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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOM HOUSE, INC., . .

PIaintiff, . . 01 Civ. 1728 (SHS)

v . . .

ROSETTA BOOKS LLC
and ARTHUR M. KLEBANOFF, in his individual
capacity and as principal of ROSETTA BOOKS LLC.,

Defendants.

DECLARATION OF _____Ellen Levine_____

1 . I hold the positions of President of the Ellen Levine Literary Agency, Inc. and Co-Chair of the Contracts Committee of the Association of Authors Representatives, Inc.

2. I have worked in the field of book publishing in the United States for approximately 35 years. On the publishing end, I worked for New American Library and Harper & Row (now HarperCollins) beginning in 1965. I was an agent at the Paul R. Reynolds Agency (not currently in existence) in the late 1960's and 1970, and at Curtis Brown from 1971 to April 1980. I established the Ellen Levine Literary Agency, Inc. in May 1980, which now represents over two hundred authors.

3. During this time, I have negotiated many hundreds of book publishing contracts. I have personal knowledge of the meaning generally given to words used in the book publishing industry in the United States, and the process by which authors grant rights to publishers.

4. I have been shown the following documents and asked to comment on them:

- a contract dated April 10, 196 1 between Random House and William Styron and an amendment dated June 3, 1965 concerning "The Confessions of Nat Turner";
- a contract apparently dated 1977 between Random House and William Styron and an amendment dated November 13, 1990 concerning "Sophie's Choice" and three other works;
- a contract dated March 7, 1965 between Delacorte Press and Kurt Vonnegut for three untitled novels;
- a contract dated November 20, 1970 between Delacorte Press and Kurt Vonnegut concerning four titles, the first of which is "The Sirens of Titan";
- a contract dated February 4, 1982 between Delacorte Press and Robert Parker concerning four books, the first of which is "The Godwulf Manuscript";

5. I have also read the following:

- an affidavit by Edward A. Miller dated February 23, 2001
- an affidavit of Ashbel Green dated February 26, 2001

6. I am aware that the Vonnegut, Styron, and Parker contracts, and the Miller and Green affidavits, are part of a current legal proceeding in which Random House has sued Rosetta Books over the issue of electronic publishing rights.

7. Mssrs. Miller and Green assert that the phrase "print, publish and sell the work in book form" is intended by trade usage in the book publishing industry to convey from the author to the publisher the "electronic rights" to the author's work. The assertion by Mssrs. Miller and Green is incorrect. The words "print, publish and sell the work in book form" have never encompassed electronic rights, and do not do so today.

8. The Styron, Vonnegut and Parker contracts listed above have never, and are not now considered, in the book publishing industry to have conveyed any electronic rights from those authors to Random House or its affiliates.

9. The phrase "print, publish and sell the work in book form" has been used in the publishing industry for many decades, and has a well-recognized trade meaning.

10. When an author grants to the publisher the license "to print, publish and sell the work in book form" that means the publisher has obtained only the right of publication of that work in the format of a physical book, i.e., printing the work on sheets paper pages which are sewn or glued between covers. The phrase has never been understood in the industry to convey any broader grant than this.

11. When additional rights beyond this primary right were, or are, sought by a publisher, they have been, and remain, the subject of separate negotiation, which is often very intense, and which involves separate contractual language added either in the basic contract itself, or in amendments to the contract.

12. The publishing industry is one in which the end products sold to consumers—books -are in most cases the work of a single author, who from the moment of creation owns all rights in his or her work, and who in a publishing contract grants to a publisher only those rights in the work which the author (often through representation by his or her agent) finds advantageous to grant. Based on my experience selling movie rights to book properties and my knowledge of the sale of screenplay material, this is in contrast to the motion picture industry, in which the end products disseminated to consumers-movies- a r e in the majority of cases the result of collaborative effort, and in which the various contributors (including the writer) generally are commissioned to provide their contributions (in the case of a writer, the script), or who in any event cede all rights in their contributions to a production entity, retaining only those rights which the production entity allows them to retain.

13. From a historical perspective, when publishers have sought rights in addition to the right to "print, publish and sell the work in book form", publishers have separately negotiated for them. An example is the printing of an excerpt of a work in a magazine in advance of book publication, or the serialization of the full or partial text of a work in installment form in a magazine in advance of book publication ("first serial rights"). Even though such use involves the same text as in the printed book, the right to this use has never been considered in the trade to be encompassed in the grant to "print, publish and sell the work in book form." "First serial rights" always have been subject to a separate negotiation and contractual language between the author and publisher.

14. In the 1970's, the audio recording of authors' work on magnetic tape for consumer use arose ("audio books" or "books on tape"). Either the author, or another, reads the complete or abridged written text of the author's work verbatim onto tape. This was not considered in trade usage to be included in the right to "print, publish and sell the work in book form". For the

publishers to obtain these rights from the author involved separate negotiation and consideration, and separate contractual language.

15. In the 1980's the possibility of selling works in electronic form on disc for reading on personal computers (or, possibly, for printing out) became known in the industry. In the 1990's the possibility of the distribution of electronic editions over the World Wide Web was conceived. Only in the 1990's was the possibility of "e-book" editions for reading on portable handheld electronic devices, or on dedicated electronic book readers (such as the "Rocket e-Book"), foreseen.

16. I was not aware of the possibility of electronic publishing until the late 1980's or early 1990's. Until that time it was simply not a subject of negotiation between agents and publishers.

17. In March 28, 1994, Random House announced to the trade that it was amending its Standard Trade Publishing Agreement to include a new clause licensing "electronic rights" from authors. The Random House new provision licensing electronic rights is attached to this declaration, and reads as follows:

> x. to prepare, reproduce, publish and sell, to distribute, transmit, download or otherwise transfer copies of, and, with the Author's consent, which consent shall not unreasonably be withheld or delayed, to license the foregoing rights in, electronic versions of the work (referred to as Electronic Versions). As used herein, Electronic Versions shall mean versions that include the text of the work and any illustrations contained in the work (in complete, condensed, adapted or abridged versions, and in compilations) for performance and display (i) in any manner intended to make such Electronic Versions of the work available in visual form for reading (whether sequentially or non-sequentially, and together with accompanying sounds and images, if any and (ii) by any electronic means, method, device, process or medium) referred to as Electronic Device or Medium. For the purpose of this subparagraph, Electronic Device or Medium shall include, but not be limited to, electronic, magnetic, digital, optical and laser-base d in' ormation storage and retrieval systems, floppy diskette-based software, CD Rom, interactive software and compact discs, floptical disks, ROM card, silicon chip, on-line electronic or satellite-based data transmission and other such

> systems, and any other device or medium for electronic reproduction, publication, distribution or transmission, whether now or hereafter known or developed. Notwithstanding the foregoing, the rights to publish or license Electronic Versions pursuant to this subparagraph shall be revocable by the Author upon giving written notice to the Publisher with respect to any particular Electronic Device or Medium for which the Publisher has not published or licensed publication, transmission or distribution of any Electronic Version within five (5) years after first publication of the work in book form in the United States or after first development of such Electronic Device or Medium in commercially viable form, whichever is later.

18. I understand from Mr. Miller's and Mr. Green's affidavit that Random House is currently taking the position in this lawsuit that the Mssrs. Vonnegut's, Styron's and Parker's grant to Random House in the 1960's and 1970's of a license to "print, publish and sell" their works "in book form" conveyed to Random House the same "electronic publishing" rights that Random House's new "electronic publishing" clause conveyed only in 1994 and afterwards.

19. That view is contrary to what "print, publish and sell the work in book form" historically has meant in the trade, and what it means today. In my view, and based upon my handling of contracts with various divisions of Random House, Random House's current position is also contrary to the position Random House itself has taken in the industry from 1994 until it filed its current lawsuit, wherein the initial grant to "print, publish and sell the work in book form" is separate from the specific grant of electronic rights.

20. I note that Random House's 1994 electronic rights clause itself distinguished between "electronic rights" and the right to "print, publish and sell the work in book form" ("transmission or distribution of any Electronic Version within five (5) years after first publication of the work in book form in the United States"). This would be impossible if the right to "print, publish and sell the work in book form" and "electronic rights" were synonymous.

21. Mr. Green's affidavit states:

> When the parties used the standard language ['print, publish and sell the work in book form'] in these contracts, as identified above, they clearly contemplated that the publisher was being granted a broad grant of rights to distribute the full content of the work in a linear text fashion-as opposed to as an audio recording, motion picture or multimedia presentation. Whether a work is read on printed paper, on a computer screen or on a handheld e Book reading device, it is the same book with the same linear text delivered to the reader and provides the same reading experience.

22. This statement is contrary to decades of trade usage. In my many years of work in this industry, I have never heard the phrase "distribute the full content of the work in a linear text fashion" prior to reading the Green and Miller affidavits. To my knowledge, no one in the industry has ever used that phrase, and that phrase has never appeared in any author's contract of which I am aware. I cannot comment upon whatever subjective "reading experience" Mr. Miller and Mr. Green may have had, but the publishing industry does not consider the electronic distribution of an author's work to be similar to printing that work on paper.

23. I am aware of the clause in the some of the contracts which reads:

> Exclusive right to publish and license the Work for publication, prior to or after book publication, within the territory set forth in this Paragraph, in anthologies, selections, digests, abridgements, magazine condensations, serialization, newspaper syndication, picture book versions, microfilming, Xerox and other forms of copying, either now in use or hereafter developed.

24. "Xerox and other forms of copying, either now in use or hereafter developed" has meant in the publishing industry, and means today, the right to make hard-copy photocopies of a work. For example, when Kinkos copied selected chapters of an author's work to assemble into a reading package for use by college students in their courses of study, that type of photocopying would be covered by the above language. It has never been used in the industry to refer to electronic rights.

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 3 r d day of April, 200 1.