

September 13, 2012

## COMMITMENTS OF HACHETTE

### CASE COMP/39.847 – E-BOOKS

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

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

#### **I. DEFINITIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Including” means including, but not limited to.

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

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

- (i) the Retail Price at which an E-book Retailer or, under an Agency Agreement, Hachette, Sells one or more E-books to Consumers, depends in any way on the Retail Price, or Discounts from the Digital List Price, at which any other E-book Retailer or Hachette under an Agency Agreement through any other E-book Retailer, Sells the same E-book(s) to Consumers; or
- (ii) the Wholesale Price at which Hachette sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price at which Hachette sells the same E-book(s) to or through any other E-book Retailer; or
- (iii) the types of business arrangement for the distribution or sale of E-books that the E-book Retailer is entitled to enter into with Hachette depend in any way on the types of business arrangement for the distribution or sale of E-books that Hachette enters into with another E-book Retailer; or
- (iv) the revenue share or Agent Commission that an E-book Retailer receives from Hachette in connection with the Sale of one or more E-books to Consumers depends in any way on the revenue share or Agent Commission that (a) any other E-book Retailer receives from Hachette in connection with the Sale of the same E-book(s) to Consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher’s E-books.

“Purchase” means a Consumer’s acquisition of one or more E-books as a result of a Sale.

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

“Sale” means delivery of access on a permanent basis to a Consumer to read one or more E-books (Purchased alone, or in combination with other goods or services) in

exchange for payment; “Sell” or “Sold” means to make or to have made a Sale of an E-book to a Consumer.

“Wholesale Price” means (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to Hachette for an E-book that the E-book Retailer Sells to Consumers; or (ii) under an Agency Agreement, the Digital List Price minus the Agent Commission or other payment that Hachette pays to the E-book Retailer in connection with, or that is reasonably allocated to, that Sale.

## **II. REQUIRED CONDUCT**

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

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

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

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

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

## **III. PROHIBITED CONDUCT**

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

- (i) For two years, Hachette in its capacity as E-book Publisher shall not restrict, limit, or impede an E-book Retailer’s ability to set, alter, or reduce the Retail Price of any E-book or to offer Discounts, such two-

year period to run separately for each E-book Retailer, at the option of Hachette, from either:

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

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

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

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

#### **IV. NON-CIRCUMVENTION**

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

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

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

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

- (i) Hachette's good faith decision not to pursue a promotional program or arrangement, or price grid proposed by an E-book Retailer; or
- (ii) Hachette's good faith decision to offer its own promotional program or arrangement with one or more E-book Retailers.

## **V. PERMITTED CONDUCT**

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

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

- (i) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Hachette' E-books by an aggregate amount equal to the total Agent Commissions Hachette pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Hachette's E-books to Consumers (the "Agreed Funds");
- (ii) Hachette shall not restrict, limit, or impede the E-book Retailer's use of the Agreed Funds to offer Discounts; and
- (iii) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity.

## **VI. NATIONAL LAWS**

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

## **VII. DURATION**

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

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

## **VIII. REVIEW CLAUSE**

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