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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF NEW YORK

4

RANDOM HOUSE, INC.,)

5

Plaintiff,)

6

vs.) No. 01 Civ. 1728 (SHS)

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ROSETTA BOOKS LLC and ARTHUR)

8

M. KLEBANOFF, in his individual)
capacity and as principal of)

9

ROSETTA BOOKS LLC,)

10

Defendants.)

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14

DEPOSITION OF LEO D. DWYER

15

New York, New York

16

Thursday, April 19, 2001

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23 Reported by:

SHAUNA STOLTZ-LAURIE

24 CSR NO. 810490

JOB NO. 120632A

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April 19, 2001

10:12 a.m.

Deposition of LEO D. DWYER, held at
the offices of Weil, Gotshal & Manges, 767
Fifth Avenue, New York, New York, pursuant
to notice, before Shauna Stoltz-Laurie, a
Notary Public of the State of New York.

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2 A P P E A R A N C E S:

3

4 WEIL, GOTSHAL & MANGES LLP

5 Attorneys for Plaintiff

6 767 Fifth Avenue

7 New York, New York 10153-0119

8 BY: JONATHAN S. SHAPIRO, ESQ.

9 LISA CANTOS, ESQ.

10

11 KOHN, SWIFT & GRAF, P.C.

12 Attorneys for Defendants

13 One South Broad Street

14 Philadelphia, Pennsylvania 19107-3389

15 BY: MICHAEL J. BONI, ESQ.

16

17 ALSO PRESENT:

18 MATTHEW E. MARTIN (Random House)

19 ARTHUR M. KLEBANOFF (RosettaBooks)

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IT IS HEREBY STIPULATED AND AGREED, by
and between the attorneys for the respective
parties herein, that filing and sealing be
and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized to
administer an oath, with the same force and
effect as if signed and sworn to before the
Court.

1

2 L E O D . D W Y E R , called as a witness,

3 having been duly sworn by a Notary Public,

4 was examined and testified as follows:

5 EXAMINATION BY

6 MR. SHAPIRO:

7 Q. Good morning, Mr. Dwyer.

8 A. Good morning.

9 Q. Can you please state your name and

10 address for the record.

11 A. Leo David Dwyer, [REDACTED]
[REDACTED].

13 Q. Thank you.

14 I know we met. My name is Jonathan

15 Shapiro with the law firm of Weil Gotshal & Manges

16 here in New York. We represent the plaintiff

17 Random House in this action.

18 Have you ever been deposed before, Mr.

19 Dwyer?

20 A. Never.

21 Q. I assume your attorney may have told you

22 some of the ground rules, but I'll tell you that

23 I'm going to be asking you a series of questions.

24 I'll ask you to answer to the best of your

25 recollection. To the extent that you don't

1 Dwyer

2 understand a question that I've asked, or maybe
3 it's unclear, please let me know, and I'll do my
4 best to clarify it. If you don't let me know, I'll
5 assume that you do understand the question.

6 Also, everything that we say will be
7 taken down by the court reporter, so she needs
8 audible responses, yes, no or whatever, but not an
9 uh-huh or a shake of a head. It won't come up.

10 A. Fine.

11 Q. OK? Great.

12 Do you understand that the testimony
13 you're about to give is sworn just as if you were
14 giving your testimony in a court of law? Do you
15 understand that?

16 A. Certainly, yes.

17 MR. SHAPIRO: Let me mark as [Dwyer]
18 Exhibit 1 Plaintiff's First Request for
19 Production of Documents.

20 ([Dwyer] Exhibit 1, Plaintiff's First
21 Request for Production of Documents, marked
22 for identification, as of this date.)

23 Q. Mr. Dwyer, just take a second to look at
24 what I've put in front of you as [Dwyer] Exhibit 1.
25 Have you ever seen this before?

1 Dwyer

2 A. I saw a copy of it, yes.

3 Q. And what's your understanding of what
4 this is?

5 A. It's a request for production of
6 documents.

7 Q. Made by Random House?

8 A. Made by Random House.

9 Q. Are you aware of any steps that
10 RosettaBooks or Mr. Klebanoff may have made to
11 comply with this request?

12 A. Yes.

13 Q. And what steps were those?

14 MR. BONI: The reason Mr. Klebanoff
15 took or --

16 MR. SHAPIRO: No. I'm using
17 generically defendants.

18 Q. Were you aware of the steps taken by
19 defendants to comply with this request for
20 documents?

21 A. Yes.

22 Q. And what steps are you aware of?

23 A. We read the request and, to the extent
24 that the documents requested were available,
25 extracted from our files and copied them and sent

1 Dwyer

2 them on to our attorney.

3 Q. When you say "we read the request," did
4 you yourself read them?

5 A. I read the request with Mr. Klebanoff,
6 who had read the request I believe; I'm not
7 certain.

8 Q. Do you know anyone else read the
9 request?

10 A. I couldn't -- I couldn't say for sure.

11 MR. BONI: You mean other than the
12 attorneys?

13 MR. SHAPIRO: Yes, right.

14 Q. I'm not asking for anything you
15 discussed with counsel.

16 Anyone else at RosettaBooks?

17 A. I couldn't say for sure.

18 Q. Do you maintain an office here at
19 RosettaBooks in New York?

20 A. Yes, I do.

21 Q. And do you maintain files in your
22 office?

23 A. Not extensive files, but I have some
24 files, contract --

25 Q. I'm sorry, go ahead.

1 Dwyer

2 A. Contracts.

3 Q. Do you have a secretary?

4 A. No.

5 Q. Does RosettaBooks have a central filing
6 system?

7 MR. BONI: You want to explain what
8 you mean by that?

9 MR. SHAPIRO: Sure.

10 Q. In your office do you have a filing
11 cabinet?

12 A. Yes.

13 Q. Do you have a desk drawer?

14 A. Yes.

15 Q. And you keep some files in there?

16 A. Yes.

17 Q. Other people have offices, and they have
18 their own filing cabinets and desk drawers?

19 A. Yes.

20 Q. Were there some files that are kept
21 outside of individual offices, filing cabinets in
22 another room or in the hallways?

23 A. Yes.

24 Q. Are you aware that all these, the filing
25 cabinets in the hallways, that are not located in

1 Dwyer

2 the individual offices were searched?

3 A. To the best of my knowledge, yes.

4 Q. And do you know whether or not your

5 individual files in your office were searched?

6 A. Yes.

7 Q. Did you search them yourself?

8 A. I did flip through, yes.

9 Q. Does RosettaBooks maintain any off-site

10 storage, sort of archive documents somewhere?

11 A. We're not old enough to have any

12 archives.

13 Q. That's what I thought.

14 So everything you have would be right

15 there on site?

16 A. Correct.

17 Q. And how big of a space is Rosetta Books?

18 A. We have a portion of an office, and I

19 believe in round numbers I'd say it's a 2,000 foot

20 space.

21 Q. 2,000 square feet?

22 A. Right.

23 And we would occupy about half of that,

24 and some shared spaces, Xerox machines.

25 Q. Right. OK.

1 Dwyer

2 Do you maintain any files at home? Do

3 you keep any files at home?

4 MR. BONI: Related to RosettaBooks?

5 MR. SHAPIRO: Yes.

6 A. I might have personal documents relating
7 to my relationship with RosettaBooks at home, and I
8 also would have just perhaps some Internet search
9 documents stored on the computer, but no real
10 working business documents, no.

11 Q. Do you ever bring work home?

12 A. No, not usually. I tend to work late,
13 and I try to leave --

14 Q. Sorry to hear that.

15 A. -- when I go home.

16 Q. Well, that's good.

17 Did you search your home to see if there
18 are any responsive documents to the request?

19 A. No, I didn't. I didn't feel there was a
20 need to --

21 MR. BONI: It just calls for a yes or

22 no.

23 Q. You were saying you didn't feel there
24 was a need to.

25 You didn't think there would be any

1 Dwyer

2 responsive documents?

3 A. No.

4 Q. No, you didn't think -- the question

5 was --

6 A. I did not believe that there were any

7 responsive documents at home.

8 Q. OK, we were crossing paths.

9 OK, do you have a computer in your

10 office?

11 A. Yes.

12 Q. In your own personal office?

13 A. Yes.

14 Q. Was that searched for responsive

15 documents?

16 A. Yes.

17 Q. Like the hard drive?

18 A. Yes.

19 Q. How about any floppy disks?

20 Do people use them any more?

21 MR. BONI: Why don't you ask him if he

22 uses floppy disks.

23 A. No.

24 Q. You don't use them?

25 A. No.

1 Dwyer

2 Q. Any backup storage systems, zip drives

3 or anything like that?

4 A. Not outside the network, no.

5 Q. Did someone search the network at

6 RosettaBooks?

7 A. Yeah.

8 MR. BONI: Object to form.

9 Q. Yes, for responsive documents?

10 A. Yeah.

11 Q. And the network, it's the type -- is

12 there a shared file system so can you access other

13 files at Rosetta Books through the network?

14 A. Could you repeat the question?

15 Q. Sure.

16 How is your network set up?

17 You said there was a network. Can you

18 explain that?

19 Can you, Mr. Dwyer, search the network,

20 and will you by doing so be able to search all the

21 shared files at RosettaBooks?

22 MR. BONI: I object to the form of the

23 question. The question itself supposes that

24 there's a shared system.

25 MR. SHAPIRO: All right.

1 Dwyer

2 Q. Do you understand the question? Or I'll

3 try to rephrase it.

4 A. Maybe if you could rephrase it.

5 Q. Sure.

6 Why don't you explain the network that

7 you have at RosettaBooks.

8 A. We have a server, and we have I believe

9 it is four or five remote PCs that are networked to

10 the server.

11 Q. Is that like the one in your office?

12 A. Yes.

13 Q. So to the extent that somebody creates a

14 document on one of your remote PCs and places it on

15 the network, you can access it from your location;

16 is that correct?

17 A. Not in all cases.

18 Q. Not in all cases?

19 You indicated there was a search of the

20 network for responsive documents.

21 A. Can I actually ask you to define search?

22 Q. Why don't you tell me what you mean by

23 search.

24 MR. BONI: It's your question. What

25 he's saying is he doesn't understand your

1 Dwyer

2 question.

3 Q. OK, you said you read the document

4 request; is that correct?

5 A. That's correct.

6 Q. And you said you undertook some type of

7 search for files.

8 A. Right.

9 Q. With respect to the computer files, what

10 kind of search did you undertake?

11 A. I extracted those documents from the

12 computer that were responsive to the request.

13 Q. Now, when you say computer, does that

14 include from the network or just from your own PC?

15 A. To be honest, I couldn't tell you for

16 sure whether the documents came out of my PC or the

17 server drive. They came out of the system.

18 Q. The question I'm asking is did you

19 search solely on your own PC or did you search on

20 the network.

21 MR. BONI: If you understand what is

22 meant by the word search in that question,

23 you can answer.

24 A. I don't understand what is meant by the

25 word search.

1 Dwyer

2 MR. SHAPIRO: Object to the form?

3 Why don't you read back his last

4 answer. Read back a few questions.

5 (Record read.)

6 Q. I'm asking a follow-up to that response.

7 You said you extracted documents from the computer,

8 and I'm trying to ask how did you extract them.

9 Do you recall whether you extracted them

10 from your own personal computer and/or you included

11 the global network?

12 A. I was sitting at my personal computer.

13 Q. OK.

14 A. I printed the documents on a network

15 printer.

16 Q. OK.

17 A. And I couldn't tell you for sure whether

18 the documents I printed were stored on my local

19 drive or on the network drive.

20 Q. Do you recall checking the network drive

21 for responsive documents?

22 MR. BONI: Object to form.

23 A. Could you define check?

24 Q. We'll use whatever word you like.

25 A. To the extent that I could locate

1 Dwyer

2 responsive documents, we, or I, produced them.

3 Q. And did you limit that search --

4 A. I didn't limit it in any way.

5 MR. BONI: Let him finish his

6 question, and then answer the question.

7 Q. To make sure we understand the nature of

8 your search, you checked the network for responsive

9 documents; is that what you're saying?

10 MR. BONI: Object to form.

11 Q. (Continuing) You can answer it.

12 A. Could you repeat the question?

13 Q. Can you, from sitting at your computer

14 are you able to check the network of documents --

15 that's correct? -- for documents created by others?

16 MR. BONI: Object to form.

17 A. Yes, I can check the network.

18 Q. Did you do that in response to the

19 document request?

20 If you don't recall --

21 A. Could you define for me what doing that

22 entails? Does it --

23 Could I ask you a question?

24 Q. Sure. Go ahead.

25 A. Does it entail doing a search?

1 Dwyer

2 Or let me pick one of the items in the

3 document request.

4 MR. BONI: Let's short circuit this.

5 You were instructed -- and I agree with the

6 examiner's instruction -- if you don't

7 understand the question, just say you don't

8 understand the question, could you rephrase

9 it, and we'll go from there, OK?

10 THE WITNESS: Right.

11 Q. All right. Are you aware of whether or

12 not the individual remote PCs were searched?

13 MR. BONI: Object to form.

14 A. I -- I know that the PCs that I believe

15 would have anything on them that have anything to

16 do with the request were searched.

17 Q. When you tell me the PCs, are you

18 talking about the hard drives of those PCs?

19 A. Yes.

20 Q. And did you make that determination

21 which PCs might have responsive documents?

22 A. Not -- not solely. It -- if your

23 question is do I believe that we have produced all

24 the documents --

25 MR. BONI: That wasn't his question.

1 Dwyer

2 Just listen to his question and answer his

3 question.

4 Q. You said not solely. Who else made that

5 determination which --

6 A. Art Klebanoff asked me to assist him in

7 searching his PC.

8 Q. Anyone else?

9 A. No.

10 Q. Can you just briefly tell me your

11 educational background?

12 A. I've got a BA from Washington University

13 in St. Louis, I've got a master's in architecture

14 from Harvard, and I've got a master's in business

15 administration from Harvard.

16 Q. What year was the BA?

17 A. '79.

18 Q. Well, do you have a major?

19 A. Architecture.

20 Q. And what about the MBA, what year was

21 that?

22 A. '86.

23 Q. And was there any type of concentration

24 in the MBA?

25 A. There is not a concentration in the MBA

1 Dwyer

2 program at Harvard.

3 Q. After receiving your MBA in '86 what was
4 your next employment? What was your employment
5 after that, I should say?

6 A. I worked with a company called ARCORP
7 Properties, I believe all caps.

8 Q. What type of company was that?

9 A. It's a real estate development company.

10 Q. And what was your position?

11 A. I was a project manager.

12 Q. How long did you work there?

13 A. I believe it was two years.

14 Q. What was your next employment?

15 A. I worked at Drexel-Burnham.

16 Q. So was that you started about 1988 or
17 so? Is that about right?

18 A. Something like that.

19 Q. And what was your position there?

20 A. I was an associate in corporate finance.

21 Q. How long were you at Drexel?

22 A. Between one and two years.

23 Q. And then where did you go?

24 A. Then I went to a company called Forest
25 City Enterprises.

1 Dwyer

2 Q. Was that around 1990?

3 A. Yes.

4 Q. Sorry. What kind of company is Forest
5 City Enterprises?

6 A. Real estate development.

7 Q. How long were you there?

8 A. Approximately two years.

9 Q. And then where did you go next?

10 A. I worked for a company called -- it
11 changed its name. Let me think. It would be the
12 King Island Dairy. I'm sorry, it was Island Foods
13 would have been most of my duration that I was
14 there.

15 Q. And that's a kind of food distribution
16 or --

17 A. Specialty dairy products and
18 distribution.

19 Q. What was the nature of your employment
20 there?

21 A. I was a manager, executive.

22 Q. And where did you go after Island Foods?

23 A. I was an independent consultant, did
24 general advisory work to corporate clients for a
25 number of years. It would be about four years.

1 Dwyer

2 Q. How many? I'm sorry.

3 A. Four.

4 Q. So when did you start that -- do you
5 recall? -- independent consulting?

6 A. I should have brought my resume. It
7 would have been '86 -- I'm sorry, '96.

8 Q. '96?

9 And were you on your own or was this --

10 A. I was on my own.

11 Q. Is there a typical type of corporate
12 client you worked for?

13 A. I worked for a very large corporation
14 doing sort of business strategy and often
15 investment.

16 Q. Investment you said?

17 A. Yeah.

18 Q. Was that the last employment before you
19 began working at Rosetta?

20 A. Right.

21 MR. SHAPIRO: Let me just mark this as

22 [Dwyer] Exhibit 2. This is an April 18,

23 2001 letter from Mr. Michael Boni of Kohn

24 Swift to R. Bruce Rich.

25 ([Dwyer] Exhibit 2, Mr. Boni 4/18/01

1 Dwyer

2 letter to Mr. Rich, marked for

3 identification, as of this date.)

4 Q. Sorry. I meant to show this to you

5 before. Just quickly, just take a look at that.

6 Have you seen this before?

7 A. No, I haven't.

8 Q. Do you have an understanding of what

9 this is?

10 A. No, I don't.

11 Q. I'll represent that this is a letter

12 from your counsel -- I think you would agree --

13 responding to plaintiff's document request that we

14 looked at earlier.

15 Did you participate in the drafting of

16 this letter?

17 A. No, I didn't.

18 Q. Did you see an earlier draft of this

19 letter?

20 A. No, I didn't.

21 MR. BONI: Are done with this?

22 MR. SHAPIRO: Yes.

23 Next mark this as [Dwyer] Exhibit 3,

24 declaration of Leo David [Dwyer].

25 ([Dwyer] Exhibit 3, Mr. Dwyer

1 Dwyer

2 declaration, marked for identification, as

3 of this date.)

4 Q. Mr. Dwyer, have you seen Exhibit 3

5 before?

6 A. Certainly.

7 Q. Can you just identify it for me?

8 A. It's my declaration that I submitted as

9 part of our response.

10 Q. Response to Random House --

11 A. Complaint.

12 Sorry about that.

13 Q. Did you draft this yourself?

14 A. I did.

15 Q. And when did you begin drafting the

16 declaration?

17 A. I'm trying to think. I'm not very good

18 with dates, but I believe I worked on it for about

19 14 days, so from the day it was submitted back 14

20 days, which would be --

21 Where is the date?

22 Q. I think you'll see it on the last page.

23 A. April 5th, so two weeks before

24 April 5th.

25 Q. And did you draft this on your own PC?

1 Dwyer

2 A. I did.

3 Q. If you look at paragraph two on the
4 first page --

5 It starts on the first page.

6 A. Yup.

7 Q. -- we were just talking about your
8 independent consultancy.

9 What was the name of that?

10 Was there a business name?

11 A. There really wasn't.

12 Q. You said "I assisted the founding
13 partners of Rosetta in the development of a
14 business plan."

15 A. Yes.

16 Q. When were you first engaged by the
17 founding partners of RosettaBooks?

18 A. July of 2000.

19 Q. July 2000?

20 A. Approximately.

21 Q. Did you have a relationship with one of
22 the founding partners before being engaged?

23 A. I was -- no, I didn't.

24 I was introduced to them.

25 Q. And who introduced you?

1 Dwyer

2 A. A friend.

3 Q. What's his name or her name?

4 A. Joel Pozanski.

5 Q. Did you prepare any type of pitch or

6 proposal for RosettaBooks concerning your

7 engagement?

8 MR. BONI: Object to form.

9 Pitch his employment or for

10 RosettaBooks? It's vague.

11 Q. (Continuing) For your engagement.

12 You said you were introduced by a

13 friend.

14 A. This is true.

15 Q. What happened next?

16 MR. BONI: Object to form.

17 Q. Let me ask you, did you have a meeting

18 with someone at RosettaBooks, one of the founding

19 partners of RosettaBooks?

20 A. I -- yes. Yes.

21 Q. And did they indicate what type of

22 consultancy work they might need?

23 A. Yes.

24 Q. And did you provide them any written

25 materials as to what kind of services you could

1 Dwyer

2 provide them?

3 A. My resume.

4 Q. And that's it?

5 MR. BONI: You have to say yes.

6 A. Yes. I'm sorry.

7 MR. SHAPIRO: Thank you.

8 Q. Did there come a time when you prepared

9 any type of business proposal or plan for

10 RosettaBooks?

11 A. No.

12 Q. And around July 2000, when you were

13 first engaged, what was your assignment, for lack

14 of a better word?

15 MR. BONI: Position?

16 MR. SHAPIRO: No, assignment.

17 Q. What were you charged to do for

18 RosettaBooks?

19 A. To assist in formulating the bones of a

20 company. We were starting with an idea, and to

21 make that a reality takes a lot of things.

22 Q. And what kind of things did you work on?

23 A. Identifying technology, identifying

24 potential sources of -- for out-sourcing of DRM,

25 book conversion, identifying retail channels,

1 Dwyer

2 identifying the relationships we would have to

3 create to make a business.

4 Q. I think you said "DRM." Can you just

5 for the record explain what that refers to?

6 A. Digital rights management. It's the

7 encryption or -- of a -- of a file that prevents it

8 from being copied.

9 Q. Were you involved at this stage in the

10 drafting of any operative documents in the creation

11 of RosettaBooks?

12 A. Could you define operative documents.

13 Q. What types of documents were you

14 involved in drafting at this stage, if any?

15 A. I don't recall there being any

16 particular documents produced --

17 Could you give me examples?

18 Q. Sure. Like if there was a partnership

19 agreement, like there was any kind of business

20 plan.

21 A. No, I was not involved in the formative

22 partnership agreement, if that's what you're

23 talking about.

24 Q. Did you get involved at this stage --

25 talking about the early July 2000 stage -- in

1 Dwyer

2 drafting any of the contracts for works, for

3 titles?

4 A. No. No. I certainly would have read

5 it.

6 Q. Would you have given input, do you

7 recall?

8 MR. BONI: In the preparation of these

9 contracts?

10 MR. SHAPIRO: Yes.

11 A. I don't recall.

12 Q. Do you recall when you came on board

13 around July 2000 whether or not there was a form or

14 a standard contract developed for titles?

15 A. I -- I couldn't say for certain the

16 date, but sometime in July, August there certainly

17 was a formal contract that had developed, that

18 defined -- I'm not certain if it was there when I

19 arrived or it was formed -- that really wasn't my

20 focus in what I was doing.

21 Q. And how would you define your focus?

22 A. My focus was more on the -- the

23 infrastructure and relationships required to

24 distribute the books and to create the electronic

25 files than it was on the acquisition rights.

1 Dwyer

2 Q. And who had principal responsibility for

3 the acquisition of rights?

4 A. Art Klebanoff.

5 Q. If you turn over, still looking at your

6 declaration, to the second page, paragraph four

7 lists your -- I'm sorry, let me back up a second.

8 At some point your relationship changed;

9 is that correct?

10 A. Right.

11 Q. You went from being essentially an

12 outside consultant to an executive at RosettaBooks?

13 A. Yes.

14 Q. And that was around October 1st, 2000?

15 A. It was October 1st, 2000.

16 Q. How did your responsibilities change

17 when you became executive at RosettaBooks?

18 A. I would say they didn't.

19 Q. They did not?

20 A. No. The nature of an early start-up

21 business is that there aren't very tightly defined

22 tasks or titles or -- in fact, the meaning of a

23 title -- if you've got two people in the office, it

24 doesn't matter what your title is. You get your

25 own coffee.

1 Dwyer

2 Q. Either you do it or he's doing it.

3 A. Right.

4 And that was the nature of the business.

5 We're a start-up.

6 Q. And let's say starting when you were

7 consulting in around July August 2000 or so, how

8 many people were employed by RosettaBooks, or how

9 many founding members were there?

10 A. In terms of working on the project, it

11 was Art and myself.

12 Q. And when you started in October 1, 2000

13 was it still just you and Mr. Klebanoff?

14 A. Dorothy would have joined us at some

15 point close to October 1st. I couldn't say for

16 sure the exact date.

17 Q. Is this Dorothy --

18 A. Dorothy Kauffman.

19 Q. K-a-u-f-m-a-N?

20 A. Double f-m-a-N.

21 Q. Thank you?

22 A. And --

23 Q. I'm sorry. Go ahead.

24 A. And there was sort of -- again, I

25 actually forget the title, but there was a woman

1 Dwyer

2 who joined us named Theresa Vellese, V-e-l-l-e-s-e,

3 and that would have been around October 1st.

4 Q. What was her title?

5 A. Her title escapes, but it was something

6 to do with coordinator of e-publishing.

7 Q. And just generally what were her

8 responsibilities?

9 A. Anything that needed to be done. She

10 helped with the files. She held with the editing,

11 proofing, assigning ISBN numbers, pricing or

12 communicating pricing, transferring files, all the

13 things you have to do. Basically if you look at

14 our business and if there was anything done, there

15 were three people that had to do it. So I mean

16 saying who did exactly what on any given day,

17 everybody did -- ever did everything on some day.

18 Q. In paragraph four of your declaration

19 you identify some of the duties as COO.

20 A. Right.

21 Q. It says "contract negotiation and

22 administration."

23 A. Right.

24 Q. What types of contracts does that refer

25 to?

1 Dwyer

2 A. My involvement in contracts was mostly
3 on the side of producing the books, engaging folks
4 that were involved in the DRM or the conversion of
5 the books, or establishing contracts for
6 distribution of the books, retail and wholesale.

7 Q. Did you ever get involved with contracts
8 for acquisitions of rights?

9 MR. BONI: You mean in his capacity as
10 COO?

11 MR. SHAPIRO: Right.

12 Q. Now we're talking about it in your
13 capacity as COO.

14 A. Very occasionally, not -- I can't
15 remember a specific instance where I would have
16 negotiated or signed a contract.

17 Q. At this point now all my questions refer
18 to when you were COO and beyond unless I indicate
19 otherwise.

20 At this point you were familiar with the
21 form contract for acquisition of rights?

22 MR. BONI: Object to form.

23 A. If -- if familiar means having read it,
24 I have read it. At some point October, November I
25 certainly had read it.

1 Dwyer

2 Q. And besides reading it, you were not any
3 more familiar with it, with any of the terms you'd
4 say?

5 MR. BONI: Object to form.

6 Q. Did you have some understanding of the
7 terms of the contract?

8 A. "The terms" meaning?

9 Q. Other than you said that you read the
10 contract.

11 I mean you understood the terms; is that
12 correct?

13 A. Could you define "terms" a little bit?

14 Q. Terms, the rights that were required in
15 the contract, did you understand that?

16 A. Yes, I think so, to the extent I
17 understand law.

18 I'm not a lawyer.

19 Q. I understand.

20 But you needed to know, didn't you, for
21 the other work you did for RosettaBooks what type
22 of rights you required, didn't you?

23 A. Yes.

24 Q. And you needed to know what you could
25 and could not do with the titles that you acquired;

1 Dwyer

2 isn't that correct?

3 A. Yes.

4 Q. Further down in paragraph four it refers

5 to general technology management --

6 A. Yes.

7 Q. -- do you see that?

8 Do you have any kind of technical

9 computer science background?

10 A. I don't have a degree, but I consider

11 myself fairly knowledgeable about computers having

12 bought my first personal computer in 1986 and

13 started using the Internet probably in the early

14 90's, '92 or '94.

15 Q. So --

16 A. And I like computers.

17 Q. But you have no formal training for

18 computer science or computers, is that accurate?

19 A. I've taken courses.

20 Q. Yeah?

21 A. Yes.

22 Q. What kind of courses have you taken?

23 A. In college, in probably '77 I took

24 advanced course in PL-1 it was called at the time.

25 It was -- this was back before there were PCs.

1 Dwyer

2 And I've always taken a liking to
3 computers. I've replaced my home computer every
4 two years since '84. Actually --

5 MR. BONI: He's just asking what
6 courses you took.

7 THE WITNESS: Oh, OK.

8 A. (Continuing) I've taken courses in
9 Access. I've taken courses in Outlook.

10 Q. These are programs?

11 A. Yes.

12 Q. And who gives those courses?

13 A. I think I took them at Comp USA.

14 Q. And how long do they run?

15 A. One or two days.

16 Q. Any other technical or computer-related
17 courses, that you can think of, that you've taken?

18 A. The best course I've taken is teaching
19 myself.

20 Q. If you look at page the same page, at
21 paragraph five of your declaration it says, first
22 sentence, "We usually via a third-party vendor
23 convert each Rosetta work to a digital electronic
24 format."

25 What's your understanding of the word

1 Dwyer

2 convert as used in paragraph five?

3 A. It would mean to take a paper copy and
4 transform it into a string of zeros and ones, that
5 is a digital electronic file, a binary file.

6 Q. Now, I'm going to ask you a series of
7 questions for the rest of the deposition and I'll
8 often refer to "the works at issue in this
9 lawsuit." We'll define that so we don't have to
10 run through them.

11 There are eight works at issue in this
12 lawsuit; are you aware of that?

13 A. (No response.)

14 Q. Let me ask it another way. Random House
15 has in its complaint alleged infringement with
16 respect to eight works, and I'll run through them,
17 and you can tell me if you've heard of these works:
18 two by William Styron, including The Confessions of
19 Nat Turner and Sophie's Choices, five by Kurt
20 Vonnegut, Slaughterhouse Five, Breakfast of
21 Champions, The Sirens of Titan, Cat's Cradle and
22 Player Piano, and one by Robert Parker, Promised
23 Land. Have you heard of those works?

24 A. Yes. Yes.

25 Q. When I discuss here and I use the term

1 Dwyer

2 works at issue in this lawsuit, we'll use that to

3 mean these eight works.

4 A. I actually think that there's 20,000

5 works at issue.

6 MR. BONI: He's just asking, for

7 shorthand purposes, when he says works at

8 issue, it means those eight works. Right?

9 THE WITNESS: Right.

10 MR. BONI: Go ahead.

11 Q. So we don't have to go through all of

12 them.

13 A. That's fine.

14 Q. Can you tell me the ways -- and if

15 there's more than one, please tell me -- in which

16 you converted those works at issue into digital

17 files?

18 A. I believe the two works by Styron were

19 converted with double entry, meaning there was a

20 person who typed from a manuscript the book and

21 then someone else retyped from the same manuscript.

22 The two digital files they produced were cross-

23 compared for consistency, and if it was

24 inconsistency, it was noted as an exception and

25 then looked and actually corrected because one of

1 Dwyer

2 them was wrong, so an accuracy feature.

3 Q. So one of them was wrong because it did

4 not use the word that was used in the title.

5 MR. BONI: Object to form.

6 Q. In the work.

7 In other words, when you said you

8 checked for accuracy, it was against the words that

9 was actually used in the Styron novel, correct?

10 A. On the printed manuscript.

11 Q. The printed manuscript, OK.

12 When you say "printed manuscript" can

13 you tell me what your understanding of that term is

14 in this context?

15 A. In this context it would have been a

16 copy of the work which we acquired through either a

17 new or used book dealer and sent to be converted.

18 Q. Now, you just discussed how you

19 converted the two Styron works.

20 How about the five Vonnegut works were

21 they all converted in the same manner?

22 A. No, I believe, in both -- in both of

23 these instances -- I can't say I've seen it done --

24 it was done by a subcontractor, and so what I'm

25 telling you is what they have told me but is, I

1 Dwyer

2 believe, the process on those five works, the

3 Vonnegut works.

4 Q. The same double entry as you --

5 A. No. I was trying to explain.

6 Q. I'm sorry, go ahead.

7 A. The five Vonnegut works would have been

8 a process where the written manuscript is scanned

9 and a digital image produced which is then run

10 through an optical character recognition program to

11 extract the words and store them in a digital file.

12 Q. What was the name of the subcontractor,

13 if you recall, that you used?

14 I'm talking about the five Vonnegut

15 works.

16 A. Actually, I contracted with Reciprocal

17 Incorporated, which subcontracted the work in the

18 case of the Vonnegut works with BN.com, which used

19 their subsidiary EP Ventures.

20 Q. Now, again, when you indicated that they

21 started from a written manuscript, did you acquire

22 that manuscript in the same way you acquired the

23 manuscript for the Styron title?

24 A. Yeah. I can't say specifically how I

25 got them, because I don't keep records of that.

1 Dwyer

2 Q. Your best recollection would have been
3 that they would have been obtained from a used
4 bookstore or --

5 A. Yeah.

6 Q. So these manuscripts were not created
7 independently for purposes of Rosetta Books' use --

8 A. No.

9 Q. -- is that correct?

10 And those manuscripts, those are the
11 paper books of those novels; is that correct?

12 A. Yes.

13 Q. Now, we'll talk for a second about the
14 scanning.

15 You indicated that the paper book is
16 scanned and a digital image is produced through an
17 optical character image; is that correct?

18 A. No. The digital image is created in the
19 scanning process. The optical character
20 recognition program is the program that extracts
21 the letters in the words from the digital image.

22 Q. Isn't it this scanning process sort of
23 akin to a Xerox copy except that its on a screen
24 instead of a paper?

25 MR. BONI: Object to form.

1 Dwyer

2 A. Can you ask the question again?

3 MR. SHAPIRO: Can you read it back,
4 please.

5 (Record read.)

6 MR. BONI: I object to the form of the
7 question. No foundation.

8 A. Can I object to the form?

9 Q. No.

10 MR. BONI: No.

11 Q. Do you understand the question?

12 MR. BONI: If you don't understand the
13 question, ask him to rephrase it.

14 A. Could you rephrase the question?

15 Q. The copy that's produced from the paper
16 that is scanned, is that the exact same -- the
17 exact same words that were on the manuscript? Is
18 that correct?

19 THE WITNESS: Can you repeat that?

20 (Record read.)

21 MR. BONI: Object to form.

22 A. Can you define copy?

23 Q. Let me try it a different way.

24 You indicated that this optical
25 character recognition program extracts the words

1 Dwyer

2 and stores them on a digital file; is that correct?

3 MR. BONI: Mischaracterizes the

4 testimony. Object. That's not what he

5 said.

6 MR. SHAPIRO: All right, well --

7 A. I'd like to hear what I said.

8 Q. Do you recall testifying that there is

9 an extraction process where the words from the

10 paper manuscript are stored in the digital file?

11 A. Can you read back what I said?

12 Q. Why don't you just answer this question

13 now.

14 MR. BONI: Well, again you're trying

15 to characterize -- let me just finish,

16 John -- you're trying to characterize

17 earlier testimony.

18 MR. SHAPIRO: I'm asking a question.

19 If he thinks it's wrong, he can tell me.

20 I'm not characterizing.

21 MR. BONI: You are. The easiest

22 thing, if you want to know what he said, is

23 to go back to the record to see that he

24 said.

25 MR. SHAPIRO: I appreciate the tips,

1 Dwyer

2 and I'll do that when I feel it's necessary.

3 MR. BONI: Well, I object again for
4 mischaracterizing his testimony.

5 MR. SHAPIRO: You made the objection,
6 and if Mr. Dwyer doesn't understand it, I'll
7 have to read it back or I'll ask a different
8 question.

9 THE WITNESS: I asked you to read it
10 back.

11 (Record read.)

12 THE WITNESS: Right.

13 Q. After a manuscript is scanned what is
14 produced?

15 A. A digital image.

16 Q. And what's that digital image of?

17 A. It's of the page.

18 Q. Of the same page that was in the paper
19 book?

20 A. Yes.

21 Q. Did you or anyone else seek permission
22 from anyone to scan the works at issue?

23 MR. BONI: Object to the form.

24 A. I don't know if I can speak for anyone
25 else. I can speak for myself.

1 Dwyer

2 Q. OK.

3 A. And I did not.

4 Q. You did not.

5 Are you aware of anyone else seeking

6 permission to scan the works?

7 MR. BONI: Object to form.

8 A. Could I ask you a procedural question?

9 Q. Sure.

10 MR. BONI: You want to ask it of me?

11 THE WITNESS: Yeah.

12 MR. BONI: Do you want to take a

13 break?

14 A. Can we take a break?

15 Q. We have a question pending. Why don't

16 we get an answer to the question.

17 A. What's the question?

18 MR. SHAPIRO: You want to read it

19 back, please.

20 (Record read.)

21 MR. BONI: I object to the form of the

22 question.

23 If you don't understand it -- I don't

24 understand it.

25 MR. SHAPIRO: You objected already.

1 Dwyer

2 MR. BONI: -- then just tell him you

3 don't understand it.

4 Q. Do you not understand the question?

5 A. Actually, what I don't understand is the

6 -- the meaning of your objecting to the form of the

7 question.

8 MR. BONI: Oh. I'm placing an

9 objection in the record as to the manner in

10 which the question was presented for

11 vagueness or lack of foundation, or it's a

12 compound question.

13 Unless I instruct you not to answer,

14 you can go ahead and answer the question.

15 THE WITNESS: Oh. That's basically

16 why I'm sitting here going --

17 Q. I understand. I'm glad we clarified

18 that.

19 A. No, I'm not aware of anyone else. No.

20 Q. Are you aware that the paper book, that

21 the paper version of the works at issue were

22 published and owned by Random House or a

23 subsidiary?

24 MR. BONI: Object to form.

25 MR. SHAPIRO: Place your objection,

1 Dwyer

2 and then I'll let him answer.

3 MR. BONI: I understand, John. I'm
4 also entitled to explain my objection.

5 MR. SHAPIRO: Just state your form.

6 MR. BONI: That's what I was doing,
7 but you interrupted me.

8 I object to the form. It's calling
9 for a legal conclusion. He's not a lawyer.
10 It presupposes Random House has any legal
11 rights.

12 MR. SHAPIRO: Now you're starting to
13 testify, so you want to be deposed, that
14 will be for another day.

15 MR. BONI: John, let's keep it at a
16 high road.

17 MR. SHAPIRO: I agree. So object to
18 the form --

19 MR. BONI: I did.

20 MR. SHAPIRO: -- and then we'll move
21 on.

22 Q. Were you aware who has the publishing
23 rights to the works at issue --

24 MR. BONI: Object to form.

25 Q. -- in paper form?

1 Dwyer

2 A. I think that question asks me to take a
3 position on something that I'm probably not
4 qualified to answer.

5 Q. Do you know who published the paper
6 version of the books that were scanned?

7 A. No, I don't.

8 Q. We talked about how RosettaBooks has
9 digitized the Styron and the Vonnegut works --

10 A. Right.

11 Q. -- right?

12 How about the Parker, Parker work?

13 A. I don't believe that's been digitized
14 yet. And if it has, I'm not sure which process.

15 Q. And are there any other ways that
16 RosettaBooks has digitized works other than the two
17 methods that you discussed?

18 A. Yes.

19 Q. What are the other ways?

20 A. On occasion we've gotten a digital file,
21 and I believe on one occasion we received a
22 typewritten manuscript from an author.

23 Q. Now, when you say you received a digital
24 file, what does that mean?

25 Let me back up. The question was any

1 Dwyer

2 other ways you digitized text, and --

3 A. What I'm saying is that receiving it
4 nullifies the need to do it.

5 Q. That's what I want to clarify.

6 A. Yeah.

7 Q. So there are occasions where you have
8 received the work already digitized, so there was
9 no need to, quote, convert the file; is that
10 correct?

11 A. Right.

12 Q. And that was not the case for any of the
13 works at issue; is that correct?

14 A. As I've testified.

15 Q. Right.

16 And you said you received a typewritten
17 manuscript. What does that refer to? In other
18 words, what does that mean?

19 Is that a manuscript that's been backed
20 up?

21 What is a typewritten manuscript?

22 A. It's a manuscript that's been typed.

23 MR. BONI: Try not to talk over each
24 other.

25 Q. How does that differ from the paper

1 Dwyer

2 books that we discussed for the Styron works on the

3 Vonnegut works?

4 A. It doesn't have a binding on it.

5 Q. I see. So when you were referring to

6 the Styron and the Vonnegut manuscripts, you were

7 actually talking about buying a used book already

8 bound --

9 A. Yes.

10 Q. -- as opposed to actually get an unbound

11 typewritten manuscript that has not yet been

12 published and bound for commercial sale; is that

13 correct?

14 A. I couldn't say whether it had been

15 published or not.

16 Q. Well, it could be unpublished, but I'm

17 just trying to understand the difference in

18 actually what you had in your hands.

19 Once you had a book commercially

20 available that you had bought as a book from a used

21 bookstore or otherwise; is that correct?

22 A. Yes.

23 Q. And that's what we were talking about as

24 far as the Styron or the Vonnegut works.

25 A. Yes.

1 Dwyer

2 MR. SHAPIRO: Oh, did you want to take

3 a break?

4 MR. BONI: We'll take a five-minute

5 break.

6 THE WITNESS: Yeah, that would be

7 good.

8 MR. SHAPIRO: Great.

9 (Recess taken.)

10 Q. Mr. Dwyer, just a few follow-ups on we

11 were talking about two methods for scanning, the

12 Styron --

13 A. No.

14 MR SHAPIRO: Strike that.

15 Q. We were talking about two methods for

16 conversion, the Styron works, the double entry, and

17 the Vonnegut works, via scanning.

18 How is it determined which method to

19 use?

20 A. I guess it comes down to which of

21 Reciprocal's subcontractors did the work.

22 Q. Do you or someone else at RosettaBooks

23 request one versus the other?

24 A. We were trialing different sources, so

25 the answer to that is we did not direct a specific

1 Dwyer

2 book to a specific converter because of the

3 process, no.

4 Q. So how does the process work?

5 Do you request Reciprocal to convert a

6 paper file, a paper book, and then they decide on

7 their own whether to do it by double entry or

8 scanning?

9 A. No. They consult with me as to whether

10 EP Ventures or TechBooks was to do the conversion,

11 and, depending on which of them did it, determined

12 the method that was used.

13 Q. And so EP Ventures we talked about, they

14 were the ones who did the scanning of the Vonnegut

15 works.

16 TechBooks, is that the subcontractor

17 that did the double entry of the Styron?

18 A. Yes.

19 Q. And is what you said, that you had no

20 preference versus one or the other on your end?

21 A. Well, my -- no. I didn't have -- in,

22 fact until this became an issue, I didn't know how

23 it was done.

24 Q. So is it fair to say that your --

25 A. Actually, in fact, could I go back?

1 Dwyer

2 Q. Sure.

3 A. Where I said until this became an issue,
4 I shouldn't say before. When I said I didn't know
5 who published, who was the publisher, or words to
6 that effect, certainly now I know that Random House
7 claims or is the publisher for paper form. At the
8 time that I sent the books for conversion --

9 (Interruption at the door.)

10 (Counsel confer off the record.)

11 MR. BONI: Why don't we take another
12 two-minute break.

13 (Recess taken.)

14 (Mr. Klebanoff joined the
15 proceedings.)

16 THE WITNESS: Could we go back and
17 read it?

18 MR. SHAPIRO: I was going to say,
19 let's read it.

20 (Record read.)

21 A. (Continuing) At the time I sent the
22 books for conversion I actually hadn't paid any
23 attention to who the publisher was. When I said
24 before I didn't know who the publisher was at that
25 time, the reason being what was important to us is

1 Dwyer

2 we had acquired the rights from the author, who

3 owned the rights.

4 Q. The electronic rights.

5 A. The electronic rights.

6 Q. Looking at --

7 A. In fact, today I couldn't tell you

8 whether the book I sent was a Random House book,

9 because it was destroyed in the process. It ripped

10 apart and gone.

11 Q. Looking further at your declaration, we

12 were talking about paragraph five. We were just

13 talking about the conversion process. And then it

14 says, the last part of the last clause of the first

15 sentence in paragraph five, "after which we edit

16 the digital file."

17 Can you tell me what your understanding

18 of the word edit is there in the paragraph five?

19 A. We add a forward, we add a cover page,

20 we add copyright information, we add -- in some

21 instances, I couldn't say in these particular

22 books, we add new chapter breaks. We certainly

23 insert graphics or sort of a chapter graphic break

24 at each chapter. We add an afterward. And we look

25 at the book stylistically in terms of use of

1 Dwyer

2 italics, indentation, that sort of thing.

3 Q. OK, but now, using the Slaughterhouse
4 Five as an example, the actual words of the text
5 from let's say the first word of the first chapter
6 through the last word of the last chapter, you
7 don't edit that; is that correct?

8 A. Certainly stylistically --

9 MR. BONI: Do you understand the
10 question?

11 Do you change any of the words that
12 the author wrote?

13 THE WITNESS: To change -- no, we
14 certainly don't change the author's words.
15 Those words belong to the author.

16 Q. In fact, are you aware that whether or
17 not your contracts with the authors of these works
18 prohibit you, without further consent, from
19 changing their text?

20 MR. BONI: Object to form.

21 A. I couldn't comment on these specific
22 contracts.

23 Q. Well, let's take a look at them.

24 MR. SHAPIRO: Would you mark as
25 [Dwyer] Exhibit 4 a document Bates stamped

1 Dwyer

2 Rosetta looks like 24 through 29.

3 ([Dwyer] Exhibit 4, Vonnegut contract,
4 Bates Rosetta 24-29, marked for
5 identification, as of this date.)

6 MR. BONI: Do you have one for me,
7 John?

8 MR. SHAPIRO: Sure. Sorry.

9 MR. BONI: OK, thank you.

10 Q. Mr. Dwyer, have you ever seen Exhibit 4
11 before?

12 A. Yes.

13 Q. Can you please identify it for me?

14 A. It's a contract between RosettaBooks and
15 Kurt Vonnegut as the rightsholder for a number of
16 titles.

17 Q. For a number of titles?

18 And the titles that this contract
19 pertains to are listed on the last page, Exhibit N;
20 is that correct?

21 A. That's correct.

22 Q. And these are the same five titles that
23 we discussed before as part of the works at issue
24 in this lawsuit, as defined?

25 A. That's correct.

1 Dwyer

2 Q. Is it your understanding that this is a
3 boiler plate contract or form contract used by
4 RosettaBooks?

5 A. The form of the contract we use changes
6 with each negotiation, and I would say the
7 structure of the contract would probably -- I would
8 call a boiler plate, but I wouldn't say the words
9 within this contract. I'd have to go back and
10 compare it.

11 Q. Absent royalty provisions, advances --

12 A. No, I would say --

13 MR. BONI: Let him finish the
14 question.

15 Q. -- things particular to a particular
16 author, this is generally the structure of the
17 contracts for works at issue, for works acquired by
18 RosettaBooks?

19 A. I would have to compare this with our
20 boiler plate to tell you that. I couldn't say.

21 Q. And do you have a boiler plate form?

22 MR. BONI: Object to form.

23 Q. (Continuing) Do you understand the
24 question?

25 A. (No response.)

1 Dwyer

2 Q. Let me ask it another way. Do you have
3 a form that does not have an author's name on it,
4 that when someone at RosettaBooks goes out to
5 acquire a new title they work off of?

6 A. Yes.

7 MR. SHAPIRO: Michael, we asked that
8 that be produced.

9 MR. BONI: I'm sorry, what be
10 produced?

11 MR. SHAPIRO: This boiler plate form
12 contract.

13 MR. BONI: Well, we'll take it under
14 advisement.

15 MR. SHAPIRO: I mean at a minimum I
16 think it wouldn't have to be part of the
17 contract files. It would have to be an
18 early draft.

19 MR. BONI: Right. If you want to get
20 all this on the record, I don't see the need
21 for us to do that. We've had discussions
22 with Bruce.

23 MR. SHAPIRO: We won't put it on the
24 record.

25 MR. BONI: OK, very good.

1 Dwyer

2 Q. Mr. Dwyer, if you turn to page two of
3 Exhibit 4, you'll see this is 5(d).

4 A. Yes.

5 Q. Now, this five, I'm sorry, if you turn
6 -- "without limitation the publisher shall have the
7 following rights"; do you see that?

8 A. Yes.

9 Q. And "the publisher" here is
10 RosettaBooks?

11 A. Correct.

12 Q. And in D it says "to distribute the
13 titles as a whole or if in segments provided.
14 However, that publisher will not change the text of
15 the titles without the consent of the
16 rightsholder."

17 A. I see that.

18 Q. Is it your understanding that that
19 clause is a standard RosettaBooks clause?

20 MR. BONI: Object to form.

21 A. I'm not certain.

22 Q. Have you seen that clause before?

23 A. I have seen it before, yes.

24 Q. And what's your understanding of what
25 that means?

1 Dwyer

2 A. That means we will not change the text
3 of the titles without the consent of the rights
4 holders.

5 Q. So in other words, when you convert the
6 paper book, the words written by the rightsholder
7 remain the same in your digital file; is that
8 correct?

9 MR. BONI: Object to the form of the
10 question. You know, that's a loaded
11 question.

12 DIR I object and I instruct the witness not
13 to answer it.

14 MR. SHAPIRO: Well, are you directing
15 him not to answer?

16 MR. BONI: I think that's a loaded
17 question. You used the words rightsholder
18 in an earlier question.

19 But listen, John, if you don't want
20 an explanation, that's fine.

21 MR. SHAPIRO: I don't want to
22 explanation.

23 MR. BONI: Good. OK.

24 A. Repeat the question.

25 MR. SHAPIRO: Do you want to read back

1 Dwyer

2 the question.?

3 (Record read.)

4 MR. BONI: Same objection.

5 DIR I instruct you not to answer as stated.

6 MR. SHAPIRO: It's totally

7 inappropriate, but I'll tell you what, for

8 the sake of compromise --

9 Q. I used the words rightsholder because

10 that's the word that's in your contract.

11 Would you prefer a different word?

12 MR. BONI: I prefer a different --

13 MR. SHAPIRO: I'm asking the witness.

14 MR. BONI: Right, but I'm the one

15 instructing him not to answer.

16 MR. SHAPIRO: But if it's not

17 privileged and you're instructing him not to

18 answer, that's not an ethical practice.

19 MR. BONI: I don't think it's ethical

20 to ask a loaded question. You can ask the

21 question another way, and we can get through

22 this.

23 MR. SHAPIRO: I'm going to ask it the

24 way I want to ask it. If you want to direct

25 him not to answer, that's your prerogative.

1 Dwyer

2 Q. Let me ask it this way.

3 The paper book that is converted by
4 RosettaBooks, the words that were written in that
5 paper book according to this contract are not to be
6 changed by RosettaBooks absent consent from the
7 rightsholder; is that correct?

8 A. I don't believe that's what the contract
9 said.

10 Q. How is that not correct?

11 A. I don't believe the contract refers to
12 the paper book at all.

13 Q. So that's the part that you don't
14 believe is correct? That's the part of my question
15 that you don't think is correct --

16 A. Repeat the question.

17 Q. -- with reference to the paper book?

18 A. Repeat the question.

19 MR. SHAPIRO: Repeat the question.

20 (Record read.)

21 MR. BONI: Why don't you ask another
22 question.

23 Q. Do you have the question?

24 A. (No response.)

25 Q. I'll ask another question.

1 Dwyer

2 What does "the text of the title" refer

3 to there?

4 A. The words that belong to the author.

5 Q. And in the case that we talked before of

6 Mr. Vonnegut, those words were contained in a

7 commercially available paper book that was acquired

8 by RosettaBooks and then scanned; is that correct?

9 A. It's probably one of many places those

10 words are available.

11 Q. But with respect to Mr. Vonnegut, as you

12 testified earlier, Rosetta Books acquired paper

13 versions of those books, and they were scanned;

14 isn't that correct?

15 MR. BONI: Asked and answered.

16 If you can answer it again.

17 A. Can you ask it again?

18 THE WITNESS: Just read it back.

19 MR. SHAPIRO: Repeat the question.

20 (Record read.)

21 A. (Continuing) Yes. That's the question

22 on the table. Yes.

23 Q. So at least in this instance we're

24 discussing now, Mr. Vonnegut, the text of the

25 titles referred to the text of the paper version of

1 Dwyer

2 his works; isn't that correct?

3 MR. BONI: Object to form.

4 A. Is your question whether the text of the

5 titles as written in this contract? Is that what

6 you're saying?

7 Q. As written in this contract and as

8 actually was -- and actually in practice, because

9 we discussed how Mr. Vonnegut's -- how his titles

10 were converted?

11 MR. BONI: You're asking two different

12 things, John. The witness already testified

13 he didn't draft these contracts and had very

14 limited to no participation in these

15 contracts. If your question is about what

16 the contract means, this is not the witness

17 to ask it.

18 MR. SHAPIRO: Well, fine. Again, just

19 I think this would go better if you would

20 just state your objection.

21 MR. BONI: I'm sure you do think that.

22 MR. SHAPIRO: Well, it's not

23 appropriate for you to make these speeches

24 on the record.

25 MR. BONI: Yes, it is.

1 Dwyer

2 MR. SHAPIRO: Fine, we'll check the

3 local rules on that.

4 Q. Mr. Dwyer, looking at paragraph six of

5 your declaration --

6 A. Right.

7 Q. -- it discusses various e-book

8 platforms; do you see that?

9 A. Yes, I do.

10 Q. What platforms are the works at issue

11 currently available on?

12 A. They're available currently in Microsoft

13 Reader, Acrobat eBook Reader, and Adobe Acrobat

14 Reader.

15 Q. Now, paragraph six goes on to the next

16 page, page three of your declaration, with a little

17 A through I, and can you explain what these

18 examples are?

19 A. These are examples of functions

20 performed or that are possible with an e-book, not

21 any particular version of an e-book. These are

22 generalized. There are some platforms that would

23 do these things or a subset of them, but in general

24 these are the sorts of the things that eBooks can

25 do.

1 Dwyer

2 Q. Not necessarily the platforms that are
3 currently available for the works at issue; is that
4 correct?

5 MR. BONI: Object to form.

6 A. I think pretty much --

7 Q. Let's go through them.

8 A. OK.

9 Q. Little A involves large type and
10 repackage nation; is that correct?

11 A. That's correct.

12 Q. Is that currently available in MS
13 Reader, Acrobat eBook Reader and Adobe Reader?

14 A. It's available in MS Reader currently,
15 and as I understand in the newest version of the
16 Adobe platforms it will be available that were just
17 released in the last day or two. It's a moving
18 target with all these platforms. They're all
19 evolving very quickly.

20 Q. Now, first, that's a function that is
21 germane to the platform; that's correct?

22 MR. BONI: Object to form.

23 A. What do you mean by germane?

24 Q. OK, let me ask it a different way.

25 When you convert a title into a digital

1 Dwyer

2 file you don't -- you, RosettaBooks, do not provide

3 this functionality; is that correct?

4 MR. BONI: Object to form.

5 A. We -- we provide the content packaged in

6 a file that can utilize the functionality implicit

7 in the platform. A digital file won't work across

8 every platform. It's a different file for a

9 different platform.

10 Q. So if you provide, like you said -- I'm

11 not trying to characterize your testimony, but you

12 provide the digital content, and then if a

13 particular platform enables the user to enjoy a

14 particular functionality, then they will be able to

15 do so; is that correct?

16 A. In some cases what we do with the file

17 enables some of the functionality.

18 Q. Right, but if the platform doesn't

19 provide that type of functionality, the user won't

20 be able to take advantage of it; is that correct?

21 A. Yeah.

22 Q. Now, in your understanding is (a), the

23 repagination and large type, is that functionality

24 a key distinguishing feature between a paper and an

25 e-book?

1 Dwyer

2 A. One of them.

3 Q. One of them?

4 MR. BONI: Object to the form of the
5 question.

6 Q. Now, B involves hyperlinks? Actually,
7 B, C and D refer to the concept of hyperlinks.

8 What is your understanding of the terms
9 as used in B, C and D of hyperlink?

10 A. Which term?

11 Q. Hyperlinks?

12 A. They are -- it is a navigational tool
13 that allows you to move to specific points within
14 the text easily.

15 Q. It's an internal navigation, within the
16 text, not to go outside the text, but to stay
17 within the text?

18 A. It could be both.

19 Q. The ones listed here, B, C and D, those
20 involved internal navigation; is that correct?

21 A. Let's look (Reading.)

22 B would be internal. C would be
23 internal. And D would be internal.

24 But I would have to say they're internal
25 given the current evolution of the platforms.

1 Dwyer

2 It's very conceivable that in the
3 distant future one could create links in their text
4 to out on the web anywhere.

5 Q. Right.

6 Right now I'm talking about the
7 distinctions that you've identified between the
8 paper and the e-book, and I want to focus on the
9 works at issue.

10 For B, C and D, are those functions
11 available in the three platforms that you
12 identified?

13 A. I believe so.

14 Q. And are each of those functions, B, C
15 and D, functions that are key distinguishing
16 features between paper and e-book?

17 MR. BONI: Object to the form of the
18 question.

19 A. I think they're useful. They're
20 important.

21 Q. Looking at little E, it refers to
22 pasting notes directly into the text.

23 A. Yes.

24 Q. Can you tell me what your understanding
25 of that is?

1 Dwyer

2 A. You can put the electronic equivalent of
3 a yellow Post-It note within the text, and if you
4 want to remember something, or perhaps you're doing
5 a book report and you want to highlight something
6 that would be of interest, something that later on,
7 when you're pulling together all your thoughts
8 about the book that you want to have a collection
9 of your notes, you can put it right in the text as
10 you're going through, and then, when you get to the
11 end of your read of the whole book, assemble them,
12 you can assort them different ways. It's a very
13 useful function.

14 Q. When you say "right within the text,"
15 don't you really mean sort of in the margins or
16 above or below the text?

17 A. Actually, I believe what you link to is
18 an actual point within the stream of words.

19 Q. So it's like a place holder, in other
20 words, like almost like a footnote for lack of a
21 better description.

22 MR. BONI: Object to the form.

23 A. The whole concept of where you put the
24 note in an electronic file is a very abstract
25 concept, whether you put it on a footnote or the

1 Dwyer

2 edge of the page because that's just a function of
3 where the note is displayed by the reader. Really
4 what you're doing is you're linking the note to a
5 point within the text.

6 Q. But the user doesn't actually edit the
7 text, right?

8 A. No, I would say not no. But they can
9 create their custom version, just as when you buy a
10 softback and you put notes in it.

11 Q. Right, in the margin, and I can write on
12 the top or below a line.

13 A. You've customized your book.

14 (Discussion off the record.)

15 Q. E and F, are those functions currently
16 available on the three platforms that the works at
17 issue are currently available on?

18 A. I believe so.

19 Q. And again, are those two functions key
20 distinguishing features, in your mind, between
21 paper and e-book?

22 MR. BONI: Object to form.

23 A. Yes, I think they're very useful. The
24 idea that you can find reference to a name of a
25 character or a particular word at the touch of a

1 Dwyer

2 button is a very useful feature.

3 Q. Now, little G, it says "eBook users can
4 automatically access dictionary definitions"?

5 A. Yes.

6 Q. How do they do that?

7 A. They point at a word and they can click
8 at it.

9 Q. The dictionary itself, isn't that a
10 separate file that they have to download?

11 MR. BONI: They, the user?

12 MR. SHAPIRO: They, the user.

13 A. Yes.

14 Q. So that is, again, something that is
15 provided by the platform; is that correct?

16 A. Certainly, but without the eBook or the
17 content in the form that's usable, it's worthless.

18 I mean I could give you all the files in the world
19 and a softback copy of a book, and you wouldn't be
20 able to point at the word and see the definition.

21 Q. I'm sorry, I wouldn't be able to point
22 at the word where?

23 A. You wouldn't be able to point at the
24 word in the softback book and see the definition on
25 the word, no matter how many files. What you're

1 Dwyer

2 trying to suggest to me --

3 Q. I'm not trying to suggest anything.

4 MR. BONI: Let him finish his answer.

5 A. I see your train of questioning going

6 down the line is the platform and the content are

7 separately, and I would suggest to you that without

8 the content in the correct form, the platform is

9 not of any value at all.

10 Q. So if I have a backpack of paper books

11 and I want to -- I will include I will pick up a

12 dictionary, include in my backpack so I can look up

13 the words in the dictionary the words that I read

14 in one of the books; that's correct?

15 MR. BONI: What's the question?

16 Q. Stay with me for a second.

17 Similarly, if you have half a dozen --

18 if you have the works at issue on your -- that you

19 have downloaded, you download single dictionaries,

20 don't you?

21 You don't download six dictionaries, do

22 you?

23 MR. BONI: Object to form. You're

24 talking --

25 A. The point I was making, I think, is that

1 Dwyer

2 you can buy your hardback copy of the dictionary
3 and a hard copy of a book, and I'll grant you you
4 can look up the words in the book in the
5 dictionary, but I'm suggesting that what an e-book
6 allows you to do is point to the word, and the
7 definition jumps up, and functionally that is very
8 different.

9 Q. And the dictionary is something that is
10 platform driven; is that correct? It's from the
11 platform?

12 MR. BONI: Objection. We're going
13 round and round. Already he answered the
14 question.

15 Q. (Continuing) You can answer the
16 question.

17 A. It's a chicken and egg question.

18 Q. OK.

19 A. The electronic dictionary is worthless
20 without the electronic word to look up in it.

21 Q. Right. I'm not talking about whether
22 it's worthless or not.

23 What I'm saying, when you digitize a
24 title, you don't add a dictionary --

25 A. You effectively add the digital

1 Dwyer

2 dictionary in having the word in the format which
3 is in the digital dictionary.

4 Q. And the digital dictionary is provided
5 in a particular platform that the user is reading
6 the digital file --

7 MR. BONI: Object to the form.

8 Q. -- is that correct?

9 MR. BONI: He's answered the question.

10 MR. SHAPIRO: No, he hasn't. Like you
11 said, we're going in circles.

12 MR. BONI: That's exactly right.

13 MR. SHAPIRO: I'm trying to clarify
14 for --

15 MR. BONI: You asked the same
16 question.

17 THE WITNESS: Can you ask the question
18 again?

19 MR. SHAPIRO: Can you repeat it.

20 This is not making it any shorter,

21 Mike.

22 (Record read.)

23 A. Yes, it is separate.

24 Q. Thank you.

25 And again, for G, do you believe that

1 Dwyer

2 the ability to access a dictionary is a key
3 distinguishing feature between a paper and an
4 e-book?

5 MR. BONI: Object to form.

6 A. For my own purposes I'd say yes. I find
7 it very useful to look up words I don't know.

8 Q. Looking at little H, it says there were
9 such functions that had been built in the file.

10 The functions referred to in H, are
11 those currently available in the three formats that
12 the works at issue are available?

13 A. I believe that there is a link to the
14 Internet from within those files. I couldn't say
15 that for a fact. I know in the later e-books we've
16 done in the Adobe eBookReader and the Adobe
17 Acrobat, I think I -- could I go back? The Adobe
18 -- it's the Adobe eBookReader and Adobe Acrobat
19 reader -- tongue twisters -- in those two formats
20 in the later books we've done, and I'd have to
21 check these specific books.

22 Now, I think it's the case you can link
23 to the Internet from both the forward and the
24 afterward.

25 Q. The forward and the afterward, but not

1 Dwyer

2 in between; is that --

3 A. Not in the current electronic edition.

4 Q. And you discussed some platforms

5 providing audio pronunciation.

6 A. Yes.

7 Q. Which platforms are those?

8 A. The Acrobat eBookReader.

9 Q. Is that only the most recent version or

10 that you said just came out, or the earlier version

11 as well?

12 A. Earlier versions.

13 Q. Is that called the Plus, the Acrobat

14 Reader Plus?

15 A. In terms of pronunciation of a look-up

16 word, I believe that's the case, yes, because the

17 dictionary function I don't believe is in the

18 standard Acrobat eBookReader.

19 Q. Now, you've discussed some of the

20 functionality here in A through I that some of

21 which is available currently to a user viewing the

22 works at issue, correct?

23 A. Yes.

24 Q. Just to make sure we're on the same

25 page.

1 Dwyer

2 For any of that, the functionality that
3 has been added by RosettaBooks, was Rosetta
4 required to gain an additional consent from the
5 author or the rightsholder, however you want
6 to --

7 A. Not to my knowledge.

8 Q. Do you have --

9 A. That is not to say in the future it's
10 not planned that we would.

11 Q. OK, so does that mean you have an
12 understanding that certain functionality that you
13 may add in the future would require you, meaning
14 RosettaBooks, would require RosettaBooks, to go to
15 the author and seek their consent?

16 A. I think it's very hard to predict the
17 future, but I could imagine scenarios.

18 Q. Do you have an understanding of whether
19 or not certain functionality added requires you to
20 go to the author or rightsholder for an additional
21 consent?

22 MR. BONI: Objection, lack of
23 foundation. I think that that requires
24 contract interpretation and a legal
25 conclusion.

1 Dwyer

2 Q. Let's go back to number four I think it
3 is. Again, this is [Dwyer] Exhibit 4, the contract
4 for the Vonnegut works.

5 A. Right.

6 Q. And we were discussing before paragraph
7 five, which, as we discussed, was a listing of
8 rights given to the publisher under this
9 agreement --

10 A. Yes.

11 Q. -- publisher meaning RosettaBooks; is
12 that correct?

13 A. Yes.

14 Q. You see there on H, it's on page two?

15 A. H.

16 Q. It's 5(h). Do you see that about three
17 quarters of the way down the page?

18 A. Yes.

19 Q. It says :To enhance and augment the
20 titles with surrounding text."

21 A. Um-hm.

22 Q. "Interactive materials."

23 A. Yup.

24 Q. You had a "yes and/or video content,
25 links to other web cites, and other such other

1 Dwyer

2 content, and such other means as publisher

3 determines will enhance the experience of a

4 consumer"; do you see that there?

5 A. Yes, I do.

6 Q. And then it says in the last sentence

7 "such enhancements and augmentations would be

8 subject to the approval of the rightsholder."

9 A. Yes.

10 Q. Have you ever seen this provision

11 before?

12 A. Yes.

13 Q. Are you familiar with that provision?

14 A. Yes.

15 Q. And what is your understanding of what

16 that means?

17 A. That if we were going to enhance the

18 title with audio, video, links to other websites,

19 as it reads, we would have to have the approval of

20 the rightsholder.

21 Q. And for the works at issue in this case

22 have you sought such approval for enhancements or

23 augmentations?

24 A. I have not personally.

25 Q. You have not personally?

1 Dwyer

2 Do you know of anyone else that has?

3 A. Most of the communications with the
4 rightsholders is between Art Klebanoff and the
5 rightsholders. And if there was discussion
6 concerning that, that's where it would have
7 occurred.

8 Q. Do you have an understanding whether or
9 not there are enhancements and/or augmentations in
10 the works at issue currently that would have
11 required someone to seek additional consent from
12 the rightsholders?

13 MR. BONI: Object to the form.

14 A. I don't believe there are.

15 Q. And what does a surrounding text refer
16 to there in the first sentence of H?

17 A. I would presume --

18 MR. BONI: He doesn't want your
19 guesses. You wants to say what you know.

20 Q. Do you have any understanding of what
21 the term surrounding text means there?

22 A. I could guess, but -- but I don't know
23 what the term of trade is for surrounding text, no.

24 Q. Are you familiar with
25 RosettaBooksConnection --

1 Dwyer

2 A. Yes.

3 Q. -- that concept?

4 Can you tell me what that is?

5 A. That's a series of hyperlinks from our
6 website to locations on the Internet that we
7 believe would be of interest to someone reading the
8 book and enhance their experience in that they
9 would help in the understanding of the context in
10 which the work was written, whether it is
11 information about the author, the title, perhaps a
12 movie which was made from the book. It's just
13 additional information.

14 Q. So a reader or a user of a RosettaBooks
15 title first goes to the RosettaBooks website, and
16 from there they navigate to this other information;
17 is that correct?

18 A. Not limited to reader either. It could
19 be anyone.

20 You could do it.

21 Q. I can do it? Thank you.

22 The point is you don't have to purchase
23 or download a RosettaBooks title.

24 A. Right.

25 Q. It's a free service.

1 Dwyer

2 A. We think that is good for the author,
3 it's good for the title, it's good for the title in
4 any form, whether it's paper or electronic. We
5 believe that would encourage both paper and
6 electronic sales.

7 Q. Are you aware that a consumer of
8 RosettaBooks work has the ability to print screen
9 shots?

10 A. I -- I actually became aware of it when
11 I read Ms. Cantos' deposition and tried to figure
12 out how she got an image of one of the pages of our
13 books, which I understand by license from Microsoft
14 included from being printed, how they printed it,
15 and that turns out to be the way was done, I
16 presume, having investigated it.

17 MR. SHAPIRO: Let me mark next as
18 [Dwyer] Exhibit 5 Microsoft Reader End User
19 License Agreement.

20 And I will represent to counsel that
21 this is a copy. This was part of
22 Defendants' Response to Random House'S
23 Motion for Preliminary Injunction. It is
24 Defendants' exhibit number 28 that we copied
25 from there. I can represent that.

1 Dwyer

2 MR. BONI: What are we up to, five?

3 MR. SHAPIRO: Five.

4 (Discussion off the record.)

5 ([Dwyer] Exhibit 5, Microsoft Read End

6 User License Agreement, marked for

7 identification, as of this date.)

8 Q. Have you ever seen this before, Mr.

9 Dwyer?

10 A. Yes, I have.

11 Q. Is it your understanding that this is

12 the Microsoft Reader end user license agreement

13 that you just referred to?

14 A. Actually, I should go back and say I

15 believe I've seen it before. I've -- I've -- as

16 I've downloaded Microsoft reader I've seen and read

17 a license agreement and taking a particular

18 interest in it because of our business, and so I

19 believe this is that license, yes.

20 Q. And you indicated that you believed that

21 the screen shot of a title was in violation of that

22 license agreement, that's correct?

23 A. Yes, I do.

24 Q. Can you show me where, what provision

25 makes that illegal or improper?

1 Dwyer

2 A. Actually, my reason for saying I believe
3 that was in contradiction was that when I
4 determined it was a screen shot, I asked my counsel
5 if, in fact, they would read the agreement for me
6 and tell me whether they thought it was in
7 violation.

8 MR. BONI: That's where your answer
9 will end. He didn't want privileged
10 information.

11 Q. So do you not have -- do you have any
12 independent knowledge aside -- I don't want
13 counsel's information -- independent knowledge as
14 to a term or provision of this agreement that might
15 prevent a user from making screen shots of a
16 Rosetta title?

17 MR. BONI: Do you understand the
18 question?

19 THE WITNESS: No.

20 A. Could you ask the question again, or
21 reread the question?

22 Q. Sure.

23 Do you have any independent knowledge as
24 to a provision or term of this license agreement
25 that prevents a user of a RosettaBooks title from

1 Dwyer

2 making a screen shot?

3 MR. BONI: Independent meaning?

4 MR. SHAPIRO: Independent of learning

5 from counsel.

6 MR. BONI: Right.

7 A. I can't remember the specific

8 conversations, but I've had specific -- I've had

9 conversations with folks involved in the DRM area

10 and in the software area that have told me that it

11 is a term of the license agreement months ago, well

12 before this got started. It is of interest to us

13 because we were in this business.

14 Q. And why was it of interest to you

15 besides just being in the business?

16 A. Just curiosity.

17 Q. Now, do you see 1(b)?

18 Can you read that to yourself?

19 A. (Reading) Yes.

20 Q. Having read that, do you have any

21 understanding of what that means?

22 I know the language is pretty tortured.

23 A. It's Microsoft language.

24 MR. BONI: It's's code.

25 A. (Continuing) Yes. OK. That makes sense

1 Dwyer

2 to me now, because we set a parameter when we
3 package a book which allows for copying or not, and
4 we, I believe, expressly prohibit by the terms set
5 forth in a particular book any copying.

6 Q. Now, but doesn't this provision -- let's
7 walk through it -- say "solely with respect to
8 electronic documents included with the software
9 product."

10 A. Oh, perhaps it is.

11 Q. So we're referring to -- this is
12 referring to essentially a -- for lack of a better
13 description, a free book that you get when you
14 download, a reader.

15 MR. BONI: Object to the form.

16 Q. (Continuing) Do you agree with that?

17 MR. BONI: That's your representation?

18 Or I'm not sure --

19 MR. SHAPIRO: I'm asking if he agrees
20 with that interpretation.

21 A. You know, you'd have to think about how
22 you define the word included.

23 Q. OK.

24 A. Because they go on to say "unless
25 expressly prohibited by terms set forth in a

1 Dwyer

2 particular book," and to the best of my knowledge

3 they don't provide books with the software when you

4 download it.

5 Q. OK.

6 A. So it seems a little ambiguous.

7 Q. So does this connect to what you said

8 before, that you, in your own books, prohibit the

9 user from making screen shots?

10 MR. BONI: Object to form.

11 Does what connect to it?

12 Q. Let me ask it a different way. If you

13 read on here, it says "you may make an unlimited

14 number of copies," it says; then skipping the

15 parenthetical, "provided such copies are not

16 republished or distributed to any third party."

17 So doesn't that, this whole provision,

18 deal with actually someone making a copy, a paper

19 copy and distributing it, a paper or electronic,

20 distributing it to a third party?

21 MR. BONI: Objection to form. No

22 foundation. He already said he referred to

23 counsel. He didn't write the agreement.

24 MR. SHAPIRO: I'm asking as he sits

25 here today and reading the agreement what's

1 Dwyer

2 his interpretation of it.

3 MR. BONI: Lacks foundation.

4 A. The operative words are "expressly

5 prohibited unless set forth in terms in a

6 particular book," and I believe that in our

7 particular book there are terms that limit --

8 Q. Terms that limit what?

9 A. -- a purchaser's right to copy or print.

10 I'm sorry, strike that, and say print.

11 Q. Let's look back at [Dwyer] Exhibit 4 for

12 a second. It again is the Kurt Vonnegut agreement.

13 A. Gotcha.

14 Q. Do you see on the first page, paragraph

15 two?

16 A. Yes.

17 Q. Midway through the paragraph it says

18 "The technology is by which the publisher may

19 exercise its right may or may not enable the reader

20 to print unbound copies of pages of titles."

21 A. Yes, I see.

22 Q. Do you see that?

23 Do you have an understanding of what

24 that sentence means?

25 A. It means that they may or may not enable

1 Dwyer

2 the reader to print unbound copies of pages in the

3 titles. I mean it's English.

4 Q. And why does RosettaBooks -- do you

5 have an understanding of why this language is in

6 there?

7 MR. BONI: Object to form.

8 A. I didn't put the language in there. I

9 don't know why was put in there.

10 Q. So at least according to this there's no

11 prohibition for a reader to print unbound copies of

12 pages of titles; is that correct?

13 MR. BONI: Object to form. He said he

14 didn't write it, he said he doesn't know why

15 it's in here, and you're just trying to

16 mischaracterize a provision in the contract.

17 MR. SHAPIRO: Just state your

18 objection and let's move on.

19 Q. (Continuing) You can answer the

20 question.

21 Do you want to have it read back?

22 THE WITNESS: Read back the answer --

23 the question.

24 (Record read.)

25 A. Since this is an agreement between

1 Dwyer

2 RosettaBooks and Mr. Vonnegut, it has nothing to do

3 with the reader.

4 Q. Well, it does, because it refers to the

5 reader there, no?

6 MR. BONI: Object to form.

7 Now you're arguing with the witness,

8 John.

9 Q. Well, I'm asking. You say it doesn't

10 have anything to do with the reader, but doesn't

11 this sentence we just discussed refer to the

12 reader?

13 MR. BONI: Doesn't it make sense to

14 ask these questions of someone who

15 participated in drafting the contract?

16 MR. SHAPIRO: This is not helpful.

17 MR. BONI: -- to try to elicit facts

18 from somebody who didn't draft the

19 agreement?

20 MR. SHAPIRO: Mike, I'm not going to

21 get into a discussion with you. He knows

22 what rights or what rights they get or don't

23 get. He has to do that to know those facts

24 when he puts together the package, digitized

25 the text and all that. I'm not going to get

1 Dwyer

2 into a discussion. Check the local rules.

3 You say objection, and you move on. No

4 prolonged speeches on the record. It's not

5 going to make the process go any quicker.

6 MR. BONI: Read the depositions of

7 your witnesses and see what your co-counsel

8 has done. There's no difference.

9 MR. SHAPIRO: I'm sure you took

10 exception with it.

11 Where were we now? Can you read the

12 last -- I'm going to move on to something

13 else, OK?

14 Q. Looking back at your declaration --

15 sorry we're jumping around.

16 A. That's OK.

17 Q. -- this is [Dwyer] Exhibit 3. On page

18 eight -- I'm sorry, start with page seven.

19 A. Got it.

20 Q. Page seven starts with REB 1100. From

21 that -- and it's a hardware device for reading

22 eBooks; that's correct?

23 A. Correct.

24 Q. From that device onward through page

25 eight and to the end of paragraph seven, the works

1 Dwyer

2 at issue are not currently available in any of

3 these platforms; that's correct?

4 A. Yes.

5 Q. Now, on page eight, was it Night

6 Kitchen?

7 A. Yes.

8 Q. It says "This is a next generation eBook

9 platform?"

10 A. Yes.

11 Q. What's your understanding of the phrase

12 "next generation eBook platform"?

13 A. Perhaps it's a loose use of words. I

14 didn't have any particular definition in mind when

15 I used them. What I meant to imply is this is

16 something that's evolving, it's current. Was just

17 released in March 2001 to the public. So I see it

18 as being perhaps next generation.

19 Q. So the works at issue as presently

20 available in the platforms that we've discussed are

21 not what you would call a next generation e-book.

22 MR. BONI: Object to form. It

23 mischaracterizes his testimony.

24 (Interruption at the door.)

25 A. It depends from what point in time

1 Dwyer

2 you're talking about next generation. Two years
3 ago MS Reader would have been next generation.
4 It's an evolving world. Next generation is a
5 moving target.

6 Q. All right, well, let's take it from the
7 point of February 27th, 2001, when we filed this
8 action.

9 A. Right. It's not available in Night
10 Kitchen to the consumer.

11 Q. Paragraph nine --

12 A. Yes.

13 Q. -- it says, the second sentence, "I
14 believe it's reasonable to equate the state of
15 evolution of the eBook today" --

16 A. Yes.

17 Q. -- and then it goes on.

18 What's the basis for this belief?

19 A. That's an interesting question to ask
20 someone, the basis of their beliefs.

21 Q. I'm not asking religious --

22 A. I'm just being a little light in the
23 conversation.

24 Q. It's OK. We're having a little fun.

25 A. Well, I think that -- I believe that

1 Dwyer

2 where we are in the evolution of the eBook is very
3 early on. I can imagine a world in which someone
4 puts on a pair of reading glasses and is able to
5 look at the text of a book sitting at the beach and
6 read the text through the glasses in hologram out
7 in space somewhere. This stuff is evolving very
8 quickly, and who knows where it's going to go. The
9 consumer is going to determine where it's going to
10 go. I'm not going to determine where it's going to
11 go. But we're very early on.

12 These -- the -- the Palm as a reading
13 platform is not a very pleasant reading platform at
14 the moment, but it's the most popular because it's
15 a portable. As people begin to develop more
16 desirable portable platforms, that will increase
17 the desire of folks to read in those platforms, and
18 the experience will become better. So we're just
19 beginning. And I believe that.

20 Q. Were there any documents that you relied
21 on to form that belief?

22 A. General knowledge.

23 Q. General knowledge?

24 A. And just being in the industry, seeing
25 what's happening, having my eyes open.

1 Dwyer

2 (Discussion off the record.)

3 Q. If you turn over, you see the last --
4 sorry. It starts on the bottom of page eight,
5 paragraph ten. "I read the affidavit of Adam
6 Smith," and it carries over to page nine?

7 A. Yes.

8 Q. The end of that paragraph says "I would
9 suggest that if one is searching for a place to
10 draw a dividing line, it is the most easily drawn
11 and rightly belongs between delivery of print copy
12 and the delivery of electronic files," and then it
13 goes on, and it says "not in some unilaterally
14 devised and ill-defined distinction between
15 electronic versions and electronic rights, eBooks."
16 Do you see that?

17 A. Yes.

18 Q. First off, what is your understanding of
19 the term delivery in that sentence?

20 A. Mr. Vonnegut owns words. How those
21 words are delivered to a consumer, there are many
22 ways in which those words can be delivered to a
23 consumer. And that is how I construe the meaning
24 of the word delivery.

25 Q. And one way to deliver those words to

1 Dwyer

2 the consumer is buy a paper book; that's correct?

3 A. Static --

4 MR. BONI: It's a yes or no question.

5 A. (Continuing) Yes.

6 Q. It's your testimony that the only

7 distinction that makes sense at this point in time

8 is one that is between a paper book and an

9 electronic book?

10 MR. BONI: Object to form. That's not

11 what this says.

12 Q. (Continuing) Is that a fair

13 characterization of what you're saying in your

14 affidavit here?

15 THE WITNESS: Would you read that back

16 to me?

17 (Record read.)

18 A. Yes, I think that's fair to say.

19 Q. Don't you, though, draw some distinction

20 between what I'll term as today's eBook as defined

21 as of the date that we filed this action,

22 February 27th, 2001, and this next generation eBook

23 that you discussed here in your declaration?

24 MR. BONI: Object to form.

25 You mean a legal distinction?

1 Dwyer

2 MR. SHAPIRO: No.

3 A. I see it as being a continuum, a
4 continuum that can go all the way from the simplest
5 to a DVD full-length movie.

6 Q. Let's look back at the Vonnegut
7 contract --

8 A. Yes.

9 Q. -- again, to 5(h) that we looked at
10 before.

11 Isn't there a distinction made in H that
12 certain enhancements and augmentations will you
13 subject to approval by the rightsholder?

14 A. I don't see what that has --

15 MR. BONI: He's just asking if that's
16 what it says.

17 A. (Continuing) That's what it says, sure.

18 Q. So currently the functionality that is
19 included in the eBooks of the works at issue by
20 RosettaBooks don't include, as we discussed, those
21 enhancements or augmentations; that's correct?

22 MR. BONI: Object to the form.

23 Calling for a legal conclusion.

24 A. I would have to say that it calls for a
25 legal conclusion that I'm not qualified to answer.

1 Dwyer

2 Q. But you know whether or not there are
3 enhancements or augmentations placed in a digital
4 file that would require you to get, you Rosetta
5 books to get additional consents from the
6 rightsholder, don't you?

7 MR. BONI: Object to the form.

8 A. I don't understand what that has to do
9 with the question.

10 MR. BONI: As long as you understand
11 the question. If you don't understand it,
12 say you don't question.

13 Q. You don't understand the question?

14 MR. SHAPIRO: Just go off the record
15 for a second.

16 (Discussion off the record.)

17 MR. SHAPIRO: Let me mark as [Dwyer]

18 Exhibit 6 --

19 MR. BONI: Are we done with these,
20 John?

21 MR. SHAPIRO: For now.

22 (Telephone interruption.)

23 MR. BONI: Can we ask Matt to step
24 out?

25 Are you going to ask questions?

1 Dwyer

2 This is a counsel-sensitive document,
3 and we'll put this portion on the
4 confidential record.

5 MR. SHAPIRO: I'm sorry about that.

6 MR. BONI: That's OK.

7 (Mr. Martin left the room.)

8 (The following portion has been deemed
9 confidential and bound under separate
10 cover.)

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1 Confidential - Dwyer

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REDACTED

1 Confidential - Dwyer 102

REDACTED

1 Confidential - Dwyer

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1 Confidential - Dwyer

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1 Dwyer

2 MR. SHAPIRO: Can I just take a
3 one-minute break? I'm just going to check
4 some notes.

5 MR. BONI: Sure.

6 (Recess taken.)

7 MR. SHAPIRO: At this point I have no
8 further questions. Obviously the deposition
9 is closed to the extent that this is in the
10 preliminary junction stage, as we've agreed
11 that to the extent there's another issue,
12 and we'll at that point decide if we want to
13 take Mr. Dwyer further.

14 MR. BONI: I understand that that's
15 the agreement with all the witnesses.

16 MR. SHAPIRO: I thought it was, too.
17 I want to make sure that's clear.

18 Thank you very much.

19 (Time noted: 1:01 p.m.)

20 _____

21 LEO M. DWYER

22 Subscribed and sworn to before me

23 this ____ day of _____, 2001.

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, SHAUNA STOLTZ-LAURIE, a Notary Public

within and for the State of New York, do

hereby certify:

That LEO D. DWYER, the witness whose
deposition is hereinbefore set forth, was
duly sworn by me and that such deposition is
a true record of the testimony given by the
witness.

I further certify that I am not
related to any of the parties to this action
by blood or marriage, and that I am in no
way interested in the outcome of this
matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 20th day of April, 2001.

SHAUNA STOLTZ-LAURIE

1

2 ----- I N D E X -----

3 WITNESS EXAMINATION BY PAGE

4 LEO D. DWYER MR. SHAPIRO 5

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6 ----- INFORMATION REQUESTS -----

7 DIRECTIONS: 60, 61

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9 ----- EXHIBITS -----

10 [DWYER] FOR ID.

11 [Dwyer] Exhibit 1, Plaintiff's First Request 6

12 for Production of Documents.

13 [Dwyer] Exhibit 2, Mr. Boni 4/18/01 letter 22

14 to Mr. Rich.

15 [Dwyer] Exhibit 3, Mr. Dwyer declaration. 23

16 [Dwyer] Exhibit 4, Vonnegut contract, Bates 56

17 Rosetta 24-29.

18 [Dwyer] Exhibit 5, Microsoft Read End User 84

19 License Agreement.

20 [Dwyer] Exhibit 6, eBookReserve Publisher 101

21 Agreement, Bates Rosetta 99-102.

22 [Dwyer] Exhibit 7, Gemstar eBook Ltd. 104

23 Distribution Agreement, Bates

24 Rosetta 112-114.

25

1

2 [DWYER] FOR ID.

3 [Dwyer] Exhibit 8, proposed RosettaBooks- 105

4 PeanutPress agreement, Bates

5 Rosetta 103-111.

6 [Dwyer] Exhibit 9, eBook Resale Agreement, 108

7 Bates Rosetta 77-85.

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