

Subject: Apple  
Date: Mon, 11 Jan 2010 13:30:46 -0800  
From: Kevin Saul <ksaul@apple.com>  
To: <david.shanks@us.penguingroup.com>  
Cc: Kevin Saul <ksaul@apple.com>, Eddy Cue <cue@apple.com>, Keith Moerer <kmoerer@apple.com>  
Message-ID: <C8469A34-A4EC-4D2D-8A05-3E2CE7816EE1@apple.com>

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Dear David,

Please find attached Apple's proposed eBook Distribution deal for your review. We look forward to working with you and your team. If he hasn't already, Keith Moerer will be contacting you to arrange a meeting to discuss the draft agreement and other business terms.

Best regards,  
Kevin Saul

Legal Affairs  


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----- end message -----



EBOOK AGENCY DISTRIBUTION AGREEMENT

United States / Canada

MS# \_\_\_\_\_

This Agreement is between Apple Inc. ("Apple"), having its principal place of business at 1 Infinite Loop, Cupertino, California 95014, and \_\_\_\_\_ ("Publisher"), having its principal place of business at \_\_\_\_\_, and is effective on the date signed by both Parties (the "Effective Date").

Apple desires to be appointed as Publisher's agent for sales and delivery of digital books under certain conditions, and in exchange for a fee, on behalf of principal Publisher's account, and Publisher is willing to appoint Apple as its agent under such conditions and pay Apple a fee.

In consideration of mutual promises, Apple and Publisher (each a "Party" and collectively, "Parties") hereby agree as follows:

1. Definitions.

The following terms shall have the following meanings for purposes of this Agreement:

- (a) "Artwork" means book covers, photos, drawings, and illustrations associated with Publisher Content, including any artwork that is included in physical copies of Publisher Content, and which has been provided by or on behalf of Publisher to Apple. All Artwork provided to Apple shall have been cleared for Apple's use.
- (b) "Content File" means a digital file comprising at least an item of Publisher Content, associated Artwork, metadata, and Insert Content.
- (c) "Customer Price" means the price displayed to the end-user on the Online Store, as designated by Publisher for each eBook by selecting from the prices set forth in Exhibit A using iTunes Connect.
- (d) "eBook" means each copy of Publisher Content, Artwork, Insert Content, Extras (if any) and metadata in a form authorized for download on the Online Store.
- (e) "Insert Content" means promotional content provided by or on behalf of Publisher and associated with Publisher Content, such as book reviews, author bios, forewords and similar content.
- (f) "iTunes Connect" means the proprietary content and account management tool known as iTunes Connect, provided by Apple to Publisher during the Term subject to acceptance of applicable terms and conditions.



- (g) “New Release” mean a book during whichever of the following periods ends earlier; twelve (12) months from its first generally available commercial publication in any format; and such time as the book is available only in hardcover (if at all).
- (h) “Online Store” means an electronic store owned or controlled by Apple or an Apple affiliate.
- (i) “Preview” means at least one full-chapter excerpt from each item of Publisher Content, as selected by Publisher in the metadata. The Parties agree that Previews need not be protected using the Security Solution or be subject to any content usage rules other than limited for personal, non-commercial use.
- (j) “Publisher Content” means textual and graphical book content owned or controlled by Publisher that has been cleared for distribution in digital form.
- (k) “Publisher Materials” means, collectively, materials furnished by or on behalf of Publisher to Apple in furtherance of its appointment, including Publisher Content, Artwork, metadata, Insert Content, Previews and any extra bonus-type audio, video or audio-visual content (“Extras”).
- (l) “Security Solution” means Apple’s proprietary digital rights management solution marketed as “Fairplay”, as set forth in the Fairplay Specification attached as Exhibit C.
- (m) “Term” means the period beginning on the Effective Date and continuing until the earlier of termination pursuant to its terms or termination, for any or no reason by either Party, upon advance written notice of not less than thirty (30) days.
- (n) “Territory” means the United States, its territories and possessions (collectively, “United States”), and Canada, its territories and provinces (collectively, “Canada”).

2. Agency Appointment.

- (a) Publisher hereby appoints Apple as its non-exclusive agent for the marketing and delivery of eBooks through the Online Store on Publisher’s behalf in the Territory to end-users for their personal, non-commercial use, and Apple accepts such appointment.
- (b) In furtherance of such appointment, Apple may:
  - i. Market, solicit and obtain orders on Publisher’s behalf for eBooks from end-users, including delivery of copies of Previews for free to potential eBook customers;
  - ii. Make copies of, format, and otherwise prepare Content Files as eBooks for download by end-users;



- iii. Provide storage, searching, and hosting services to Publisher so end-users may search for, obtain recommendations for, and acquire eBooks from Publisher by electronic download through the Online Store;
- iv. issue invoices for the purchase price payable by end-users for eBooks;
- v. use Artwork, Insert Content and metadata, and trademarks and logos associated with eBooks, as well as other images and materials provided by Publisher to Apple, for promotional purposes in marketing materials and gift cards; and
- vi. do other things on a “through to the end user” basis in furtherance of Apple’s appointment and consistent with this Agreement, such as modify metadata as reasonably necessary to correct errors.

3. Publisher Obligations.

- (a) Publisher acknowledges that the breadth of eBook offerings on the Online Store is of the essence of the Agreement and the successful appointment. Publisher shall endeavor to make all books (including revisions, re-printings, updates etc.) under Publisher’s ownership or control in the Territory available to Apple under its appointment, and in no event less than the Publisher Content it provides to any other electronic distributor of Publisher’s content in digital form. The Parties acknowledge that the Parties will work together in order to provide end users with the best consumer offering in relation to enhanced and interactive content, for example, for travel and cookbooks.
- (b) Publisher shall not discriminate against Apple with respect to the permitted usage rules, functionality, and quality of any Publisher Content.
- (c) Except for a limited-time, one-off promotion for a particular item of Publisher Content, Publisher shall provide and make available New Releases to Apple under its appointment on the same day and date and for as long as Publisher makes any New Release available to end users in any format, including physical copies and so-called conditional downloads.
- (d) Publisher shall deliver Content Files to Apple, at Publisher's expense, in the delivery format and using the delivery method reasonably specified by Apple using iTunes Connect, eg, ePub format. Publisher Content will be delivered to a server in California by means of telecommunications or via “load & leave” per California regulation 1502.
- (e) Publisher shall not include any digital watermark or similar technologies in the Content File.



4. Royalties.

Publisher shall be responsible for and timely pay any royalties or license fees owed to authors, illustrators, artists, talent and other rights holders or contributors (if any) arising from the use of any Publisher Materials in furtherance of Apple's appointment, and the Content Usage Rules, consistent with this Agreement, including any payments required under collective bargaining agreements.

5. Agency Commission; Tax; and Reporting.

- (a) For sales of eBooks, Apple shall be entitled to a commission of thirty percent (30%) of the Customer Price payable by eBook purchasers net of any and all taxes collected ("eBooks Proceeds"), even if Apple is unable to collect from the purchaser. The "sale" of an eBook shall occur when an eBook is first delivered to an end user.
- (b) If, for any particular New Release in hardcover format, the then-current Customer Price at any time is or becomes higher than a customer price offered by any other reseller ("Other Customer Price"), then Publisher shall designate a new, lower Customer Price to meet such lower Other Customer Price.
- (c) After deducting its commission from eBook Proceeds, Apple shall either remit to Publisher, or issue a credit in Publisher's favor subject to minimum monthly remittance amount thresholds determined by Apple, the remaining balance by electronic funds transfer ("EFT") no later than forty-five (45) days following the close of the previous monthly sales period. Payment shall be made in United States dollars (US\$) for sales in the United States, and in Canadian dollars (CDN\$) for sales in Canada.
- (d) Using iTunes Connect, Apple shall make available and Publisher shall have access to an updated sales report including itemized sales of eBooks.
- (e) Publisher is responsible for any fees (e.g., wire transfer and EFT fees) charged by Publisher's bank or any intermediary banks. Publisher shall provide Apple with Publisher's banking information using iTunes Connect.
- (f) If a purchase is subject to withholding or similar tax, or sales, use, goods and services, value added, or other tax or levy not collected by Apple under Section 5(g) below, or any other tax or other government levy of whatever nature, the full amount of that tax or levy shall be solely for Publisher's account, and shall not reduce the commission to which Apple is entitled



- (g) Apple may withhold any taxes, duties, charges or levies on payments by Apple to Publisher required by applicable law, rule or regulation, and Apple shall remit any such withholding to the appropriate tax authority.
- (h) Publisher shall indemnify and hold Apple harmless against any and all claims by any tax authority for any underpayment of any sales, use, goods and services, value added or other tax or levy, and any penalties and/or interest thereon.

6. Apple Obligations.

- (a) Apple shall condition use of eBooks on an end user's acknowledgement of terms of use, which terms shall state that any use of eBooks is for personal and non-commercial use only, and that the sale of eBooks does not provide any commercial or promotional use rights in any eBook.
- (b) Apple shall be responsible for all marketing, storage, hosting and delivery costs associated with Apple's appointment activities, except as otherwise agreed by the Parties in writing.
- (c) If Publisher notifies Apple that, for reasons beyond its control, it is no longer able to authorize Apple to use certain rights permitted under its appointment, or if Apple's exercise of its rights will cause Publisher to violate the rights of a third party (each a "Clearance Issue"), then Publisher may withdraw such authorization, in which case Apple shall cease promotion and sales of eBooks using such withdrawn rights within three (3) business days of such notice (for the avoidance of doubt, Apple may continue to provide re-downloads of previously purchased eBooks). Publisher shall not discriminate against Apple regarding any withdrawal requests.

7. Parental Advisory.

Publisher shall use commercially reasonable efforts to indicate which Publisher Content (if any) may be inappropriate for children using "explicit" content ratings, which Apple may use to notify potential end users of such rating and control access to such content.

8. Names and Likenesses; Promotional Use and Opportunities.

- (a) Apple may use the names and authorized likenesses of, and biographical material for, any eBook author, illustrator or other talent, as well as Previews, Insert Content, or Artwork, in furtherance of its appointment. Further written approval from Publisher shall be required if any name, likeness or identifying material is otherwise used as an endorsement of Apple, the Online Store, or other products.





- (b) For the avoidance of doubt, generally, Apple may promote the Online Store and content on the Online Store in its sole discretion.

9. Copyright Notices; Ownership.

- (a) Publisher shall provide an appropriate copyright notice in the Content File, or as reasonably requested by Apple, which Apple shall display for each eBook.
- (b) As between the Parties, subject to any pre-existing rights of Apple, all right, title and interest in and to (i) Publisher Content, (ii) Artwork, (iii) Previews, (iv) Insert Content, (v) all copyrights and equivalent rights embodied therein, and (v) any other materials furnished by Publisher, shall remain the property of Publisher; nonetheless, Apple shall not have any lesser rights than it would otherwise have as a member of the public. Upon Apple's request, Publisher shall provide a list of public domain material furnished by Publisher.

10. Press Release.

Publisher agrees not to make or issue any public statement or press release regarding this Agreement or its subject matter without prior written approval from Apple.

11. Data Protection.

- (a) Apple shall protect materials furnished by Publisher in a manner no less restrictive than Apple protects materials furnished by any other book publisher, including the use of the Security Solution, and the implementation and enforcement of Content Usage Rules, as set forth in Exhibit B. If the Security Solution is compromised such that eBooks are being made widely available without restriction, having a material adverse effect on the commercial purpose of the appointment and this Agreement, then Apple shall use commercially reasonable efforts to cure such compromise. If the breach is not substantially cured within thirty (30) days, then Publisher may stop providing additional New Releases to Apple, and if the breach is not substantially cured within sixty (60) days, then Publisher may suspend Apple's appointment until cured.
- (b) In the event of a security breach of the Online Store servers such that unauthorized access to Publisher Content becomes available, then Apple will disable all access to such servers or destroy content on such servers within twenty-four (24) hours.
- (c) Publisher Materials in Apple's control or possession shall reside only on secure network servers or equivalent devices owned or controlled by Apple or its contractors with restricted access.



## 12. Record-Keeping and Audit.

- (a) Apple shall maintain complete records regarding sales of eBooks and proceeds payable to Publisher for at least three (3) years following the applicable monthly sales period.
- (b) Upon no less than thirty (30) days advance written notice, and within two (2) years following the applicable monthly sales period (the “Audit Period”), Publisher, at its expense, may appoint an independent certified public accountant to audit directly applicable records of Apple at Apple’s principal place of business in the Territory for the sole purpose of verifying proceeds due Publisher. An audit shall take place during regular business hours, and shall not occur more than once during any twelve (12) month period. The certified public accountant should not be engaged in an audit of Apple or Publisher, or on a contingency-fee basis, and must provide to Apple a confidentiality agreement that protects Apple’s confidential information no less than the terms of this Agreement or Publisher protects its own similar information. Publisher may audit a record only once, and no audit shall be conducted for a period spanning less than six (6) months.
- (c) Unless Publisher provides a detailed objection within two (2) years following the applicable monthly sales period, Publisher shall be deemed to consent to all reports, and reports shall not be subject to objection by Publisher for any reason. Publisher agrees that Apple’s books and records contain “Confidential Information” (as defined below).

## 13. Termination and Effect of Termination.

- (a) Either Party shall have the right to terminate this Agreement prior to the expiration of the Term if the other Party (i) becomes insolvent, (ii) files a petition in bankruptcy, (iii) makes an assignment for the benefit of creditors, or (iv) breaches a material term of this Agreement, unless such breach is cured within thirty (30) days from notice, or if not able to be so cured, then resolved to the other Party’s reasonable satisfaction.
- (b) Sections 1, 4, 5, 6(b), 9(b), 10, 12, 13, 14, 15, 16, and 17 shall remain in full force and effect following the termination or expiration of this Agreement.
- (c) If this Agreement terminates or expires, then Publisher Materials in Apple’s possession or control shall be promptly destroyed, excluding copies necessary for Apple’s standard customer support practices, eg, re-downloads (subject to applicable terms in this Agreement), or required to be maintained by applicable law, rule or regulation.





14. Indemnification and Limitation of Liability.

- (a) Apple shall have no responsibility for the installation and/or use of any eBook by any end-user. Publisher shall be solely responsible for any and all product warranties, end-user assistance and product support with respect to each eBook.
- (b) Publisher shall be solely responsible for, and Apple shall have no responsibility or liability whatsoever with respect to, any and all claims, suits, liabilities, losses, damages, costs and expenses arising from, or attributable to, Publisher Materials and/or use by any end-user, including, but not limited to: (i) claims of breach of warranty; (ii) product liability claims; and (iii) claims that any of the Publisher Materials and/or the end-user's possession or use of those materials infringes the copyright or other intellectual property rights of any third party.
- (c) In the event that Apple receives any notice or claim from any end-user that: (i) the end-user wishes to cancel its license to use any eBook within ninety (90) days of the date of download; or (ii) an eBook fails to conform to Publisher specifications or Publisher's product warranty or the requirements of any applicable law, Apple may refund the end-user the full amount of the price paid by the end-user. In the event that Apple refunds any such price to an end-user, Publisher shall reimburse, or grant Apple a credit for, an amount equal to the price for that eBook. Apple will have the right to retain its commission on the sale of that eBook, notwithstanding the refund of the price to the end-user.
- (d) Apple will indemnify and hold harmless, and upon Publisher's request, defend, Publisher and its affiliates (and their respective directors, officers and employees) from and against any and all losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees and costs) arising out of a claim by a third party by reason of a breach of any warranty, representation, covenant or obligation of Apple under this Agreement; or any claim that the technology used by Apple in its appointment infringes the intellectual property rights of another party. Publisher shall promptly notify Apple of any such claim, and Apple may assume control of the defense or settlement of such claim. Publisher shall have the right, at its expense, to participate in the defense thereof under Apple's direction.
- (e) Publisher will indemnify and hold harmless, and upon Apple's request, defend, Apple and its affiliates (and their respective directors, officers and employees) from and against any and all losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees and costs) arising out of a claim by a third party by reason of a breach of any warranty, representation, covenant or obligation of Publisher under this Agreement; or any claim that Publisher Materials infringes the intellectual property rights of another party. Apple shall promptly notify Publisher of any such claim, and Apple may assume control of the defense or settlement of such



claim. Apple shall have the right, at its expense, to participate in the defense thereof under Publisher's direction.

- (f) EXCEPT PURSUANT TO AN EXPRESS INDEMNITY OBLIGATION, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, SUCH AS LOSS OF PROFITS OR PUNITIVE DAMAGES, EVEN IF ADVISED OF THEIR POSSIBILITY.
- (g) NO WARRANTY OR TERM, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, AS TO THE CONDITION, QUALITY, DURABILITY, PERFORMANCE, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE ONLINE STORE OR ANY ELEMENTS THEREOF IS GIVEN TO, OR SHOULD BE ASSUMED BY, PUBLISHER, AND ANY SUCH WARRANTIES AND TERMS ARE HEREBY EXCLUDED.

15. Confidentiality.

Each Party acknowledges that by reason of this Agreement it may have access to certain information and materials concerning the other Party's business plans, customers, technology and products that are confidential and of substantial value to such Party, which value would be impaired if such information were disclosed to third parties or used for purposes other than as expressly permitted by this Agreement (referred to in this Agreement as "Confidential Information"). Each Party agrees to maintain any and all Confidential Information received from the other, in confidence, and agrees not to disclose or otherwise make available such Confidential Information to any third party without the prior written consent of the disclosing Party. Each Party agrees that Confidential Information shall be disclosed to its employees and other personnel under its control and supervision for purposes of performing under this Agreement solely on a need-to-know basis in furtherance of this Agreement, and solely to those individuals who are bound by a written non-disclosure agreement having terms no less restrictive than the non-disclosure terms of this section, unless required by law, or court or governmental order. Confidential Information shall be deemed to include (i) information marked confidential, if conveyed in writing, and (ii) information identified orally as confidential, if conveyed orally. Confidential Information shall not be deemed to include any information which (a) is publicly known at the time of the disclosure, (b) becomes publicly known other than by breach of the terms of this section, (c) becomes known to the receiving Party, without restriction, from a source free of any obligation of confidentiality and without breach of this section, or (d) is independently developed by the receiving Party.

16. Additional Representations and Warranties of the Parties.



- (a) The Parties agree that the nature of their relationship is that of Publisher as principal and Apple as agent.
- (b) Apple shall not pledge, mortgage or otherwise encumber any part of the Publisher Materials.
- (c) Each Party agrees that it has full authority to enter into this Agreement, and to fully perform in a professional and competent manner.
- (d) Each Party agrees that it owns or controls the necessary rights in order to make the grant of rights herein, and that the exercising such rights shall not violate or infringe the rights of any third party.
- (e) Each Party agrees to perform in compliance with any applicable law, rule and regulation.

17. General Provisions.

- (a) *Contractors.* Apple may contract with third parties in furtherance of Apple's appointment, provided such third parties are subject to terms no less restrictive than the terms Apple is subject to under this Agreement. Apple shall be responsible for the performance of such third parties while under Apple' control and supervision.
- (b) *Entire Agreement, Modification, Waiver.* This Agreement, including any schedules and exhibits, contains the entire understanding of the Parties relating to its subject matter, and supersedes all previous understandings between the Parties. This Agreement cannot be changed or modified except by a writing signed by the Parties. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable, such determination shall not affect any other provision hereof, and the unenforceable provision shall be replaced by an enforceable provision that most closely meets the commercial intent of the Parties.
- (c) *Binding on Successors.* This Agreement shall be binding on the assigns, heirs, executors, administrators, and successors (whether through merger, operation of law, or otherwise) of the Parties. Apple may assign or transfer any part of this Agreement to an affiliate of Apple without Publisher's consent.
- (d) *Notices.* Any notice under this Agreement shall be given in writing and shall be deemed to have been delivered and given: (i) on the delivery date if delivered personally; (ii) upon delivery by confirmed-receipt facsimile; (iii) one (1) business day after deposit with a commercial overnight carrier, with written verification of receipt; or (iv) five (5) business days after the mailing date, whether or not actually received, if sent by certified mail, return receipt requested, postage and charges prepaid.



If to Publisher, to the contact specified by Publisher via iTunes Connect, with a courtesy copy by email or facsimile, which copy shall not constitute notice, to the Legal contact specified by Publisher via iTunes Connect.

If to Apple, to:  
Associate General Counsel, iTunes  
Apple Inc.  
1 Infinite Loop, MS 3-ITS  
Cupertino, CA 95014  
Fax: 408-974-9105

- (c) *Governing Law.* This Agreement shall be governed and interpreted in accordance with the laws of the State of California, without regard to principles of conflict of laws. The Parties agree that any proceeding relating to this Agreement will take place in the No. District of California; and both Parties hereby waive the right to object to that choice of law, personal jurisdiction or venue.
- (f) *Counterparts.* This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same document.
- (g) *Remedies.* To the extent permitted by applicable law, the rights and remedies of the Parties provided under this Agreement are cumulative and in addition to any other rights and remedies of the Parties at law or equity.
- (h) *Headings.* The titles used in this Agreement are for convenience only and are not to be considered in construing or interpreting the Agreement.
- (i) *No Third-Party Beneficiaries.* This Agreement is for the sole benefit of the Parties and their authorized successors and permitted assigns. Nothing is intended to confer upon any person or entity, other than the Parties and their authorized successors and permitted assigns, any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.



IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their respective officers thereunto duly authorized.

Apple INC.

Publisher

By: \_\_\_\_\_

By: \_\_\_\_\_

*Signature*

Name: Eddy Cue  
Title: VP, Internet Services  
Date: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_



EXHIBIT A

Customer Pricing

United States (all prices in US dollars)

- For New Release hardcover titles with list prices of \$30 or less, Publisher may designate a Customer Price from among the following tiers:

\$12.99, \$11.99, \$10.99, \$9.99, \$8.99, \$7.99, \$6.99, \$5.99, \$4.99, \$3.99, \$2.99, \$1.99, \$0.99; and a \$14.99 tier for New Release hardcover titles with list prices of more than \$30, with incremental \$5 customer pricing tiers for every \$5 list price (for example, a \$19.99 Customer Price for a \$35 or more list price, until the next higher Customer Price tier is triggered).

- For hardcover titles that are not New Releases, trade paperbacks, mass markets and Out of Print titles, Publisher may designate a Customer Price from among the following tiers:

\$9.99, \$8.99, \$7.99, \$6.99, \$5.99, \$4.99, \$3.99, \$2.99, \$1.99, \$0.99

An “Out of Print” title means a book that is no longer made available by Publisher in physical format.

Publisher acknowledges the business practice that for any eBook, the Customer Price less Apple’s commission should be materially lower than the wholesale price for such book in physical format.

Canada (all prices in Canadian dollars)

[TBD]





## EXHIBIT B

### Content Usage Rules

#### 1. Definitions.

(a) “Non-Transfer Device” means a device (including, without limitation, a digital content rendering device or mobile phone) that uses the Security Solution, but cannot transfer an eBook along with their usage rights keys to any other device, except if that other device is already authorized for the Online Store account used to acquire that eBook.

(b) “Transfer Device” means a computer that uses the Security Solution, and can transfer eBooks along with their usage rights keys to any other device.

#### 2. Usage Rules.

End users acquiring eBooks may:

- Use eBooks on up to five (5) Transfer Devices and an unlimited number of Non-Transfer Devices at the same time;
- Use eBooks solely for end user’s personal and non-commercial use; and
- Re-download previously purchased eBooks from the Online Store.



EXHIBIT C  
“FAIRPLAY SPECIFICATION”  
[As provided]

