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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF NEW YORK

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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,)

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Defendants.)

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DEPOSITION OF ARTHUR M. KLEBANOFF

15

New York, New York

16

Thursday, April 19, 2001

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23 Reported by:

SHAUNA STOLTZ-LAURIE

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CSR NO. 810490

JOB NO. 120632B

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April 19, 2001

2:22 p.m.

Deposition of ARTHUR M. KLEBANOFF,
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 APPEARANCES:

3

4 WEIL, GOTSHAL & MANGES LLP

5 Attorneys for Plaintiff

6 767 Fifth Avenue

7 New York, New York 10153-0119

8 BY: R. BRUCE RICH, ESQ.

9 NATALIA PORCELLI, 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 LINDA STEINMAN

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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 ARTHUR M. KLEBANOFF, called as

3 a witness, having been duly sworn by a

4 Notary Public, was examined and testified as

5 follows:

6 EXAMINATION BY

7 MR. RICH:

8 Q. Good afternoon, Mr. Klebanoff.

9 A. Good afternoon.

10 Q. Would you state your name and business

11 and home addresses for the record, please?

12 A. Arthur M. Klebanoff, business address

13 845 Third Avenue, 15th floor, New York, New York

14 10022, home address [REDACTED]

[REDACTED]. I have another address

16 in Connecticut if it's relevant.

17 Q. And by whom are you presently employed,

18 Mr. Klebanoff?

19 A. I'm self-employed.

20 Q. What, if any, present relationship do

21 you have with an entity known as RosettaBooks?

22 A. I'm the chief executive officer, I'm a

23 cofounder and I'm a stockholder. I should say I'm

24 a holder of -- it's a limited -- an LLP, so I'm a

25 holder of units, LLP.

1 Klebanoff

2 MR. RICH: Can I hear that answer

3 back, Please.

4 (Record read.)

5 A. (Continuing) LLC I should say.

6 Q. And could you describe the other equity

7 participants in RosettaBooks?

8 A. Well, I have --

9 Q. Name them, identify them?

10 A. Their names are Marshal Sonenshine and

11 Rafael Pastor.

12 Q. And among that group are all shares or

13 units, as the case may be, accounted for presently?

14 A. However, two of our employees have

15 option interests.

16 Q. Can you just identify them for the

17 record, please.

18 A. Leo Dwyer and Dorothy Kauffman.

19 Q. You indicated you're self-employed; is

20 that right?

21 A. Yes.

22 Q. You do not have any formal employment

23 relationship with RosettaBooks?

24 A. I have no -- correct. I mean correct in

25 the sense that I don't take a salary, if that's

1 Klebanoff

2 what you mean by an employment relationship.

3 Q. How much of your professional work week
4 is devoted to RosettaBooks-related activities?

5 A. Most.

6 Q. And the balance of your professional
7 time is devoted to what social activities?

8 A. Running the Scott Meredith Literary
9 Agency, which I own.

10 Q. In the last six months about what
11 percent of your time has been devoted to the
12 latter?

13 A. As in Scott Meredith?

14 Q. Yes.

15 A. I would say modest. 15 to 20 percent of
16 my time I would say.

17 Q. I'd like you to tell me your
18 understanding of what a book is.

19 MR. BONI: Object to the form.

20 MR. RICH: What's objectionable about
21 the form?

22 MR. BONI: To the extent that it calls
23 for a legal definition in the context of
24 this litigation.

25 Q. (Continuing) You can answer.

1 Klebanoff

2 A. If you mean a physical book is printed

3 on paper --

4 Q. My question was slightly different.

5 Do you have a more generic definition of

6 book, or is your only conception of book consistent

7 -- let me finish for the record -- consistent with

8 your last answer that a book assumes only physical

9 dimension?

10 A. No, it clearly doesn't assume physical

11 dimension, since RosettaBooks is an electronic book

12 company. From experience in the book business I

13 would actually guess respond -- not -- I guess I

14 would respond to the question what is a book, in

15 physical form it has many types of types of

16 editions, and in an electronic form.

17 Q. Do you regard RosettaBooks as a book

18 publisher?

19 A. It's an electronic book publisher.

20 Q. And what is the distinction as you see

21 it?

22 A. Well, an electronic book is delivered in

23 -- well, it could be delivered in I guess

24 conceptually, broadly speaking, one way digital for

25 in devices, or if it came in the form of a CD rom

1 Klebanoff

2 or CD rom like device, which is still digital, it

3 could include a physical disk.

4 Q. Is an electronic book a book?

5 MR. BONI: Object to form.

6 A. Is an electronic book a book. I guess

7 -- if I -- my answer, to me, that would be I don't

8 know.

9 Q. You never thought about that?

10 A. Well, in -- an electronic book is not a

11 book in the sense in which a physical book is a

12 book.

13 Q. I think you testified to that effect

14 earlier. My question was meant to be slightly

15 broader, which is is the conception of a book broad

16 enough in your estimation to include for the

17 purpose of books other than physical books?

18 I believe you had answered yes; is that

19 correct?

20 MR. BONI: Asked and answered.

21 Q. (Continuing) Is that correct?

22 A. Electronic book incorporates the

23 contents -- can incorporate the contents of a

24 physical book.

25 Q. But you're unprepared sitting here to

1 Klebanoff

2 state, in your view, that an e-book or to

3 electronic book is a book.

4 MR. BONI: Object to the form of the

5 question.

6 A. Well, I would answer it this way. They

7 call it an e-book because it's an e-book.

8 Q. Who is they?

9 A. I mean people. The name e-book has come

10 about I mean I would argue because it is actually a

11 different form of a book.

12 Q. In what sense is it a different form of

13 a book?

14 A. In the sense that it moves in a digital

15 environment, that it's received in a digital

16 environment, that it's read on a screen, that it's

17 not on paper.

18 Q. And what attributes of an e-book have in

19 common with a physical book?

20 A. Well, in certain instances it would have

21 -- in the sense of a particular physical book by a

22 particular author, it might have -- it would have

23 presumably all the same words, the words of the

24 author.

25 Q. Would you agree or disagree with the

1 Klebanoff

2 statement that RosettaBooks publishes books in

3 electronic formats?

4 MR. BONI: Object to form.

5 A. Well, we obviously publish books in

6 electronic format, sure.

7 Q. Would you agree with the

8 characterization of an electronic book as a

9 paperless book?

10 MR. BONI: Object to form.

11 A. Well, I don't think of it in that -- in

12 that -- like using that word, but it is paperless.

13 Q. Have you ever seen that expression used

14 in relation to e-books?

15 MR. BONI: What expression?

16 MR. RICH: That they are tantamount

17 to paperless books.

18 A. Well, I wouldn't say -- no. As opposed

19 to --

20 Q. Let me rephrase the question. Thank

21 you.

22 Have you ever seen e-books described as

23 paperless books?

24 A. I've certainly heard the expression

25 paperless used to -- you know, used in describing

1 Klebanoff

2 when some people describe an electronic book.

3 Q. And do you agree or disagree with that
4 characterization?

5 A. It's obvious that an electronic book is
6 paperless.

7 Q. Do you agree it is a paperless book?

8 MR. BONI: Objection to form. He's
9 answered the question.

10 MR. RICH: Not really.

11 A. People -- I mean I go back to what I
12 said. People refer to it as a paperless -- it is a
13 book without paper.

14 Q. And my question is do you have
15 difficulty or do you disagree with such a
16 characterization, and if so, why.

17 MR. BONI: Object to the form.

18 You have to make sure you understand
19 the question before you answer the question,
20 and if you don't, ask the examiner.

21 A. Well, I don't actually understand -- I
22 don't understand what you're trying to ask me.

23 Q. Well, you are characterizing in the
24 thinking of third persons, "some people
25 characterize it as such," and my question is,

1 Klebanoff

2 recognizing that, is that a characterization you
3 agree with or disagree with, namely, that an e-book
4 is a paperless book.

5 A. I agree -- well, I would state it
6 differently. I agree that an e-book is paperless.
7 See, you're trying to get me to say that in -- that
8 a -- that a -- that it -- something tantamount,
9 that it's -- that an electronic book is the same as
10 a physical book, which is not what I feel.

11 Q. I'm not putting any words in our mouth.

12 A. Fine. Then I don't -- my view is that
13 an e-book and a physical book are not the same. No
14 matter how I answer the question around it, I don't
15 want to get mischaracterized by my answer saying I
16 think they're the same in any way, shape or form.

17 Q. In contrast to a physical book, is it
18 accurate that an e-book could be conceived of as a
19 virtual book?

20 MR. BONI: Object.

21 (Inaudible) -- when you use the word
22 book, he's got the same understanding. It's
23 a fundamental communication problem here.

24 Q. Do you have the question in mind?

25 THE WITNESS: Would you read the

1 Klebanoff

2 question back, please.

3 (Record read.)

4 A. I've certainly seen the word virtually
5 used frequently in referring to e-books. The
6 context in which I think the word virtual is used
7 is the same context as virtual space, which I think
8 is referring to the digital world, in which things
9 move as opposed to saying a different use of the
10 word virtual, which is A equals B. I don't think
11 it is used in the context that says that a physical
12 book is therefore an electronic book. I'm saying
13 an electronic book is virtual in the same sense
14 that e-mail is virtual.

15 Q. I don't think a single question was
16 intended to ask you to equate a physical book with
17 an e-book.

18 A. Fine.

19 Q. My questions have been intended to
20 elicit whether a variety of formats in which an
21 author's content are presented specifically in
22 paper format or physical format as well as e-book
23 or electronic format, both in your conception of
24 the concept of book fit within the concept of a
25 book. I'm not asking you to equate the two as

1 Klebanoff

2 products.

3 Is my question a little clearer now?

4 MR. BONI: Well, that's not a

5 question, so why don't you ask a question.

6 Q. With that clarification, sitting here

7 today do you agree that RosettaBooks is in the book

8 publishing business, that is, in the business of

9 publishing books in electronic format?

10 MR. BONI: Object to form.

11 A. Well, we're definitely an electronic

12 publisher who, among other things, will publish an

13 electronic -- who will publish electronic books,

14 meaning -- by the way, I mean books whose prior

15 appearances have been in physical form.

16 (Discussion off the record.)

17 MR. RICH: Off the record.

18 (Discussion off the record.)

19 MR. RICH: Let's mark as [Klebanoff]

20 Exhibit 1 a document which is undated but

21 bears Rosetta production numbers 0187

22 through looks like 229, and it's titled

23 Yourclassics.com, The Path for Industry

24 Players to Navigate the Content Side of

25 E-Publishing. I beg your pardon. It is

1 Klebanoff

2 dated, January 2000.

3 MR. BONI: Can we ask Linda to step
4 out if this is a counsel only document?

5 MR. RICH: Let's go off the record
6 here.

7 (Discussion off the record.)

8 MR. RICH: I want to hear why you're
9 pulling it back.

10 MR. BONI: Because we never intended
11 to produce this document. This is a
12 clerical error.

13 Well, you can smirk, but that's the
14 case, and it was inadvertently produced, and
15 we're requesting it back because it was
16 inadvertently produced, and it was
17 consistent with discussions that you had I
18 had, Bruce, over the telephone that we would
19 not be providing drafts of any documents.
20 We agreed to hold the issue of financial
21 information in abeyance, and I recall
22 specifically saying to you that even when we
23 have final versions of this type of
24 document, we would dispute at that time
25 whether it's relevant and we should hold it

1 Klebanoff

2 in abeyance. Your position, as you stated
3 to me, is you're not agreeing, but that
4 you're going to defer on the answer.

5 MR. RICH: This is a fanciful
6 interpretation. We never had such a
7 discussion. What we agreed to disagree
8 about was, one, a document request,
9 specifically document request 12,
10 requesting, quote, all of RosettaBooks
11 financial statements and financial
12 projections, unquote. It was the position
13 of RosettaBooks with which we disagreed that
14 no financial information was relevant at the
15 preliminary injunction stage of the case,
16 although it was suggested that questions at
17 least on a limited basis could be posed to
18 Mr. [Klebanoff]. the document which is, A,
19 claimed to be a draft, which eludes me
20 completely to the basis of that and,
21 nevertheless is responsive on its face, and
22 obviously to any number of other questions
23 which were not objected to.

24 For example, number nine, quote, all
25 documents referring or regarding the

1 Klebanoff

2 marketing promotion or distribution, whether
3 commercial or non-commercial of e-books, to
4 which in response you indicated in request
5 number nine --

6 MR. BONI: You don't have to go on.

7 MR. RICH: -- that responsive
8 documents have been produced.

9 MR. BONI: OK. OK. Different
10 document. That's fine. But it is, counsel
11 -- then I am amend as to why I'd rather
12 resolve these things off the record. I
13 thought this was another document. So this
14 is. Fine but it is Counsel Eyes Only.

15 We're back to the first issue, and I
16 would prefer anyone inside Random House not
17 to be in the room.

18 MR. RICH: OK, I'm going to ask you
19 to excuse yourself.

20 (Ms. Kleinman left the room.)

21 (The following portion has been deemed
22 confidential and bound under separate
23 cover.)

24

25

REDACTED

REDACTED

1 Confidential - Klebanoff

21

REDACTED

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1 Klebanoff

2 (Ms. Steinman rejoined the
3 proceedings.)

4 MR. RICH: I'm going to ask the
5 reporter to mark as the next exhibit a
6 document dated February 20, 2000, one
7 bearing the heading Executive Summary, and
8 it has production Rosetta 0183 through 0186.

9 ((Klebanoff] Exhibit 2, 2/20/00
10 Executive Summary, Bates Rosetta 0183-186,
11 marked for identification, as of this date.)

12 Q. Is this a document with which you're
13 familiar?

14 A. Yes.

15 Q. Could you describe what it is?

16 A. This is a document we prepared that
17 would permit us, with a few pages of paper, to
18 explain to people principally in the rights
19 community what we were doing with RosettaBooks.

20 Q. This document, was it updated
21 periodically or --

22 A. This is the current form of the
23 document. It has predecessor forms that are not
24 radically different but different.

25 Q. What would be the essential nature of

1 Klebanoff

2 the differences from the predecessor forms?

3 A. I think we have a broader range of
4 marketing partners who would be listed here, since
5 some of them we would not have had at an earlier
6 date. We have at given points in time certain of
7 the titles or authors referenced we wouldn't have
8 had signed, so it would have been shorter lists.

9 I think this is the first document that
10 references our advisory committee, who at an
11 earlier time would not have been recruited. And
12 our staff was -- we didn't have -- we had Dorothy
13 Kauffman in the earlier document, and I know the
14 attachment, which is on this document, we didn't
15 use in the earlier documents.

16 Q. Thank you.

17 Is this the most recent iteration of
18 this document?

19 A. Yes.

20 Q. The very first sentence states
21 "RosettaBooks is the leading electronic quality
22 back list publisher."

23 Was that true as of February 2001?

24 A. That's our -- that's our position.

25 Q. Had Rosetta launched its website as of

1 Klebanoff

2 the date this document was written?

3 A. Well, we were in -- we hadn't launched
4 -- we were in beta. We'd been in beta form for
5 some time at that time.

6 Q. On that basis is the statement founded
7 namely that in beta test standing, notwithstanding
8 beta test stage Rosetta is the leading electronic
9 quality back list publisher?

10 A. Well, the point we were making, the
11 statement -- and today I think we would argue that
12 no one's put forward as diverse a back list range
13 of books as we have, nor have they packaged them in
14 the manner that we have, and we could -- at the
15 point we put this executive summary forward we
16 could demonstrate that to anybody who had access to
17 our site.

18 Q. I take it it was not intended from your
19 answer to be based on any quantitative volumes or
20 sales volumes.

21 A. Correct.

22 Q. By definition, there had been none at
23 this point, correct?

24 A. Correct.

25 Q. By the way, who wrote and periodically

1 Klebanoff

2 updated this executive summary?

3 A. Well, the earlier versions of this I
4 wrote. This version was recrafted by Dorothy
5 Kauffman with -- I mean collaboratively with me.

6 Q. She handles your marketing?

7 A. Yes.

8 Q. Now, on page two, at the top it states
9 "In general RosettaBooks acquires its exclusive
10 rights directly from authors who control those
11 rights in the United States for books published
12 before approximately 1980," and you go on to talk
13 about the U.K.; do you see that?

14 A. Yes.

15 Q. On what facts as to the status of
16 authors' rights is that statement based? What is
17 the source for that statement, source or sources?

18 A. Based on nearly 30 years of experience
19 in the book business, based upon an extensive
20 review of contracts that are in the files of Scott
21 Meredith Literary Agency, based on, at the point
22 that this was written, I would say approximately
23 100 personal meetings with agencies in New York and
24 London, and a substantial additional number of
25 conversations with agents who shared this point of

1 Klebanoff

2 view on rights, this was our assessment in general
3 of the rights posture.

4 Q. How many face-to-face meetings did you
5 or any other RosettaBooks representatives have with
6 U.S. book publishers that discussed this topic?

7 A. U.S. book publishers?

8 Q. Yes.

9 A. I had several, not many.

10 Q. And can you identify with whom you had
11 discussion?

12 A. Well, I had discussions with people at
13 book publishers. I mean specifically I had a
14 discussion at Harper Collins. We entered into a
15 non-disclosure agreement about -- it was on the
16 possibility that we would explore Harper Collins as
17 a strategic partner.

18 Q. I'm sorry, your voice trailed off.

19 A. The possibility that we would explore
20 Harper Collins as a strategic partner.

21 We never actually conducted that
22 conversation.

23 Q. I don't need to go into that, those
24 specifics, for purposes of this case.

25 But my question is in that conversation

1 Klebanoff

2 or those conversations with the individual or
3 individuals at Harper did you come to discuss the
4 rights issues in relation to Harper's rights in
5 e-books from some period of time, you know --

6 MR. BONI: You can answer it yes or
7 no. I want you to be careful. You've got a
8 non-disclosure. He asked you a yes or no
9 question. You can answer it yes or no.

10 A. The --

11 MR. BONI: You can answer it yes or
12 no.

13 A. (Continuing) Yes, we -- yes, we
14 discussed the -- I mean the rights philosophy that
15 we were -- that we were exploring for the rights
16 assumption of Rosetta.

17 Q. And I'd like you to describe the nature
18 of those discussions, please.

19 MR. RICH: We can put this on
20 confidential if you want. I'm not looking
21 for any discussions --

22 Off the record.

23 (Discussion off the record.)

24 MR. RICH: Back on the record.

25 A. My -- I was interested in exploring

1 Klebanoff

2 whether Harper would license any of the titles to
3 which it did control electronic rights to Rosetta,
4 and the Harper position was that it had made a
5 corporate policy decision that it would only
6 explore electronic licenses in an environment in
7 which it was doing this wholesale, if you will,
8 versus retail, and only where it would explore a
9 strategic relationship which might involve taking
10 an economic interest in the company to whom it
11 would place a license; that it would not explore a
12 title by title license exploration. It was under
13 that headline that we then considered having a
14 conversation.

15 But in the same -- in the same -- in the
16 same preliminary conversation I was very clear that
17 we were actively negotiating for an interest in
18 titles that predated Harper's electronic rights,
19 specific electronic rights clauses, and the Harper
20 people I talked to in those conversations certainly
21 didn't say anything to me that we disagreed with
22 what I was saying.

23 Q. Did they say they agreed with your
24 position as to the --

25 A. We weren't sitting there signing

1 Klebanoff

2 agreements. You know, they certainly didn't

3 disagree.

4 Q. There's two negatives. It's a double
5 negative. I'm trying to deconstruct your answer.

6 Let me ask a different question.

7 First of all, what was the nature of the
8 positions held by these people at Harper Collins?

9 A. The person I spoke to was Chris North.

10 Q. Chris --

11 A. North. Now, as far as I know was in
12 charge of the electronic effort.

13 Q. And what specifically do you recall that
14 he said to you in response to your stated position
15 that RosettaBooks was interested actively in
16 acquiring rights to titles which in RosettaBooks'
17 view predated the more explicit adoption of
18 electronic rights clauses by Harper Collins?

19 A. I recall having a lunch with Chris North
20 before we ever addressed the question of -- you
21 know, before we ever reached going into a
22 non-disclosure, to see whether we'd have a later
23 conversation, where we talked about in the Harper
24 agreements there are, generally speaking, two
25 generations of -- of these electronic rights

1 Klebanoff

2 grants.

3 In the earlier ones there's a right of
4 Harper's to license to a third party but no right
5 of theirs to publish without an agreement with the
6 author as to the royalty right. Then there's a
7 later set of agreements which gave them a right to
8 publish, more recent, with an agreed royalty rate.
9 And North was very interested in my opinion about
10 how they could -- they were busy negotiating with
11 various agents in the community, trying to figure
12 out how to unscramble this set of issues in their
13 electronic rights clause contracts.

14 Q. Do you have any knowledge about how long
15 Mr. North has been associated with Harper Collins?

16 A. Not a particularly long time.

17 Q. Less than two years?

18 A. From now, when these discussions were
19 probably about a year ago, about a year ago he was
20 probably there, I don't know, 18 months at the
21 time, something like that. He was hired for the
22 purpose of working in the electronic arena.

23 Q. Apart from the discussions you've just
24 described with Harper Collins did you have any
25 similar conversations touching on the rights

1 Klebanoff

2 issues, with any other U.S. publishing house since
3 you'd begun developing the business of
4 RosettaBooks?

5 A. Well, one of the titles we've licensed
6 is from Workman Publishing Association. I've had
7 discussions at Workman Publishing regarding
8 electronic rights issues, and I have history with
9 Workman Publishing with particular titles for
10 Sheila Lukins, the cookbook author, where the
11 electronic clauses are specifically withheld.

12 Q. Have you had any discussions relating to
13 rights issues predating the lawsuit necessarily
14 with anyone at Random House?

15 A. No.

16 Q. On what basis did you select the year
17 1980?

18 You said approximately 1980 as the sort
19 of the changeover period.

20 What was that based upon?

21 MR. BONI: Object to form. That's not
22 what this says.

23 MR. RICH: Let me rephrase. That's
24 fair.

25 Q. The first sentence on page two indicates

1 Klebanoff

2 the view that authors control in the United States

3 eBook rights "for books published before

4 approximately 1980."

5 How did you come to determine that that

6 was the appropriate date?

7 A. Well, what we -- the purpose of this

8 document is to encourage the people who were seeing

9 it to do some homework and be interested in

10 exploring a relationship with RosettaBooks. In our

11 view, my view, 1980 is a pretty safe date going

12 across publishers, and it's a very rare book

13 contract before 1980 that would have a specific

14 electronic rights clause. There are many rights

15 agreements, including Random House's, running to

16 1994 that would have no electronic rights clause to

17 a much later date.

18 Q. Was to you the operative issue in terms

19 of whether the rights were controlled by the

20 authors or the publisher evidence of an explicit

21 electronic rights clause in one or more publishing

22 agreements?

23 A. Basically, yes.

24 Q. Now, on the third paragraph on page two

25 you indicate "RosettaBooks publishes books only in

1 Klebanoff

2 electronic formats - not by print in demand or any

3 other print formats."

4 Is that still an accurate statement?

5 A. Yes. We don't do anything that takes

6 physical form. It's not -- in the sense in which

7 it's -- the sense I want to be clear in the answer

8 is we -- in the sense that we have already

9 published short stories, in the sense that we have

10 contemplating publishing forms of documents that

11 really are not books, we are -- we are broadening

12 what we do, but we are not doing anything that

13 would take the form of print.

14 Q. To that very point, if you look at the

15 top of page three, and I think consistent with your

16 testimony just now you indicate toward the back of

17 that paragraph that "The consumer will become

18 comfortable with e-reading not just of books but of

19 newspapers, magazines, texts, professional

20 materials, corporate materials - in effect

21 everything which today is printed."

22 Was that suggestive of the broader

23 direction in which RosettaBooks may also be moving?

24 A. It's one of the directions even broader

25 than that, actually.

1 Klebanoff

2 Q. Encompassing both books and other
3 reading materials.

4 A. Yes.

5 Q. Toward the bottom of that page,
6 paragraph beginning "We believe that there are
7 between 15,000 and 25,000 titles which could meet
8 RosettaBooks' editorial criteria."

9 Broadly speaking, what are those
10 editorial criteria?

11 A. That is a book whose authorship or title
12 has continuing residence in today's world for
13 categories of consumers.

14 Q. Are you the individual who principally
15 attempts to make those determinations?

16 A. Am I? I am one of a small group of
17 individuals making those determinations. We have a
18 small team, and when -- we have the board of
19 advisors, and we --

20 Q. Do you call on that group to make these
21 judgments?

22 A. We haven't actually used the board of
23 advisors very actively yet. We will.

24 Q. Back up to the top of three, the second
25 sentence of the first paragraph says "this first

1 Klebanoff

2 fundamental change in book production since

3 Gutenberg."

4 Does that harken back to your discussion

5 a little bit earlier about the transformation

6 you've seen in the book production process?

7 A. Yes.

8 Q. Most recently typified by

9 eBookPublishing?

10 A. Yes.

11 Q. Now, with respect to the 15,000 to

12 25,000 titles that could meet RosettaBooks'

13 editorial criteria, do you know sitting here today

14 approximately what number of titles fall under one

15 or another Random House imprint?

16 A. I don't.

17 Q. You recall that in your affidavit you

18 suggest that as much as a third of -- let's not

19 guess. Let me put your affidavit in front of you.

20 MR. RICH: First of all, shall we mark

21 it?

22 MR. BONI: It's up to you.

23 MR. RICH: We will mark as [Klebanoff]

24 3, a declaration of Arthur M. Klebanoff

25 dated April 5, 2001.

1 Klebanoff

2 ([Klebanoff] Exhibit 3, Mr. Klebanoff

3 4/5/01 declaration, marked for

4 identification, as of this date.)

5 MR. BONI: Can we take a quick break?

6 MR. RICH: Sure.

7 (Recess taken.)

8 MR. RICH: I don't remember the last

9 question.

10 (Record read.)

11 Q. Mr. Klebanoff, I've placed in front of

12 you a document which appears to be a declaration

13 you submitted in connection with this case.

14 Do you recognize it?

15 A. Yes.

16 Q. And if you look to the back, does it

17 bear your signature?

18 A. Yes.

19 Q. And were you involved in the preparation

20 of this document?

21 A. I drafted this.

22 Q. You drafted it.

23 And I take it you approved and stand by

24 its contents?

25 A. Yes.

1 Klebanoff

2 Q. If you look at paragraph 24 for the
3 moment, please, and in little sub A you indicate
4 that among the hardships that RosettaBooks would
5 suffer if Random House is granted the injunctive
6 relief it seeks is "access to up to one third of
7 attractive trade titles (based on Random House's
8 overall market share) will be denied to
9 RosettaBooks for exploration of electronic rights
10 licensing"; do you see that?

11 A. Yes.

12 Q. How did you make that computation?

13 A. Well, I've read on many occasions of
14 Random House's dollar market share, and have also
15 heard from the Authors' Guild of their assessment
16 of Random House's dollar market share, and I was
17 actually just drawing a line between market share
18 and titles.

19 Q. And did you make any further
20 discrimination or any further analysis looking at
21 what you term A list back titles to see what
22 proportion of that group of works fall within the
23 Random House family?

24 A. No.

25 MR. RICH: Natalia, I'm going to mark

1 Klebanoff

2 the Parker RosettaBooks agreement, please.

3 ([Klebanoff] Exhibit 4, 1/18/01 Parker
4 contract, Bates Rosetta 0005-9, marked for
5 identification, as of this date.)

6 MR. RICH: We're going to mark as
7 [Klebanoff] 4 a document dated the 18th of
8 January 2001. It appears to be a contract
9 between RosettaBooks LLC and Robert B.
10 Parker, and it bears production numbers
11 Rosetta 0005 through 0009.

12 Q. Can you identify this document, Mr.
13 Klebanoff?

14 A. Yes. This is the contract between
15 RosettaBooks and Robert Parker, which is one of the
16 books in question in the litigation.

17 Q. Did you negotiate this agreement with
18 representatives of Mr. Parker?

19 A. Yes.

20 Q. And who did you deal with?

21 A. Helen Brann and occasionally her
22 associate, whose name I actually should know but
23 don't. I have it back at the office.

24 Q. For the record who is Helen Brann? What
25 is her relationship to Mr. Parker?

1 Klebanoff

2 A. Helen Brann is his agent.

3 Q. And you negotiated this in your capacity
4 as the CEO of RosettaBooks?

5 A. Yes.

6 Q. And over what period of time would you
7 recall the negotiation took place? How many days,
8 weeks or months?

9 A. Well, we would have made our initial
10 inquiry I would say perhaps as much as six months
11 between when the initial inquiry was made and when
12 we were able to get this contract signed.

13 Q. Am I correct, at least based on the a
14 sample of agreements we've seen, that the
15 fundamental terms of this document are standard
16 with respect to the agreements you've entered into
17 with your authors, putting aside the royalty
18 provisions?

19 A. Not exactly, because I think if you laid
20 every contract of Rosetta side by side, and it's
21 typical for discussions between -- in my
22 experience, between a buyer and seller and a
23 subsidiary right in publishing, there's a -- there
24 are variations, agent to Rosetta, that you could
25 argue as to their significance, but there are

1 Klebanoff

2 variations. So we have tried to come to a form

3 with each agent to satisfy that agent.

4 Q. To save time, I have no intention of

5 going through each and every document. If as we go

6 through this document, which I intend to use as

7 hopefully representative, it comes to your mind

8 that there are material differences in the

9 agreements with any of the other -- with respect to

10 any other works, I would appreciate your advising

11 me. I don't expect it to be a memory test, but I

12 would appreciate it.

13 How is this consistent with a --

14 depreciative of your comment that there are some

15 variations, how did this essential form of contract

16 come to be developed?

17 A. Well, as we set out to -- before we

18 approached the first authors for licensing I

19 conceptualized a basic form of license that I

20 thought would be appropriate for RosettaBooks, and

21 then with the advice of our publishing counsel,

22 Franklin Weinrab & Rudell --

23 MR. BONI: You don't want to discuss

24 the advice.

25 THE WITNESS: Not just the advice. I

1 Klebanoff

2 just want to say there was advice.

3 A. (Continuing) In our discussion with
4 Franklin Weinrab & Rudell we by a back and forth
5 process came to what I would call a boiler plate.
6 Boiler plate was subsequently reviewed by a
7 committee of the Association of Authors'
8 Representatives, the AAR, the literary agents'
9 group, and we made changes in the agreement based
10 upon suggestions from them, and that basically is
11 your boiler plate subject to certain other changes
12 we've made as we get consistent comments from
13 agents. We are trying to have an author friendly
14 contract. We have made moving changes as the clock
15 ticks.

16 Q. Who is it at the Franklin Weinrab firm
17 serves as your counsel?

18 A. My main contact is Mike Rudell, and the
19 person who we talk frequently to is Neal Rossini,
20 and the fellow who helped on the -- actually, the
21 person most active on the drafting of the contract
22 was Dan Wasser.

23 Q. As you got into individual negotiations
24 with individual authors' representatives did the
25 Franklin Weinrab play a role in those as well?

1 Klebanoff

2 A. Basically not. I did the negotiations,
3 and I typically did the revisions or changes in the
4 contract for the particular occasion.

5 Q. And who were the members of the
6 committee of the AAR with whom you consulted and
7 who provided you had feedback?

8 A. I am -- the -- the person with whom I
9 spoke, who was on either -- she was on the
10 committee, I believe, was Jane Gelman of Gelman
11 Schneider, and she relayed a number of comments
12 which we were free deal with or not deal with, but
13 this committee was reading a range of electronic
14 licenses from a range of publishers.

15 Q. And what form did she collect comments
16 from committee members and then forward them to you
17 in some fashion?

18 A. It was all verbal.

19 Q. And she was the point person?

20 A. But she was the point person.

21 Q. I see.

22 And was that one exchange or was it a
23 series of back and forth over time?

24 A. Well, because she represents Ed McBain,
25 and we bought an Ed McBain title from her, as a

1 Klebanoff

2 practical manner we had her comments initially on
3 behalf of the AAR, and then we had her review, and
4 a yet more detailed way when we actually went
5 through the process of getting the Ed McBain
6 contract signed.

7 Q. How significant were the changes that
8 you accepted based on recommendations of the AAR?

9 A. I don't think they were particularly
10 significant against our form. They had been very
11 flattering to our form, which I was sort of pleased
12 about. And it was important to know, while they
13 don't -- they made clear they weren't endorsing
14 anybody's form. I thought it was very good
15 politics to have a form that the committee felt was
16 responsive to their review, so that when I came in
17 with five or six items that I think one was in the
18 accounting clause area, there were certain other
19 comments that I have to tell you at the moment I
20 can't remember, but we did basically accommodate
21 them.

22 Q. Did Ellen Levine sit on the AAR
23 committee for this purpose?

24 A. I don't know.

25 Q. Have you had occasion to discuss your

1 Klebanoff

2 form of agreement with Ms. Levine?

3 A. No, because -- I mean I have -- I

4 believe I have sent pitch proposals to Ellen

5 Levine's agency looking for titles, but we haven't

6 yet landed one. Landed one to the point of having

7 a substantive one.

8 Q. With her or any of her colleagues.

9 A. Right.

10 Q. Within that agency.

11 A. Right, within that agency.

12 Q. I want to ask you some specific

13 questions off of the contract itself, if I may.

14 Focusing first on paragraph two and looking at the

15 first sentence -- actually let me ask you this

16 question preliminarily.

17 Are you aware of the fact that the AAR

18 together with the Authors' Guild filed a brief in

19 support of RosettaBooks on the pending motion?

20 A. Yes.

21 Q. Did you have any consultative or other

22 involvement in the shaping of that brief?

23 A. Did I personally?

24 Q. Yes.

25 A. I attended one meeting with

1 Klebanoff

2 representatives of the AAR and the Authors' Guild

3 and counsel.

4 Q. To discuss the brief.

5 A. No. To discuss the -- at the time it

6 was actually to discuss whether they --

7 MR. BONI: You can discuss the general

8 subject matter.

9 A. (Continuing) Well, it was simply to

10 discuss in general terms whether there would be a

11 brief, who was doing -- it was really work

12 assignments, who was going --

13 MR. BONI: They discussed defensible

14 litigation.

15 Q. Were you shown any drafts of the brief

16 that eventually was --

17 A. Was I?

18 Q. Yes.

19 A. No.

20 Q. Since it's been filed have you had

21 occasion to read it?

22 A. Yes.

23 Q. And did you find yourself disagreeing

24 with any of the arguments that were made in that

25 filing?

1 Klebanoff

2 A. No.

3 MR. BONI: Legal arguments or --

4 MR. RICH: Any arguments. He is a
5 lawyer.

6 A. (Continuing) No, I mean I -- I -- I
7 thought it was a very good brief.

8 Q. I don't have multiples of this, but I
9 want to show you simply one of the assertions in
10 the brief. That's all we're going to do with this.
11 I'm not going to even mark it.

12 MR. BONI: Off the record a second.

13 (Discussion off the record.)

14 Q. I'm going to show you at page 12 of
15 Amicus Memorandum of the Authors' Guild and the
16 Association of Authors' Representatives, and ask
17 you to read footnote number three, which is a
18 rather lengthy footnote on that page?

19 MR. BONI: It's pure law. What do you
20 want to know? I mean he has a legal --

21 MR. RICH: I haven't asked a question.
22 I'm asking him to read it.

23 MR. BONI: You want to know if he
24 agrees with that? That was the underpinning
25 of the question.

1 Klebanoff

2 MR. RICH: I haven't asked a question.

3 MR. BONI: OK.

4 (Discussion off the record.)

5 Q. Do you as a publishing industry lawyer
6 and agent have an understanding of the concept of
7 the display right under the copyright law?

8 A. I don't consider myself an intellectual
9 properties lawyer. From the point I first began
10 doing this kind of work in the 70's I'm really, if
11 I had to characterize it, I think a person
12 competent to read contracts. And the reason we
13 hired Franklin Weinrab was to have a sophisticated
14 intellectual property counsel. And actually in
15 terms of the levels of argument that I've now had
16 to familiarize myself in connection with this
17 litigation I'm reading about things I don't know
18 about in any detail.

19 Q. Focusing on your knowledge of contracts,
20 in your experience how many publishing industry
21 contracts in the grant of right clause convey the
22 right to display the licensed work to the
23 publishing house in those words?

24 MR. BONI: In those words.

25 A. How many publishing --

1 Klebanoff

2 Q. Contracts with which you're familiar

3 utilize --

4 A. I have no idea.

5 Q. Have you ever seen one, ever?

6 A. That uses the phrase display right?

7 Q. Yes.

8 A. One doesn't come to mind.

9 Q. Does it come to mind, looking at

10 paragraph two of your own agreement, does paragraph

11 two of your agreement contain the words "to display

12 among the rights granted to RosettaBooks"?

13 MR. BONI: I'm sorry. Is the word

14 display anywhere in paragraph two? Is that

15 the question?

16 MR. RICH: Yes.

17 Q. (Continuing) I don't see it.

18 A. It isn't.

19 Q. Do you nevertheless believe that you

20 acquired from Mr. Parker and other authors with

21 whom you've entered into this form of agreement the

22 right to publish their books in eBook form?

23 MR. BONI: Object to form.

24 A. I certainly think we acquired the right

25 to publish the works in eBook form.

1 Klebanoff

2 Q. Now, looking at the first sentence of
3 paragraph two there are a series of verbs following
4 the "right to." Could you give me your
5 understanding of what each of them conveys to
6 RosettaBooks, beginning with the word "publish"?

7 A. Well, I'm not sure how I would elaborate
8 on these words.

9 Q. Do they individually as opposed to
10 collectively have any meaning to you in the concept
11 of publishing?

12 A. Beyond how it sits on the page, not to
13 my -- not to the way I would think about it.

14 Q. Well, let me ask a slightly different
15 question then.

16 Is it your understanding that by being
17 granted by Mr. Parker the right to publish,
18 transmit, distribute, sell and produce the titles
19 as described that RosettaBooks was thereby obliged
20 to undertake each and every act that's comprehended
21 by those verbs in order to fulfill its obligation
22 under the agreement?

23 MR. BONI: Can I hear the question
24 back, please?

25 (Record read.)

1 Klebanoff

2 MR. BONI: Thank you.

3 A. I think if you're reading paragraph
4 four, how the triggering events work for when we
5 must publish and the consequences of not
6 publishing, I think the critical event is publish;
7 that we have -- we have basically fulfilled our
8 core responsibility to any one of our rightsholders
9 by publishing.

10 Q. Consistent with what I understand your
11 answer to be saying, if, for example, the
12 production function were allocated, assigned to a
13 third party, if you yourself did not produce the
14 work or farmed it out, I take it you wouldn't feel
15 that you were acting in violation or in derogation
16 of your obligation under clause two, correct?

17 A. Correct.

18 Q. And likewise, if you look at paragraph
19 5(f), which confers on RosettaBooks the right to
20 distribute the titles "on any commercial and
21 non-commercial basis it," I take it that to the
22 extent RosettaBooks were to determine to distribute
23 the titles on a non-commercial basis, the fact that
24 it was not thereby, quote, selling, unquote, the
25 works as it is entitled to do under paragraph two,

1 Klebanoff

2 would not put you in breach either; is that

3 correct?

4 A. Correct.

5 I want to amend at this point and just

6 say that a number of agents reviewing RosettaBooks'

7 contracts would object, for example, to the phrase

8 granting us non-commercial use so you would not see

9 this consistently through our contracts.

10 Q. But here it exists.

11 A. Yes.

12 Q. And you have that ability.

13 A. Right.

14 Q. So is it accurate that the grant clause

15 we're talking about which grants the right to

16 publish, transmit, distribute, sell and produce

17 essentially with the possible exception of the core

18 right of the publishing means to do any or all of

19 the foregoing?

20 A. Yes.

21 Q. Now, just so I'm clear -- I think I know

22 the answer to the next question -- as we continue

23 to work through the first sentence of the grant

24 clause, it refers to "in any analog or digital

25 electronic format."

1 Klebanoff

2 My question is what is analog modified

3 by? Is it properly read as any analog electronic

4 format or any analog format? What is the

5 intention?

6 A. The intention is any analog electronic

7 format, and when we've had a sophisticated reading

8 of this by people that were more technically

9 knowledgeable than we have, I believe we have come

10 to believe we should delete the word analog

11 altogether.

12 Q. Meaning?

13 A. It doesn't seem to mean anything in the

14 proper context of the digital world as it is

15 evolving.

16 Q. And to the extent you're able as we

17 carry forward in that sentence, there is a

18 reference to there's a litany of format

19 possibilities including, it says, "including

20 without limitation over the Internet, intranets,

21 propriety on-line systems via satellite or via any

22 computer, hand-held device or electronic network."

23 Do you know what the reference to

24 proprietary on-line systems is as it has

25 applicability to RosettaBooks' business?

1 Klebanoff

2 A. Well, I think this would give us the
3 right, for example, although it is not our business
4 model, to distribute, for example, through Qestra.

5 Q. Through what?

6 A. Qestra, Q-u-e-s-t-r-a, which is a
7 database, an on-line database.

8 Q. And who are the customers?

9 Is that a subscription database?

10 A. It's a subscription database.

11 Q. Commercial --

12 A. Educational users.

13 Q. Educational users.

14 What would be an example of satellite
15 distribution format?

16 Is there any that comes to mind?

17 A. I don't think we are currently exploring
18 any which are commercially viable, that I'm aware
19 of.

20 Q. And again, as a matter of grammar, where
21 it next says or via any computer, is that intended
22 to be a modifier of "computer network" or standing
23 alone or via any computer?

24 A. I think it's meant to stand alone.

25 Q. And what would be an example there?

1 Klebanoff

2 A. Well, I think it's meant to include a
3 laptop computer and desktop computer, an tablet
4 computer which is forthcoming.

5 Q. Now, two sentences on you state "This
6 grant is meant to encompass e-books in any form
7 and/or format and through any platform of
8 distribution now known or hereafter developed on CD
9 roms and other magnetic, digital, optical, laser
10 based or other information storage and retrieval
11 technology."

12 What is, as you understand it, the core
13 grant of rights that's meant to be described by
14 that sentence? What is the common feature to
15 everything described that is meant to be
16 encompassed; if you're able to answer that?

17 MR. BONI: Object to form.

18 A. I think the common feature is the
19 digital world, that basically everything in one way
20 or another is digitally based. I guess you could
21 argue that laser maybe raises some questions about
22 digital, but even there --

23 Q. "Other information storage or retrieval
24 technology," what do you understand that to mean?

25 A. We -- I mean, again, I would mean in my

1 Klebanoff

2 mind what we'd be looking at are these databased
3 electronic delivery systems where the question --
4 the one that I mentioned, that library has another
5 model, a company called eBrary has another model,
6 tomorrow morning there will be another company that
7 has another model. Our business methodology model
8 as of now does not involve doing businesses through
9 those channels.

10 Q. Do I understand this correctly to say in
11 recognition that technology keeps moving, that any
12 form of information storage and retrieval device or
13 technology that allows this product, help me here,
14 to be presented here you say either an analog or
15 digital electronic format and granted to be
16 encompassed in the grant form of rights? Is that
17 an accurate statement?

18 A. Yes.

19 Q. Now, 5(d) of this agreement authorizes
20 RosettaBooks to distribute the titles as a whole or
21 in segments, semicolon, provided, however, that
22 publisher will not change the text of the titles
23 without the consent of the rightsholder.

24 First of all, what is the scope of, as
25 you understand it, of the right to distribute the

1 Klebanoff

2 titles in segments?

3 A. We have contemplated selling a book by
4 chapters. We have also had from a range of the
5 agents who have granted us rights -- and I think
6 you'd see this in the Styron agreement -- that an
7 objection that we won't grant us those agreements,
8 and we have said no. And indeed we don't know
9 today that that is even a direction we wish to
10 pursue.

11 Q. I take it even if you were empowered to
12 and publish in chapters, that the totality of those
13 chapters would still be true to the statement
14 following the proviso; is that correct?

15 A. Correct. No change in words.

16 Q. And I take it that any collections,
17 condensations, abridgements, anthologies and other
18 derivative applications would require the author's
19 consent.

20 A. Yes. And again, in this arena we have
21 had a range of objections to this language, and I'm
22 not sure that we won't end up simply pulling the
23 language.

24 Q. The language which I just quoted?

25 A. Yes.

1 Klebanoff

2 Q. And if you look at 5(h) of this
3 agreement, "RosettaBooks" -- let me just read it,
4 "to assist the marketing of the titles to enhance
5 and augment the titles with surrounding text,
6 interactive materials, audio and/or video content,
7 links to other websites and such other content and
8 by such other means as publisher determines will
9 enhance the experience of the consumer, such
10 enhancements and augmentations will be subject to
11 the approval of the rightsholder, such approval not
12 to be unreasonably withheld."

13 Can you provide me with an example or
14 two of the type of enhancement or augmentation
15 which is contemplated by 5(h)?

16 A. Well, this is describing some detail of
17 Dorothy Kauffman's affidavit, and in simple terms
18 we tend to commission an essay about the author,
19 the title, the context, if it's a movie, the movie.
20 We create the RosettaBooks connection which gives
21 hyperlinks to, give or take, ten links around the
22 web that relate to author, title, content, context.
23 We create an eForward to a book. We create an
24 electronic jacket. And that is the sort of the
25 core of what we are adding to this at this time.

1 Klebanoff

2 Q. And with respect to those activities, do
3 you solicit and obtain the consent of authors to
4 each of those enhancements?

5 A. We advise the authors of what we are --
6 yes, of what we're doing so that they can comment.

7 Q. Now, with respect to the works at issue
8 in this lawsuit, am I correct that consistent with
9 the requirements of 5(d) of the license, the texts
10 of those works, to your knowledge, were not
11 altered?

12 A. Correct.

13 (Discussion off the record.)

14 MR. BONI: Let him clarify his answer.
15 Your question referred to all of the works
16 at issue, and yet we're working off of one
17 contract.

18 MR. RICH: Fair enough.

19 MR. BONI: Let him clarify.

20 Q. My question was intended that in respect
21 of all of the works in this lawsuit, is it your
22 understanding that the text of the work itself as
23 presented is faithful to and identical to the text
24 of the paper version?

25 A. Yes, it is.

1 Klebanoff

2 Q. Is it also your understanding that there
3 were one or more augmentations within the meaning
4 of 5(h) of these agreements?

5 A. Yes.

6 Q. And what approvals were sought and what
7 approvals were obtained, to your knowledge, from
8 each of the authors or their representatives with
9 respect to those 5(h) augmentations?

10 A. We invited the -- we invited the
11 authors' agents to see the work as it was created
12 on the website and through other means, to comment
13 on whatever we were doing.

14 Q. And did you receive any feedback in any
15 case?

16 A. No problems.

17 Q. No problems because you heard silence,
18 or they said no problems and --

19 A. No problems.

20 Q. What do you mean by that?

21 A. No, we had what we --

22 Q. No news is good news.

23 A. No.

24 Q. I don't want to put words in your mouth.

25 Go ahead.

1 Klebanoff

2 A. We're satisfied we have the approval we

3 need.

4 Q. On what basis have you drawn that

5 judgment? What is the evidence of the approval

6 that you looked to?

7 A. The presentation to the agents.

8 Q. What form did that take?

9 A. Advising them electronically that here's

10 the -- here's what we're doing, and soliciting any

11 feedback and comment.

12 Q. Do you have any record, whether e-mail

13 or fax or correspondence or telephone log or

14 anything, memorializing a consent by any of those

15 agents to these enhancements?

16 A. I'd have to go back and review. I don't

17 know.

18 Q. Sitting here today does any come to

19 mind?

20 A. I don't think so, in a formal sense.

21 We just also, to clarify, this has been

22 done -- we -- we -- not to use an overused term. I

23 mean we have been working at web speed at our

24 agency, and author clients knew, and we gave people

25 the opportunity to comment, and in a few instances

1 Klebanoff

2 not involving these eight titles we did -- we did
3 make certain mistakes in the billing or
4 presentation, and we got comments from agents
5 saying please use the middle initial, please don't
6 use the middle initial. In the case of, actually,
7 although I think we caught the error in the case of
8 our jacket in The Confessions of Nat, Turner in the
9 first version we had left off the "The."

10 Q. If within the body of text itself it
11 were determined that it would be a lot of fun and
12 commercially attractive to insert new illustrations
13 or lots of interesting, in the middle of text,
14 hyperlinks to a referenced church or historical
15 figure, or that there ought to be a button where
16 somebody can begin listening to background music --
17 you get my drift? -- while reading Slaughterhouse
18 Five, if those types of changes were contemplated,
19 by what technique would RosettaBooks seek the
20 approval of an author?

21 MR. BONI: Object to form.

22 A. In a very formal way.

23 Q. And why is that?

24 How do you distinguish that from what
25 you described?

1 Klebanoff

2 A. I'll explain. First of all, the range
3 of the agents with whom we're dealing have -- I'd
4 have to put the contracts here for -- in front of
5 me to -- that isn't the case for the Parker
6 agreement in front of me, but it is frequently the
7 case that we have clarification in this paragraph
8 that doing precisely what you're characterizing, we
9 either cannot do it at all or we can't do it
10 without specific written approvals. And as a
11 matter of what I would call author relations, which
12 is the heart of RosettaBooks, this is very
13 sensitive from the point of view of most authors
14 and agents, and if we were to go down the road,
15 which as a business matter I'm not at all sure we
16 wish to go down in any event, we would do so by --
17 in a partnered way with our rightsholder for
18 approval.

19 Q. Now, which is the road that you have
20 some question that it would be productive or
21 fruitful to go down? How do you describe that or
22 define that?

23 MR. BONI: Object to form.

24 A. Well, I did -- I would do it by example.
25 I mean there's a company called LifeReads. It's

1 Klebanoff

2 published a book by Jack Kerouac, the title of
3 which alludes me, which comes out of his trunk, and
4 it has a change of the type of features you're
5 talking about. It's our business view at the
6 moment, A, that it isn't what the consumer wants,
7 although there's a lot of debate in the community,
8 B, that it's much too expensive to prepare. So
9 given the embryotic state of the books, it's not a
10 good decision. And C, it complicates the
11 discussions with agents and authors, and since our
12 objective is to sign as broad a range of authors as
13 we can, as quickly as we can, it doesn't strike us
14 as being a sensible thing to do.

15 Q. What is your view of what you think the
16 consumer wants?

17 A. I think in the case of classic titles, I
18 think the consumer wants the ability to read
19 cleanly and simply within the functionality of the
20 different platforms that are going to be offered --
21 that are being offered and that will be offered
22 through the hardware and software options.

23 Q. Because I believe, as you said in one of
24 our pieces, if I cannot capture what you think is
25 "content is king" in respect to those classics,

1 Klebanoff

2 that this is ultimately the magnificence of the

3 work that's goes to attract the reader?

4 A. Yes, but I would also say if you throw

5 the clock forward, just again returning like to the

6 Andersen/Accenture study, and you say -- I think

7 their number was 28 million hand-held devices that

8 would read books -- who knows if they're right or

9 wrong -- I think it's pretty apparent that nobody

10 knows today who the hardware winner is in that

11 battle. No one knows who the software winner is

12 between an Adobe, Microsoft or somebody else. And

13 I think that it's really the consumer is going to

14 vote the winning formats and delivery systems

15 within electronic books functionality, but when

16 that functionality is voted, they will, in our

17 opinion, still want to be Brave New World.

18 Q. What is it about the features Ms.

19 Kauffman discussed in her affidavit that don't

20 fundamentally change that reality, which is the

21 reader is not fundamentally doing anything

22 significantly different than reading Brave New

23 World even with that added functionality?

24 My question is very bad.

25 A. I don't understand the question.

1 Klebanoff

2 MR. RICH: Withdraw the question.

3 Q. You were drawing a distinction between
4 the kinds of enhancements you indicated that you
5 already do, forwards and the like, and this
6 different form of experience which you have some
7 questions about, whether presently there's a market
8 for and its viability and so forth, and what is it
9 about the form enter, namely the enhancements that
10 you are undertaking that allows you, in your
11 estimation, to stay true to what you think the
12 consumer really wants, which is have that still
13 core reading experience?

14 MR. BONI: Object to form.

15 A. Well, we do think that the consumer will
16 benefit from and enjoy surrounding content, and we
17 think given that it's a web environment, what we're
18 doing with the RosettaBooksConnection, we think,
19 does take interesting advantage of the -- of what
20 the web provides to a consumer experience.

21 Q. Is the key to that in a sense that it's
22 surrounding text, the integrity of the text is left
23 as per the paperback?

24 MR. BONI: Objection. Object to the
25 form. I think that's a mischaracterization

1 Klebanoff

2 of his testimony.

3 Q. (Continuing) I'm asking whether that's
4 accurate in your --

5 A. Well, in the surrounding text, it's
6 text. RosettaBooksConnection, it's hyperlinks with
7 characterizations of what you'll find.

8 MR. RICH: Can I hear that answer
9 back, please.

10 (Record read.)

11 Q. You indicated also as part of a prior
12 answer that there was also a sensitivity in the
13 author community to pushing beyond a certain level
14 now.

15 What is your understanding of what the
16 basis for that sensitivity by the authors'
17 community is?

18 MR. BONI: Level of what,
19 functionality or enhancements?

20 MR. RICH: Of the kinds of greater
21 enhancements I described, adding sound and,
22 you know, graphics.

23 A. I'll answer with an example. It took us
24 more than six months to negotiate the closure with
25 the Estate of Winston Churchill for the World

1 Klebanoff

2 War II books. The estate is very conservative. We
3 -- we closed the amendment which is Curtis Brown
4 Group in London (sic) started to raise questions
5 with us of, well, wouldn't it be wonderful if we
6 can actually put Victory at Sea inside Winston
7 Churchill? So at the beginning of the discussion
8 they were super careful, super conservative, super
9 not necessarily comfortable with electronic space
10 altogether, and by the end of the discussion you
11 might say they want to sing and dance. Well, from
12 our point of view we -- we're trying it for the
13 outset to keep everything very simple.

14 And we think actually -- I think that
15 it's what the, for the foreseeable future, the
16 consumer will want in the category of books we're
17 doing. I think there are entirely other markets,
18 but for what we're talking about at the core, I
19 think that's what the consumer wants.

20 Q. If you look at paragraph seven of this
21 agreement, please, which has the reps and
22 warranties, in the case of the titles at issue in
23 this lawsuit what investigation did you make or
24 cause to have made independently of any
25 representations made by the authors as to their

1 Klebanoff

2 right to convey e-book rights to RosettaBooks?

3 MR. BONI: Object to the form.

4 A. None.

5 Q. Is that consistent with what has been

6 your general practice beyond the titles involved in

7 this lawsuit?

8 A. Yes.

9 Q. You've relied entirely on your authors

10 and their representatives to make the necessary

11 legal determinations?

12 A. Yes. But I'll amend that also by saying

13 that, A, that's been typical for my experience in

14 buy-sell in publishing agreements for 30 years, and

15 it was also consistent with my own reading of a

16 very wide range of publishing agreements from the

17 time windows from the files at Scott Meredith.

18 Q. With respect to the compensation

19 provisions of these agreements of which paragraph

20 eleven and it's appendix here is an example, I take

21 it these have been negotiated on a case-by-case

22 basis?

23 A. Yes.

24 Q. And what have been the factors that have

25 determined where you have ended up you've made

1 Klebanoff

2 business judgment to end up with any particular
3 agreement in terms of advance and royalty rate?

4 A general answer is fine.

5 A. Well, the advances have certainly been
6 determined by some sort of -- you could say some
7 vague sense of the star quality of the title. And
8 I would also amend that particularly in the Styron
9 example, it's higher than the other numbers.

10 Q. Yes.

11 A. We felt a particular value early on to
12 signing certain obviously important authors, where
13 today we probably wouldn't pay the same number
14 since we have signed a hundred.

15 Q. Was the interest in how it would spark
16 interest at the site of the consumer level and
17 strategic partners all of the above?

18 A. These were factors. I think the
19 consumer -- I think that from the only amendment I
20 would give from the consumer level we've certainly
21 assumed that the business model for Rosetta is a
22 ramp-up over time, so to -- so we were much were --
23 we were and are much more interested in our
24 progress collecting rights and collecting
25 alliances.

1 Klebanoff

2 Q. What was the basis on which -- what was
3 the business judgment based upon which you
4 determined establish a royalty or attempt to
5 establish a royalty based on publisher's net
6 receipts as opposed to percentage of list price?

7 A. Well, when I surveyed whatever I could
8 learn about what others were doing in electronic
9 publishing, it appeared to me that more of the
10 publishers were investigating net receipt based
11 royalties than the customary retail based royalty
12 in physical publishing, and it was clearly in a web
13 environment more sensible to deal with definitions
14 that dealt with the net, which in reality is the
15 gross dollar flow. That's what RosettaBooks
16 receives.

17 Q. Was this topic something on which you
18 received feedback from the AAR committee?

19 A. Well, the AAR was certainly familiar
20 looking at our master form with the basic
21 definitions of our royalty, and we did not, to my
22 recollection -- I didn't debate with the AAR the
23 royalty rate, but they did see the royalty
24 definition.

25 Q. And did any of them communicate to you a

1 Klebanoff

2 stated preference for the basis on which the
3 royalty would be computed?

4 A. Actually, in the couple of hundreds of
5 discussions I've had so far on rights I don't
6 recall a single example where a representative was
7 concerned about a net receipts royalty as a
8 definition. I can recall a lot of discussions
9 where they were concerned about the number, but no
10 -- but I can't recall a discussion where they were
11 concerned about having a retail definition for
12 off-site receipts, in other words, for third-party
13 receipts.

14 Q. Are you familiar with the royalty policy
15 which Random House announced with E. Brooks in
16 2000?

17 A. I've seen the press release.

18 Q. Do you have an understanding Random
19 House's definition of net receipts is the same of
20 yours?

21 A. I've been trying to figure it out. If
22 you would provide it, I'd be extremely interested.

23 (Laughter.)

24 Q. If you would look at the appendix of
25 this document, please.

1 Klebanoff

2 MR. BONI: Can we go off the record
3 for a quick second?

4 MR. RICH: This is my last question
5 on this document.

6 MR. BONI: That's fine. Good.

7 Q. Under Exhibit B there is a reference to
8 "30 percent of net receipts for the first 5,000
9 downloads."

10 A. Yes.

11 Q. What constitutes a download for purposes
12 of this agreement?

13 A. For this agreement it would be any
14 consumer receiving a This Promised Land by Robert
15 Parker from any source.

16 Q. From any source.

17 MR. RICH: We can take a break now.

18 MR. BONI: Any electronic source.

19 THE WITNESS: Any electronic source,
20 no matter how achieved.

21 (Recess taken.)

22 Q. Mr. Klebanoff, based on conversations
23 you had over time with the author and agent
24 community what have you learned about their views
25 of what a fair and appropriate eBook royalty would

1 Klebanoff

2 be?

3 MR. BONI: Object to the form.

4 A. The Random House enhancement was very
5 well publicized. An agent would have to be pretty
6 tone deaf not to have noticed it. So a number that
7 sounds like around 50 has circulated in the
8 community.

9 Q. Yes.

10 A. Having said that, there is an issue --
11 there were several definitional issues.
12 Definitional issue number one is 50 percent of what
13 the definition of net receipts, which I understand
14 it is still a little bit fluid for definitional
15 purposes, and I've heard different stories in
16 London than I've heard in the United States. And
17 there is also then a fundamental marketing
18 question, which is expectation of the rightsholder
19 as to -- which is any publisher's argument
20 competing for rights, which is who will in fact do
21 a better job and therefore produce a better result.
22 So because a somewhat lower percentage of a much
23 bigger flow is more money ultimately for a
24 rightsholder than a somewhat larger percentage of a
25 much smaller flow.

1 Klebanoff

2 The contracts that are the subject of
3 this dispute which were entered in the very early
4 phases of Rosetta are at lower royalty rates than
5 Rosetta is discussing with certain star authors and
6 certain configurations now in response to Random
7 House's movement in response to the movement of
8 others. I mean others have in the business, as I
9 understand it, have been studying, too.

10 Q. So subject to the stated uncertainties
11 of interpretation, is it accurate that Random House
12 has at least apparently raised the bar in terms of
13 levels of proposed remuneration of e-books?

14 MR. BONI: In the agent community?

15 MR. RICH: Yes, and author community.

16 A. Well, as if to -- if you isolate the
17 issue of royalty alone --

18 Q. Yes.

19 A. -- I think that that's fair. The answer
20 would be yes.

21 Q. Separate from marketing issues.

22 A. And separate from issues of term of
23 commitment, which is, I think, of significant
24 concern.

25 Q. And by that you mean?

1 Klebanoff

2 A. By how many years an electronic book

3 right would be controlled by the publisher.

4 Q. I take it to be a selling point for

5 RosettaBooks that you secure rights for a shorter

6 rather than a longer time period?

7 A. Yes.

8 Q. Let me break it down.

9 Is that of business benefit to

10 RosettaBooks?

11 A. No.

12 Q. Why do you do it then?

13 A. Well, the -- the authors have been

14 particularly -- well, we're really talking here

15 about the representatives. The representatives

16 particularly of the major authors and then in turn

17 particularly the major representatives, whether it

18 be for a major or a less major author, are

19 extremely sensitive at this point to the term of

20 commitment for electronic book rights in the back

21 list. We're not talking in our world now about the

22 front list, which is its own battling ground.

23 MR. RICH: Let's mark the next exhibit

24 [Klebanoff] 5, an October 20, 2000

25 memorandum from Arthur Klebanoff to Helen

1 Klebanoff

2 Brann bearing Rosetta 0013 through 0016.

3 ([Klebanoff] Exhibit 5, Mr. Klebanoff

4 10/20/00 memo, Bates Rosetta 0013-16, marked

5 for identification, as of this date.)

6 Q. Do you recognize this document as a

7 document you prepared?

8 A. Yes.

9 Q. The first sentence you indicate that

10 RosettaBooks had completed over 50 full

11 presentations to agents and lawyers in New York.

12 What form did those presentations take?

13 A. Those presentations referred to here

14 were in person.

15 Q. "Referred to" -- I'm sorry.

16 A. In person.

17 Q. In person.

18 Were these groupings of or groups of

19 agents?

20 A. It varied. There were -- occasionally

21 for certain agents they were one-on-one. For

22 certain some in I'd say the largest meeting at that

23 time probably had six or seven agents in the room.

24 Q. And what was the format of these

25 presentations?

1 Klebanoff

2 A. Again, it varied. My goal was to secure
3 typically an hour, if I could get it. Sometimes
4 they ran shorter. Sometimes they ran longer. The
5 meeting where we could present what we viewed as
6 the credentials of RosettaBooks, our model, and why
7 we hoped the agent in question would do business
8 with us for their clients. And we had for each
9 meeting a -- books we knew they represented, and
10 were looking to determine the identity of other
11 books they represented that might be suitable for
12 our purposes.

13 Q. And were there handouts or leave-behind
14 type of materials associated with these
15 presentations?

16 A. The early presentations actually used
17 certain of the -- if you look, the document we went
18 over.

19 Q. The executive summary?

20 A. Well --

21 MR. BONI: No.

22 A. -- in the executive summary form, which
23 was prepared later, in an earlier format existed.
24 Also, we took certain of the slides that are in the
25 document we were looking at when Linda was out of

1 Klebanoff

2 the room.

3 Q. The investment community?

4 A. Right. But a very small slice of that

5 was relevant to talking to the rightsholders.

6 Q. And were those packages that were left

7 with the attendees?

8 A. Yes, those are things left. In certain

9 instances we -- well, the earliest such meetings we

10 actually had very, very little to show. In fact,

11 at the earliest meetings we weren't even

12 RosettaBooks. At a certain point in the meetings

13 we had having -- we had early jackets to show.

14 It was a developmental curve as we

15 proceeded.

16 Q. In connection with reviewing your files

17 for making production in this case did you come

18 across one or more of documents that represents one

19 of these leave-behinds from these meetings?

20 A. I am prepared to look again. I mean I

21 think that the -- the -- the -- the executive

22 summary is a second generation of that document.

23 And I don't -- but in -- the -- the problem that I

24 faced when I went looking is that I -- is that I

25 cleaned my computer as I moved from A to B, so it

1 Klebanoff

2 wasn't in my computer. And we actually copy in

3 physical files only, basically only signed

4 contracts.

5 Q. How regularly do you clean your

6 computer?

7 A. I don't know. I don't know. Every

8 three, four, five weeks, something -- but, you

9 know, it's not like a -- it's not like I have

10 computer cleaning day.

11 (Laughter.)

12 Q. When was the last time you did a

13 housecleaning?

14 A. A housecleaning?

15 Q. Computer cleaning.

16 A. If the question is if I cleaned the

17 computer after the lawsuit started, the answer is

18 no.

19 Q. That was my next question.

20 You believe you may or may not have

21 somewhere one or more copies of such presentations?

22 A. Right. But I couldn't find anything

23 substantively different from it than the executive

24 summary in your hand. It would be thinner in that

25 it would have a shorter list of authors, a shorter

1 Klebanoff

2 list of alliances. If it were done at the -- like

3 I see here, in October, this was just within two

4 weeks after Dorothy Kauffman had joined us, so if

5 this document had been -- if we were making a

6 presentation one month before, it wouldn't have had

7 Dorothy's name in it, et cetera. So there were

8 iterations as we -- as certain milestones of

9 Rosetta were reached.

10 Q. Was it your practice to take questions

11 at these presentations?

12 A. Well, absolutely. I mean I wanted the

13 presentations to be as interactive as possible.

14 Q. And did it occur from time to time at

15 these presentations that an attendee would ask you

16 a fairly specific question about whether publishing

17 house X or publishing contract Y in terms of its

18 grant clauses permitted a particular work or a

19 particular author associated with a particular work

20 to convey rights to RosettaBooks? Did those types

21 of questions come up in these sessions?

22 A. I think the way I would answer that is

23 we definitely discussed in these sessions the

24 ownership of older -- of the electronic rights of

25 older books. It was the fundamental premise on

1 Klebanoff

2 which I was in the room. I think it's the way I
3 would summarize the discussions in general was, A,
4 I was hardly the only person with electronic
5 interests who had been in the room with these
6 agents. Depending on the agent in question, they
7 might have had a lot of meetings, they might have
8 had a few meetings. And I never heard from a
9 single agent a comment that suggested anything
10 other than they were in a position to control the
11 rights that we wanted -- were there to discuss.

12 Q. Did you make any affirmative statements
13 or suggestions as to how particular contracts
14 properly should be construed as a legal matter as
15 they considered the opportunity of doing business
16 with RosettaBooks?

17 A. Not that I can recall. I mean our
18 general -- the general presentation was that we
19 felt in general, and indeed the people at the
20 opposite side of the room volunteered even before
21 it came up for discussion, that a contract that was
22 silent as to electronic rights grant had the
23 electronic rights in the hands of the authors. And
24 I would make that point repeatedly across
25 publishing company, not to any particular

1 Klebanoff

2 publishing company.

3 And the general -- and I never heard a

4 contradictory comment in the room.

5 MR. BONI: You've answered the

6 question.

7 THE WITNESS: Fine.

8 MR. BONI: Let him ask another

9 question.

10 Q. Did you offer your own opinion that that

11 would be a correct construction of contracts

12 predating clauses specifically identifying

13 electronic rights?

14 MR. BONI: Did he render a legal

15 opinion to these people?

16 Q. Did you in words or substance say from

17 my perspective or in my opinion or based on my

18 experience in the industry if these publishing

19 contracts don't have an explicit clause addressing

20 this, my view is the author controls the rights?

21 In words or substance did you convey that

22 viewpoint?

23 A. Well, that is and was my position. I

24 said it in many rooms and in many contexts.

25 Q. Did you invite, elicit or request anyone

1 Klebanoff

2 interested in doing business with RosettaBooks
3 independently to make their own determination on
4 that subject?

5 A. Well, sure, because the opening -- the
6 opening request was that people go to their
7 contracts and determine first -- it was two levels.
8 It was first determine whether they were willing to
9 contemplate as to a particular book selling
10 electronic rights at all, and if they were, go to
11 their contract, determine in their view the
12 electronics rights that were available and then
13 talk to us about how a deal might be struck. And
14 frankly, a great deal of the rights issues for
15 RosettaBooks are getting the agents to go through
16 the steps, getting them to do the work.

17 Q. Now, when you refer in the second
18 sentence of the first paragraph to the rights
19 community being unified --

20 Do you see that?

21 A. Yes.

22 Q. -- what comprised the rights community,
23 as you term it?

24 A. Well, I was referencing really to the --
25 I mean, again, you might -- I guess here I was

1 Klebanoff

2 saying it against the sampling of the fistful
3 presentations and then beyond the full
4 presentations. By that point I would have had many
5 dozens of, you know, telephone calls, e-mail
6 exchanges with agents that had full presentations
7 which were consistent on these issues.

8 Q. Did you mean to include publishers in
9 the rights community, or simply authors and agents?

10 A. This was addressed to the authors.

11 Q. Authors, OK.

12 And the next sentence does address
13 publishers, yes, where you say the question
14 "Publishers in New York and London have debated
15 that view but now generally agree." Do you see
16 that?

17 A. Yes.

18 Q. On what basis did you conclude that
19 publishers generally agree with the vow that
20 electronic rights to older books are opened and
21 controlled by author?

22 A. At this time, at the time this was
23 written and for the period of months leading up to
24 when it was written, I had tried to determine as
25 best I could and I had in turn in talking to these

1 Klebanoff

2 agents, you know, probed for whatever they were
3 figuring out of the points of view of publishers,
4 that the publishers were not challenging the author
5 position of ownership. At Scott Meredith we had
6 offers from Time Warner to bring in back list books
7 that were, you know, Time Warner books. There were
8 various other measurements from other publishers of
9 their -- you know, of points of view that I felt
10 were consistent with a point of view that they
11 didn't have the rights.

12 Q. Sufficient for you in October of 2000 to
13 conclude that publishers generally agreed with the
14 author position on the subject?

15 A. That was my view in October 2000.

16 Q. And has that view now changed?

17 A. Well, I guess I wouldn't be here if my
18 -- without a certain amount of view had changed.

19 Q. How would you rewrite that sentence to
20 what you now perceived?

21 A. Well, certainly Random House has a
22 different view. And, you know, I am familiar with
23 public comments from certain other publishers that
24 they'd be pleased if Random House prevailed in the
25 litigation.

1 Klebanoff

2 Q. Bottom of page one, last paragraph you
3 refer to iconographic titles.

4 A. Yes.

5 Q. What do you mean by that?

6 A. It was a term that I found useful until
7 actually I think Dorothy Kauffman talked me out of
8 using it a lot, that simply meant that the --
9 either the title or the author was extremely well
10 known as a symbol in some manner of a particularly
11 important book. It seemed during the months of
12 1991 a way to summarize the A list book. I'm not
13 sure it's a particularly effective word.

14 MS. STEINMAN: Off the record.

15 (Discussion off the record.)

16 Q. Turning to page two, there's a reference
17 to in the first paragraph a book into film author.
18 Tell me what that is or was.

19 A. Well, it is. If there's a -- there's
20 some place in the discovery sheets, in the
21 discovery pieces we've provided, I think we sent in
22 our one-page visuals of the book jackets. In terms
23 of looking at that page or looking at our site,
24 you'll see at this point that we probably control
25 the rights to as many as -- I don't know, it could

1 Klebanoff

2 be 40 books that have become films, and one of the
3 first authors I conceptualized partly from a
4 business point of view and partly from a rights
5 comfort point of view was to try to persuade agents
6 that wouldn't it be interesting to use the web for
7 the purpose of selling electronic editions of books
8 which have become films.

9 Q. And in the next paragraph, in the middle
10 of the paragraph you state "We have interests from
11 several major consumer sites with millions of
12 customers in promoting and selling our books."

13 Was that an accurate statement as of the
14 time this was written?

15 A. Yes.

16 MR. BONI: You answered the question.

17 A. (Continuing) Yes.

18 MR. BONI: You don't need to give the
19 life's story.

20 Q. In the next paragraph you state in the
21 third sentence "As a publisher dedicated only to
22 electronic publishing we have no conflict between
23 physical and virtual books."

24 What were you meaning to convey by that
25 sentence?

1 Klebanoff

2 MR. BONI: I'm sorry, I'm not seeing

3 it.

4 MR. RICH: It's the third sentence.

5 MR. BONI: I got it, I got it.

6 A. The easiest example which is, you know,
7 subject to great controversy on a running basis is
8 how to price an electronic book and the issue how
9 to relate that price to the corresponding physical
10 edition of that book, rather the hardcover or the
11 paper book as it lives, as an all-electronic
12 publisher, for openers, on the subject to price has
13 complete flexibility, and I think a physical
14 publisher dealing with electronic books has less
15 flexibility.

16 Q. The paragraph towards the bottom
17 beginning "With true risk," the second sentence,
18 "Inexpensive scanning equipment means the
19 possibility of the pirated and posted editions."

20 Can you explain why inexpensive scanning
21 equipment promotes those phenomena?

22 A. Again I'll just answer by way of
23 example. Within the last week we've had to deal
24 with several bootleg editions of Brave New World,
25 and they come from -- not from companies, they come

1 Klebanoff

2 from basically individuals who ran it through a
3 scanning machine and posted it and then having used
4 various viral techniques on the web. For openers,
5 yesterday they found it on Gemstar. So that it's a
6 problem.

7 Q. And what you were saying here was sign
8 up with someone who has a stake in protecting the
9 copyrights and getting you paid and doing whatever
10 security we need to do to protect your works.

11 A. Correct.

12 MR. RICH: I just want to mark a
13 couple of documents at this time. I have
14 questions on these particular documents.

15 Let's mark next Rosetta 0012. It's a
16 Klebanoff to Brann memo.

17 MS. STEINMAN: You want to provide the
18 date.

19 MR. RICH: It's not dated.

20 (Discussion off the record.)

21 MR. RICH: This is six.

22 ([Klebanoff] Exhibit 6, Mr. Klebanoff
23 undated memo to Ms. Brann, Bates Rosetta
24 0012, marked for identification, as of this
25 date.)

1 Klebanoff

2 (Discussion off the record.)

3 MR. RICH: I have marked as
4 [Klebanoff] 6 a document bearing production
5 number Rosetta 0012. It's an undated
6 memorandum from Arthur Klebanoff to Helen
7 Brann with a re line saying "electronic
8 rights to Promised Land by Robert Parker."

9 Q. Mr. Klebanoff, I take it this is a
10 document you authored?

11 A. Yes.

12 Q. And in the second paragraph, second
13 sentence there's a reference to an enclosed list of
14 committed titles.

15 MR. BONI: I'm sorry, Bruce, would you
16 mind, not to be paranoid, but just turn that
17 over, because Linda's right there.

18 Thank you.

19 Q. Is that a list which is maintained on a
20 continuing and updated basis by RosettaBooks?

21 A. Yes. We have a database that you can
22 hit a button and produce the list at any given
23 time.

24 Q. I'm going to mark a document your
25 counsel produced to us pursuant to a follow-up

1 Klebanoff

2 request this afternoon, which we appreciate, and
3 I'm not going to ask you any questions, I think,
4 about it. I simply want to ask you if this is a
5 current iteration of this?

6 MR. BONI: That's fine. As long as
7 it's marked in the exhibits, it will have to
8 be segregated from whatever transcript, you
9 know, in the open record.

10 MR. RICH: Off the record.

11 (Discussion off the record.)

12 MR. BONI: In response to Random
13 House's counsel's request today we responded
14 before this deposition by handing over
15 certain documents that by agreement we will
16 have Bates stamped. In the interests of not
17 delaying the deposition, we produced these
18 documents for today, but we'll have Bates
19 stamps substituted in the record.

20 MR. RICH: Thank you.

21 And we'll mark a document -- which is
22 hard to describe -- which has titles listed
23 alphabetically as [Klebanoff] 7, and the
24 document which has titles listed within
25 categories --

1 Klebanoff

2 THE WITNESS: Themes.

3 MR. RICH: -- themes, as [Klebanoff]

4 8.

5 ([Klebanoff] Exhibit 7, confidential
6 document, marked for identification, as of
7 this date.)

8 ([Klebanoff] Exhibit 8, confidential
9 document, marked for identification, as of
10 this date.)

11 MR. BONI: Let me just say on the
12 record, these documents say, because I wrote
13 them, "in counsel eyes only" are intended to
14 mean outside counsel only, and that's how
15 they'll be Bates stamped.

16 MR. RICH: I don't think any of the
17 questions I'm going to be asking should
18 cause you problems on the record, but let me
19 know if they do.

20 MR. BONI: You were just going to
21 say --

22 Q. Can you identify what we've marked as
23 [Klebanoff] 7 and 8, please?

24 A. Yes. These are current lists. They're
25 actually as of this morning the RosettaBooks

1 Klebanoff

2 committee titles. They weren't organized in
3 alphabetical by title and by theme (sic).

4 Q. And "by titles" means what in --

5 A. The vast majority of cases they're
6 signed contracts. In some cases there are
7 handshake arrangements that are in draft contract.

8 Q. Does RosettaBooks offer to the public
9 any works for which it has not secured a form
10 signed agreement?

11 A. No.

12 Q. Does your database also maintain records
13 as to the identity of the publisher of these works
14 in paper format?

15 A. No.

16 But post the lawsuit we did some
17 research on our -- on the titles we had committed.

18 Q. Was that in connection with your
19 counsel?

20 A. No. We did it for our own -- we did it
21 as a business matter for our own curiosity. As an
22 internal -- just again, just for one other sentence
23 on this, it's not always 100 percent clear from
24 looking at the physical book where the underlying
25 rights linkage actually is.

1 Klebanoff

2 Q. Are there additional committed Random
3 House titles that have been titled as the works in
4 suit?

5 A. In terms of underlying rights, I think
6 the only titles in question that I'm aware of that
7 are -- that come from in-print works with active
8 rights, are on the websites, are titles by Daniel
9 Dorstin.

10 Q. On account of this lawsuit have you
11 deferred or ceased discussions with one or more
12 authors who have had works published by Random
13 House and with whom you otherwise would have been
14 engaging in associations?

15 A. We have active discussions underway with
16 a wide range of agent representatives. I think
17 it's fair to say in general in the United States
18 that the agent community is looking at this
19 litigation with a great deal of curiosity, and
20 they're not in a hurry to commit rights until they
21 see where this litigation is going.

22 Q. If you would turn back to [Klebanoff] 6,
23 please, in the second paragraph there is a
24 reference to an enclosed report summarizing
25 RosettaBooks' progress to date.

1 Klebanoff

2 What form did that report take?

3 A. I am virtually certain that that report
4 is in fact document five, the October 20 document,
5 which is also the same --

6 MR. BONI: This is one of the things
7 we produced to them today.

8 A. (Continuing) And this is describing
9 another iteration.

10 MR. RICH: May I have the benefit of
11 seeing that?

12 Natalia, can you show me what Mike has
13 pulled out?

14 THE WITNESS: Actually, I didn't
15 realize there was a Helen Brann -- well,
16 this literally went to Helen Brann, and this
17 went to other people at approximately the
18 same time in a very similar form.

19 MR. BONI: Right. OK. He wants to
20 know what is being referred to.

21 A. (Continuing) The answer is in -- is that
22 you're talking to a CEO who does his own typing,
23 and obviously I left the date off the Helen Brann's
24 document six here, and the enclosure to document
25 six I'm virtually certain is document five.

1 Klebanoff

2 Q. Thank you very much.

3 A. It would have been a list that would
4 have been contemporaneous to October 20, which
5 lists I no longer have the ability to recreate
6 because I don't have it in paper and it's been
7 superceded in terms of the database.

8 Q. In [Klebanoff] 6 a series of
9 representations are made in the second and third
10 paragraphs that by December -- and, by the way,
11 when approximately would you say the document was
12 dated?

13 A. I'm saying I think this is an October 20
14 document.

15 Q. So in or around October you made a
16 series of representations of things that would
17 occur by December of early next year and so forth,
18 and am I correct that at a minimum there has been
19 some slippage with respect to those prospective
20 time tables?

21 A. Yes.

22 Q. Apart from the advent in late February
23 of this lawsuit, what other business factors and/or
24 legal factors of which you're aware caused that
25 slippage?

1 Klebanoff

2 A. There were no legal factors. The
3 business factors were that it took us somewhat
4 longer than we anticipated to deal with all of the
5 issues of quality of presentation that we wanted to
6 achieve for the titles. It took us a bit longer
7 than we anticipated to get critical mass of titles.
8 And we made a business decision in early December
9 to organize our launch against the -- a
10 co-marketing presentation with DataPlay at the
11 Consumer Electronics Show in Las Vegas in January.

12 (Discussion off the record.)

13 MR. RICH: This will be

14 [Klebanoff] 9.

15 ([Klebanoff] Exhibit 9, Ms. Brann
16 12/5/00 e-mail to Mr. Klebanoff, marked for
17 identification, as of this date.)

18 MR. RICH: I have marked as
19 [Klebanoff] 9 a December 5, 2000 e-mail from
20 Helen Brann to Arthur [Klebanoff].

21 Q. Mr. Klebanoff, do you recall receiving
22 this e-mail from Ms. Brann?

23 A. I do.

24 Q. And in the second sentence she indicates
25 "I know that we control electronic rights, but

1 Klebanoff

2 there are many other factors involved, which is why
3 this is taking a little time."

4 Did Ms. Brann discuss with you what she
5 terms here as some or all of the "many factors
6 involved"?

7 A. Actually, she didn't in any specific
8 way. I know that Robert Parker is published on a
9 forward-looking basis by another publisher, and
10 there were quite a few Robert Parker titles that
11 are in the back list at Random House, so I don't
12 know what she had to unscramble.

13 Q. Do you recall there coming a time when
14 Ms. Brann advised you that she had heard from a
15 Dell attorney?

16 A. Yes.

17 Q. And what did she advise you as to that
18 contact?

19 A. Well, this was very shortly before the
20 cease and desist letter landed. I think it was
21 only actually the end of the previous week. And
22 she told me that a Dell attorney had called her and
23 took the position that she didn't have the rights
24 or Parker didn't have the rights to sell to us.
25 She also told me from the same conversation that

1 Klebanoff

2 the attorney offered to buy the rights, which I
3 thought was a curious position if they owned the
4 rights, and what she relayed to me is simply she
5 had informed them that she had the rights, that she
6 had sold us the rights. And she was advising me of
7 the conversation.

8 Q. Did she indicate to you that she was
9 going to seek legal consultation on the subject?

10 A. Yes.

11 Q. And why did you understand she was going
12 to seek legal consultation if she was clear in your
13 hand that Mr. Parker had the rights (sic)?

14 MR. BONI: Object to the form.

15 A. I have no idea.

16 Q. She didn't communicate her reasons to
17 you.

18 A. No.

19 Q. And did you recommend Mr. Rudell and his
20 law firm to her?

21 A. Did I recommend Mr. Rudell? Mr. Rudell
22 I understand is her general lawyer. There was the
23 issue that we were obviously also Mr. Rudell's
24 client.

25 Q. And you cleared any conflict; is that

1 Klebanoff

2 right?

3 A. I said I had no objection.

4 My understanding, actually, is that she

5 conferred with other counsel.

6 Q. I see.

7 Would she advise you as to the substance

8 that she discussed with other counsel?

9 A. No.

10 MR. RICH: Let's mark as the next

11 exhibit a January 16, 2001 letter from Ms.

12 Brann to Mr. Klebanoff, Rosetta production

13 numbers 10 and 11.

14 ([Klebanoff] Exhibit 10, Ms. Brann

15 1/16/01 letter to Mr. Klebanoff, Bates

16 Rosetta 10-11, marked for identification, as

17 of this date.)

18 Q. This document, Mr. Klebanoff, makes

19 reference in the first sentence to a fax from you

20 of January 16th for electronic rights in The

21 Promised Land; do you see that?

22 A. Yes.

23 Q. Do you recall transmitting such a fax?

24 A. Well, I do, because I would have made an

25 offer on paper for the book.

1 Klebanoff

2 Q. And what was the content of the fax?

3 A. Well, the content.

4 Q. I asked that because we have not

5 physically obtained a copy.

6 A. The content would have been the business

7 elements that you see in the contract.

8 Q. So this was a further proposal designed

9 to --

10 A. We went through, I think, if I remember

11 correctly, two exchanges in order to reach what

12 became the business terms of the agreement.

13 Q. I'm going to show you what's been

14 previously marked as [Dwyer] Exhibit 4 and ask if

15 you can identify this document.

16 A. This is the contract for RosettaBooks

17 with Kurt Vonnegut.

18 Q. And is that your signature at the foot

19 of the document?

20 A. Yes, it is.

21 Q. Thank you. I don't have any more

22 questions on that one.

23 MR. RICH: Let's mark next a document

24 bearing production number 33 an October 23,

25 2000 letter from Donald C. Farber to Arthur

1 Klebanoff

2 Klebanoff.

3 ([Klebanoff] Exhibit 11, Mr. Farber
4 10/23/00 letter to Mr. Klebanoff, Bates 33,
5 marked for identification, as of this date.)

6 Q. Do you recall receiving this
7 correspondence?

8 A. Yes.

9 Q. Can you identify who Mr. Farber is?

10 A. Mr. Farber is Kurt Vonnegut's lawyer and
11 long-time representative.

12 Q. You see in the second paragraph he
13 indicates "I want to make my site the official
14 Vonnegut site, and I will have a special page or
15 two or more of Kurt's works"; do you see that?

16 A. Yes.

17 Q. Did you have an understanding why Mr.
18 Farber had a particular interest in making his
19 website the official Vonnegut site?

20 A. I don't know why. We routinely offer as
21 part of the contract at RosettaBooks a link at the
22 request of the author, and at the time Donald
23 Farber told me that, we were working on putting up
24 a Kurt Vonnegut website. Actually, to the best of
25 my knowledge, at this point they hadn't asked us to

1 Klebanoff

2 link to that site, and I'm not sure if that site is
3 up.

4 MR. RICH: Let's mark next a document
5 on Scott Meredith Literary Agency letterhead
6 an August 5, 2000 letter from Mr. Klebanoff
7 to Don Farber, production number 0034.

8 ([Klebanoff] Exhibit 12, Mr. Klebanoff
9 8/5/00 letter to Mr. Farber, Bates 0034,
10 marked for identification, as of this date.)

11 Q. Mr. Klebanoff, the re line on this is
12 "Kurt Vonnegut, The Fantastiks.

13 What property or properties were the
14 subject of this memorandum?

15 A. There were two subjects. The Kurt
16 Vonnegut subject is the package that became the
17 five books that RosettaBooks acquired. The
18 Fantastiks is a book that Donald Farber wrote
19 regarding the production arrangements for the
20 Broadway show "The Fantastiks."

21 Q. And in the second paragraph there's a
22 reference to -- it says "I have enclosed an offer
23 for Kurt Vonnegut which also addresses the
24 questions you asked me when we met."

25 I don't believe we've received that.

1 Klebanoff

2 Do you remember the contents of that
3 document?

4 A. Well, the offer would have been the --
5 basically the financial outcome of that contract.
6 I mean the initial financial offer and final offer
7 were, I think, actually identical.

8 Q. And what were the questions that it was
9 designed to address, as you recall?

10 A. The -- well, the questions that he had
11 involved really how electronic space would work.
12 So, in other words, the offer was to -- was to
13 outline what became the contract. I didn't send
14 him a contract at this point. I'm not even sure
15 that the date of August 5th, as early as it was for
16 Rosetta -- it wasn't even yet Rosetta -- that we
17 actually even had our contract in final form.

18 Q. Did that document address any questions
19 as to the availability in terms of rights
20 availability of the works to RosettaBooks?

21 A. No.

22 Q. And what came of your discussions with
23 Mr. Farber as to The Fantastiks?

24 A. He gave me a copy of the book. I
25 offered on behalf of Rosetta to explore publishing

1 Klebanoff

2 it, because it would link to our book-into-film
3 project. The Fantastiks became a movie last year.
4 And he had a coauthor, and he was never able to
5 respond to me whether he was in a position to clear
6 the rights.

7 Q. And the offer reflected in the
8 penultimate paragraph of this was an offer with
9 respect to The Fantastiks?

10 A. Yes.

11 Q. So you got Vonnegut, but thus far you
12 didn't get his agent.

13 A. Yes. We would have been happy to take
14 the agent, too.

15 (Laughter.)

16 MR. RICH: Let's mark the Styron
17 contract.

18 ([Klebanoff] Exhibit 13, William
19 Styron contract, marked for identification,
20 as of this date.)

21 Q. I'm going to ask you to identify what
22 we've marked as [Klebanoff] 13.

23 A. This is the contract between
24 RosettaBooks and William Styron.

25 Q. And is your signature on page four?

1 Klebanoff

2 A. Yes.

3 Q. This is the contract to which you
4 alluded before with a rather significant advance
5 from your standpoint, correct?

6 A. Yes.

7 Q. Is this the largest advance you have to
8 date offered?

9 A. Yes.

10 MR. RICH: Let's mark as the next
11 exhibit a document dated August 5, 2000 from
12 Arthur Klebanoff to Michael Congdon and
13 Susan Romer, production numbers 52 and 53,
14 that is, Rosetta 52 and 53.

15 ([Klebanoff] Exhibit 14, Mr. Klebanoff
16 8/5/00 correspondence to Mr. Congdon and Ms.
17 Romer, Bates Rosetta 52-53, marked for
18 identification, as of this date.)

19 Q. In this August 2000 document, Mr.
20 Klebanoff, there's a reference in the second
21 sentence to you attaching a latest rightsholder
22 presentation and license agreement; do you see
23 that?

24 A. Yes.

25 MR. RICH: Off the record.

1 Klebanoff

2 (Discussion off the record.)

3 MR. RICH: Let's mark as the next then
4 two exhibits. As [Klebanoff] 15 we're going
5 to mark an October 10, 2000 memorandum from
6 Arthur Klebanoff to an unidentified person
7 or persons.

8 MR. BONI: That's not a redaction,
9 whatever it is.

10 MR. RICH: And [Klebanoff] 16 is a
11 draft of a license agreement. I can't
12 further identify it.

13 (Discussion off the record.)

14 ([Klebanoff] Exhibit 15, Mr. Klebanoff
15 10/10/00 memo, marked for identification, as
16 of this date.)

17 ([Klebanoff] Exhibit 16, draft of a
18 license agreement, marked for
19 identification, as of this date.)

20 Q. Mr. Klebanoff, are you able to identify
21 what we marked as [Klebanoff] 15 and 16 and
22 referenced "Rightsholder Presentation" and "License
23 Agreement" discussed in [Klebanoff] 14?

24 A. Well, 15 is a somewhat later iteration
25 of what -- because, for example, Dorothy Kauffman

1 Klebanoff

2 hadn't started work until October, and this is an
3 August date, so it would have been a similar but
4 somewhat shorter and simpler presentation.

5 And the license agreement would be
6 similar but not identical.

7 Q. To that --

8 A. -- which would have been circulated.

9 Q. Does that license agreement predate or
10 postdate August 5?

11 A. It would postdate it.

12 Q. Looking at Exhibit 16, do you know whose
13 draft of a license agreement this is?

14 Yours and outside counselors?

15 A. Well, it's my modification of what had
16 become our basic boiler plate agreement.

17 MR. BONI: So some iteration of this
18 is what you attached?

19 THE WITNESS: Right.

20 Q. Let's turn back to your affidavit which
21 we marked as [Klebanoff] 3. Have you still
22 retained a copy in your set there?

23 If you turn to paragraph eight, please,
24 you talk about active negotiating experience
25 regarding electronic rights in two circumstances.

1 Klebanoff

2 A. Yes.

3 Q. Are those designed to be illustrative or
4 do those constitute the totality of your experience
5 regarding negotiating electronic rights?

6 A. On the sell side?

7 Q. Yes?

8 A. No, it's not the totality. I mean I
9 sold electronic rights for, in fact, several
10 electronic rights packages for Sheila Lukins, Julie
11 Rosso and the for The Silver Palate Cookbook, and
12 The All Around the World Cookbook for Sheila
13 Lukins.

14 Q. Was there a particular reason why you
15 selected The Mayo Clinic and The Haldeman Diaries
16 as examples of your experience in negotiating
17 electronic rights?

18 A. They're very visible and very large.

19 Q. Could you describe at a general level
20 the nature of the electronic rights to The Mayo
21 Clinic?

22 A. The Mayo Clinic was a renegotiation of
23 rights involving the electronic publisher which at
24 the time was called IBI, and with William Morrow,
25 which was at the time owned by Hurst, and the net

1 Klebanoff

2 result was an advance in the newly-struck agreement

3 for a million four for the electronic rights

4 package.

5 And The Haldeman Diaries -- I guess you

6 asked me about Mayo. I'm answering --

7 Q. Is there anything particular to these

8 transactions that you think bears on the resolution

9 of this legal dispute?

10 MR. BONI: Object to form.

11 The Rosetta Random House loss?

12 MR. RICH: Yes.

13 Q. In other words, why did you feel putting

14 this material in was relevant to this lawsuit?

15 Was this just to give an indication that

16 you have experience in negotiating electronic

17 rights?

18 A. Yes.

19 Q. Is there anything particular about the

20 contracts or any of the aspects of the negotiation

21 of those transactions that otherwise has a bearing

22 on this dispute?

23 A. Well, The Mayo Clinic has made a point

24 -- The Mayo Clinic has certain commitments of books

25 for which it controls the electronic rights and

1 Klebanoff

2 certain commitments of books which it doesn't, so
3 they are illustrative of a publisher -- of an
4 author who occasionally has electronic rights and
5 occasionally does not depending upon the terms of
6 its contract. And in the case of The Haldeman
7 Diaries, which was done as late as 1993, Bob
8 Haldeman owned the electronic rights as it was
9 offered to the community, so we only offered the
10 physical rights to The Haldeman Diaries. So an
11 interconnection is that this is a case of divided
12 rights.

13 Q. Have you retained or have any of your
14 affiliated professional associations, like The
15 Scott Meredith Agency retained the contract files
16 associated with these transactions?

17 A. I think I have -- I have certain
18 elements of these contract files.

19 Q. Do you have the final contracts
20 themselves?

21 A. Well, the reason -- I am not certain I
22 have the Sony contract. I know I have the Haldeman
23 book contract. I'd have to look. I have the --
24 you know, I saw it at a given point back when, and
25 I have -- I may very well have it. I didn't

1 Klebanoff

2 negotiate it. What -- I didn't negotiate the final
3 form of the Haldeman grant to Sony. But in the
4 Mayo case I think I do have the IBI-Morrow
5 renegotiation agreement

6 REQ MR. RICH: Mike, since we had asked for
7 copies of documents underlying and/or
8 referred to in any of the witness
9 declarations, I would ask that the materials
10 the witness testified to and that he thinks
11 he retains copies of be produced in this.

12 MR. BONI: Sure. We'll discuss it,
13 and we'll talk to you tomorrow.

14 THE WITNESS: I'm certainly going need
15 confidentiality for that, from a client
16 perspective.

17 MR. RICH: That's not a problem.

18 (Time noted: 6:00 p.m.)

19 Q. In paragraph four, little paragraph A,
20 there's a reference to a three million circulation
21 e-mail.

22 A. Yes.

23 Q. How is the list of e-mail recipients
24 developed?

25 A. Well, my basic understanding is that

1 Klebanoff

2 BN.com supplied me plus four or 5,000 names, and

3 Adobe supplied the balance.

4 Q. If you turn to paragraph 15, carry over

5 to part of page seven, you state "Under Random

6 House's interpretation of the rights the Kurt

7 Vonnegut, William Styron and Robert Parker titles

8 would be committed for the life of the copyright

9 without advance payment and with no assurance of

10 quality or promotional publication"; do you see

11 that?

12 A. Where are we, what paragraph?

13 Q. We are at the end of paragraph 15.

14 A. OK.

15 Q. Take your time in reading it.

16 A. Yes.

17 Q. When you say "without advance payment,"

18 by that I take it you do not mean -- by that I mean

19 you take it a separate advance associated with the

20 exploitation of electronic rights; is that correct?

21 A. Correct.

22 Q. In your experience, when a publisher has

23 a series of rights that it is granted and offers an

24 initial advance and then a royalty structure, is it

25 common or uncommon for there to be a series of

1 Klebanoff

2 subsequent advances when the publisher does nothing
3 than exploit rights to which it had already been
4 granted authority?

5 MR. BONI: Object to form.

6 A. Well, if the rights were under the
7 contract, typically it would not call for
8 subsequent advances, unless that had been indeed
9 the form of the contract, the form of the
10 commitment.

11 Q. Precisely.

12 And your reference to "no assurance of
13 quality publication," what did you have in mind?

14 A. Well, I'll give you an example. And
15 this is not -- I mean I don't know exactly how the
16 Random House, you know, electronic forms are
17 proceeding. Rosetta is doing quite a bit of work
18 and spending quite a bit of money to put an
19 identical typeface across all formats in eBook
20 context so the experience for the reader is the
21 same whatever format they use. We're resizing
22 jackets, which cost us almost the cost of the
23 preparation of the jacket itself, in order to have
24 the jacket appear within the four boundaries of any
25 given format. I'm not sure what Random House is

1 Klebanoff

2 doing. We regard this as one of the elements of
3 the way to publish.

4 Now, maybe that's what Random House is
5 going to do; I don't know. But our pitch to our
6 people is we're doing it the right way.

7 Q. You don't know, in fact, what measures
8 Random House is taking to assure the quality of its
9 own eBookPublishing program.

10 A. On a look-forward basis, no.

11 Q. Now, down in paragraph 17 you assert
12 that "Of Random House's \$100 million in promotional
13 expenditures (which according to Publishers Weekly
14 themselves represent less than five percent of
15 sales) a very tiny fraction are allocated to the
16 back list (which Random House states represent 40
17 percent of sales)."

18 On what is that statement based?

19 A. The one hundred million number and the
20 40 percent number come out of the complaint.

21 MR. BONI: Random House's complaint.

22 THE WITNESS: Random House's
23 complaint.

24 A. (Continuing) A number of -- for a sales
25 number north of the \$2 billion I've seen reported

1 Klebanoff

2 in any number of public sources over time. So 100
3 million is less than five percent of two billion.
4 The question of what percentage of the 100 million
5 is going to the back list, I mean I've used the
6 characterization of "very tiny" based on years of
7 experience, in the sense that you don't see any. I
8 don't know, obviously, what that percentage is with
9 precision.

10 I think it's extremely clear that the
11 overwhelming majority of the promotional effort
12 goes to the front list.

13 Q. And is it also accurate that the A list
14 classic titles which RosettaBooks is interested in
15 publishing have certainly in many cases benefitted
16 from the front list promotions made by the
17 publishers in those works?

18 A. I don't know. Well, I think you'd
19 actually have to -- I don't know what Random House
20 has spent on Parker's Promised Land.

21 Q. But you would agree that there is more
22 to the investment in a work than simply the back
23 list investment -- correct? -- in the case of an
24 initial publisher.

25 MR. BONI: Object to form.

1 Klebanoff

2 A. Sure. Publishers invest in the front
3 list of their works.

4 Q. Yes.

5 And that's an investment which, as you
6 testified earlier, RosettaBooks has been able to
7 avoid by the nature of your business enterprise,
8 correct?

9 MR. BONI: Object to form.

10 A. Rosetta is licensing rights which in its
11 opinion are owned by the authors. There are a wide
12 range of rights owned and retained by authors even
13 though the publisher is going to invest in some
14 cases for a top list author. It's very substantial
15 sums of money in the front list of their work. So
16 I think the -- I don't think the investment
17 question of the publisher in the work is the
18 question. I think the question is whether the
19 ownership of the electronic rights itself is under
20 the contract or not under the contract.

21 Q. In paragraph 18 you state that you
22 disagree with Mr. Miller's interpretation of the
23 phrase, quote, in book form.

24 What is your understanding of the proper
25 interpretation of the phrase in book form?

1 Klebanoff

2 A. Well, I certainly feel until the
3 electronic rights clauses came into active use and
4 then by publisher were adopted one by one into the
5 agreements that it meant the physical format of the
6 book.

7 (Discussion off the record.)

8 Q. In the case of a publisher who initially
9 publishes in physical form a hardcover edition of a
10 work and subsequently releases a paperback version
11 is it your understanding that "in book form" would
12 cover both of those publishing activities?

13 A. I think it would. They're both -- well,
14 A, it would depend upon the contract, because it
15 isn't necessarily in all cases, you know, acquired
16 that way, but it certainly is frequently acquired
17 that way, and it would be encompassed within a
18 physical edition of the book.

19 Q. Yes.

20 (Discussion off the record.)

21 Q. I show you the memorandum submitted by
22 your counsel on this motion.

23 Do you have a notion of the meaning of
24 the concept of right of first publication?

25 A. Right of first publication?

1 Klebanoff

2 Q. Yes.

3 A. In what -- I mean in what context?

4 Q. In a book publishing context setting.

5 A. I mean -- what it would mean is that --

6 that the publisher wants the manuscript in its

7 hands to publish, I mean, for its purposes first

8 before an author does anything else with it.

9 MR. RICH: May I hear that answer,

10 please.

11 (Record read.)

12 Q. If a work is first published in a

13 hardcover format and the publisher later releases

14 that work in paperback format, are both of those

15 acts first publication of the author's manuscript

16 or is only the first act first publication?

17 A. I mean I actually haven't, you know,

18 heard the phraseology used, I mean, typically in

19 my, you know, day-to-day work in the community. I

20 mean you certainly hear a phrase like first

21 paperback publication, first hardcover publication,

22 first edition, first printing. I'm not sure the

23 context in which you're trying to place the

24 question.

25 Q. How many publishing agreements would you

1 Klebanoff

2 estimate you've seen in your career?

3 A. Over a hundred.

4 Q. Have you ever seen in any publishing

5 agreement in words or substance a grant clause that

6 states that the publisher has obtained "only the

7 right of the publication of the work in the format

8 of a physical book," comma, "i.e.," comma,

9 "printing the work on paper pages which are sewn or

10 glued between covers"? Have you ever seen a grant

11 clause that contains substantially those words?

12 MR. BONI: Object to form.

13 Did he ever say that he did?

14 MR. RICH: I'm asking if he ever did.

15 A. I don't recall seeing precisely those

16 words in a publishing agreement I've reviewed.

17 Q. I'm going to show you a statement

18 written by your counsel, page six of the memorandum

19 of law, the top paragraph. I ask you to read that

20 to yourself.

21 MR. BONI: Bruce, if you can ask him

22 to read it to himself, I'm not going to

23 comment on anything, and I'll object on the

24 attorney work product and attorney/client

25 privilege doctrine.

1 Klebanoff

2 MR. RICH: I'm going to ask him what
3 that means.

4 What would be the basis of that
5 objection?

6 MR. BONI: On the basis --

7 MR. RICH: I'm asking if he
8 understands the meaning of the --

9 (Discussion off the record.)

10 MR. RICH: I haven't posed a question
11 yet.

12 Q. Have you had a chance to read that top
13 paragraph?

14 A. Yes.

15 Q. Do you understand what is being
16 conveyed?

17 MR. BONI: You can answer with a yes
18 or a no.

19 A. Yes.

20 Q. And what is your understanding of what
21 is being conveyed?

22 MR. BONI: I don't want him to discuss
23 that.

24 MR. RICH: I know you don't want him
25 it, but what's the basis --

1 Klebanoff

2 MR. BONI: I object because
3 discussions that we have had with respect to
4 the legal arguments we made in a brief is
5 subject to the attorney work product and
6 attorney/client privilege doctrine.

7 Q. Separate from any discussions you may
8 have had with your counsel, do you have an
9 understanding of what it means that the publisher
10 has obtained the right of first publication of the
11 author's manuscript in the form of a print book,
12 unquote?

13 DIR MR. BONI: I instruct the witness not to
14 answer on the basis of the attorney work
15 product doctrine.

16 MR. RICH: Unfortunately, this may
17 jeopardize catching a train, but we may have
18 to go through them all now.

19 MR. BONI: Why are you doing it now?

20 MR. RICH: Because you're short
21 circuiting my inquiry.

22 MR. BONI: Then we're going to cut it
23 off right now, and you can get a ruling, and
24 we'll strenuously object to --

25 MR. RICH: It's a way of getting --

1 Klebanoff

2 MR. BONI: You can ask him a question
3 about what his understanding is about
4 certain concepts.

5 MR. RICH: I just tried to do that.
6 If you were to listen to my question, I said
7 separate and apart from any legal advice --
8 I can't be clearer -- do you have an
9 understanding of the meaning of such words
10 would --

11 MR. BONI: Ask a question that has --

12 MR. RICH: I asked him the question I
13 wanted to ask him. I'll ask him now out of
14 all the affidavits.

15 MR. BONI: You asked him if he had an
16 understanding of first reproduction, and he
17 gave the answer, and then he said that he
18 didn't, so what do you want to get after
19 that? He answered the question.

20 Q. I show you paragraph ten.

21 Do you know a gentleman named Donald
22 Congdon?

23 A. Actually, I don't think I've met him.

24 Q. Do you know him by reputation?

25 A. Yes.

1 Klebanoff

2 Q. Are you aware that he submitted a
3 declaration in this matter?

4 A. Yes.

5 Q. All right, let me show you paragraph ten
6 of that declaration.

7 A. (Reading.)

8 (Discussion off the record.)

9 Q. I'm sorry to borrow this back, but I
10 have to get it in the record.

11 Do you have an understanding of what Mr.
12 Congdon means when he writes that "When an author
13 conveys to the publisher the license 'to print,
14 publish and sell the work in book form,' that means
15 the publisher has obtained only the right of first
16 publication of that work in the format of a
17 physical book, i.e. printing the work with ink on
18 sheets of paper which are sewn or glued between
19 covers of a volume"?

20 MR. BONI: Object to the form of the
21 question. The witness already testified he
22 doesn't know and (inaudible) accept by
23 reputation, and you're asking him what this
24 affiant meant when he wrote that. If you
25 want to ask the witness if the witness has

1 Klebanoff

2 an understanding of that, then you're

3 welcome to ask him that question, Bruce.

4 Q. Did you have a problem with my question?

5 Counsel is free to object, and the

6 you're also free to answer if you understand the

7 question.

8 A. I mean in --

9 Q. Do those words have independent meaning

10 to you?

11 MR. BONI: That's a different

12 question.

13 MR. RICH: It is.

14 MR. BONI: He's asking you what --

15 MR. RICH: Please let the witness

16 answer now.

17 MR. BONI: He's asking you what your

18 understanding is of the phrase.

19 A. My understanding of print, publish and

20 sell in book form, which is really what that

21 paragraph is talking about it seems to me, is that

22 it grants the right to a physical book, multiple

23 editions of a physical book, but a physical book.

24 Q. To the extent one or more affiants in

25 this matter have asserted the view that that right

1 Klebanoff

2 excludes, for example, subsequent publication of
3 soft cover or paperback books, I take it you
4 disagree.

5 MR. BONI: Object to the form.

6 A. The references, as I understand them
7 from having read the bulk of the pages, from having
8 read the affidavits and briefs in the case, is that
9 the issues surrounding hardcover and paperback
10 rights are meant to address a time period in
11 publishing largely before the paperbacks, mass
12 paperbacks as a phenomenon when it was common,
13 since the paperback right was unknown, to have
14 agreements that didn't address paperback, and then
15 as time marched on they did address a paperback,
16 and there were soft/hard agreements, and then there
17 were agreements where the paperback is only a
18 subsidiary right. It comes in many flavors.

19 Q. I take it there is nothing inherent in
20 the concept of in book form, as I understood your
21 prior answers, that would exclude -- subject, of
22 course, to reading different agreements as they may
23 embellish -- that would exclude paperback
24 publishing; is that correct?

25 A. In book form would clearly include in

1 Klebanoff

2 the paperback form of a book, I mean as a
3 possibility.

4 Q. As a possibility, yes.

5 What else would it include in terms of
6 other physical forms of publication?

7 A. Book Club edition of the book.

8 Q. What else?

9 A. If it were granted, a translation
10 edition of a book.

11 Q. What else?

12 A. A large print edition of a book.

13 Q. Anything else?

14 A. A leather-bound edition of the book.

15 Q. Such as Eastern Press?

16 A. Such as Eastern Press.

17 Other examples. I mean a trade
18 paperback as well as a mass market paperback
19 edition of a book.

20 MR. RICH: Off the record.

21 (Discussion off the record.)

22 Q. If you look at paragraph 19 of your
23 declaration, you make reference to Scruples by
24 Judith Kranz.

25 A. Yes.

1 Klebanoff

2 Q. Based on what did you construct this
3 paragraph?

4 What did you do, if anything, to refresh
5 your recollection?

6 A. I mean from memory.

7 Q. Just from memory.

8 You consulted no materials?

9 A. No.

10 And also --

11 MR. BONI: Did you? Did you consult
12 anything?

13 Q. Did you want to add to your answer, sir?

14 THE WITNESS: No, I didn't consult
15 anything.

16 Q. If you look at paragraph 21, which makes
17 reference to the Accenture study --

18 A. Yes.

19 Q. -- you indicate that the study concluded
20 that 70 percent of all e-book sales would be made
21 by people who would not have otherwise bought the
22 physical book.

23 As I read this paragraph maybe I
24 misunderstood your intent I construed that would be
25 cited by you as evidence of the assertion in the

1 Klebanoff

2 first paragraph that "The promotion, marketing and
3 sales of e-books will enhance rather than hinder
4 the sales of print books."

5 Did you intend that connection or not?

6 A. I intended a connection, yes.

7 Q. How is the fact that someone would not
8 have otherwise bought a print book and thereby
9 would be induced to buy an e-book, how would that
10 enhance sales of print books?

11 A. Well, there were two -- there were two
12 interconnected arguments. One of them is that the
13 study reflects a continuing growth pattern for
14 physical books, so if there was a concern that the
15 -- that an electronic movement in books was
16 actually going to eat in in a meaningful way to
17 physical sales, physical sales should go down, not
18 up, so the pattern of every report that I've seen
19 separate and apart from a -- from that part is the
20 positive sales book is projected for future years
21 for physical sales of books as eBook sales are
22 anticipated to grow.

23 And the second point is purely
24 promotional and cross linked, which is that the --
25 A, that our projection is the more exposures for a

1 Klebanoff

2 jacket, the better for an author and a book, and B,
3 since we are going to end up doing linking of
4 physical editions of books either on site or off
5 site, on site by RosettaBooks, which we will likely
6 be storefront, off site if we choose to with an
7 affiliation with Amazon.com, I believe in the
8 foreseeable future the disproportionate number of
9 interested book buyers will be physical book
10 buyers, not electronic book buyers. I believe that
11 what we're going to generate is much more physical
12 book traffic sale than electronic book traffic
13 sale.

14 So at the end I think Random House is
15 going to thank us.

16 Q. Is going to --

17 A. Thank us.

18 Q. I take it this is not the preferred
19 outcome of your business model, however.

20 A. No, I don't agree with that, because
21 what the preferred outcome of our business model is
22 that we build a core successful electronic book
23 business and an ancillary revenue stream from the
24 bookseller's share or the share we can capture of
25 the physical book for physical books, audio books,

1 Klebanoff

2 DVDs, movies.

3 Q. Turn to paragraph 24, please, C. Among
4 the hardships you predict if an injunction is
5 granted is "venture capital and other funding
6 sources will likely dry up."

7 Is this based on actual conversation
8 you've had since the commencement of the lawsuit,
9 or simply your judgment?

10 A. Well, we are continually having
11 discussion, conversations about funding for
12 Rosetta, and it's -- the lawsuit is -- not only is
13 it very visible, but it goes to the heart of the
14 premise of the core of our business. So certainly
15 in connection with the preliminary injunction any
16 funding we're talking to now is laying back to
17 consider how it is going to come out.

18 Q. Indeed you say "Third-party alliance
19 partners, for example, BN.com, Amazon, AMS and
20 Baker & Taylor will likely lose confidence in our
21 ability to deliver titles and maintain our business
22 as a going concern."

23 Similar question: Have you had
24 discussions with one or more of these alliance
25 partners that gives rise to that concern?

1 Klebanoff

2 A. We have regular conversations with
3 BN.com that are, you know, concerned about the
4 state of this litigation and its effect on Rosetta
5 in an industry context. We have had -- our ability
6 to conclude an alliance with Baker & Taylor is
7 definitely influenced by the litigation. And we
8 have pending negotiations with AMS that are
9 influenced by the litigation. And our ability to
10 make the deal we'd like to make with Amazon is
11 influenced by the litigation.

12 Q. In paragraph 26 you state "In sum,
13 granting the preliminary injunction could be
14 tantamount to a death sentence for RosettaBooks."

15 On the assumption that the injunction
16 would cover solely RosettaBooks' offering of Random
17 House titles and not affect your continuing ability
18 to offer other titles, why would that injunction,
19 or why could it be tantamount to a death sentence
20 for RosettaBooks?

21 MR. BONI: Object to form. The
22 question presupposes that that assumption is
23 built into this paragraph. It's not.

24 A. We already have public comment from Time
25 Warner, from Harper Collins, from Simon and

1 Klebanoff

2 Schuster that -- well, just to simplify the phrase
3 -- that they're on Random House's side in this
4 litigation. I think it's from -- if for no other
5 observation, from a chilling effect for us in the
6 rights community and the from fear in the rights
7 community to transact, which is sort of like both
8 directions.

9 If the preliminary injunction is
10 granted, at least in the United States I think we
11 will have -- we and any other electronic
12 rightsholder will have a very difficult time
13 persuading any rightsholder whose book is in
14 physical form published by a major publisher to
15 transact those rights until there is a full -- you
16 know, some full resolution of the litigation.

17 Q. Because a principle of more general
18 applicable would be inferred from the injunction
19 (sic).

20 A. Correct, and -- A, and B, the -- I'm
21 sure we will hear in a louder year (sic) than we
22 have heard from the other publishers if such an
23 injunction is granted.

24 MR. RICH: I have about two more
25 minutes.

1 Klebanoff

2 MR. BONI: OK, a mad dash.

3 MR. RICH: One last exhibit is this
4 one.

5 (Discussion off the record.)

6 ([Klebanoff] Exhibit 17, screen prints
7 of RosettaBooks' Slaughterhouse Five pages
8 1-2, marked for identification, as of this
9 date.)

10 MR. RICH: We're going to mark as
11 [Klebanoff] 17 screen prints of pages one
12 and two of the RosettaBooks' offering of
13 Slaughterhouse Five.

14 Q. Do you recognize the printed words
15 appearing on pages one and two of what we've marked
16 as [Klebanoff] 17?

17 A. Yes. These would be our copyright
18 notice pages.

19 Q. And is it your understanding that
20 RosettaBooks secured the identified permissions
21 with respect to these three cited excerpts?

22 A. We don't have independent permissions
23 for these three cited excerpts.

24 Q. And did you make a judgment that such
25 permissions were unnecessary?

1 Klebanoff

2 A. This is the first time I'm focusing on
3 the issue of these permissions for electronic
4 purposes, so I didn't make any judgment one way or
5 the other.

6 Q. Do you know how this material came to be
7 incorporated in the front pages of --

8 A. It tracks -- well, the material was -- I
9 assume that it tracks what's in the front pages of
10 the physical edition of the book --

11 Q. And --

12 A. -- and that it would have been --

13 Q. Indeed I am showing you the trade
14 paperback version to confirm that your
15 understanding is correct. I'll represent to you --

16 MR. BONI: He's represented to you
17 that --

18 Q. I'll represent the text through the
19 first paragraph on page two --

20 A. Fine. It's there.

21 Q. I'll represent that the text through the
22 first paragraph on page two is in haec verba what
23 appears in the acknowledgment page of the trade
24 paragraph except for the typographic error in which
25 "seven sent cotton" appears in the Rosetta version

1 Klebanoff

2 as opposed to "11" with an "L sent cotton" in the
3 correct paperback version.

4 Did you instruct anyone to copy verbatim
5 this material into the RosettaBooks at eBook?

6 A. Copy which material?

7 Q. The material that's appearing in
8 [Klebanoff] 17, that is, the representations with
9 respect to reprint rights?

10 A. Well, our general -- I mean our general
11 copyright approach for -- has been to -- to reprint
12 what is on the copyright notice pages of the
13 physical edition. So these permission descriptions
14 being there, they have found their way from the
15 physical edition to our electronic edition.

16 (Discussion off the record.)

17 Q. I have one last question. How did you
18 come up with the name RosettaBooks?

19 A. I talked to Christopher Johnson, our
20 design genius, logo and positions advisor, at some
21 great length, and the one we were looking for,
22 something that echoed ancient times and modern
23 times, and a number of things we thought about were
24 taken, and this came up in the conversation between
25 the two of us. If the company works, our claim --

1 Klebanoff

2 I'll claim that it was mine.

3 MR. RICH: Thank you for your
4 patience.

5 MR. BONI: Thank you.

6 (Time noted: 6:36 p.m.)

7 _____

8 ARTHUR M. KLEBANOFF

9

10 Subscribed and sworn to before me

11 this ___ day of _____, 2001.

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2 [KLEBANOFF] FOR ID.

3 [Klebanoff] Exhibit 9, Ms. Brann 12/5/00 124

4 e-mail to Mr. Klebanoff.

5 [Klebanoff] Exhibit 10, Ms. Brann 1/16/01 127

6 letter to Mr. Klebanoff, Bates

7 Rosetta 10-11.

8 [Klebanoff] Exhibit 11, Mr. Farber 10/23/00 129

9 letter to Mr. Klebanoff, Bates 33.

10 [Klebanoff] Exhibit 12, Mr. Klebanoff 8/5/00 130

11 letter to Mr. Farber, Bates 0034.

12 [Klebanoff] Exhibit 13, William Styron 132

13 contract.

14 [Klebanoff] Exhibit 14, Mr. Klebanoff 8/5/00 133

15 correspondence to Mr. Congdon and Ms.

16 Romer, Bates Rosetta 52-53.

17 [Klebanoff] Exhibit 15, Mr. Klebanoff 134

18 10/10/00 memo.

19 [Klebanoff] Exhibit 16, draft of a license 134

20 agreement.

21 [Klebanoff] Exhibit 17, screen prints of 161

22 RosettaBooks' Slaughterhouse Five

23 pages 1-2.

24

25

