtains a final determination of its Application, much of the 18-month timeframe will have expired. If a stay is not granted, the Application will effectively be rendered moot, and Kobo's rights as a directly affected party under s. 106(2) will be illusory.
16. Granting a stay preserves the status quo (pre-Consent Agreement) pending the determination of the Application. This is the same status quo that has prevailed for the past 18 months while the Commissioner has conducted his investigation.
17. If the Application is not successful, the stay will not harm consumers or frustrate the Commissioner's ability to implement the terms; it will only delay the implementation of the time-limited remedies for the period of time it takes to have the Application determined. The terms of the Consent Agreement, and the 18-month period it contemplates, would simply commence at a later date. As demonstrated by the 16-month implementation period of similar remedies in the United States, the objectives of the Consent Agreement are not prejudiced by delay.
18. The *Competition Act*, RSC 1985 c C-34, as amended, including sections 1.1, 90.1, 105 and 106.
19. The *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp), as amended, including section 8.
20. The *Competition Tribunal Rules*, SOR/2008-141.
21. The *Federal Court Rules*, SOR/98-106, including rules 372 and 398.
22. Such further and other grounds as counsel may advise and the Tribunal may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. The Affidavit of Michael Tamblyn, to be sworn.
2. The Consent Agreement.
3. Such further and other documents as counsel may advise and the Tribunal may admit.

**DATED AT** Toronto this 21<sup>st</sup> day of February, 2014.



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**COMPETITION TRIBUNAL**

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- and -

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LIMITED, HOLTZBRINCK PUBLISHERS, LLC, and  
SIMON & SCHUSTER CANADA, A DIVISION OF  
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Respondents

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**NOTICE OF MOTION**

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# TAB 2

File No. CT-2014-

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Applicant/Moving Party

- and -

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

Respondents/Responding Parties

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**AFFIDAVIT OF MICHAEL TAMBLYN**

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I, **MICHAEL TAMBLYN**, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chief Content Officer at Kobo Inc. ("**Kobo**"), and as such I have personal knowledge of the matters set out below.

#### **Kobo's Background and E-book Operations**

2. Kobo is an E-book<sup>1</sup> company with its headquarters in Toronto, Ontario. One of Kobo's primary business operations is as a retailer of E-books. Kobo also develops and retails E-book reading devices ("**E-readers**") and creates free application software for reading E-books on computers and mobile devices.
3. Kobo sells E-books to users who read them either on devices equipped with the Kobo app or on Kobo or other compatible E-readers. There are over 18.4 million users of Kobo E-readers and E-reading applications worldwide. Kobo currently offers these customers access to over 4 million E-books.
4. Kobo commenced operations in February 2009 as Shortcovers, which was, at that time, a division of Indigo Books & Music Inc. ("**Indigo**"). The division was then spun off in December 2009 as an independent company, Kobo., which is now a wholly-owned subsidiary of Rakuten, Inc.

#### **Kobo's Contractual Relationships with Publishers in Canada**

5. The E-book titles Kobo sells originate from a broad international base of publishers. Kobo currently offers content from publishers based in Canada, the US, Australia, New Zealand, Germany, France, Spain, Italy, Portugal, Slovenia, the Netherlands and the UK. Kobo has agreements that grant it rights to sell E-books in Canada. Some of these agreements are with publishers, others are with authors directly, with agents holding rights on behalf of authors, or with distributors (collectively, "**Publishers**"). As a result of these agreements, Kobo obtains access to and the right to sell the E-book content of approximately 15,000 rights holders.

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<sup>1</sup> All defined terms are consistent with the definitions in the Consent Agreement filed February 7, 2014, unless otherwise defined in this Affidavit.

6. Publishers seeking to sell E-books through Kobo typically opt to negotiate either wholesale or agency terms. Kobo continues to sign agreements under both models. Negotiation and modification of contractual terms for both agency and wholesale agreements is common. These negotiations are done one-on-one between Kobo and each Publisher. These are “vertical” agreements, in that Kobo does not compete with Publishers.
7. Wholesale agreements are typically non-exclusive agreements whereby Kobo acquires from the Publisher the right to sell the E-book at a price set by Kobo. Typically, the Publisher sets a suggested retail price for the title, and Kobo pays the Publisher 50% of the suggested retail price for each E-book Kobo sells. Within this model, Kobo determines the price to be paid by the customer and provides the Publisher with a monthly sales report, identifying for the Publisher how many copies of that E-book Kobo has sold.
8. Agency Agreements are typically agreements whereby Kobo is appointed as a non-exclusive agent for the marketing and delivery of E-books on the Publisher’s behalf. In these arrangements, the Publisher sets the price at which the E-book must be sold, and Kobo receives a commission for each E-book it sells. Typically, that commission is 30% of the price paid by the customer.
9. Copies of all of Kobo’s agreements with the Consenting Publishers have been provided on a confidential basis to the Competition Bureau (“**Bureau**”) as part of the Bureau’s investigation into the E-book industry. All of these agreements are Agency Agreements. Kobo will seek the permission of the Consenting Publishers to allow it to provide copies to the Tribunal in advance of the hearing of this Motion.

#### **The Agency Model in the US and the US Settlement Agreements**

10. Agency Agreements in the E-book industry originated in the US prior to becoming part of the E-book landscape in Canada.
11. The United States Department of Justice (“**US DOJ**”) investigated certain Publishers in the United States (the “**US Publishers**”) and brought a case against E-book retailer Apple Inc., alleging that it had conspired with the US Publishers to eliminate retail price competition in order to raise E-book prices. The US District Court of the Southern District

of New York found that the defendant US Publishers had conspired with each other to eliminate retail price competition in order to raise E-book prices, and that Apple Inc. played a central role in facilitating and executing that conspiracy. That decision is currently under appeal. A copy of an article describing the case is attached hereto as **Exhibit “A”**. A copy of the decision is attached hereto as **Exhibit “B”**.

12. The US Publishers—the US branches of Macmillan, Simon & Schuster, Hachette, Penguin, and HarperCollins—avoided trial by reaching settlements with the US DOJ (the **“Settlement Agreements”**). The Settlement Agreements were reflected in judgments of the US District Court for the Southern District of New York (the **“Final Judgments”**).
13. A copy of the Final Judgment against Hachette, HarperCollins, and Simon & Schuster, entered September 6, 2012, is attached hereto as **Exhibit “C”**. A copy of the Final Judgment against Macmillan, entered August 12, 2013, is attached hereto as **Exhibit “D”**.
14. The Final Judgments effectively required the US Publishers to terminate any agreements with E-book Retailers that:
  - (a) restricted the ability of E-book Retailers 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 (i.e., Agency Agreements); and/or
  - (b) contained clauses which, broadly speaking, made the price at which an E-book Retailer sells an E-book, or the revenue share or commission that an E-book Retailer receives for the sale of E-books to consumers, dependent in any way on the prices or revenue shares or commissions of any other E-book Retailer (known as **“Price MFN”** clauses).
15. The implementation of the Settlement Agreements was staggered. In each case, **“Stipulations”** were filed, after which the US Publishers had a certain amount of time to send notices to E-book Retailers that the E-book Retailers could terminate their agreements. Then, within a certain number of days after the Final Judgment was entered, the US Publishers had to take steps to terminate (or allow to lapse) any agreement that the E-book Retailers had not terminated earlier. In each case, there were

five to six months between the filing of the Stipulation and the entering of the Final Judgment.

16. Given the staggered timing of the Settlement Agreements, the process of implementing the Settlement Agreements took 16 months.

#### **The Effects of the US Settlement Agreements on Kobo and the E-book Market**

17. As a result of the Settlement Agreements, several of Kobo's contracts with Publishers for the sale of E-books in the US were altered, including its contracts with Hachette, HarperCollins, Simon & Schuster, and Macmillan. Contracts that were previously Agency Agreements were shifted to an "**Agency Lite**" model, whereby Publishers continue to set the Retail Price of E-books, but the E-book Retailer is permitted to reduce the final price paid by customers, within certain limits.
18. The move to an Agency Lite model has had a negative impact on Kobo's US market share and revenues.
19. Since the entry of Agency Lite, Kobo has shed significant revenues as it has been forced to discount titles to match the deep discounting that some US competitors have engaged in. Despite these efforts to protect its market share by lowering prices, Kobo has seen its position in the US market dwindle. At this time, Kobo has stopped making significant investments in the US market. It has closed its one office there, has not replaced US sales staff, and is generally focusing on other markets.
20. The experiences of Sony and Barnes & Noble further illustrate the profitability challenges faced in the E-book market following the shift to Agency Lite.
21. Sony announced its exit from the E-book market in the US. It was reported in online media in October 2013 that Sony has confirmed it has no intention of selling its new PRS-T3 E-reader in the US. Sony's public relations department is quoted as stating, "Sony will not be offering the Reader PRS-T3 in the United States. In response to the region's market changes, Sony will be focusing instead on mobile and tablet devices, including the Xperia Tablet Z and Xperia Z smartphone." Sony removed the E-reader section from its US website entirely. Kobo has recently acquired Sony's E-reader business and will be transferring Sony's customers to Kobo's infrastructure. Four media reports of Sony's exit of the US market are attached hereto as **Exhibit "E"**.

22. Barnes & Noble's NOOK E-book division experienced EBITDA losses of \$476M for the 2013 fiscal year. In Q1 2014, NOOK reported a decrease in revenue of 20.2% from the previous year's Q1 and experienced EBITDA losses of \$55M. In Q2 2014, NOOK reported a decrease in revenue of 32.2% from Q2 2013, and experienced EBITDA losses of \$45M. Barnes & Noble press releases dated June 25, 2013, August 20, 2013, and November 26, 2013, respectively, highlighting these losses are attached hereto as **Exhibit "F"**. A Bloomberg Businessweek article about NOOK's decline is attached hereto as **Exhibit "G"**.
23. Sony and Barnes & Noble's difficulties illustrate that even large, established companies face incredible challenges in a market where the Agency model is prohibited.

### **The Canadian E-Books Investigation and the Consent Agreement**

24. The Commissioner of Competition ("**Commissioner**") commenced an investigation into the E-book industry in Canada in or around August 2012. This investigation is ongoing. Between November 2012 and February 2014, Kobo voluntarily provided information to the Bureau regarding the E-book industry in Canada to assist with the Bureau's investigation. It cooperated fully with all Bureau requests for data and answers.
25. Following 18 months of investigation, the Commissioner entered into a Consent Agreement (the "**Consent Agreement**") on February 6, 2014, with four publishers (the "**Consenting Publishers**"): 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. The Commissioner filed the Consent Agreement on February 7, 2014.
26. A copy of the Bureau's Press Release dated February 7, 2014, announcing the Consent Agreement is attached hereto as **Exhibit "H"**. A copy of the Consent Agreement is attached hereto as **Exhibit "I"**.
27. The material details of the Consent Agreement are described in Kobo's Section 106 Application.
28. Since that time, Kobo has begun to receive amendment/termination notices. Attached hereto as **Exhibit "J"** are notices from Hachette and Simon & Schuster dated February 18, 2014.



**The Projected Effects of the Termination of Agency Model in Canada**

29. The effect on Kobo in Canada will be magnified compared to that in the US, given Kobo's origins and focus on the Canadian market. Canada is Kobo's single largest market.

30. **[ REDACTED ]**

It should be noted that it is the E-retailer, i.e. Kobo, who will absorb these losses. The Publishers will receive the same price for their books under an Agency Lite model as they would have under an Agency model. It is, in my view, wrong for Kobo to bear these losses, given that Kobo has done nothing wrong, nor has it been alleged to have ever done anything wrong by the Canadian or US antitrust authorities.

31. Of further concern is that switching four Publishers simultaneously to a new contract model has never been done before. As noted above, the Settlement Agreements were implemented over a 16-month period; here, the Consenting Publishers have been given only 40 days.

32. While we have developed a contingency plan to address such a switch, the plan will involve a great deal of staff time, and involves the risk that, in such abridged timeframes, errors may occur. Changing Publisher accounts to reflect updated contracts is an involved process. Once a new agreement has been negotiated and signed, Kobo must engage in a multi-step process to reconfigure the Publisher accounts and update all titles in a Publisher account's catalogue. The 40-day timeline also obviates any possibility of Kobo actually being able to negotiate any terms that could help to mitigate the significant losses it is about to suffer.

33. I understand that a key issue that underpins a case under section 90.1 of the *Competition Act* is whether there is an agreement or arrangement among competitors. In this case, having been the one "on the ground" negotiating the shift to Agency in

Canada, I can speak firsthand to the fact that the shift to Agency in Canada occurred in a very different manner than it is alleged to have happened in the US.

- (a) In the US, the shift occurred simultaneously, with all of the publishers moving to Agency on the very same day. In Canada, the shift occurred in a staggered manner.
- (b) In the US, the shift to Agency was alleged to have been designed to ensure that Apple would enter the market before the launch of the iPad. In Canada, by the time the agency agreements began to be entered into, the iPad and iBookstore had already launched.
- (c) Amazon was present in the US, and pricing at unsustainably low prices, prior to the launch of Agency. In Canada, Amazon was not active in the market at the time that Kobo shifted to Agency.
- (d) Perhaps most importantly, while in the US the shift to Agency was very much a process that was brought to Kobo by the Publishers, in Canada, Kobo had to press several Publishers to move to the Agency model. Having been at the negotiating table for those discussions, my impression was not that the Agency model was something that had been concocted by the Publishers and was being imposed on Kobo. To the contrary, with both Simon & Schuster and HarperCollins, Kobo had to press to keep the Publishers moving toward Agency. While I have not reviewed all of my files, I have found at least some correspondence to help illustrate the push that Kobo was making for this model.

To that end, I attach as **Exhibit “K”** a letter of Heather Reisman, dated March 29, 2011 to HarperCollins. I also attach as **Exhibit “L”** an email exchange between Simon & Schuster and me. Both are illustrative of the fact that the Agency model with these Publishers came about as a result of Kobo’s desires, not out of a backroom deal among the Publishers.

**[ REDACTED ]**

**SWORN before me** at the City of Toronto on February \*\*, 2014.

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Commissioner for Taking Affidavits

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(Signature of Deponent)

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CBS Canada Holdings Co.

**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 *Competition 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 CANADA HOLDINGS CO.**

Respondents

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**AFFIDAVIT OF MICHAEL TAMBLYN**

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**Lawyers for the Applicant**

# EXHIBIT "A"

This is **Exhibit "A"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.



## The Scholarly Kitchen

AUTHORS, BOOKS, COMMERCE, ECONOMICS, READING

# Why the Apple Ebook Ruling is a Loss for Publishers, Authors, and Readers

POSTED BY MICHAEL CLARKE · JUL 11, 2013 · 99 COMMENTS

FILED UNDER AMAZON, AMAZON KINDLE, APPLE, BARNES & NOBLE, BARNES & NOBLE NOOK, EBOOKS, HACHETTE, HARPERCOLLINS, IPAD, MACMILLIAN, PENGUIN, RANDOM HOUSE, SIMON & SCHUSTER, STEVE JOBS

The United States v. Apple Inc.

Yesterday federal judge Denise L. Cote, of United States District Court in Manhattan, ruled against Apple in the *United States vs. Apple Inc., et. al.* ebook case. You can read Cote's ruling [here](#).

Anyone who thinks this isn't a terrible outcome for publishers, authors, and readers, isn't paying attention.

Let's recap.

Amazon (who is at the crux of this story) sells ebooks under the wholesale model. This means that they can set prices as they wish, usually at \$9.99. They can sell the title for \$9.99 even if their agreement with the publisher stipulates that they must pay the publisher a royalty of more than \$9.99. Meaning, Amazon chooses to lose money on many of the books it sells, a fact documented in the Department of Justice's (DOJ) suit (see page 17 of the ruling).

That sounds great for both publishers and readers, right? Publishers receive more revenue and readers, subsidized by Amazon, pay less. What is not to like?

Here is the catch. Some books are niche titles, such as those published by university presses or other independents. They don't sell enough copies to recoup their costs at \$9.99. Other books, such as those by bestselling authors sold by larger publishers, can command high prices that are needed to offset the losses such publishers incur on other titles. This is why different books have historically had different prices and why niche titles and blockbusters (at least when the first come out) often cost more. But because Amazon chooses to sell an ebook at \$9.99 (or whatever price they like), the ebook can't be sold anywhere else for more. Who is going to buy the ebook for \$19.99 via the publisher's site or Barnes & Noble or anywhere else when they can get it via Amazon for \$9.99? Amazon is selling the book below cost to forestall competition in ebook distribution.

Enter Apple. Back in 2010, Steve Jobs had a magical new invention called the iPad. It was like an iPhone except you could more easily read books on it because it had a larger screen. Unfortunately, Amazon had beaten him to the ebook market with the introduction of the Kindle. Moreover, they had used Jobs'

own playbook to do so. Amazon essentially copied what Apple had done with iTunes and the iPod with their Kindle and Kindle Store. Jobs therefore knew this game well and knew he had no hope of competing against Amazon in ebook distribution as things stood without touching off a price war and losing money on every sale (which he could have afforded to do but that just isn't how Jobs rolled). Jobs needed to change the playing field.

He did this by getting publishers to agree to the agency model whereby publishers set their own prices with Apple receiving a percentage of each sale. Moreover, publishers agreed to what has been called a "most favored nation" clause which stipulated that Apple could match the price in any other ebook store (e.g. Amazon's Kindle Store).

Five of the so-called "Big Six" trade publishers (Hachette, Penguin, HarperCollins, Macmillan and Simon and Schuster) agreed to Apple's terms (Random House was the only large publisher who did not participate at the time of the iPad's launch). The publishers then went back to Amazon and used the deal with Apple, and the hype around the new iPad, to pressure Amazon into accepting an agency model on the same terms as Apple, ceding more pricing control to publishers (and the free market).

This, says Judge Cote (page 9), constituted a "conspiracy" to raise prices:

*"The Plaintiffs have shown that the Publisher Defendants conspired with each other to eliminate retail price competition in order to raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy. Without Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010."*

Due to browbeating by the Department of Justice and fear of a protracted suit and punitive fines, all five publishers settled out of court and agreed to reinstate the wholesale model with Amazon for at least two years. Yesterday's ruling against Apple has made it less likely that publishers will have the leverage to revert to the agency model in the near future after the two-year period dictated by the settlement ends.

What this means is that anyone wishing to enter the ebook distribution space will face an ebook pricing war against an entrenched competitor that is willing to sell at a loss, propped up by a seemingly limitless supply of cash from investors who do not seem to care about margins so long as market share is growing.

The result is likely to be an ebook market (at least in trade publishing – professional and scholarly publishing is a different matter) with little innovation – why would anyone bother? Not only must a new entrant invest in new technology, negotiate complex, multi-national rights agreements with publishers, and market their new product to consumers, they must then slog it out in a price war. And while a very few entrants such as Kobo are trying, one of the few companies with the cash hoard to withstand Amazon is Apple (Google is another and Microsoft, reported to be flirting with the idea of purchasing Barnes & Noble's Nook business, is a third), though a price war goes against their DNA and it is not clear that ebooks are important enough to them to be worth the cost.

In case anyone thinks that this is overstating the bleakness of the situation, I direct you to the recent departure of Barnes & Noble's CEO, William Lynch, a former Palm executive who was brought into the company to grow their reader business, in what Reuters called "an acknowledgement that its digital division Nook has failed to compete successfully in the e-reader and tablet markets". Furthermore, after reporting that Nook sales dropped 34% last quarter, the company announced it was pulling the plug on its hardware division.

So what, you might say, if Amazon controls the market so long as they keep prices low? Anyone who has looked at Amazon's price to earning ratio will tell you that Wall Street is assuming the company is engaged in a market share maximization strategy. As CNN has pointed out, whereas it would take 13 years for Apple to pay back your investment based on their current P&E ratio, it would take Amazon nearly three millennia (and while Jeff Bezos is known to play a long game, I suspect even his horizon is quite a bit closer). The aim of a market maximization strategy is to dominate the market and, once all credible competition is vanquished, to raise prices and substantially grow margins unfettered by competitive pressures. While Wall Street has, of course, been wrong before, this one looks like a good bet – there is even some evidence this is happening already.

This view of Amazon's strategy is shared by publishers as evidenced by the recent Penguin/Random House merger, completed just last week, which reduces the Big Six to the Big Five. The primary motivation for the merger is reportedly to establish a publishing house with enough size to have leverage with Amazon. More mergers may be yet to follow. And while such consolidation may indeed improve the publishing industry's leverage with Amazon, there are consequences for readers as Boris Kachka observes in an op-ed in the New York Times. These may include lower bids on author manuscripts, few options for authors, more homogenized titles (you think there are too many vampire novels now), and an even greater focus on genres and blockbusters.

So we now have a market in which ebooks are steadily commandeering a larger slice of the book market, but sales for which are dominated by a single player intent on keeping competitors out even if it means selling at a loss. Moreover, when this loss-leader strategy falters we have a Department of Justice ready to step in to "protect consumers" from potentially spending a couple extra bucks in the short term, meanwhile all but ensuring we will see even higher price increases over the longer term given the lack of competitive pressure. We have decreasing incentive to innovate in ebooks, with even established firms such as Barnes & Noble exiting the market. And we have market conditions that are forcing publishers to consolidate, leading to a less diverse offering of titles and lower royalty checks for authors.

And while there is, at the same time, a growing array of self-publishing options (including directly via Amazon) and there remain independent trade publishers such as McSweeney's as well as the university presses (and, of course, the professional publishers such as Wiley, Elsevier, Springer, etc.), these are typically not options for professional writers who require substantive advances to, you know, eat. Moreover, these smaller and independent houses face the same pricing challenges with regard to ebooks.

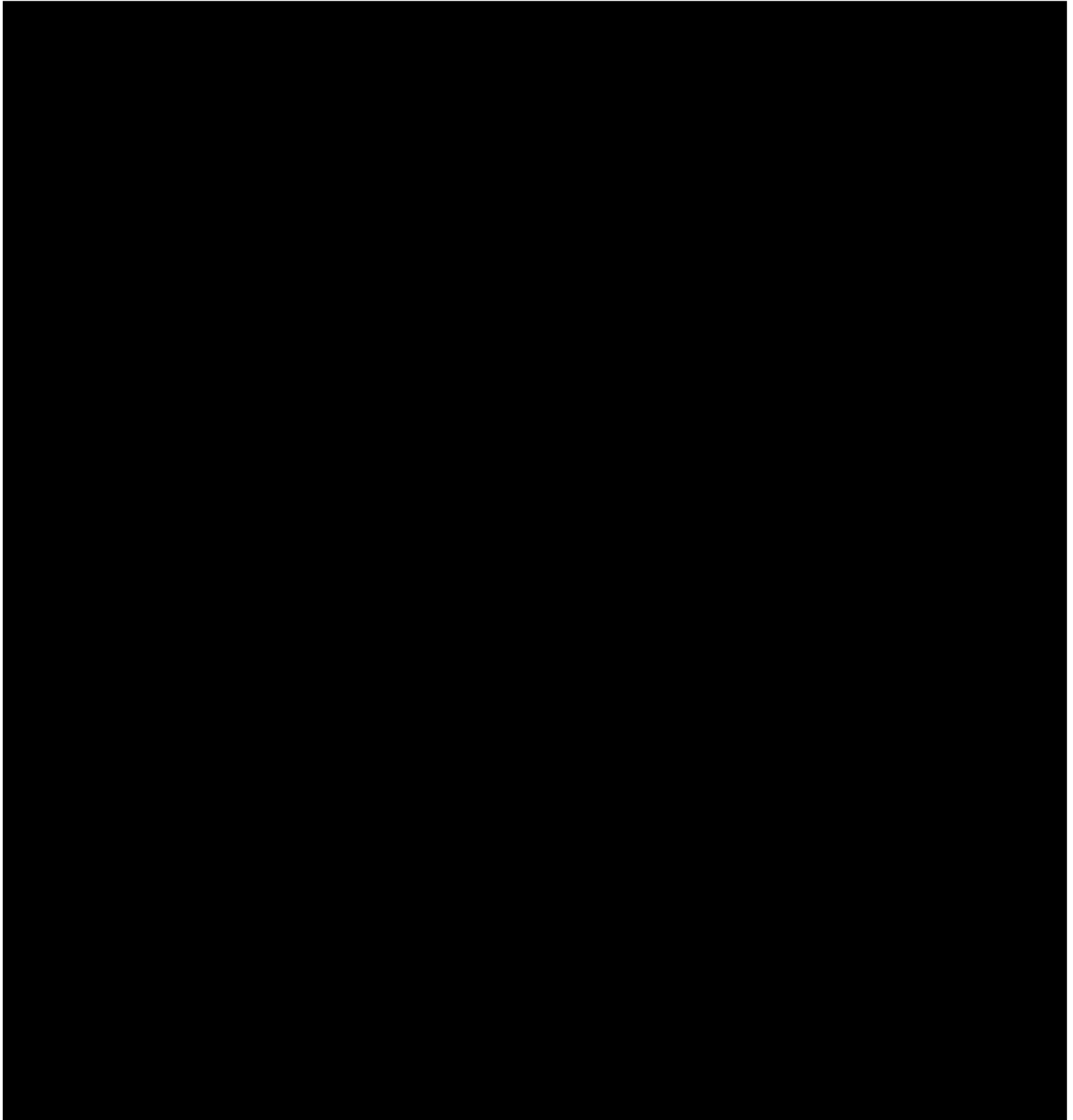
Apple intends to appeal this decision and they have strong motivation to do so. That motivation has little to do with the ebook market at this point, however. The iPad was the last major product Jobs was closely involved in developing and he was personally involved in negotiations with publishers – emails written by Jobs (that may or may not have been sent) were used as key evidence against Apple. The fight is now first and foremost about the legacy of Apple's iconic founder. Publishers will have to fend for themselves.

## About Michael Clarke

Michael Clarke is the Founder and President of Clarke & Company ([www.clarke-company.com](http://www.clarke-company.com)), a management consultancy focused on digital information strategy, product development, and marketing

related to professional and scholarly publishing. Prior to founding Clarke & Company, he was Executive Vice President for Product and Market Development at Silverchair Information Systems. Additionally, Michael has held positions at the American Medical Association, the American Academy of Pediatrics, and the University of Chicago Press. He currently serves on the board of directors for Silverchair Information System, the Society for Scholarly Publishing, and the Council of Science Editors. A graduate of the University of Colorado and the University of Chicago, Michael is a frequent contributor to the Scholarly Kitchen.

[View all posts by Michael Clarke »](#)



# EXHIBIT "B"

This is **Exhibit "B"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

9/5/13

UNITED STATES OF AMERICA,  
 Plaintiff,  
 v.  
 APPLE, INC., *et al.*,  
 Defendants.

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THE STATE OF TEXAS, *et al.*,  
 Plaintiffs,  
 v.  
 PENGUIN GROUP (USA) INC., *et al.*,  
 Defendants.

Civil Action No. 1:12-CV-2826

**PLAINTIFF UNITED STATES'  
FINAL JUDGMENT**

and

**PLAINTIFF STATES'  
ORDER ENTERING  
PERMANENT INJUNCTION**

Civil Action No. 1:12-CV-3394<sup>1</sup>

DENISE COTE,  
UNITED STATES DISTRICT JUDGE

**I. DEFINITIONS**

As used in this Final Judgment and Order Entering Permanent Injunction:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the Retailer acts as an agent of the Publisher and is paid a

<sup>1</sup> Pursuant to the agreement of the parties and Court order, the proceedings in *Texas et al. v. Penguin Group (USA) Inc. et al.*, Civ. A. No. 1:12-CV-3394, have been bifurcated. Issues related to non-injunctive relief, including damages and civil penalties, will be addressed in subsequent proceedings.

commission (or a portion of the Retail Price) in connection with the sale of one or more of the Publisher's E-books.

B. "Apple" means Apple, Inc.

C. "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.

D. "E-book App" means a software application sold or distributed through Apple's "App Store" relating to the reading, browsing, purchase, sale, recommendation, selection, or cataloging of any book or E-book.

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 within the United States to E-book Retailers and to permit such E-book Retailers to sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. "E-book Retailer" means any Person that lawfully sells (or seeks to lawfully sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, sells E-books to consumers. Apple is an E-book Retailer. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Effective Date" means the date, under Section VIII.A of this Final Judgment, on which this Final Judgment takes effect.



H. “External Compliance Monitor” means the person appointed by the Court to perform the duties described in Section VI of this Final Judgment.

I. “Final Judgment” means this document: the Final Judgment in *United States v. Apple, Inc., et al.*, Civil Action No. 1:12-CV-2826, and the Order Entering Permanent Injunction in *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, Civil Action No. 1:12-CV-3394.

J. “Hachette” means Hachette Book Group, Inc.

K. “HarperCollins” means HarperCollins Publishers L.L.C.

L. “Macmillan” means Holtzbrinck Publishers, LLC d/b/a Macmillan and Verlagsgruppe Georg von Holtzbrinck GmbH.

M. “Penguin” means Penguin Group (USA), Inc., The Penguin Group, a division of U.K. corporation Pearson plc, The Penguin Publishing Company Ltd, Dorling Kindersley Holdings Limited, and Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.

N. “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.

O. “Plaintiff States” means the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin and the District of Columbia.

P. “Publisher Defendants” means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster.

Q. “Representative Plaintiff States” means, as of the Effective Date of this Final Judgment, the States of Texas and Connecticut. The Plaintiff States may designate a different Plaintiff State as a substitute Representative Plaintiff State at any time by communicating the change in writing to Apple and the United States.

R. “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.

S. “Retail Price MFN” means a term in an agreement between an E-book Publisher and an E-book Retailer under which the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher 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 the E-book Publisher, under an Agency Agreement, through any other E-book Retailer sells the same E-book(s) to consumers.

T. “Simon & Schuster” means Simon & Schuster, Inc.

## II. APPLICABILITY

This Final Judgment applies to Apple and each of its affiliates, subsidiaries, officers, directors, agents, employees, successors, and assigns, to any successor to any substantial part of the business, and to all other Persons acting in concert with Apple and having actual notice of this Final Judgment.

### III. PROHIBITED CONDUCT

A. Apple shall not enforce any Retail Price MFN in any agreement with an E-book Publisher relating to the sale of E-books.

B. Apple shall not enter into any agreement with an E-book Publisher relating to the sale of E-books that contains a Retail Price MFN.

C. Apple shall not enter into or maintain any agreement with a Publisher Defendant that restricts, limits, or impedes Apple'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. The prohibitions in this Section III.C shall expire, for agreements between Apple and a Publisher Defendant, on the following dates:

1. For agreements between Apple and Hachette: 24 months after the Effective Date of this Final Judgment;

2. For agreements between Apple and Harper Collins: 30 months after the Effective Date of this Final Judgment;

3. For agreements between Apple and Simon & Schuster: 36 months after the Effective Date of this Final Judgment;

4. For agreements between Apple and Penguin: 42 months after the Effective Date of this Final Judgment; and

5. For agreements between Apple and Macmillan: 48 months after the Effective Date of this Final Judgment.

D. Apple shall not (1) retaliate against or punish, (2) threaten to retaliate against or punish, or (3) urge another Person to retaliate against or punish any E-book Publisher for refusing

to enter into an agreement with Apple relating to the sale of E-books or for the terms on which the E-book Publisher sells E-books through any other E-book Retailer. This provision does not require Apple to enter into an agreement with an E-book Publisher or E-book Retailer, or seek to prevent Apple from negotiating terms of agreement in good faith.

E. Apple shall not communicate, directly or indirectly, to any E-book Publisher (1) the status of its contractual negotiations with any other E-book Publisher; (2) the actual or proposed contractual terms or business plans or arrangements it has with any other E-book Publisher, or (3) any non-public competitively sensitive information it learns from any other E-book Publisher, including, but not limited to:

- a. the E-book Publisher's business plans or strategies;
- b. the E-book Publisher's past, present, or future pricing strategies or wholesale prices for E-books or audio books;
- c. the E-book Publisher's future retail prices for E-books or audio books;
- d. any terms in the E-book Publisher's agreement(s) with any retailer of books licensed or sold in any format; or
- e. any terms in the E-book Publisher's agreement(s) with any author.

Nothing in this Section III.E prohibits Apple from developing and offering to E-book Publishers a standard form contract containing the terms on which Apple would agree to sell the E-book Publishers' E-books, and so informing an E-book Publisher that it is a standard form; nor shall this prohibit Apple from publicly communicating the retail price of E-books available on the iBookstore.

F. Apple shall not enter into or maintain any agreement with an E-book Publisher where such agreement likely will increase, fix, or set the price at which other E-book Retailers can acquire or sell E-books.

Nothing in this Section III.F prohibits Apple from entering into or maintaining an agreement with an E-book Publisher merely specifying prices that Apple must pay for the E-book Publisher's E-books.

G. Apple shall not enter into or maintain any agreement with any other E-book Retailer where such agreement likely will increase, fix, stabilize, or set the prices or establish other terms on which Apple or the other E-book Retailer sells E-books to consumers.

#### IV. REQUIRED CONDUCT

A. On or before the Effective Date of this Final Judgment, Apple shall either modify any Agency Agreement with a Publisher Defendant to comply with Section III.C of this Final Judgment or terminate any Agency Agreement with a Publisher Defendant that does not comply with Section III.C of this Final Judgment.

B. Apple shall apply the same terms and conditions to the sale or distribution of an E-book App through Apple's App Store as Apple applies to all other apps sold or distributed through Apple's App Store.

This provision does not prevent Apple from introducing new categories of apps with different terms and conditions or from changing its App Store terms and conditions and applying them in a reasonable manner so long as Apple does not discriminate against E-book Apps.

C. Apple shall furnish to the United States and the Representative Plaintiff States, within ten business days of receiving such information, any information that reasonably suggests

to Apple that any E-book Publisher has impermissibly coordinated or is impermissibly coordinating the terms on which it supplies or offers its E-books to Apple or to any other Person.

#### V. ANTITRUST COMPLIANCE

To ensure its compliance with this Final Judgment and the antitrust laws, Apple shall perform the activities enumerated below in Sections V.A through V.J of this Final Judgment. Within thirty days after the Effective Date of this Final Judgment, Apple's Audit Committee, or another committee comprised entirely of outside directors (*i.e.*, directors not also employed by Apple), shall designate a person not employed by Apple as of the Effective Date of the Final Judgment to serve as Antitrust Compliance Officer, who shall report to the Audit Committee or equivalent committee of Apple's Board of Directors and shall be responsible, on a full-time basis until the expiration of this Final Judgment, for supervising Apple's antitrust compliance efforts and performance of the following:

A. furnishing a copy of this Final Judgment, within thirty days of its Effective Date, to each member of Apple's Board of Directors, to its Chief Executive Officer, to each of its Senior Vice-Presidents, and to each of Apple's employees engaged, in whole or in part, in activities relating to Apple's iBookstore;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section V.A of this Final Judgment;

C. ensuring that each person identified in Sections V.A and V.B of this Final Judgment, and appropriate employees in Apple iTunes and App Store businesses, receives comprehensive and effective training annually on the meaning and requirements of this Final

Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. obtaining, within sixty days after the Effective Date of this Final Judgment and on each anniversary of the Effective Date of this Final Judgment, from each person identified in Sections V.A and V.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting, in consultation with the External Compliance Monitor, an annual antitrust compliance audit covering each person identified in Sections V.A and V.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Apple's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify Apple's conduct to assure compliance with this Final Judgment; and, within seven days of discovering or receiving such information, providing to the United States and the Representative Plaintiff States a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the United States and the Representative Plaintiff States on a quarterly basis electronic copies of any non-privileged communications with any Person containing

allegations of Apple’s noncompliance with any provisions of this Final Judgment or violations of the antitrust laws;

I. maintaining, and furnishing to the United States, the Representative Plaintiff States, and the External Compliance Monitor on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among any person identified in Sections V.A or V.B of this Final Judgment and

1. any person employed by or associated with another E-book Retailer, relating, in whole or in part, to E-books or devices for reading E-books, but excluding any communications primarily involving the App Store; or

2. employees or representatives of two or more E-book Publishers, relating, in whole or in part, to E-books, devices for reading E-books, or E-book Apps,

including, but not limited to, an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication; and

J. providing to the United States and the Representative Plaintiff States annually, on or before the anniversary of the Effective Date of this Final Judgment, a written statement as to the fact and manner of Apple’s compliance with Sections III, IV, and V of this Final Judgment.

**VI. EXTERNAL COMPLIANCE MONITOR**

A. The Court shall appoint an External Compliance Monitor to undertake the responsibilities and duties described in this Section VI. The appointment shall be for a period of two years, provided that the appointment does not expire before Apple has completed two years of



the annual training required by Section V.C, and provided that the Court may *sua sponte* or on application of the United States or any Plaintiff State extend the appointment by one or more one-year periods. Promptly upon entry of this Final Judgment, but before its Effective Date, the United States and the Representative Plaintiff States will meet and confer with Apple to determine if the parties can agree on a recommended External Compliance Monitor. Apple may at any time suggest to the United States and the Representative Plaintiff States candidates for the position of External Compliance Monitor. On or before the Effective Date of this Final Judgment, the United States and the Representative Plaintiff States jointly shall recommend to the Court one or more persons to serve as External Compliance Monitor. Apple will have five days to object to the Court by letter to the recommended appointment. Apple is responsible for the reasonable expenses incurred by candidates for appointment as External Compliance Monitor in connection with any travel undertaken for interviews of the candidates by the United States or the Court.

B. The External Compliance Monitor shall have the power and authority to review and evaluate Apple's existing internal antitrust compliance policies and procedures and the training program required by Section V.C of this Final Judgment, and to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training.

C. The External Compliance Monitor shall conduct a review to assess whether Apple's internal antitrust compliance policies and procedures, as they exist 90 days after his or her appointment, are reasonably designed to detect and prevent violations of the antitrust laws. The External Compliance Monitor shall also conduct a review to assess whether Apple's training program, required by Section V.C of this Final Judgment, as it exists 90 days after his or her appointment, is sufficiently comprehensive and effective. Within 180 days of his or her

appointment by the Court, and at six month intervals thereafter throughout the appointment, the External Compliance Monitor shall provide a written report to Apple, the United States, the Representative Plaintiff States, and the Court setting forth his or her assessment of Apple's internal antitrust compliance policies, procedures, and training and, if appropriate, making recommendations reasonably designed to improve Apple's policies, procedures, and training for ensuring antitrust compliance.

D. The External Compliance Monitor may, at any time prior to the expiration of this Final Judgment, provide one or more additional written reports to Apple, the United States, the Representative Plaintiff States, and the Court setting forth additional recommendations reasonably designed to improve Apple's policies, procedures, and training for ensuring antitrust compliance. The External Compliance Monitor may provide such additional reports on his or her own initiative or at the request of the Court, the United States, or the Representative Plaintiff States.

E. If Apple objects to any recommendation, it shall propose in writing to the External Compliance Monitor, the United States, and the Representative Plaintiff States, within 30 days after it receives the report, an alternative policy, procedure, or system designed to achieve the same objective or purpose. If Apple and the External Compliance Monitor fail, after good faith discussions, to agree on an alternative policy or procedure within 30 days of Apple's objections to a recommendation, Apple shall, after consultation with the United States and the Representative Plaintiff States, apply to this Court within 14 days for relief.

F. If the External Compliance Monitor in the exercise of his or her responsibilities under this Section VI discovers or receives evidence that suggests to the External Compliance Monitor that Apple is violating or has violated this Final Judgment or the antitrust laws, the

External Compliance Monitor shall promptly provide that information to the United States and the Representative Plaintiff States. The External Compliance Monitor shall take no further action, including seeking information from Apple pursuant to Section VI.G of this Final Judgment, to investigate any such potential violation of the Final Judgment or the antitrust laws.

G. Apple shall assist the External Compliance Monitor in performance of the responsibilities set forth in this Section VI. Apple shall take no action to interfere with or to impede the External Compliance Monitor's accomplishment of its responsibilities. The External Compliance Monitor may, in connection with the exercise of his or her responsibilities under this Section VI, and on reasonable notice to Apple:

1. interview, either informally or on the record, any Apple personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Apple;
2. inspect and copy any documents in the possession, custody, or control of Apple; and
3. require Apple to provide compilations of documents, data, or other information, and to submit reports to the External Compliance Monitor containing such material, in such form as the External Compliance Monitor may reasonably direct.

H. Any objections by Apple to actions by the External Compliance Monitor in fulfillment of the External Compliance Monitor's responsibilities must be conveyed in writing to the United States and the Representative Plaintiff States within ten calendar days after the action giving rise to the objection.

I. The External Compliance Monitor may hire, subject to the approval of the United States, after consultation with the Representative Plaintiff States, any persons reasonably necessary to fulfilling the External Compliance Monitor's responsibilities. The External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall serve at the cost and expense of Apple, on such terms and conditions as the United States, after consultation with the Representative Plaintiff States, approves, including, but not limited to, the execution of customary confidentiality agreements. The compensation of the External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities and consistent with reasonable expense guidelines. The External Compliance Monitor shall submit a quarterly expense report to the United States and the Representative Plaintiff States.

J. If the United States, after consultation with the Representative Plaintiff States, or Apple determines that the External Compliance Monitor has ceased to act or failed to act diligently or in a cost-effective manner, it may recommend that the Court appoint a substitute External Compliance Monitor.

## **VII. PLAINTIFFS' ACCESS**

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice Antitrust Division or the Representative Plaintiff States, including, but not limited to, consultants and other persons retained by the United States or the Representative

Plaintiff States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, and on reasonable notice to Apple, be permitted:

1. access during regular business hours to inspect and copy, or at the option of the United States or the Representative Plaintiff States, to require Apple to provide to the United States and the Representative Plaintiff States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Apple, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Apple's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Apple.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, Apple shall submit written reports or respond to written interrogatories, under oath, relating to any of the matters contained in this Final Judgment. Written reports authorized under this paragraph may require Apple to conduct, at its cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States or any Plaintiff State to any person other than an authorized representative of the executive branch of the United States, the Attorney General's Office of any Plaintiff State, or the External Compliance Monitor, except in the course of legal proceedings to which the United States or the relevant Plaintiff State(s) is a party (including, but not limited to, grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Apple to the United States and the Representative Plaintiff States, Apple represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Apple marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States and the Representative Plaintiff States shall give Apple ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

#### **VIII. ADDITIONAL PROVISIONS**

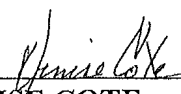
A. This Final Judgment shall take effect 30 days after the date on which it is entered. If the Final Judgment is stayed, all time periods in the Final Judgment will be tolled during the stay.

B. This Court retains jurisdiction to enable the United States, the Representative Plaintiff States, any other Plaintiff State (after consultation with the United States and the Representative Plaintiff States), or Apple to apply to this Court at any time for, or to act *sua sponte* to issue, further orders and directions as may be necessary or appropriate to carry out or construe

this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

C. This Final Judgment shall expire by its own terms and without further action of this Court five years after its Effective Date, provided that, at any time prior to its expiration, the Court may *sua sponte* or on the application of the United States or any Plaintiff State extend the Final Judgment by one or more one-year periods, if necessary to ensure effective relief.

**SO ORDERED:**

  
\_\_\_\_\_  
**DENISE COTE**  
**UNITED STATES DISTRICT JUDGE**

Dated: September 5, 2013

# EXHIBIT "C"



This is **Exhibit "C"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.

*Content*

**PUBLIC VERSION**

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.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 9/6/2012

Civil Action No. 12-CV-2826 (DLC)

FINAL JUDGMENT

AS TO DEFENDANTS HACHETTE, HARPERCOLLINS, AND SIMON & SCHUSTER

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Settling Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by Settling Defendants that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, Settling Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Settling Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Settling Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that they will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Settling Defendants, it is ORDERED, ADJUDGED, AND DECREED:

#### I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over the Settling Defendants. The Complaint states a claim upon which relief may be granted against Settling Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

#### II. DEFINITIONS

As used in this Final Judgment:

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. “Apple” means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Department of Justice” means the Antitrust Division of the United States Department of Justice.

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 this Final Judgment, 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; or (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.

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 within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. “E-book Retailer” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, Sells E-books to consumers. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. “Including” means including, but not limited to.

J. “Macmillan” means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

K. “Penguin” means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York, and (2) The Penguin Group, a division of

U.K. corporation Pearson PLC with its principal place of business in London, England, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

L. "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.

M. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher 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 the E-book Publisher, under an Agency Agreement, through any other E-book Retailer Sells the same E-book(s) to consumers.

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

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher 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 the E-book 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.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if a Settling Defendant agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires the Settling Defendant to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

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 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. “Settling Defendants” means Hachette, HarperCollins, and Simon & Schuster. Where the Final Judgment imposes an obligation on Settling Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Settling Defendant individually and to any joint venture other business arrangement established by a Settling Defendant and one or more Publisher Defendants.

S. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T. “Wholesale Price” means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

### III. APPLICABILITY

This Final Judgment applies to Settling Defendants and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.



#### IV. REQUIRED CONDUCT

A. Within seven days after entry of this Final Judgment, each Settling Defendant shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to the filing of the Complaint.

B. For each agreement between a Settling Defendant and an E-book Retailer other than Apple that (1) 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 (2) contains a Price MFN, the Settling Defendant shall notify the E-book Retailer, within ten days of the filing of the Complaint, 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 within thirty days after entry of this 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.

C. Settling Defendants shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which a Settling Defendant and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing

the joint venture or other business arrangement. Within thirty days after a Settling Defendant provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, the Settling Defendant shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between a Publisher Defendant and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) a Settling Defendant licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) a Settling Defendant providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) a Settling Defendant distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Each Settling Defendant shall furnish to the Department of Justice (1) within seven days after entry of this Final Judgment, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between the Settling Defendant 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 the Settling Defendant's previous submission of agreements to the Department of Justice.

**V. PROHIBITED CONDUCT**

A. For two years, Settling Defendants 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-year period to run separately for each E-book Retailer, at the option of the Settling Defendant, from either:

1. the termination of an agreement between the Settling Defendant 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 price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or

2. the date on which the Settling Defendant notifies the E-book Retailer in writing that the Settling Defendant 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.

Each Settling Defendant shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.

B. For two years after the filing of the Complaint, Settling Defendants 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.

C. Settling Defendants shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Settling Defendants shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Settling Defendants are prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit any Settling Defendant 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 the Settling Defendant's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of the Settling Defendant's E-books.

E. Settling Defendants shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or

Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit a Settling Defendant from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. A Settling Defendant (including each officer of each parent of the Settling Defendant who exercises direct control over the Settling Defendant's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;
2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);
3. any terms in its agreement(s) with any retailer of books Sold in any format; or
4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit a Settling Defendant from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information the Settling Defendant needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

#### VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit a Settling Defendant unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, a Settling Defendant may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to purchase one or more of the Settling Defendant's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Settling Defendant's 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 the Settling Defendant's E-books by an aggregate amount equal to the total commissions the Settling Defendant pays to the E-book Retailer, over a period of at least one year, in connection with the

Sale of the Settling Defendant's E-books to consumers; (2) the Settling Defendant 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 (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.

#### VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, each Settling Defendant shall designate its general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring the Settling Defendant's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of the Settling Defendant's officers and directors, and to each of the Settling Defendant's employees engaged, in whole or in part, in the distribution or Sale of E-books;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to the Settling Defendant's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify the Settling Defendant's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Settling Defendants' noncompliance with any provisions of this Final Judgment;



I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of the Settling Defendant's officers, directors, or employees involved in the development of the Settling Defendant's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, the Settling Defendant may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of the Settling Defendant's compliance with Sections IV, V, and VII of this Final Judgment.

#### VIII. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon

written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Settling Defendants, be permitted:

1. access during the Settling Defendants' office hours to inspect and copy, or at the option of the United States, to require Settling Defendants to provide to the United States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Settling Defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, the Settling Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Settling Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Settling Defendants shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Settling Defendants to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Settling Defendant to the United States, the Settling Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Settling Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give the Settling Defendant ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

#### **IX. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

#### **X. NO LIMITATION ON GOVERNMENT RIGHTS**

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of the Settling Defendants.

#### **XI. EXPIRATION OF FINAL JUDGMENT**

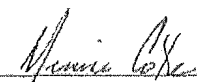
Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

## XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: September 11, 2012

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

  
\_\_\_\_\_  
Hon. Denise L. Cote  
United States District Judge

# EXHIBIT "D"

This is **Exhibit "D"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_  
UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
APPLE, INC., *et al.*,  
  
Defendants.  
\_\_\_\_\_

Civil Action No. 12-CV-2826 (DLC)

USDC SDNY

ECF Case

DOCUMENT

ELECTRONICALLY

8/12/2013

~~PROPOSED~~ FINAL JUDGMENT AS TO DEFENDANTS  
VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH &  
HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Macmillan, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by Macmillan that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, Macmillan agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Macmillan to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Macmillan has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Macmillan, it is ORDERED, ADJUDGED, AND DECREED:

**I. JURISDICTION**

This Court has jurisdiction over the subject matter of this action and over Macmillan. The Complaint states a claim upon which relief may be granted against Macmillan under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

**II. DEFINITIONS**

As used in this Final Judgment:

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. "Apple" means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Department of Justice" means the Antitrust Division of the United States Department of Justice.



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 this Final Judgment, 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; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

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 within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. “E-book Retailer” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, Sells E-books to consumers. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. “Including” means including, but not limited to.

J. “Macmillan” means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York (“Holtzbrinck”), its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany (“VGvH”), its successors and assigns, and its divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees. Where the Final Judgment imposes an obligation on Macmillan to engage in or refrain from engaging in certain conduct, that obligation shall apply to Macmillan and to any joint venture or other business arrangement established by Macmillan and one or more Publisher Defendants.

K. “Penguin” means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin

Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups, and partnerships; and each of their respective directors, officers, managers, agents, and employees.

L. "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.

M. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher 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 the E-book Publisher, under an Agency Agreement, through any other E-book Retailer Sells the same E-book(s) to consumers;

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

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher 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 the E-book 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.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if Macmillan agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires Macmillan to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

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 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. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

S. “Wholesale Price” means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

### III. APPLICABILITY

This Final Judgment applies to Holtzbrinck and VGvH, acting individually or in concert, and all other Persons in active concert or participation with Holtzbrinck or VGvH who receive actual notice of this Final Judgment by personal service or otherwise.

### IV. REQUIRED CONDUCT

A. Within three business days after Macmillan’s stipulation to the entry of this Final Judgment, Macmillan shall notify each E-book Retailer with which Holtzbrinck has an agreement relating to the Sale of E-books that Holtzbrinck will no longer enforce any term or terms in any

such agreement that restrict, limit, or impede 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, except to the extent consistent with Section VI.B of this Final Judgment.

B. For each agreement between Holtzbrinck and an E-book Retailer that contains a Price MFN, Holtzbrinck shall notify the E-book Retailer within three business days after Macmillan's stipulation to the entry of this Final Judgment 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 within ten days after entry of this Final Judgment, 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 notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which Holtzbrinck and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after Holtzbrinck provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request,

Holtzbrinck shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between Holtzbrinck and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) Holtzbrinck licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) Holtzbrinck providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) Holtzbrinck distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Macmillan shall furnish to the Department of Justice (1) by February 15, 2013, 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 Macmillan's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. Until December 18, 2014, 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 offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

B. Until December 18, 2014, 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 from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Holtzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Macmillan shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that Holtzbrinck is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit Holtzbrinck 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 offering price discounts or any other form of promotions to encourage consumers to Purchase any of Holtzbrinck's E-books.



E. Holtzbrinck shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit Holtzbrinck from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. Holtzbrinck (and each officer of VGvH who exercises direct control over Holtzbrinck's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;
  2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (e.g., print books, E-books, or audio books);
  3. any terms in its agreement(s) with any retailer of books Sold in any format;
- or
4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit Holtzbrinck from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information Holtzbrinck needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

#### VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit Macmillan unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, Holtzbrinck may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions 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* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Holtzbrinck's E-books by an aggregate amount equal to the total commissions Holtzbrinck pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Holtzbrinck's E-books to consumers; (2) Holtzbrinck 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 (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.

#### VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, Macmillan shall designate Holtzbrinck's general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring Macmillan's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of Holtzbrinck's officers and directors, to each of Holtzbrinck's employees engaged, in whole or in part, in the distribution or Sale of E-books, and to each of VGvH's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Holtzbrinck's employees and to all VGvH employees identified in Sections VII.A and VII.B of this Final Judgment that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify Macmillan's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Macmillan's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of Macmillan's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, Macmillan may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Macmillan's compliance with Sections IV, V, and VII of this Final Judgment.

#### **VIII. COMPLIANCE INSPECTION**

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Macmillan, be permitted:

1. access during Macmillan's office hours to inspect and copy, or at the option of the United States, to require Macmillan to provide to the United States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Macmillan, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Macmillan's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Macmillan.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Macmillan shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Macmillan to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Macmillan to the United States, Macmillan represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal

Rules of Civil Procedure, and Macmillan marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Macmillan ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

**IX. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**X. NO LIMITATION ON GOVERNMENT RIGHTS**

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of Macmillan.

**XI. EXPIRATION OF FINAL JUDGMENT**

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

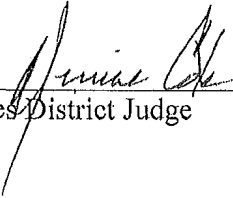
**XII. PUBLIC INTEREST DETERMINATION**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before

the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: August 12, 2013

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

  
\_\_\_\_\_  
United States District Judge



**United States District Court  
Southern District of New York  
Office of the Clerk  
U.S. Courthouse  
500 Pearl Street, New York, N.Y. 10007-1213**

**Date:**

**In Re:**

-v-

**Case #:**

( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

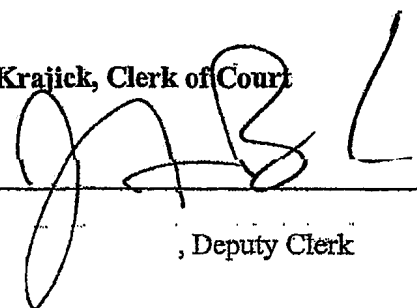
If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is \$5.00 and the appellate docketing fee is \$450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. No personal checks are accepted.

**Ruby J. Krajick, Clerk of Court**

by: \_\_\_\_\_



, Deputy Clerk

APPEAL FORMS

United States District Court  
Southern District of New York  
Office of the Clerk  
U.S. Courthouse  
500 Pearl Street, New York, N.Y. 10007-1213

-----X  
|  
-V-  
|  
-----X

NOTICE OF APPEAL

civ. ( )

Notice is hereby given that \_\_\_\_\_  
(party)  
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
(day) (month) (year)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State and Zip Code)

Date: \_\_\_\_\_

( ) \_\_\_\_\_  
(Telephone Number)

**Note:** You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court  
Southern District of New York  
Office of the Clerk  
U.S. Courthouse  
500 Pearl Street, New York, N.Y. 10007-1213

MOTION FOR EXTENSION OF TIME  
TO FILE A NOTICE OF APPEAL

-V-

civ. ( )

Pursuant to Fed. R. App. P. 4(a)(5), \_\_\_\_\_ respectfully  
requests leave to file the within notice of appeal out of time.

\_\_\_\_\_ (party)  
desires to appeal the judgment in this action entered on \_\_\_\_\_ (party)  
\_\_\_\_\_ (day) but failed to file a  
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State and Zip Code)

Date: \_\_\_\_\_

( ) \_\_\_\_\_  
(Telephone Number)

**Note:** You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

APPEAL FORMS

~~District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).~~

FORM 3

United States District Court  
Southern District of New York  
Office of the Clerk  
U.S. Courthouse  
500 Pearl Street, New York, N.Y. 10007-1213

-V-

AFFIRMATION OF SERVICE

civ. ( )

I, \_\_\_\_\_, declare under penalty of perjury that I have

served a copy of the attached \_\_\_\_\_

upon \_\_\_\_\_

whose address is: \_\_\_\_\_

Date: \_\_\_\_\_  
New York, New York

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State and Zip Code)

FORM 4

APPEAL FORMS

FORM 2

United States District Court  
Southern District of New York  
Office of the Clerk  
U.S. Courthouse  
500 Pearl Street, New York, N.Y. 10007-1213

-V-

X

X

NOTICE OF APPEAL  
AND  
MOTION FOR EXTENSION OF TIME

civ. ( )

1. Notice is hereby given that \_\_\_\_\_ hereby appeals to  
(party)  
the United States Court of Appeals for the Second Circuit from the judgment entered on \_\_\_\_\_.  
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time  
\_\_\_\_\_ respectfully requests the court to grant an extension of time in  
(party)  
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, \_\_\_\_\_ states that  
(party)  
this Court's judgment was received on \_\_\_\_\_ and that this form was mailed to the  
(date)  
court on \_\_\_\_\_  
(date)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State and Zip Code)

Date: \_\_\_\_\_

( )

\_\_\_\_\_  
(Telephone Number)

**Note:** You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

APPEAL FORMS

# EXHIBIT "E"

This is **Exhibit "E"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

---

**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.



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# Sony Withdrawing from eBook Reader Market Entirely in US

October 26, 2013 [25 Comments](#)

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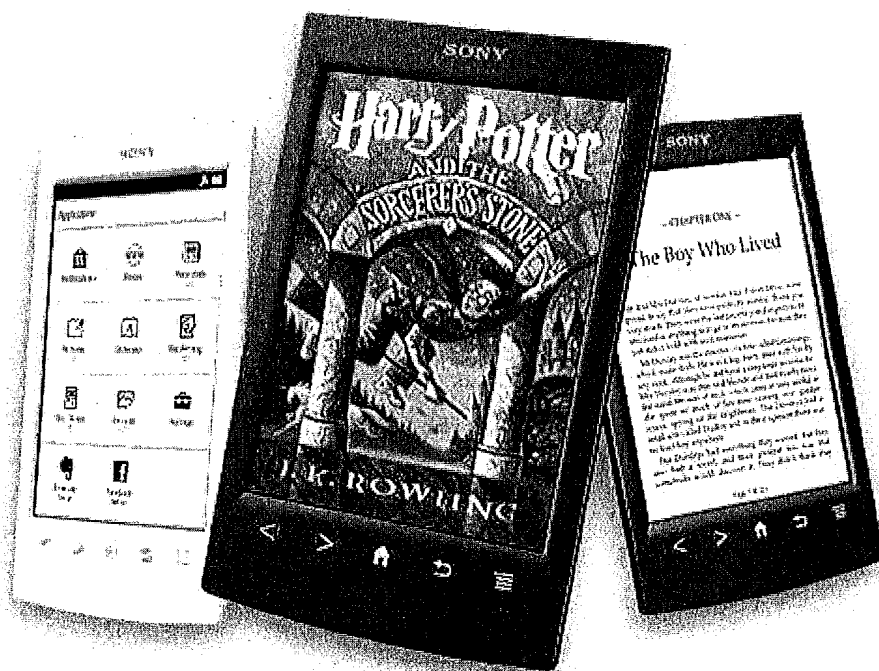


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Exactly one month ago to the day I posted an article after talking with a Sony rep that confirmed Sony had decided not to release their new PRS-T3 ebook reader in the United States, even though they had already released it in parts of Europe a few weeks prior.

At the time Sony was still selling the older PRS-T2 ebook reader from the US Sony [website](#). But now it's no longer available either, and things are looking bleaker than ever for the Sony Reader brand moving forward, at least in the US.

### Short Term Rental Toronto

[delsuites.com/30-Day-min](http://delsuites.com/30-Day-min)

Full kitchen, en-suite laundry & more space for less than a hotel!

The final deathblow came sometime this past week when Sony removed the ereader section from their website entirely. Sony appears to be updating their website design again and now all links to Sony Readers are missing from all the menus and sub-sections.

In fact the only way to find listings for Sony Readers is to run a search for them specifically, and even when you do that all the ereaders are labeled as discontinued.

Sony used to have ereaders categorized in with tablets. Now tablets and computers are grouped together. On the main computers and tablets page, they give some hope by showing a section for "Tablets & eReaders" but clicking on the link takes you to the tablet section only—the ereader section no longer exists; it has been removed, and old links redirect to the tablet section.

Deep down I was secretly hoping that Sony would surprise everyone and announce a frontlit Sony Reader for the US market in time for the holiday season. After all, it's clear that they did intend to release a new ebook reader in the US at some point this year because the PRS-T3 went through the FCC for approval.

But now with the ereader section removed entirely and all the previous Sony Readers listed as discontinued, it looks like Sony is leaving the US ebook reader market for good. I guess it's not surprising given the fact the Sony rep mentioned last month that they'd prefer to focus on smartphones and tablets given the recent market changes, but I thought maybe the PRS-T2 would stick around for awhile longer. Some may hold out hope for a new Sony Reader next year and a return to the US market, but not me. Companies don't pull the plug on something for 1 year just to bring it back the next year, especially a product with a narrow user base that has been in decline for 3 years. I think that this is the end of

the Sony Reader, at least in the US.

## New Laptop from Google

google.com/chromebook

Introducing Chromebook. 2.4 pounds light. 0.7 inches thin. For \$270.

AdChoices 

### Related Articles



Rumor: Amazon to Release Premium Kindle Paperwhite with 300ppi Screen and Updated Design

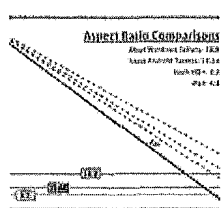
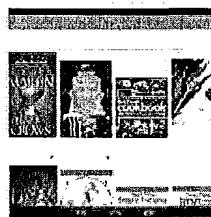


Illustration Comparing Tablet Aspect Ratios



Black Friday/Cyber Monday Deals for eReaders and Tablets 2013



Google Play Books for Android Can Now Upload Personal ePub and PDF eBooks - Supposedly

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## 25 Responses to "Sony Withdrawing from eBook Reader Market Entirely in US"

1. Daniel [Reply](#) [October 26, 2013 at 1:28 pm](#)

Sad but kind of expected.

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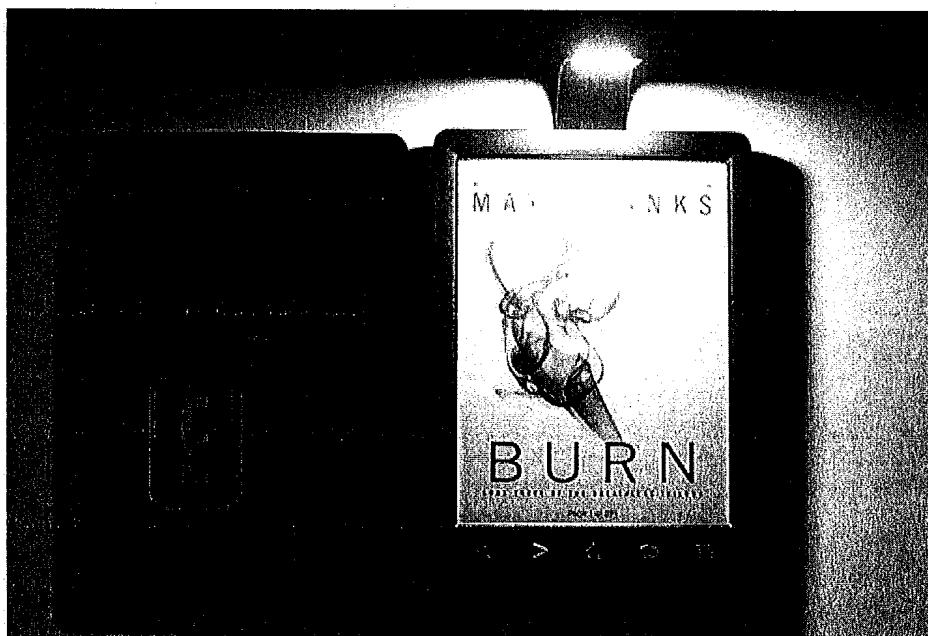
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An advertisement for Porter Airlines. It features a 'BIG SALE' sign, the text 'One-way sale fares from \$111\*', and 'Travel's a (snow) shoe-in with Porter!'. The Porter logo and 'flying retired' tagline are also visible.

Sep 26

## Sony Abandons the eReader Market in the United States

By [Michael Kozlowski](#)



Sony has confirmed that they don't have any intention of selling their new PRS-T3 e-Reader in the United States. The company simply cannot

compete against Amazon, Barnes and Noble, and Kobo with their online bookstore and price. The USA market is rife with constant price slashing in a bid to curry consumer favor. It is basically unprofitable to focus on the US, and Sony instead will focus their efforts on Canada, Europe, and Japan.

In a statement of confirmation, the Sony PR Department mentioned, "Sony will not be offering the Reader PRS-T3 in the United States. In response to the region's market changes, Sony will be focusing instead on mobile and tablet devices, including the Xperia Tablet Z and Xperia Z smartphone. Digital reading and eBooks remain an important priority for Sony. Reader Store will still help book lovers find and read their next story, anytime and anywhere, and customers can continue to expect new and exciting features and discovery tools. Reader Store will continue to support previous Readers as well as other compatible devices via the free Reader apps for PC, Mac, Android and iOS."

In recent years, Sony has divested themselves out of focusing on e-Readers. The last few models have largely been the same device, with marginal hardware and software enhancements. Consumers who live in the US can still buy the Sony PRS-T3 exclusively from [Shop e-Readers](#).

14

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**Michael Kozlowski (3399 Posts)**

Michael Kozlowski is the Editor in Chief of Good e-Reader. He has been writing about electronic readers and technology for the last four years. His articles have been picked up by major and local news sources and websites such as the Huffington Post, CNET and more. Michael frequently travels to international events such as IFA, Computex, CES, Book Expo and a myriad of others. If you have any questions about any of his articles, please send Michael Kozlowski an email to [michael@goodereader.com](mailto:michael@goodereader.com)



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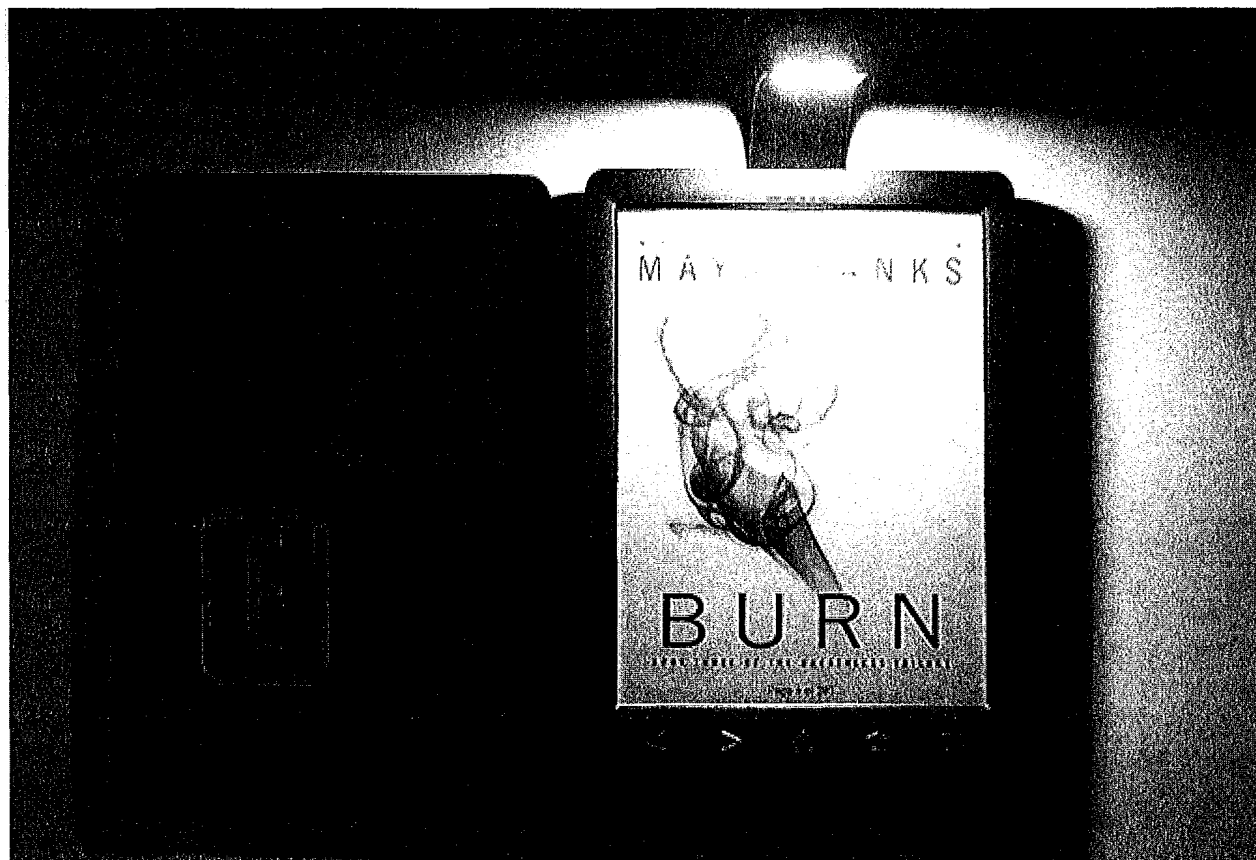
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# Sony Abandons the eReader Market in the United States

Posted by [Shanicwa Kinsey](#) on Oct 3, 2013 in [USA Markets](#) | [0 comments](#)





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In recent years, Sony has divested themselves out of focusing on e-Readers. The last few models have largely been the same device, with marginal hardware and software enhancements. Consumers who live in the US can still buy the Sony PRS-T3 exclusively from Shop e-Readers.

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**First Quarter Figures Show Tourism Growth**

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Posted by [Shanicwa Kinsey](#) on 7-19-12

**0**



February 6, 2014 11:00 AM - Financial - New Products & Services - Books  
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## ORGANIZATION PROFILE

Sony Electronics

[More on this organization](#)

# Sony Selects Kobo to Bring its World Class eBookstore to Sony Readers in the US and Canada

Kobo to power book lovers to keep reading on Sony's Readers, tablets and smartphones

SAN DIEGO, Feb. 6, 2014 /CNW/ - Sony Electronics, together with Kobo, a global leader in eReading, today announced that Kobo will provide Sony's Reader™ and Sony's Xperia® tablet and smartphone users in the United States and Canada with Kobo's world-class catalogue of more than 4 million eBooks, magazines and newspapers, graphic novels, and kids content. Sony's Reader Store customers and their current eBook libraries will transfer to the Kobo ecosystem starting in late March. Reader Store customers will be able to take advantage of Kobo's new dedicated Kids Store and magazine experience, and have full access to purchase the most popular bestsellers.

(Logo: <http://photos.prnewswire.com/prnh/20140206/LA60150.LOGO>)

"Kobo is the ideal solution for our customers and will deliver a robust and comprehensive user experience. Like Sony, they are committed to those most passionate about reading and share our vision to use open formats so people can easily read anytime and anywhere," said Ken Orii, Vice President of Digital Reading Business Division, Sony Electronics. "Our customers can be assured that they will have a seamless transition to the Kobo ecosystem and will be able to continue to access and read the titles they love from Sony devices."

"With a shared philosophy to deliver the best reading experience across platforms and with the best content available, Kobo and Sony will reach more people than ever before," said Takahito Aiki, CEO, Kobo. "Together, millions of customers across the US and Canada will find their next great read at their fingertips – any time, any place, and on any device."

The free, top-ranking Kobo App for Android will be pre-loaded on select Sony Xperia smartphones and tablets. Timing and availability may vary by market and carrier. Sony's WiFi Reader will also harness the wide variety of content available via the Kobo eBookstore. Sony's current Reader Store customers in the US and Canada will have access to the Kobo eBookstore starting in late March via a simple and easy migration process, and Sony's Reader Store will close in late March. Reader Store customers will receive an email from Sony with instructions on how to easily transfer their library to a Kobo account. Until that time, Sony's customers can continue to purchase eBooks from Sony's Reader Store.

Kobo serves 18 million readers around the world and works with 1.3 million authors to deliver one of the world's best catalogues of more than 4 million eBooks, magazines, and newspapers. From bestselling authors like Dan Brown, Margaret Atwood, Jodi Picoult, Khaled Hosseini, John Grisham, Nora Roberts, and Gillian Flynn, to popular magazines like Vanity Fair, People, Macleans, Food & Wine, and Today's Parent, Kobo has something for everyone.

For more information, please visit:

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### About Kobo Inc.

Kobo Inc. is one of the world's fastest-growing eReading services offering more than 4 million eBooks, magazines and newspapers to millions of customers in 190 countries. Believing that consumers should have the freedom to read any book on any device, Kobo provides consumers with a choice when reading. Kobo offers an eReader for everyone with a wide variety of E Ink eReaders and Google-Certified Android tablets to suit any Reader's style including the award-winning Kobo Touch™, Kobo Mini, Kobo Glo, Kobo Aura, Kobo Aura HD, Kobo Arc, Kobo Arc 7, Kobo Arc 7HD, and Kobo Arc 10HD. Along with the company's free top-ranking eReading apps for Apple®, BlackBerry®, Android®, and Windows®, Kobo ensures the next great read is just a page-turn away. Headquartered in Toronto and owned by Tokyo-based Rakuten, Kobo produces eReaders and tablets that can be found in major retail chains around the world. For more information, visit [www.kobo.com](http://www.kobo.com).

## About Sony Electronics

Headquartered in San Diego, Sony Electronics is a leading provider of audio/video electronics and information technology products for the consumer and professional markets. Operations include research and development, design, engineering, sales, marketing, distribution and customer service. Sony is noted for a wide range of consumer audio-visual products, such as the BRAVIA® LCD and 3D high-definition televisions, Cyber-shot® digital camera, Alpha Digital SLR camera, Handycam® camcorder and Walkman® personal stereo. Sony is also an innovator in the IT arena with its VAIO® personal computers Reader devices and Sony Tablets; and in high-definition professional broadcast equipment, highlighted by the XDCAM® HD and CineAlta™ lines of cameras and camcorders, and the SXRD™ 4K digital projector. For more information, visit [www.sony.com/news](http://www.sony.com/news) or join the Sony Community: [www.sony.com/blog](http://www.sony.com/blog); [www.facebook.com/Sony](https://www.facebook.com/Sony); [www.twitter.com/SonyElectronics](https://www.twitter.com/SonyElectronics); [www.youtube.com/SonyElectronics](https://www.youtube.com/SonyElectronics); and [www.pinterest.com/SonyElectronics](https://www.pinterest.com/SonyElectronics).

## SOURCE Sony Electronics

For further information:  
Maya Wasserman, Corporate Communications, Sony Electronics, 858-942-2681, [Maya.wasserman@am.sony.com](mailto:Maya.wasserman@am.sony.com),  
or Rene d'Entremont, PR Manager, Kobo, 416-977-8737 x 3587, [rdentremont@kobo.com](mailto:rdentremont@kobo.com)

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# EXHIBIT "F"

This is **Exhibit "F"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

---

**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.



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**06/25/2013**

### **Barnes & Noble Reports Fiscal 2013 Year-End Financial Results Fiscal 2013 Retail EBITDA Increases 16.0% to \$374 Million**

#### **College Generates Fiscal 2013 EBITDA of \$111 Million**

#### **NOOK® will Continue to Innovate and Build eReader Devices as It Transitions to a New Partnership Model on Color Tablets**

#### **Additional Inventory Charges Drive Higher NOOK Losses for the Year**

**New York, NY (June 25, 2013)—Barnes & Noble, Inc. (NYSE: BKS)** today reported sales and earnings for its fiscal 2013 fourth quarter and full year ended April 27, 2013.

Fourth quarter consolidated revenues decreased 7.4% to \$1.3 billion as compared to the prior year. The consolidated fourth quarter earnings before interest, taxes, depreciation and amortization (EBITDA) loss was \$122.0 million, as compared to a loss of \$9.7 million in the prior year. The consolidated fourth quarter net loss was \$118.6 million, as compared to the prior year net loss of \$56.9 million. Fourth quarter net losses were \$2.11 per share as compared to a net loss of \$1.06 per share a year ago.

For fiscal 2013, consolidated revenues decreased 4.1% to \$6.8 billion as compared to the prior year. Fiscal 2013 consolidated EBITDA was \$10.3 million, as compared to \$176.7 million a year ago. Fiscal 2013 consolidated net losses were \$154.8 million, or \$2.97 per share, as compared to \$65.6 million, or \$1.35 per share in the prior year.

Fourth quarter and full-year results were adversely impacted by NOOK inventory charges as discussed in the NOOK section below.

The company ended the fiscal year with cash of \$160.5 million and borrowings of \$77 million under its \$1 billion revolving credit facility, as compared to a net debt position of \$270 million a year ago.

The company is currently in the process of evaluating certain prior year amounts, which may result in a revision to the financial statements. The company's analysis is ongoing, but it does not believe these amounts will be material to the financial statements. Accordingly, the financial information presented in this press release is unaudited and remains subject to change based on this process.

#### **Fourth Quarter 2013 Results from Operations**

Segment results for the fiscal 2013 and fiscal 2012 fourth quarters are as follows:

\$ in millions	Revenues				EBITDA			
			Increase (Decrease)				Increase (Decrease)	
	Q4 2013	Q4 2012	\$	%	Q4 2013	Q4 2012	\$	%
Retail	\$ 948	\$ 1,047	(10%)	-10.0%	\$ 51	\$ 67	(16)	-23.9%
College	282	278	4	10.0%	4	0	4	10.0%
NOOK	108	164	(46)	-34.0%	(177)	(177)	(10)	-120.8%
Elimination**	(35)	(64)	31	-52.0%	0	0	0	0%
<b>Total</b>	<b>\$ 1,293</b>	<b>\$ 1,383</b>	<b>(90)</b>	<b>-6.4%</b>	<b>\$ (122)</b>	<b>\$ (100)</b>	<b>(22)</b>	<b>22.0%</b>

(1) Represents the elimination of intercompany sales from NOOK to Barnes & Noble Retail and Barnes & Noble College on a roll through basis.

**Fiscal 2013 Results from Operations**

Segment results for fiscal year 2013 and fiscal year 2012 are as follows:

\$ in millions	Revenues				EBITDA			
			Increase (Decrease)				Increase (Decrease)	
	Fiscal 2013	Fiscal 2012	\$	%	Fiscal 2013	Fiscal 2012	\$	%
Retail	\$ 4,268	\$ 4,853	(585)	-12.1%	\$ 374	\$ 322	52	16.0%
College	1,763	1,744	19	1.1%	111	116	(5)	-3.9%
NOOK	776	933	(157)	-16.8%	(475)	(262)	(213)	-81.7%
Elimination**	(269)	(401)	132	-33.0%	0	0	0	0%
<b>Total</b>	<b>\$ 6,538</b>	<b>\$ 7,130</b>	<b>(592)</b>	<b>-8.3%</b>	<b>\$ (100)</b>	<b>\$ (137)</b>	<b>(37)</b>	<b>-27.0%</b>

(1) Represents the elimination of intercompany sales from NOOK to Barnes & Noble Retail and Barnes & Noble College on a roll through basis.

**Retail**

The Retail segment, which consists of the Barnes & Noble bookstores and BN.com businesses, had revenues of \$948 million for the quarter and \$4.6 billion for the full year, decreasing 10.0% for the quarter and 5.9% for the fiscal year. The sales decreases were attributable to comparable store sales decreases of 8.8% for the quarter and 3.4% for the full year, store closures and lower online sales. Fourth quarter comparable bookstore sales decreased as a result of lower NOOK unit volume and a stronger title lineup in the prior year period including *The Hunger Games* and *Fifty Shades of Grey* trilogies. Core comparable bookstore sales, which exclude sales of NOOK products, decreased 5.8% for the quarter and were essentially flat for the full year.

As a result of the sales decline, fourth quarter Retail EBITDA decreased 23.9%, from \$67 million a year ago to \$51 million. However, for fiscal 2013, Retail EBITDA increased 16.0% to \$374 million, as the sales decline was mitigated by a higher sales mix of higher margin core products and lower expenses.

**College**

The College segment had revenues of \$282 million for the quarter and \$1.8 billion for the full year, increasing 10.7% for the quarter and 1.1% for the year, as compared to the prior year periods. Fourth quarter sales were positively impacted by the back-to-school rush season, which extended into the fourth quarter. Comparable College store sales increased 7.5% for the quarter, while decreasing 1.2% for the full year. Comparable College store sales reflect the retail selling price of a new or used textbook when rented, rather than solely the rental fee received and amortized over the rental period.

Fourth quarter College EBITDA improved to \$3.8 million, benefitting from higher revenues. Full year EBITDA declined 3.9% to \$111.5 million, primarily resulting from increased investments in digital education. College's full-year product margins improved on a higher mix of higher margin textbook rentals, while expenses increased due to new store growth and continued investments in digital education.

**NOOK**

The NOOK segment, which consists of the company's digital business (including devices, digital content and accessories), had revenues of \$108 million for the quarter and \$776 million for the full year, decreasing 34.0% for the quarter and 16.8% for the year, as compared to the year ago periods. Device sales declined during the fourth quarter due to lower selling volume. Digital content sales increased 16.2% for the full year, however, they decreased 8.9% for the fourth quarter due in part to the device sales shortfall as well as the comparison to the *The Hunger Games* and *Fifty Shades of Grey* trilogies a year ago.

The company plans to significantly reduce losses in the NOOK segment by limiting risks associated with manufacturing. Going forward, the company intends to continue to design eReading devices and reading platforms, while creating a partnership model for manufacturing in the competitive color tablet market. Thus, the widely popular lines of Simple Touch™ and Glowlight™ products will continue to be developed in house, and the company's tablet line will be co-branded with yet to be announced third party manufacturers of consumer electronics products. At the same time, the company intends to continue to build its digital catalog, adding thousands of eBooks every week, and launching new NOOK Apps™.

The company will continue to offer its existing inventory of its high quality NOOK® HD and NOOK® HD+ devices at amazing prices through the holiday. As always, Barnes & Noble will provide world-class pre- and post-sales support in its stores for its NOOK HD and NOOK HD+ customers, as well as ongoing software upgrades and improvements to the digital bookstore service.

"Our Retail and College businesses delivered strong financial performances in fiscal year 2013," said William Lynch, Chief Executive Officer of Barnes & Noble. "We are taking big steps to reduce the losses in the NOOK segment, as we move to a partner-centric model in tablets and reduce overhead costs. We plan to continue to innovate in the single purpose black-and-white eReader category, and the underpinning of our strategy remains the same today as it has since we first entered the digital market, which is to offer customers any digital book, magazine or newspaper, on any device."

During the fourth quarter, the company determined that goodwill impairment indicators arose in its NOOK reporting unit as recurring losses have led to revisions in its strategic plans. As a result, the company recorded a non-cash goodwill impairment charge of \$18.3 million in selling and administrative expenses. Excluding the impairment charge, NOOK expenses decreased \$26 million as compared to a year ago, a 34% decrease in expenses as compared to fiscal year 2012.

NOOK EBITDA losses were \$177 million for the fourth quarter, which include an additional \$133 million of inventory charges as the company adopted more aggressive promotional strategies given the shift in strategic direction. NOOK EBITDA losses were \$475 million for the full year, primarily driven by cumulative NOOK inventory related charges of \$222 million.

#### **Guidance**

For fiscal year 2014, the company expects Retail comparable bookstore sales to decline in the high-single digits on a percentage basis. College comparable store sales are expected to decline in the low-single digits on a percentage basis.

#### **Conference Call**

A conference call with Barnes & Noble, Inc.'s senior management will be webcast beginning at 10:00 A.M. ET on Tuesday, June 25, 2013, and is accessible at [www.barnesandnobleinc.com/webcasts](http://www.barnesandnobleinc.com/webcasts).

#### **Financial Tables**

Download financial tables related to the sales and earnings for the fiscal 2013 fourth quarter and full year ended April 27, 2013:

- [Consolidated Statements of Operations](#)
- [Consolidated Balance Sheets](#)
- [Segment Information](#)
- [Loss Per Share](#)

Barnes & Noble, Inc. will report fiscal 2014 first quarter results on or about August 20, 2013.

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#### **About Barnes & Noble, Inc.**

*Barnes & Noble, Inc. (NYSE:BKS) is a Fortune 500 company and the leading retailer of content, digital media and educational products. The company operates 675 Barnes & Noble bookstores in 50 states, and one of the Web's largest e-commerce sites, BN.com ([www.bn.com](http://www.bn.com)). Its NOOK Media LLC subsidiary is a leader in the emerging digital reading and digital education markets. The NOOK digital business offers award-winning NOOK® products and an expansive collection of digital reading and entertainment content through the NOOK Store™ ([www.nook.com](http://www.nook.com)), while Barnes & Noble College Booksellers, LLC operates 686 bookstores serving over 4.6 million students and faculty members at colleges and*

universities across the United States. Barnes & Noble is proud to be named a J.D. Power and Associated 2012 Customer Service Champion and is only one of 50 U.S. companies so named. Barnes & Noble.com is ranked the number one online retailer in customer satisfaction in the book, music and video category and a Top 10 online retailer overall in customer satisfaction according to ForeSee E-Retail Satisfaction Index (Spring Top 100 Edition).

General information on Barnes & Noble, Inc. can be obtained via the Internet by visiting the company's corporate website: [www.barnesandnobleinc.com](http://www.barnesandnobleinc.com).

#### **Forward-Looking Statements**

This press release contains certain forward-looking statements (within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended) and information relating to Barnes & Noble that are based on the beliefs of the management of Barnes & Noble as well as assumptions made by and information currently available to the management of Barnes & Noble. When used in this communication, the words "anticipate," "believe," "estimate," "expect," "intend," "plan," "will," "forecasts," "projections," and similar expressions, as they relate to Barnes & Noble or the management of Barnes & Noble, identify forward-looking statements.


Such statements reflect the current views of Barnes & Noble with respect to future events, the outcome of which is subject to certain risks, including, among others, the general economic environment and consumer spending patterns, decreased consumer demand for Barnes & Noble's products, low growth or declining sales and net income due to various factors, risk that international expansion will not be successfully achieved or may be achieved later than expected, possible disruptions in Barnes & Noble's computer systems, telephone systems or supply chain, possible risks associated with data privacy, information security and intellectual property, possible work stoppages or increases in labor costs, possible increases in shipping rates or interruptions in shipping service, effects of competition, possible risks that inventory in channels of distribution may be larger than able to be sold, possible risks associated with ceasing NOOK's production of tablet devices, including possible reduction in sales of content, accessories and other merchandise and other adverse financial impacts, possible risk that component parts will be rendered obsolete or otherwise not be able to be effectively utilized in devices to be sold, possible risk that financial and operational forecasts and projections are not achieved, possible risk that returns from consumers or channels of distribution may be greater than estimated, the risk that the expected sales lift from Borders' store closures is not achieved in whole or part, the risk that digital sales growth is less than expectations and the risk that it does not exceed the rate of investment spend, higher-than-anticipated store closing or relocation costs, higher interest rates, the performance of Barnes & Noble's online, digital and other initiatives, the performance and successful integration of acquired businesses, the success of Barnes & Noble's strategic investments, unanticipated increases in merchandise, component or occupancy costs, unanticipated adverse litigation results or effects, product and component shortages, the potential adverse impact on the business resulting from the review of a potential separation of the NOOK digital business, the risk that the transactions with Microsoft and Pearson do not achieve the expected benefits for the parties including the risk that NOOK Media's applications are not commercially successful or that the expected distribution of those applications is not achieved, the risk that any subsequent spin-off, split-off or other disposition by Barnes & Noble of its interest in NOOK Media or other separation of Barnes & Noble's businesses results in adverse impacts on Barnes & Noble or NOOK Media (including as a result of termination of agreements and other adverse impacts), the potential impact on Barnes & Noble's retail business of any separation, the potential tax consequences for Barnes & Noble and its shareholders of a subsequent spin-off, split-off or other disposition by Barnes & Noble of its interest in NOOK Media or other separation of Barnes & Noble's businesses, the risk that the international expansion contemplated by the relationship with Microsoft or otherwise is not successful or is delayed, the risk that NOOK Media is not able to perform its obligations under the Microsoft commercial agreement, including with respect to the development of applications and international expansion, and the consequences thereof, the costs and disruptions arising out of any such separation of the NOOK digital and College businesses or other separation of Barnes & Noble's businesses, the risk that Barnes & Noble may not recoup its investments in the NOOK digital business as part of any separation transaction, the risks, difficulties, and uncertainties that may result from the separation of businesses that were previously co-mingled including necessary ongoing relationships, and potential for adverse customer impacts, the risk that Barnes & Noble's ongoing evaluation of prior year amounts may result in revisions to its financial statements and changes to the financial information presented in this press release, the risk that such process results in a delay in the filing of Barnes & Noble's Annual Report on Form 10-K and associated risks and other factors which

*may be outside of Barnes & Noble's control, including those factors discussed in detail in Item 1A, "Risk Factors," in Barnes & Noble's Annual Report on Form 10-K, and in Barnes & Noble's other filings made hereafter from time to time with the SEC. Our forward looking statements relating to international expansion are also subject to the following risks, among others that may affect the introduction, success and timing of the NOOK e-reader and content in countries outside the United States: we may not be successful in reaching agreements with international companies, the terms of agreements that we reach may not be advantageous to us, our NOOK device may require technological changes to comply with applicable laws, and marketplace acceptance and other companies have already entered the marketplace with products that have achieved some customer acceptance.*

*Should one or more of these risks or uncertainties materialize, or should underlying assumptions prove incorrect, actual results or outcomes may vary materially from those described as anticipated, believed, estimated, expected, intended or planned. Subsequent written and oral forward-looking statements attributable to Barnes & Noble or persons acting on its behalf are expressly qualified in their entirety by the cautionary statements in this paragraph. Barnes & Noble undertakes no obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise after the date of this communication.*

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**08/20/2013****Barnes & Noble Reports Fiscal 2014 First Quarter Financial Results  
Confirms Commitment to NOOK® Device and Content Business****New NOOK Products Planned****Company Financial Position Remains Solid**

**Company Receives Withdrawal Notice from Chairman Regarding Schedule 13D filing New York, NY (August 20, 2013)—Barnes & Noble, Inc. (NYSE: BKS)** today reported sales and earnings for its fiscal 2014 first quarter ended July 27, 2013.

First quarter consolidated revenues decreased 8.5%, to \$1.3 billion, compared to the prior year. The first quarter consolidated earnings before interest, taxes, depreciation and amortization (EBITDA) loss was \$8.9 million, compared to positive EBITDA of \$5.8 million a year ago.

**First Quarter 2014 Results from Operations**

Segment results for the fiscal 2014 and fiscal 2013 first quarters are as follows:

\$ in millions	Revenues (unaudited)				EBITDA (unaudited)			
	Q1 2014	Q1 2013	\$	%	Q1 2014	Q1 2013	\$	%
Retail	\$1,008	\$1,119	(\$111)	-9.9%	\$65	\$76	(\$12)	-15.8%
College	236	231	\$	2.4%	(19)	(14)	(\$)	-36.1%
NOOK	153	192	(\$39)	-20.2%	(55)	(57)	2	3.7%
Elimination <sup>(1)</sup>	(\$5)	(39)	24	-26.1%	0	0	0	0%
<b>Total</b>	<b>\$1,392</b>	<b>\$1,454</b>	<b>(\$62)</b>	<b>-8.5%</b>	<b>(\$9)</b>	<b>\$6</b>	<b>(\$15)</b>	<b>(171)</b>

(1) Represents the elimination of inter-company sales from NOOK to Barnes & Noble Retail and Barnes & Noble College on a sell through basis.

**Retail**

The Retail segment, which consists of the Barnes & Noble bookstores and BN.com businesses, had revenues of \$1.0 billion for the quarter, a decrease of 9.9% from the prior year. The sales decrease was attributable to a comparable store sales decrease of 9.1% for the quarter, store closures and lower online sales, in line with company expectations. First quarter comparable bookstore sales decreased, reflecting lower NOOK device unit volume and a title lineup last year that included unusually strong sales from The Hunger Games and Fifty Shades of Grey trilogies. "Core" comparable bookstore sales, which exclude sales of NOOK products, decreased 7.2% for the quarter. Excluding the impact of the two mentioned trilogies, Core comparable bookstore sales decreased 2.9%.

Retail generated EBITDA of \$65 million in the quarter, a decline of \$12 million compared to a



year ago, as a result of the sales decline noted above.

#### **College**

The College segment had revenues of \$226 million during a period that did not include a back-to-school rush season, increasing 2.4% compared to a year ago, as a result of new store growth. Comparable College store sales decreased 1.2% for the quarter, reflecting the retail selling price of new or used textbooks when rented, rather than solely the rental fees received and amortized over the rental period.

College EBITDA losses were \$19 million, compared to losses of \$14 million last year. The difference reflected new store expenses and investments in digital education, primarily additional product development costs in accordance with the company's plans to introduce additional digital products to the higher education market under its partnership with Pearson.

#### **NOOK**

The NOOK segment, which consists of the company's digital business (including devices, digital content and accessories), reported revenues of \$153 million for the quarter, a decrease of 20.2% from a year ago. Device and accessories sales were \$84 million for the quarter, a decrease of 23.1% from a year ago, due to lower unit selling volume. Digital content sales were \$69 million for the quarter, a decline of 15.8% compared to a year ago, due in part to lower device unit sales as well as the comparison to *The Hunger Games* and *Fifty Shades of Grey* trilogies. Excluding the impact of these two titles, digital content sales decreased 6.9%.

Despite the sales decline, NOOK EBITDA losses of \$55 million were comparable to the prior year, as lower gross margins were offset by expense reductions.

#### **Consolidated Results**

The consolidated first quarter net loss was \$87.0 million, or \$1.56 per share, compared to a loss of \$39.8 million, or \$0.76 per share, in the prior year.

The wider loss was driven by the EBITDA decline, as well as higher income tax expense. Under applicable accounting guidance, given the significance of cumulative losses in recent years, the company recorded a non-cash valuation allowance against certain deferred tax assets. The impact of this item on first quarter results was \$41 million, or \$0.70 per share. Excluding this tax item, first quarter losses would have been \$0.86 per share.

#### **Guidance**

The company reaffirms its previously issued full-year guidance, in which it expects Retail comparable store sales to decline in the high single digits and College comparable store sales to decline in the low single digits. The company also expects full-year Core Retail comparable bookstore sales to decline in the low- to mid-single digits.

#### **Balance Sheet**

The company ended the first quarter with a net cash position of \$73 million, reducing bank borrowings by \$295 million compared to a year ago. In fiscal 2013, despite the NOOK segment losses, the company improved the strength of its balance sheet as a result of the cash flow generated by the Retail and College businesses, as well as funds received from strategic investments in NOOK Media.

#### **Board Chairman Files Schedule 13D Amendment**

The company said its Chairman, Leonard Riggio, has advised the Board of Directors that he has suspended his efforts to make an offer for the company's Retail business. Mr. Riggio expressed a plan to make such an offer when he amended his Schedule 13D on file with the Securities and Exchange Commission in February.

In an amended SEC filing today, Mr. Riggio said, "While I reserve the right to pursue an offer in the future, I believe it is in the company's best interests to focus on the business at hand. Right now our priority should be to serve the more than 10 million customers who own NOOK devices, to concentrate on building our Retail business, and to accelerate the sale of NOOK products in our stores, and in the marketplace."

#### **Company Update**

"Our top priority in our operating strategy is to increase all categories of our content revenue. We are working on innovative ways to sell content to our existing customers and are exploring new markets we can serve successfully," said Michael P. Huseby, President of Barnes & Noble, Inc. and Chief Executive Officer of NOOK Media. "The company intends to continue to design and develop cutting-edge NOOK black and white and color devices. We

will continue to offer our award-winning line of NOOK products including NOOK Simple Touch®, NOOK Simple Touch® with Glow Light®, NOOK® HD and NOOK® HD+ at the best values in the marketplace. At least one new NOOK device will be released for the coming holiday season and further products are in development. All NOOK devices will continue to be backed by world-class pre- and post-sales support in Barnes & Noble stores, as well as ongoing software upgrades and improvements to the digital bookstore service."

**Conference Call**

A conference call with Barnes & Noble, Inc.'s senior management will be webcast beginning at 10:00 A.M. ET on Tuesday, August 20, 2013, and is accessible at [www.barnesandnobleinc.com/webcasts](http://www.barnesandnobleinc.com/webcasts).

**Financial Tables**

Download financial tables related to the sales and earnings for the fiscal 2014 first quarter ended July 27, 2013:

- [Consolidated Statements of Operations](#)
- [Consolidated Balance Sheets](#)
- [Segment Information](#)
- [Loss Per Share](#)

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**About Barnes & Noble, Inc.**

*Barnes & Noble, Inc. (NYSE:BKS) is a Fortune 500 company and the leading retailer of content, digital media and educational products. The company operates 674 Barnes & Noble bookstores in 50 states, and one of the Web's largest e-commerce sites, BN.com ([www.bn.com](http://www.bn.com)). Its NOOK Media LLC subsidiary is a leader in the emerging digital reading and digital education markets. The NOOK digital business offers award-winning NOOK® products and an expansive collection of digital reading and entertainment content through the NOOK Store™ ([www.nook.com](http://www.nook.com)), while Barnes & Noble College Booksellers, LLC operates 692 bookstores serving over 4.6 million students and faculty members at colleges and universities across the United States. Barnes & Noble is proud to be named a J.D. Power and Associates 2012 Customer Service Champion and is only one of 50 U.S. companies so named. Barnes & Noble.com is ranked the number one online retailer in customer satisfaction in the book, music and video category and a Top 10 online retailer overall in customer satisfaction according to ForeSee E-Retail Satisfaction Index (Spring Top 100 Edition).*

General information on Barnes & Noble, Inc. can be obtained via the Internet by visiting the company's corporate website: [www.barnesandnobleinc.com](http://www.barnesandnobleinc.com).

**Forward-Looking Statements**

*This press release contains certain forward-looking statements (within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended) and information relating to Barnes & Noble that are based on the beliefs of the management of Barnes & Noble as well as assumptions made by and information currently available to the management of Barnes & Noble. When used in this communication, the words "anticipate," "believe," "estimate," "expect," "intend," "plan," "will," "forecasts," "projections," and similar expressions, as they relate to Barnes & Noble or the management of Barnes & Noble, identify forward-looking statements.*

*Such statements reflect the current views of Barnes & Noble with respect to future events, the outcome of which is subject to certain risks, including, among others, the general economic environment and consumer spending patterns, decreased consumer demand for Barnes & Noble's products, low growth or declining sales and net income due to various factors, risk that international expansion will not be successfully achieved or may be achieved later than expected, possible disruptions in Barnes & Noble's computer systems, telephone systems or supply chain, possible risks associated with data privacy, information security and intellectual property, possible work stoppages or increases in labor costs, possible increases in shipping rates or interruptions in shipping service, effects of competition, possible risks that inventory in channels of distribution may be larger than able to be sold, possible risks associated with changes in the strategic direction of the device business, including possible reduction in sales of content, accessories and other merchandise and other adverse financial impacts, possible risk that component parts will be rendered obsolete or otherwise not be able to be effectively utilized in devices to be sold, possible risk that financial and operational forecasts and projections are not achieved, possible risk that returns from consumers or channels of distribution may be greater than estimated, the risk that digital sales growth is less than expectations and the risk that it*

does not exceed the rate of investment spend, higher-than-anticipated store closing or relocation costs, higher interest rates, the performance of Barnes & Noble's online, digital and other initiatives, the success of Barnes & Noble's strategic investments, unanticipated increases in merchandise, component or occupancy costs, unanticipated adverse litigation results or effects, product and component shortages, the potential adverse impact on the Company's businesses resulting from the review of strategic alternatives and a potential separation of the Company's businesses, the risk that the transactions with Microsoft and Pearson do not achieve the expected benefits for the parties or impose costs on the Company in excess of what the Company anticipates, including the risk that NOOK Media's applications are not commercially successful or that the expected distribution of those applications is not achieved, other risks associated with the international expansion contemplated by the relationship with Microsoft, including that it is not successful or is delayed, the risk that NOOK Media is not able to perform its obligations under the Microsoft and Pearson commercial agreements and the consequences thereof, risks associated with the restatement contained in, the delayed filing of, and the material weakness in internal controls described in Barnes & Noble's Annual Report on Form 10-K for the fiscal year ended April 27, 2013 and associated risks and other factors which may be outside of Barnes & Noble's control, including those factors discussed in detail in Item 1A, "Risk Factors," in Barnes & Noble's Annual Report on Form 10-K for the fiscal year ended April 27, 2013, and in Barnes & Noble's other filings made hereafter from time to time with the SEC. Our forward looking statements relating to international expansion are also subject to the following risks, among others that may affect the introduction, success and timing of the NOOK e-reader and content in countries outside the United States: we may not be successful in reaching agreements with international companies, the terms of agreements that we reach may not be advantageous to us, our NOOK device may require technological changes to comply with applicable laws, and marketplace acceptance and other companies have already entered the marketplace with products that have achieved some customer acceptance.

Should one or more of these risks or uncertainties materialize, or should underlying assumptions prove incorrect, actual results or outcomes may vary materially from those described as anticipated, believed, estimated, expected, intended or planned. Subsequent written and oral forward-looking statements attributable to Barnes & Noble or persons acting on its behalf are expressly qualified in their entirety by the cautionary statements in this paragraph. Barnes & Noble undertakes no obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise after the date of this communication.

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(212) 633-3489  
[amilevoj@bn.com](mailto:amilevoj@bn.com)**11/26/2013****Barnes & Noble Reports Fiscal 2014 Second Quarter Financial Results****Consolidated EBITDA of \$76 Million****College Rush Season Results in Growth in Textbook Rentals****New York, NY (November 26, 2013)**—Barnes & Noble, Inc. (NYSE: BKS) today reported sales and earnings for its fiscal 2014 second quarter ended October 26, 2013.

Second quarter consolidated revenues decreased 8.0%, to \$1.7 billion, compared to the prior year. Second quarter consolidated earnings before interest, taxes, depreciation and amortization (EBITDA) increased 13.7% to \$76 million, as compared to a year ago.

"During the second quarter, Barnes & Noble grew earnings through improved margins and reduced expenses, while also completing another successful College rush season," said Michael P. Huseby, President of Barnes & Noble, Inc. and Chief Executive Officer of NOOK Media. "The company is focused on executing its plans for the holiday season and our booksellers are prepared to welcome holiday shoppers and recommend thoughtful gift ideas for everyone on their list. We have a terrific book title line-up this holiday season, a leading assortment of Educational Toys & Games and a full selection of NOOK devices, including our recently released new NOOK GlowLight."

Second Quarter 2014 Results from Operations								
Segment results for the fiscal 2014 and fiscal 2013 second quarters are as follows:								
\$ in millions	Revenues (unaudited)				EBITDA (unaudited)			
			Increase (Decrease)				Increase (Decrease)	
	Q2 2014	Q2 2013	\$	%	Q2 2014	Q2 2013	\$	%
Retail	\$921.0	\$996.0	(\$75.0)	-7.5%	\$76.6	\$70.2	\$6.4	9.1%
College	\$777.5	\$773.0	(\$4.5)	-0.6%	\$84.3	\$87.8	(\$3.5)	-4.0%
NOOK	\$105.7	\$160.3	(\$54.6)	-32.2%	(\$43.2)	(\$51.4)	\$8.2	12.1%
Elimination <sup>(1)</sup>	(\$11.1)	(\$41.9)	\$30.8	-26.1%	0.0	0.0	0.0	0.0%
<b>Total</b>	<b>\$1,734.2</b>	<b>\$1,930.6</b>	<b>(\$196.4)</b>	<b>-9.0%</b>	<b>\$77.7</b>	<b>\$66.5</b>	<b>\$11.2</b>	<b>17.0%</b>

(1) Represents the elimination of intercompany sales from NOOK to Barnes & Noble Retail and Barnes & Noble College on a sell through basis.

**Retail**

The Retail segment, which consists of the Barnes & Noble bookstores and BN.com businesses, had revenues of \$921 million for the quarter, a decrease of 7.5% from the prior year. The sales decrease, which was in-line with company expectations, was attributable to a comparable store sales decrease of 4.9% for the quarter, store closures and lower online sales. "Core" comparable bookstore sales, which exclude sales of NOOK products, decreased 3.7% for the quarter on lower store traffic and comparisons to the *Fifty Shades of Grey* trilogy a year ago.

Retail generated EBITDA of \$37 million in the quarter, increasing 21.2% as compared to a year ago as the sales decline was offset by strong expense management, including higher store productivity.

#### **College**

The College segment had revenues of \$738 million, decreasing 4.6% compared to a year ago. Comparable College sales decreased 3.6% for the quarter, impacted by a higher mix of lower priced used textbook rentals and lower textbook sales, partially offset by higher general merchandise sales. The second quarter includes the fall back to school rush season. Comparable College store sales reflect the retail selling price of new or used textbooks when rented.

College EBITDA declined \$3 million as compared to a year ago to \$84 million. The decline is primarily attributable to higher textbook rental volume, where revenues received are deferred and amortized over the rental period, which generally spans the term of the semester. The company also continued to invest in digital product development. These factors were partially mitigated by increased store count, as well as higher margins associated with textbook rentals and a greater sales mix of general merchandise.

#### **NOOK**

The NOOK segment, which consists of the company's digital business (including digital content, devices and accessories), reported revenues of \$109 million for the quarter, decreasing 32.2% from a year ago. Digital content sales were \$57 million for the quarter, a decline of 21.2% compared to a year ago, due to lower average selling prices and lower device unit sales. Device and accessories sales were \$51 million for the quarter, a decrease of 41.3% from a year ago, due to lower unit selling volume and lower average selling prices.

Despite the sales decline, NOOK EBITDA losses decreased \$6 million as compared to a year ago to \$45 million on lower device markdowns and reduced expenses.

#### **Consolidated Results**

Consolidated second quarter net earnings were \$13.2 million, or \$0.15 per share, compared to net earnings of \$0.5 million, or a loss of \$0.07 per share, in the prior year.

#### **Guidance**

The company reaffirms its previously issued full-year guidance, in which it expects Retail comparable store sales to decline in the high single digits, Core Retail comparable bookstore sales to decline in the low- to mid-single digits and College comparable store sales to decline in the low single digits.

#### **Conference Call**

A conference call with Barnes & Noble, Inc.'s senior management will be webcast beginning at 10:00 A.M. ET on Tuesday, November 26, 2013, and is accessible at [www.barnesandnobleinc.com/webcasts](http://www.barnesandnobleinc.com/webcasts).

#### **Financial Tables**

Download financial tables related to the sales and earnings for the fiscal 2014 second quarter ended October 26, 2013:

- [Consolidated Statements of Operations](#)
- [Consolidated Balance Sheets](#)
- [Segment Information](#)
- [NOOK Sales](#)
- [Loss Per Share](#)

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#### **About Barnes & Noble, Inc.**

*Barnes & Noble, Inc. (NYSE:BKS) is a Fortune 500 company and the leading retailer of content, digital media and educational products. The company operates 673 Barnes & Noble bookstores in 50 states, and one of the Web's largest e-commerce sites, BN.com ([www.bn.com](http://www.bn.com)). Its NOOK Media LLC subsidiary is a leader in the emerging digital reading and digital education markets. The NOOK digital business offers award-winning NOOK® products and an expansive collection of digital reading and entertainment content through the NOOK Store™ ([www.nook.com](http://www.nook.com)), while Barnes & Noble College Booksellers, LLC operates 695 bookstores serving over 4.6 million students and faculty members at colleges and universities across the United States. Barnes & Noble is proud to be named a J.D. Power and Associates 2012 Customer Service Champion and is only one of 50 U.S. companies so*

named. Barnes & Noble.com is ranked the number one online retailer in customer satisfaction in the book, music and video category and a Top 10 online retailer overall in customer satisfaction according to ForeSee E-Retail Satisfaction Index (Spring Top 100 Edition).

General information on Barnes & Noble, Inc. can be obtained via the Internet by visiting the company's corporate website: [www.barnesandnobleinc.com](http://www.barnesandnobleinc.com).

#### **Forward-Looking Statements**

*This press release contains certain forward-looking statements (within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended) and information relating to Barnes & Noble that are based on the beliefs of the management of Barnes & Noble as well as assumptions made by and information currently available to the management of Barnes & Noble. When used in this communication, the words "anticipate," "believe," "estimate," "expect," "intend," "plan," "will," "forecasts," "projections," and similar expressions, as they relate to Barnes & Noble or the management of Barnes & Noble, identify forward-looking statements.*

*Such statements reflect the current views of Barnes & Noble with respect to future events, the outcome of which is subject to certain risks, including, among others, the general economic environment and consumer spending patterns, decreased consumer demand for Barnes & Noble's products, low growth or declining sales and net income due to various factors, risk that international expansion will not be successfully achieved or may be achieved later than expected, possible disruptions in Barnes & Noble's computer systems, telephone systems or supply chain, possible risks associated with data privacy, information security and intellectual property, possible work stoppages or increases in labor costs, possible increases in shipping rates or interruptions in shipping service, effects of competition, possible risks that inventory in channels of distribution may be larger than able to be sold, possible risks associated with changes in the strategic direction of the device business, including possible reduction in sales of content, accessories and other merchandise and other adverse financial impacts, possible risk that component parts will be rendered obsolete or otherwise not be able to be effectively utilized in devices to be sold, possible risk that financial and operational forecasts and projections are not achieved, possible risk that returns from consumers or channels of distribution may be greater than estimated, the risk that digital sales growth is less than expectations and the risk that it does not exceed the rate of investment spend, higher-than-anticipated store closing or relocation costs, higher interest rates, the performance of Barnes & Noble's online, digital and other initiatives, the success of Barnes & Noble's strategic investments, unanticipated increases in merchandise, component or occupancy costs, unanticipated adverse litigation results or effects, product and component shortages, the potential adverse impact on the Company's businesses resulting from the review of strategic alternatives and a potential separation of the Company's businesses, the risk that the transactions with Microsoft and Pearson do not achieve the expected benefits for the parties or impose costs on the Company in excess of what the Company anticipates, including the risk that NOOK Media's applications are not commercially successful or that the expected distribution of those applications is not achieved, other risks associated with the international expansion contemplated by the relationship with Microsoft, including that it is not successful or is delayed, the risk that NOOK Media is not able to perform its obligations under the Microsoft and Pearson commercial agreements and the consequences thereof, risks associated with the restatement contained in, the delayed filing of, and the material weakness in internal controls described in Barnes & Noble's Annual Report on Form 10-K for the fiscal year ended April 27, 2013 and associated risks and other factors which may be outside of Barnes & Noble's control, including those factors discussed in detail in Item 1A, "Risk Factors," in Barnes & Noble's Annual Report on Form 10-K for the fiscal year ended April 27, 2013, and in Barnes & Noble's other filings made hereafter from time to time with the SEC. Our forward looking statements relating to international expansion are also subject to the following risks, among others that may affect the introduction, success and timing of the NOOK e-reader and content in countries outside the United States: we may not be successful in reaching agreements with international companies, the terms of agreements that we reach may not be advantageous to us, our NOOK device may require technological changes to comply with applicable laws, and marketplace acceptance and other companies have already entered the marketplace with products that have achieved some customer acceptance.*

*Should one or more of these risks or uncertainties materialize, or should underlying assumptions prove incorrect, actual results or outcomes may vary materially from those described as anticipated, believed, estimated, expected, intended or planned. Subsequent written and oral forward-looking statements attributable to Barnes & Noble or persons*


# PUBLIC VERSION

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*acting on its behalf are expressly qualified in their entirety by the cautionary statements in this paragraph. Barnes & Noble undertakes no obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise after the date of this communication.*

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# **EXHIBIT "G"**



This is **Exhibit "G"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.

Bloomberg Businessweek

## Technology

<http://www.businessweek.com/articles/2014-01-09/barnes-and-nobles-nook-sales-hurt-by-amazons-lower-e-book-prices>

# Barnes & Noble's Nook Nightmare Stars Amazon and the DOJ

By [Brad Stone](#) January 09, 2014

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Let's boil down Barnes & Noble's (BKS) Nook nightmare into a handy juxtaposition concerning the price of the digital version of Donna Tartt's gripping new novel, *The Goldfinch*.

Amazon's (AMZN) Kindle price: \$7.50.

Barnes & Noble's Nook price: \$14.99.

There are plenty of reasons for the stunning decline of the once-promising Nook. Barnes & Noble has found itself unable to compete with the likes of Apple (AAPL) and Amazon in the broader arena of multipurposed tablets. The New York-based retailer has also been undermined by the continuing migration of its customers from physical stores to online book-buying and by the desire of its risk-averse institutional shareholders to support deep, profit-draining, long-term investments in new frontiers.

Even that doesn't completely account for the dramatic upending of its Nook business. Barnes & Noble today reported gruesome numbers—a 60 percent drop in its digital division, to \$125 million, from its sales in last year's holiday period. (Sales in its physical stores fell 6.6 percent from the previous year.)

“Sales in the NOOK segment declined year-over-year largely because during the previous holiday season the company introduced two new tablet products, while no new tablets were introduced this year,” said Michael Huseby, Barnes & Noble's new chief executive, in a statement. “Instead, we executed our plan to sell through our existing high-quality devices.”

That's true. It's also not a very robust defense. E-book prices are a big reason why Barnes & Noble is losing this battle. The lopsided pricing on *The Goldfinch* is one of many examples. Amazon often sells e-books at a loss, using low prices to lure customers into the Kindle ecosystem. It goes so far as to give many books away—the Kindle Owner's Lending Library allows Kindle owners with Prime membership to “borrow” a free book each month. And a relatively new service called Kindle MatchBook prices digital copies of books at \$2.99 or lower, when a customer has already bought the physical version of the book. Barnes & Noble doesn't have the resources or the relationship with customers to match MatchBook and services like it.

Some of the blame here lies with the U.S. Department of Justice. Its successful lawsuit against Apple and major book publishers, for conspiring to set fixed, industrywide prices on e-books, now allows Amazon to set its own often ridiculously low prices. “The Justice Department came in at a time when agency pricing was weakening Amazon's hold and dispersing the e-book market,” says Mike Shatzkin, CEO of the Idea Logical, a book industry consultancy. “By eliminating fixed prices for e-books, they have handed the advantage back to Amazon. Now everyone else is losing share.”

Not everyone shops for e-book readers based on the prices of digital books, of course. But Barnes & Noble hasn't given customers many other reasons to opt for the Nook over rival devices. Amazon continues to roll out new publishing services that are exclusive to customers of Amazon. *Day One*, a smart new literary magazine, includes short stories and poems. Kindle Worlds is a program that opens up a catalog of legal fan-fiction based on well-known literary characters.

Individually these are minor services. Taken together they are links in the chain that is strangling the Nook.

In [an interview](#) with the *Wall Street Journal* yesterday, Huseby said he was committed to the Nook. "Your best chance of success for selling digital content is on your own dedicated devices which have your brand or a co-brand on them," he said. "If we can leverage an outside partnership to help us with devices, we will do that."

But Barnes & Noble will need more than a hardware partnership to get out of the trap sprung by Amazon—and the DOJ.



[Stone](#) is a senior writer for *Bloomberg Businessweek* in San Francisco. He is the author of *The Everything Store: Jeff Bezos and the Age of Amazon* (Little, Brown; October 2013). Follow him on Twitter [@BradStone](#).

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# EXHIBIT "H"

This is **Exhibit "H"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.

## Competition Bureau

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### Competition Bureau Takes Action to Promote Competition for ebooks

*Four major publishers agree to take steps that are expected to lower ebook prices in Canada*

February 7, 2014 — OTTAWA, ON — Competition Bureau

The Competition Bureau has reached an agreement with four major ebook publishers that is expected to lower the price of ebooks in Canada.

Following an 18-month investigation into the ebook industry in Canada, the Bureau has signed a consent agreement with Hachette Book Group, HarperCollins, Macmillan and Simon & Schuster. Canadian consumers will benefit from the agreement registered with the Competition Tribunal today, in that the Bureau expects that competition among retailers will increase, resulting in lower prices for ebooks.

The four publishers have agreed to remove or amend clauses in their distribution agreements with individual ebook retailers that the Bureau believes have the effect of restricting retail price competition, which will allow retailers to offer discounts on ebooks.

The Bureau alleges that the publishers engaged in conduct that resulted in reduced competition for ebooks in Canada, contrary to the civil competitor collaboration provision in section 90.1 of the *Competition Act*.

The Bureau's investigation into the ebook industry in Canada continues at this time.

#### Quick Facts

- Hachette Book Group, HarperCollins, Macmillan and Simon & Schuster publish many of the bestselling ebooks in Canada.
- Similar settlements reached in the United States in 2012 and 2013 resulted in lower prices for ebooks in the US. The Bureau's monitoring of the effects of the US settlement shows that discounts of 20 per cent, and sometimes higher, can now be found on certain bestselling ebooks.

#### Quotes

"This agreement should benefit Canadian consumers by lowering the price of ebooks in Canada. Businesses operating in the digital economy must realize that anti-competitive activity will not be tolerated, whether it occurs in the physical world or the digital one."

John Pecman,  
Commissioner of Competition

#### Related Information

The [consent agreement](#) available on the Competition Tribunal's website.

#### Contacts

**For media enquiries, please contact:**

Media Relations  
Telephone: 819-994-5945  
Email: [Media@cb-bc.gc.ca](mailto:Media@cb-bc.gc.ca)

**For general enquiries, please contact:**

Information Centre  
Competition Bureau  
Telephone: 819-997-4282

Toll free: 1-800-348-5358  
Government of Canada / Gouvernement du Canada  
1-800-642-3844

[www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

**Enquiries/Complaints**

Follow us on Twitter: [@CompBureau](https://twitter.com/CompBureau)

The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

# EXHIBIT "I"



This is **Exhibit "I"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.

Docket No.: CT-2014-

## 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 *Competition Act*.

## BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
CT-2014-001 February 7, 2014	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

HACHETTE BOOK GROUP CANADA LTD, HACHETTE BOOK GROUP, INC.,  
HACHETTE DIGITAL, INC.,

HARPERCOLLINS CANADA LIMITED,

HOLTZBRINCK PUBLISHERS, LLC, and

SIMON &amp; SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.

Respondents

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 CONSENT AGREEMENT
 

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WHEREAS pursuant to section 10 of the *Competition Act* (the "Act"), the Commissioner of Competition (the "Commissioner") commenced an inquiry relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND WHEREAS the Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act;

AND WHEREAS the Commissioner and the Respondents have reached an agreement to resolve the Commissioner's concerns regarding the Respondents' alleged conduct;

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**AND WHEREAS** the Commissioner and the Respondents agree to the registration by the Commissioner of this Agreement with the Tribunal, pursuant to section 105 of the Act;

**AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT** the Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations, and nothing in this Agreement will be taken as an admission or acceptance by the Respondents of any facts, liability, wrongdoing, submissions, legal argument or conclusions for any other purpose.

**NOW THEREFORE** the Parties agree as follows:

## **I. DEFINITIONS**

1. For the purposes of this Agreement, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:
  - (a) **"Act"** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
  - (b) **"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 in Canada through the E-book Retailer and the E-book Retailer is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books to consumers in Canada;
  - (c) **"Agreement"** means this Consent Agreement entered into by the Respondents and the Commissioner pursuant to section 105 of the Act;
  - (d) **"Commissioner"** means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
  - (e) **"E-book"** means an electronically formatted book designed to be read on a computer, a handheld device or any other electronic device capable of visually displaying E-books. For the purposes of this Agreement, 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 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) the electronically formatted version of a book marketed for use primarily in connection with academic coursework; or (v) a magazine, journal or other periodic publication;

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- (f) **“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 within Canada to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in Canada. For the purposes of this Agreement, each Respondent is an E-book Publisher, and E-book Retailers are not E-book Publishers;
- (g) **“E-book Retailer”** means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in Canada or through which an E-book Publisher under an Agency Agreement Sells E-books to consumers in Canada. For the purposes of this Agreement, the Respondents and any Persons whose primary business is book publishing are not E-book Retailers;
- (h) **“Hachette”** means Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc., and (if any and wherever located) their Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (i) **“HarperCollins”** means HarperCollins Canada Limited and (if any and wherever located) its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (j) **“including”** means “including, but not limited to” and “include” means “includes, but is not limited to”;
- (k) **“Macmillan”** means Holtzbrinck Publishers, LLC, doing business as Macmillan, and (if any and wherever located) its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (l) **“Parties”** means the Commissioner and the Respondents;
- (m) **“Penguin”** means Penguin Group (USA), LLC, Pearson Canada Inc. and Penguin Canada Books Inc., and (if any and wherever located) their Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (n) **“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;
- (o) **“Price MFN”** means a term in an agreement between an E-book Publisher and an E-book Retailer for the Sale of E-books to consumers in Canada under which:

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- (i) the Retail Price at which an E-book Retailer, or an E-book Publisher under an Agency Agreement, Sells one or more E-books to consumers in Canada depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer, or the E-book Publisher under an Agency Agreement with any other E-book Retailer, Sells the same E-book(s) to consumers in Canada;
- (ii) the Wholesale Price at which the E-book Publisher sells one or more E-books to an E-book Retailer for Sale to consumers in Canada depends in any way on the Wholesale Price at which the E-book Publisher sells the same E-book(s) to any other E-book Retailer for Sale to consumers in Canada; or
- (iii) the revenue share or commission that an E-book Retailer receives from an E-book Publisher in connection with the Sale of one or more E-books to consumers in Canada depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers in Canada, or (b) the 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 to consumers in Canada. For the purposes of this Agreement, it will not constitute a Price MFN under subsection (iii) of this definition if a Respondent agrees, at the request of an E-book Retailer, to meet more favourable pricing, discounts or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional benefit, so long as that agreement is not or does not result from a pre-existing agreement that requires the Respondent to meet all requests by the E-book Retailer for more favourable pricing within the terms of the agreement;
- (p) **"Purchase"** means the acquisition by a consumer in Canada of one or more E-books as a result of a Sale;
- (q) **"Respondents"** means Hachette, HarperCollins, Macmillan and Simon & Schuster collectively, and **"Respondent"** means any one of them. Where this Agreement imposes an obligation on a Respondent to engage in or refrain from engaging in certain conduct, that obligation shall apply to any joint venture or other business arrangement established by the Respondent and one or more other Respondents or by the Respondent and Penguin;
- (r) **"Retail Price"** means the price at which an E-book Publisher under an Agency Agreement or an E-book Retailer Sells an E-book to a consumer in Canada;
- (s) **"Sale"** or **"Sell"** means delivery of access to a consumer in Canada to read one or more E-books in exchange for payment. Delivery of access to an educational institution or a library is not a Sale.
- (t) **"Simon & Schuster"** means Simon & Schuster Canada, a division of CBS Canada Holdings Co., and (if any and wherever located) its Subsidiaries,

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successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;

- (u) “**Subsidiary**” has the meaning as defined in subsection 2(3) of the Act;
- (v) “**Tribunal**” means the Competition Tribunal, as established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended; and
- (w) “**Wholesale Price**” means:
  - (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers in Canada; or
  - (ii) the Retail Price at which an E-book Publisher under an Agency Agreement Sells an E-book to consumers in Canada through an E-book Retailer minus the commission or other payment that the E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

## II. OBLIGATIONS OF THE RESPONDENTS

2. Subject to paragraph 5, the Respondents shall not, for the period commencing forty (40) days following the date of registration of this Agreement and ending 18 months thereafter, directly or indirectly:
  - (a) restrict, limit or impede an E-book Retailer’s ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books; or
  - (b) enter into an agreement with any E-book Retailer that has the effect described in paragraph 2(a).
3. The Respondents shall not, for a period of four years and six months from the date of the registration of this Agreement, enter into any agreement with an E-book Retailer relating to the Sale of E-books to consumers in Canada that contains a Price MFN.
4. For each agreement between a Respondent and an E-book Retailer relating to the Sale of E-books to consumers in Canada in force at the date of registration of this Agreement that directly or indirectly:
  - (a) restricts, limits or impedes the E-book Retailer’s ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books; or
  - (b) contains a Price MFN with respect to the Sale of E-books to consumers in Canada;

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the Respondent shall, as soon as permitted under the agreement, take steps required under the agreement to cause the agreement to be terminated and not renewed or extended. The Respondent may, in lieu of termination, satisfy its obligations under this paragraph 4 as follows:

- (c) with respect to any such agreement that contains a Price MFN with respect to the Sale of E-Books to consumers in Canada, by entering into an amendment to the agreement, effective no later than forty (40) days after the registration of this Agreement, either (i) making the agreement inapplicable to the Sale of E-books in Canada or (ii) removing the Price MFN; and
  - (d) with respect to any such agreement that does not contain a Price MFN, including as a result of an amendment entered into pursuant to subparagraph 4(c) above, by notifying the E-book Retailer within ten (10) days of the date of registration of this Agreement that during the period commencing forty (40) days after registration of this Agreement and ending 18 months thereafter, the Respondent will not enforce any term or terms in any agreement with an E-book Retailer that restrict, limit or impede an E-book Retailer's ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books except to the extent permitted by paragraph 5 of this Agreement.
5. Notwithstanding paragraphs 2 and 4 of this Agreement, a Respondent may enter into agreements and amend agreements with E-book Retailers, and may enforce terms in agreements with E-book Retailers in force as of the date of registration of this Agreement, under which price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Respondent's E-books) are restricted, provided that:
- (a) such restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers in Canada to Purchase the Respondent's E-books by an aggregate amount (the "Agreed Funds") equal to the total commissions the Respondent pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the Respondent's E-books to consumers in Canada;
  - (b) the Respondent 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 in Canada to Purchase one or more of the Respondent's 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.
6. Nothing in this Agreement shall prohibit a Respondent from unilaterally compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

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7. The Respondents shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Respondents are prohibited by paragraph 2 of this Agreement from restricting, limiting or impeding in any agreement with an E-book Retailer. After the expiration of the prohibitions in paragraph 2 of this Agreement, this paragraph 7 shall not prohibit a Respondent 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 the Respondent's E-books for Sale to consumers in Canada or from offering price discounts or any other form of promotions to encourage consumers in Canada to Purchase any of the Respondent's E-books.
8. Each Respondent shall furnish to the Commissioner:
  - (a) within thirty (30) days from the date of the registration of this Agreement, one complete copy of each agreement, executed, renewed, amended or extended on or after 1 January 2012, between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada (unless same has previously been provided); and
  - (b) thereafter, on a quarterly basis, any new agreement or amendment between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada.
9. Unless otherwise provided herein or agreed to in writing by the Parties, the terms of this Agreement shall become effective on the date of registration of this Agreement and end four years and six months from the date of registration of this Agreement.

### III. GENERAL

10. The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement.
11. Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.
12. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which shall constitute one and the same Agreement.
13. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. The Respondents hereby consent to such registration.
14. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.
15. If a Respondent becomes aware that there has been or likely has been a breach of any of the terms of this Agreement, the Respondent shall promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature and date of said breach.



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16. Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purposes of this Agreement, the definition of "holiday" in the *Interpretation Act* shall be deemed to include Saturday.
17. Nothing in this Agreement precludes the Respondents or the Commissioner from bringing an application under section 106 of the Act (or successor or equivalent provision under the Act) to rescind or vary this Agreement. The Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.
18. The Respondents attorn to the jurisdiction of the Tribunal for the purposes of the interpretation and enforcement of this Agreement and any proceeding initiated by the Commissioner or the Respondents to rescind or vary any of the provisions of this Agreement.
19. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
20. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail.
21. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
22. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or the Respondents may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

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## IV. NOTICES

23. Notices and other communications required or permitted by the Commissioner or the Respondents pursuant to this Agreement shall be in writing, and shall be given to the Parties at the following addresses or facsimile numbers:

- (a) The Commissioner  
Commissioner of Competition  
Competition Bureau  
Place du Portage, Phase I  
50 Victoria Street  
Gatineau, QC K1A 0C9  
Telephone: (819) 997-3301  
Facsimile: (819) 953-5013

With a copy to:

Executive Director and Senior General Counsel  
Competition Bureau Legal Services  
Department of Justice  
Place du Portage, Phase I  
50 Victoria Street  
Gatineau, Québec K1A 0C9  
Facsimile: (819) 953-9267

- (b) Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

Carol Ross  
Executive Vice President, Business Affairs & General Counsel  
Hachette Book Group, Inc.  
237 Park Avenue  
New York, NY 10017  
Tel: 212-364-1510  
Carol.ross@hbgusa.com

With a copy to:

Linda Plumpton  
Torys LLP  
79 Wellington St. W, 30th Floor  
Box 270, TD South Tower  
Toronto, Ontario M5K 1N2  
Tel: 416-865-8193  
Fax: 416-865-7380  
lplumpton@torys.com

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(c) HarperCollins Canada Limited

Wayne Playter  
VP Finance  
HarperCollins Canada Limited  
1995 Markham Road  
Scarborough, Ontario  
M1B 5M8  
Wayne.Playter@HARPERCOLLINS.com

With a copy to:

Katherine L. Kay  
Stikeman Elliott LLP  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada  
M5L 1B9  
Tel. (416) 869-5507  
Fax. (416) 947-0866  
kkay@stikeman.com

(d) Holtzbrinck Publishers, LLC

Paul J. Sleven  
General Counsel  
175 Fifth Avenue  
New York, NY 10010  
Tel: 646-307-5202  
Fax: 212-529-0594  
paul.sleven@macmillan.com

With a copy to:

Randal Hughes  
Bennett Jones LLP  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, Ontario M5X 1A4  
Tel: 416-777-7471  
Fax: 416-863-1716  
hughesr@bennettjones.com

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(e) Simon & Schuster Canada, a division of CBS Canada Holdings Co

David Hillman  
Executive Vice President & General Counsel  
Simon & Schuster Incorporated  
1230 Avenue of the Americas  
New York NY 10020  
United States of America  
David.Hillman@simonandschuster.com

With a copy to:

Peter Franklyn  
Osler, Hoskin & Harcourt LLP  
First Canadian Place  
100 King Street West  
Toronto, Ontario M5X 1B8  
pfranklyn@osler.com

Any Party hereto may from time to time change its address or facsimile number by giving notice to the other Parties hereto in accordance with the provisions of this paragraph 23. The Commissioner and the Respondents may also consent to accept notices or other communications required or permitted pursuant to this Agreement by electronic mail.

DATED this 6<sup>th</sup> day of February, 2014

[ORIGINAL SIGNED BY "John Pecman"]

John Pecman

Commissioner of Competition

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Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

[ORIGINAL SIGNED BY "Carol Ross"]

I/We have authority to bind the corporation  
Name: Carol Ross  
Title: Executive Vice President, Business Affairs & General Counsel Hachette Book Group, Inc

HarperCollins Canada Limited

[ORIGINAL SIGNED BY "Wayne Playter"]

I/We have authority to bind the corporation  
Name: Wayne Playter  
Title: VP Finance HarperCollins Canada Limited

Holtzbrinck Publishers, LLC

[ORIGINAL SIGNED BY "Paul J. Sleven"]

I/We have authority to bind the limited liability company  
Name: Paul J. Sleven  
Title: General Counsel

Simon & Schuster Canada, a division of CBS Canada Holdings Co

[ORIGINAL SIGNED BY "Kevin Hanson"]

I/We have authority to bind the corporation  
Name: Kevin Hanson  
Title: President of Simon & Schuster Canada (a division of CBS Canada Holdings Co)

# EXHIBIT "J"

This is **Exhibit "J"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

---

**NICOLE TRUMAN**  
A Commissioner for taking Affidavits, etc.

**[ REDACTED ]**



# EXHIBIT "K"

This is **Exhibit "K"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

---

**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.

**[ REDACTED ]**

# EXHIBIT "L"

This is **Exhibit "L"** referred to in the Affidavit of Michael Tamblyn sworn before me this \_\_\_\_\_ day of February, 2014

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**NICOLE TRUMAN**

A Commissioner for taking Affidavits, etc.

**[ REDACTED ]**

# PUBLIC VERSION

File No. CT-2014-

## 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 *Competition 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 CANADA HOLDINGS CO.**

Respondents

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## MOTION RECORD

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