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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF NEW YORK

4

RANDOM HOUSE, INC.,)

5

)
Plaintiff,)

6

)
vs.)

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)
ROSETTA BOOKS, LLC and)

8

ARTHUR M. KLEBANOFF, in his)

individual capacity and as)

9

principal of ROSETTA BOOKS,)

LLC,)

10

)
Defendants.)

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DEPOSITION OF EDWARD A. MILLER

15

New York, New York

16

Wednesday, March 28, 2001

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24 Reported by:

JOAN WARNOCK

25 JOB NO. 119763B

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March 28, 2001

1:45 p.m.

Deposition of EDWARD A. MILLER, held
at the offices of Weil, Gotshal & Manges,
LLP, 767 Fifth Avenue, New York, New York,
pursuant to Notice, before Joan Warnock, a
Notary Public of the State of New York.

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

3

4 WEIL GOTSHAL & MANGES, LLP

5 Attorneys for Plaintiff

6 767 Fifth Avenue

7 New York, New York 10153-0119

8 BY: R. BRUCE RICH, ESQ.

9

10 KOHN, SWIFT & GRAF, P.C.

11 Attorneys for Defendants

12 One South Broad Street, Suite 2100

13 Philadelphia, Pennsylvania 19107-3389

14 BY: JOANNE ZACK, ESQ.

15

16 ALSO PRESENT:

17 ANKE E. STEINECKE

18 NATALIA PORCELLI

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IT IS HEREBY STIPULATED AND AGREED,

by and between counsel for the respective parties hereto, that the filing, sealing and certification of the within deposition shall 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 signed before any Notary Public with the same force and effect as if signed and sworn to before the Court.

1

2 EDWARD A. MILLER, having been
3 duly sworn by the Notary Public, was examined
4 and testified as follows:

5 EXAMINATION BY

6 MS. ZACK:

7 Q. Please state your name and address for
8 the record.

9 A. Edward A. Miller, 1006 Tower Drive,
10 Edgewater, New Jersey 07020.

11 Q. Mr. Miller, could you just state your
12 full name for the record again.

13 A. Edward A. Miller.

14 Q. You are testifying here as an expert
15 witness, as I understand; is that correct?

16 A. Yes.

17 Q. You're an attorney in private practice;
18 am I right?

19 A. Yes, I am.

20 Q. And where is your office?

21 A. It's located at 575 Lexington Avenue,
22 23rd floor, New York City.

23 Q. And what do you consider to be your area
24 of expertise?

25 A. Well, I've been in the publishing

1 Miller

2 business in one form or another since 1972, so I

3 would say --

4 Q. All aspects of publishing, or are there

5 some aspects that you consider to be expert in or

6 all?

7 A. Well, I wouldn't say all aspects of

8 publishing, but maybe all aspects of publishing

9 law.

10 Q. And you were with Harper & Row from 1972

11 until 1987; is that correct?

12 A. That's correct.

13 Q. Have you testified as an expert before

14 in any other matters?

15 A. I think at one time I gave an affidavit

16 as an expert in a lawsuit.

17 Q. Any other times?

18 A. Not that I remember.

19 Q. And you don't recall ever giving oral

20 testimony as an expert in a lawsuit?

21 A. No, I don't.

22 Q. And the matter in which you gave the

23 affidavit, did that have anything to do with

24 publishing?

25 A. Yes.

1 Miller

2 Q. Did it have to do with interpreting a

3 contract?

4 A. No, it didn't.

5 Q. Did it have anything to do with eBooks

6 or electronic books?

7 A. No, it didn't.

8 Q. You never appeared in court to testify

9 in that matter?

10 A. No.

11 Q. Currently, as I understand it, in

12 addition to being in private practice, you serve as

13 general counsel for a publisher; is that correct?

14 A. Yes.

15 Q. That's the Japanese company that you

16 mention in your declaration?

17 A. Yes.

18 Q. And you said you in a limited way

19 represent authors?

20 A. Yes.

21 Q. How many authors have you represented

22 over the years?

23 A. Less than ten.

24 Q. Have you ever negotiated contracts on

25 behalf of an author with a publishing company?

1 Miller

2 A. Yes.

3 Q. How many such contracts?

4 A. I think one or two that I recall. I

5 think the other authors that I represented, I

6 didn't negotiate, but I did give the author advice

7 on the provisions of the agreements.

8 Q. And about how many times did you give

9 advice?

10 A. Maybe ten or fifteen times.

11 Q. Did you ever negotiate an electronic

12 rights clause in a contract on behalf of an author?

13 A. Not that I recall.

14 Q. Did you ever give an author any advice

15 about electronic rights?

16 A. I may well have, but I don't have a

17 specific recollection.

18 Q. When you were at Harper & Row, did

19 Harper & Row have any standard form contracts?

20 A. Yes.

21 Q. And did you participate in preparing

22 them?

23 A. Yes.

24 Q. Did they change over time?

25 A. Yes.

1 Miller

2 Q. And did you have a number of separate
3 divisions at Harper & Row that had different
4 contracts or did you --

5 A. Yes.

6 Q. -- just have one standard form contract?

7 A. No. We had different contracts.

8 Q. For the different divisions?

9 A. Yes.

10 Q. What were the divisions in the 70's,
11 and, if it changed, in the 80's?

12 A. Well, I recall that we had a publishing
13 agreement for the trade department. We had a
14 publishing agreement for the college department.
15 And I think we probably had a different publishing
16 agreement for the school department. And it's
17 possible that basic books had its own form, but I
18 don't really recall. Basic books was a separate
19 sort of division at that time.

20 Q. Were there any other divisions that had
21 their own contract?

22 A. Not that I recall.

23 Q. And the trade department, was that in
24 the business of publishing trade books?

25 A. Yes.

1 Miller

2 Q. And what was the college department?

3 A. College department published college
4 textbooks.

5 Q. What about the school department?

6 A. School department published materials
7 for elementary and high school.

8 Q. What about the basic books department?

9 A. Basic books published scholarly trade
10 books.

11 Q. Did Harper & Row, while you were there,
12 have a department that published fiction?

13 A. The trade department.

14 Q. Do you recall any particular changes
15 that occurred in the form contract in the trade
16 department over the years you were there?

17 A. Yes.

18 MR. RICH: Of any type, covering any
19 subject?

20 Q. Anything that you can recall.

21 A. Yes.

22 Q. What changes?

23 A. Well, there was sort of a major change
24 in the form of the agreement. When I first came,
25 we had something called the blue form. And after I

1 Miller

2 had been there for several years, we devised a new
3 standard form that was basically a completely new
4 agreement.

5 Q. What time period was this?

6 A. I would say it was probably in the late
7 70's, between '75 and '80.

8 Q. And you were general counsel at that
9 time?

10 A. Yes, I was.

11 Q. Were you the one that thought there
12 should be a new form?

13 A. I think -- I think most of the people
14 thought there should be a new form, most of the
15 people in the legal department.

16 Q. Were you active in devising the new
17 form?

18 A. Yes, I was.

19 Q. And you participated in discussions
20 about it?

21 A. Yes.

22 Q. What was different between the old form,
23 the blue form, and the new form you set up?

24 MR. RICH: Well, he did testify it was a
25 completely new agreement, so it's an awfully

1 Miller

2 broad question.

3 Q. Well, it was an agreement for trade
4 books; right?

5 A. Yes.

6 Q. So what was completely different about
7 it?

8 A. I think the warranty clause was
9 substantially revised. I think the subsidiary
10 rights clause was rather substantially changed.
11 And I'm sure there were a lot of other changes, but
12 I'd really have to go through it.

13 Q. Well, at that time did you take a look
14 at the whole contract and really look at it clause
15 by clause with the view of improving it?

16 A. Yes.

17 Q. And did you add any clause about
18 electronic rights?

19 MR. RICH: Object to the form. You can
20 answer.

21 A. Well, we had a new or different clause
22 about electronic rights from the blue form.

23 Q. In the contract, the new contract that
24 you came out with in this period of the late 70's,
25 did the new form contract include the words

1 Miller

2 "electronic rights"?

3 A. No.

4 Q. Did it include the words "electronic

5 book"?

6 A. No.

7 Q. Did it include the words "electronic

8 version"?

9 A. No.

10 Q. What language did it have that you

11 thought related to electronic rights, if you did?

12 Did you give any thought to electronic rights in

13 the late 1970's?

14 A. Yes.

15 Q. And what thought did you give?

16 MR. RICH: Are you asking what thought

17 this witness gave --

18 MS. ZACK: Yes.

19 MR. RICH: -- or what thought was --

20 Q. What was your thinking at the time about

21 electronic rights?

22 MR. RICH: Just for clarification,

23 whether or not that thinking was

24 subsequently adopted in any measure in the

25 agreement?

1 Miller

2 MS. ZACK: Yes. Whether or not it was.

3 MR. RICH: Okay.

4 A. Could you repeat the question.

5 Q. I'm asking about you personally in the
6 late 1970's, did you give any thought to -- let me
7 ask it differently, take it one step at a time.

8 Did you give any thought to electronic books?

9 A. Yes.

10 Q. And what was your thinking at that time?

11 MR. RICH: Objection. You can answer.

12 A. I think the thinking was that the
13 agreement should cover electronic books.

14 Q. Did the blue form cover electronic
15 rights?

16 A. Yes.

17 Q. So the blue form that existed prior to
18 1975 covered electronic rights?

19 A. I believe it did.

20 Q. So there was no change; you were going
21 to just keep covering electronic rights; is that
22 right?

23 MR. RICH: Object to the form. He said
24 there were changes. You mean no change in
25 the substance?

1 Miller

2 Q. In your view, the blue form covered

3 electronic rights. Is that your testimony?

4 A. Um-hmm. Covered -- well, I'm not sure

5 what you mean by "electronic rights."

6 Q. Okay. Does that term have any meaning

7 to you?

8 A. Electronic rights?

9 Q. Yes.

10 A. Well, I understand that Random House

11 uses it to refer to basically an electronic book.

12 Q. How do you understand that? What is the

13 basis for that understanding?

14 A. I think that's in some of the papers

15 that I read in connection with this proceeding.

16 Q. Which papers were those?

17 A. Well, I was given a set of all the

18 papers, and I read them, and I think this is set

19 forth in somebody's affidavit, but I don't remember

20 who.

21 Q. So somebody's declaration or affidavit

22 you're referring to?

23 A. Right.

24 Q. Did you review any other documents in

25 preparing for your deposition, or your declaration,

1 Miller

2 other than the various declarations and exhibits to

3 the declaration?

4 A. Well, I didn't review those documents in

5 connection with the preparation of my affidavit.

6 Q. Well, before you signed your

7 declaration, did you review any documents?

8 A. Yes.

9 Q. Which documents?

10 A. I reviewed some agreements, publishing

11 agreements. And I reviewed -- I think it was the

12 publishing agreements that were annexed to the

13 complaint. And I reviewed some opinions, some

14 judicial opinions.

15 Q. So you reviewed the agreements that were

16 annexed to the complaint in this case? Is that

17 what you're referring to?

18 A. Right.

19 Q. Did you review any other publishing

20 agreements in connection with this case?

21 A. In connection with the preparation of

22 the affidavit?

23 Q. Yes. Exactly.

24 A. No.

25 Q. And you reviewed some judicial opinions?

1 Miller

2 A. Um-hmm.

3 Q. Anything else?

4 A. No.

5 Q. Which opinions did you review? Which
6 judicial opinions did you review?

7 A. I don't remember the names of them, but
8 they related to the question of when an agreement
9 will cover new uses.

10 Q. And did you rely on those opinions in
11 forming the opinion you express in your
12 declaration, or affidavit, I guess?

13 A. No. I don't think it was necessary for
14 my opinion.

15 Q. So you read the judicial opinions, but
16 --

17 A. Right. I think they were supportive of
18 my opinion.

19 Q. You didn't rely on the judicial opinions
20 in any way?

21 A. I don't think so, no.

22 Q. Going back to the blue form, what was
23 the language in the blue form that covered -- well,
24 now we've got to go back. You said what electronic
25 rights meant, your understanding what Random House

1 Miller

2 thought. What was your understanding? Had you
3 ever heard the term "electronic rights" in the
4 1970's?

5 A. I don't really remember.

6 Q. Had you heard the term "electronic book"
7 in the 1970's?

8 A. I think I had heard the concept
9 electronic book in the 70's, that it was possible
10 to create a book that would deliver the text in an
11 electronic way on a screen of some kind. Whether I
12 had associated that with the word "electronic book"
13 at that time, I don't know.

14 Q. Did you have any plans at Harper & Row
15 in the 1970's to publish books in electronic form?

16 A. I don't really know what you mean by
17 "plans."

18 Q. Did Harper & Row have a business plan,
19 to your knowledge, in the 1970's that included
20 publishing electronic books?

21 A. Meaning something that would happen
22 within let's say a five-year time frame?

23 Q. Right.

24 A. No, not that I'm aware of.

25 Q. Did Harper & Row publish electronic

1 Miller

2 books during the 1970's?

3 A. Not that I'm aware of.

4 Q. Did they publish them in the 1980's

5 while you were there?

6 A. Not that I'm aware of.

7 Q. Going back to the blue form, was there

8 some language in there that you thought covered the

9 universe of rights?

10 A. Yes.

11 Q. What was that language?

12 A. I think two bits of language. First,

13 the grant of rights to publish in book form, and,

14 secondly, the subsidiary rights identified as

15 visual rights.

16 Q. And was that in the original blue form?

17 A. Yes.

18 Q. The blue form had a clause about

19 subsidiary rights; is that correct?

20 A. Yes.

21 Q. And one of those was visual rights

22 you're saying?

23 A. Yes.

24 Q. And what is your understanding of visual

25 rights?

1 Miller

2 MR. RICH: As it was then reflected in

3 that document?

4 MS. ZACK: Yes.

5 Q. At the time that you were looking at the

6 blue form and thinking about changing it in the

7 1970's.

8 A. I understood visual rights to be seeing

9 the work through your eyes.

10 Q. As opposed to seeing it through

11 something else? I'm not quite sure what you mean

12 by visual rights is seeing the work through your

13 eyes. We read a book by seeing it with our eyes.

14 So is your understanding of visual rights something

15 different than rights relating to a print book?

16 A. Well, I think visual rights might

17 include seeing portions of the book, whereas book

18 form would include -- publication in book form

19 would include the entire book.

20 Q. What is your understanding of the phrase

21 "printing a book"?

22 A. Applying ink to whatever is used in the

23 book.

24 Q. Well, is your understanding of the

25 phrase "printing a book" what a lay person would

1 Miller

2 think of as, you know, the old-fashioned typeset

3 printing?

4 A. No.

5 Q. What type of printing?

6 A. That's -- I mean typeset printing --

7 Q. Or any kind of printing.

8 A. Well, I mean your question was, is it

9 the same thing as typeset printing.

10 Q. I'll withdraw that question. Let me ask

11 a different question. Is there a difference

12 between print rights and visual rights?

13 MR. RICH: I'm not sure the witness has

14 testified about print rights.

15 A. I didn't. I haven't testified about

16 print rights.

17 Q. Well, did Harper & Row get print rights?

18 MR. RICH: Object to the form. Lack of

19 foundation.

20 Q. In its blue form, was it your

21 understanding that Harper & Row got print rights?

22 MR. RICH: There is no foundation that

23 there is a concept called print rights.

24 Q. You've never heard the concept of print

25 rights, Mr. Miller?

1 Miller

2 A. I think that's not the term. Harper &
3 Row got the right certainly to print the books that
4 it published. But I think the term that it would
5 use would be "publication rights" or "book
6 publication rights."

7 Q. And you understood that Harper & Row in
8 the contract got the rights to print the book; is
9 that right?

10 A. Yes.

11 Q. And what was your understanding of the
12 word "print," to print a book? In 1975 did you
13 have an understanding of what the phrase "to print
14 a book" meant?

15 A. I don't know much about the technology
16 of printing. I know that it has developed over the
17 years, and it's basically a system, is my
18 understanding, I could be wrong, of the technology
19 of applying ink to paper, or if you're using cloth
20 or something like that, applying ink to cloth. And
21 there are various ways to do that, including the
22 old typeset system that you were talking about and
23 more modern techniques. I don't know how they
24 work.

25 Q. Okay. So you would consider printing

1 Miller

2 putting ink on paper in some form or fashion?

3 A. Paper or cloth or whatever the substance
4 was going to be.

5 Q. And was that your understanding of what
6 the word "print" meant in the 1970's?

7 A. I don't really remember what I thought
8 "print" meant in the 1970.

9 Q. How about the 1980's? Do you remember
10 what you thought "print" meant in the 1980's?

11 A. No.

12 Q. Has your understanding of the term
13 changed over time?

14 A. I learned more about printing over time.
15 So to that extent, yes.

16 Q. Has your basic understanding that
17 printing means putting ink on cloth or paper
18 changed from the 1970's to the present day?

19 A. No. As far as I know, it has not.

20 Q. And when you were at Harper & Row, did
21 you consider some rights in your contract, either
22 the blue form or the other revised form, to be
23 primary rights?

24 MR. RICH: Can I hear the question back,
25 please.

1 Miller

2 (Record read)

3 A. Yes.

4 Q. And is it correct to say that in the
5 70's and the 80's, that in publishing as a whole,
6 there was a distinction between primary rights and
7 subsidiary rights?

8 A. Yes.

9 Q. And what were considered subsidiary
10 rights?

11 A. Subsidiary rights, which overlapped with
12 primary rights, included reprint rights, book club
13 rights, first and second serial rights. What date
14 are we talking about? What was the date of your --

15 Q. Well, let's start with the 70's. In the
16 70's would all these things be included as
17 considered subsidiary rights?

18 A. Yes. I'm just trying to --

19 Q. And was there anything additional?

20 A. Movie rights, recording rights, visual
21 adaptation rights, dramatic rights, abridgements,
22 audio rights. That's all that I can think of right
23 now.

24 Q. And when you say the subsidiary rights
25 overlapped, what do you mean?

1 Miller

2 A. Many of the subsidiary rights were also
3 primary rights.

4 Q. Which ones?

5 A. The reprint rights, book club rights,
6 recording rights. I guess that's what comes to
7 mind.

8 Q. What made something in your mind a
9 primary right versus a subsidiary right?

10 A. I think the primary right is the
11 exclusive right to publish the work in book form.
12 Subsidiary rights, such as reprint rights, book
13 club rights, recording rights, also encompassed
14 publication in book form, but it was also included
15 in the subsidiary rights clause.

16 Q. And if those rights were included in the
17 primary right, why were they included in the
18 subsidiary rights clause?

19 A. Sometimes because it was a broader
20 right, and also because the subsidiary right
21 traditionally is one that the publisher has the
22 right to license to another publisher. Without
23 being listed in the subsidiary rights clause, the
24 publisher wouldn't have that right. And,
25 furthermore, the subsidiary rights clause usually

1 Miller

2 defined how the money would be split between the
3 publisher and the author.

4 Q. Is that because there were different
5 royalty streams for the various rights?

6 A. Well, when you're talking about
7 subsidiary rights, the royalty is what is paid by
8 the other publisher, by the publisher or whoever to
9 whom the license is made. And that's a different
10 royalty stream, yes, from the royalties that the
11 publisher pays to the author from the sales it
12 makes of the book.

13 Q. Well, some of the primary rights were
14 also put in the subsidiary rights clause when
15 Harper & Row wanted to sublicense? Or is that the
16 way you did it?

17 A. That's -- could you repeat your
18 question, please.

19 Q. Well, for instance, did Harper & Row put
20 reprint rights in the subsidiary clause because it
21 wanted to be able to sublicense to somebody else?

22 A. Yes.

23 Q. Were there any standards in the industry
24 in the 1970's concerning different royalty
25 percentages for different types of rights?

1 Miller

2 MR. RICH: May I hear the question back,

3 please.

4 (Record read)

5 MR. RICH: You can answer.

6 A. Yes, I think there were.

7 Q. And how did they become standard?

8 MR. RICH: By "standard," you mean

9 unvarying or --

10 MS. ZACK: I mean typical in the

11 industry as a whole.

12 Q. I assume they're never unvarying.

13 A. That's correct.

14 MR. RICH: If you can answer how they

15 became typical, you can answer.

16 Q. Well, how they became standard, if you

17 know.

18 MS. ZACK: Well, he's the expert.

19 MR. RICH: I'll object to the form.

20 You can answer.

21 A. Most publishers acquire their books

22 through agents. Agents deal with a lot of

23 publishers. When an agent gets a particular deal

24 from one publisher, will obviously when it deals

25 with another publisher try to get a royalty rate as

1 Miller

2 good as that one. That's one factor that would
3 lead to standardization. Also publishers basically
4 try to achieve sort of equity among authors. And
5 that's another factor that leads to
6 standardization. So I believe those factors
7 probably influenced how typical rates became
8 established.

9 Q. Now, in your blue form and then your new
10 form, did you have different royalty rates for
11 different parts of what you considered the primary
12 rights granted? In other words, did you have one
13 royalty rate for hardbacks, another royalty rate
14 for paperbacks, that sort of thing?

15 MR. RICH: Are you asking now within
16 each of the blue form and the later form, or
17 as between the blue form and the later form?

18 Q. I'll ask first, make it clearer, in the
19 blue form for the trade department, to the extent
20 you can recall. Can you recall this? I mean I
21 don't want to dredge it up if you can't recall it.

22 A. I don't think there were any -- I think
23 the provisions in the blue form or the section of
24 the blue form for royalties on book sales was left
25 blank to be filled in.

1 Miller

2 Q. You mean that was negotiated on a
3 contract by contract basis?

4 A. Yes.

5 Q. Was it the same rate for hardcover and
6 paperback, or were different rates negotiated?

7 MR. RICH: Object to the form. It's a
8 compound question. You can answer.

9 Q. As a matter of practice.

10 A. There were generally different royalty
11 rates for hardcover than paperback.

12 Q. Why is that?

13 A. I don't really know. I assume it's
14 because the economics are different.

15 Q. And that was negotiated on a contract by
16 contract basis at Harper & Row between the
17 publisher and the author?

18 MR. RICH: What is the "that," please?

19 MS. ZACK: The royalty rates on
20 hardcover books and soft cover books.

21 MR. RICH: I believe that's been asked
22 and answered. Go ahead.

23 A. Yes, it was negotiated. Each book was
24 negotiated.

25 Q. And was that true for the subsidiary

1 Miller

2 rights? Was that negotiated on a contract by
3 contract basis, the royalties, or the split of
4 royalties from the other vendor?

5 A. I think the splits may have been
6 included in the form agreements. They were subject
7 to negotiation, as any provisions of the agreement
8 are subject to negotiation. But they're probably
9 less likely to be variation for those.

10 Q. When you were at Harper & Row, did you
11 personally negotiate contracts on behalf of Harper
12 & Row?

13 A. Not very much.

14 Q. I guess that means you did it a few
15 times; right?

16 A. Yes.

17 Q. And were you negotiating them with
18 agents for authors?

19 A. Yes.

20 Q. And did you do that less than ten times,
21 more than ten times?

22 A. Probably less than ten times.

23 Q. And were changes made to the contract
24 because of the negotiations?

25 A. Yes.

1 Miller

2 Q. Were sometimes clauses stricken at the
3 author's or the author's agent's request?

4 A. Sure.

5 Q. In your experience, were subsidiary
6 rights sometimes not granted to Harper & Row by an
7 author?

8 MR. RICH: Particular ones or at all?

9 A. Not granted by Harper & Row to an
10 author? I think you have it switched.

11 Q. I may have misspoke.

12 A. Yes.

13 Q. In other words, did the author decline
14 to give Harper & Row subsidiary rights --

15 A. Sure.

16 Q. -- in some cases?

17 A. Sure.

18 Q. And was there ever negotiation about the
19 scope of the primary right?

20 A. There was to the extent that the
21 territory was subject to negotiation, and it could
22 be North American rights, it could be world rights,
23 it could be some variation on that. And also
24 whether it included just English or all languages.

25 Q. Now, you said earlier that visual rights

1 Miller

2 were subsidiary rights, or you consider them to be

3 subsidiary rights; is that correct?

4 MR. RICH: May I hear the question,

5 please.

6 (Record read)

7 MR. RICH: You can answer.

8 A. Yes.

9 Q. And back in 1970's, what was the form of

10 visual rights that Harper & Row was sublicensing,

11 if it was at that time?

12 MR. RICH: What was the form of meaning?

13 Q. What type of visual right are we talking

14 about? What type of technology?

15 MR. RICH: What was meant to be

16 encompassed by the grant?

17 Q. Well, I'm not asking what was meant to

18 be encompassed. I'm asking, as a practical matter,

19 what was actually sublicensed where something was

20 done in the area of visual rights?

21 MR. RICH: I object to the form. If you

22 understand it, you can answer.

23 A. Well, I'm not aware of any license of

24 visual rights.

25 Q. Did the blue form include visual rights?

1 Miller

2 A. Yes, it did.

3 Q. And so that gave Harper & Row the right
4 to exploit the visual rights if it so chose;
5 correct?

6 A. Right.

7 Q. And you're not aware of Harper & Row
8 doing that in the 1970's?

9 A. Yes, I'm not aware.

10 Q. How about in the 1980's while you were
11 there?

12 A. No.

13 Q. Did you ever have any discussion about
14 what was encompassed within the phrase -- did it
15 actually say "visual rights" in the contract?

16 A. Yes.

17 Q. Did you have any discussion with any
18 author about what that meant?

19 A. No.

20 Q. With any agent?

21 A. No.

22 Q. With anyone in Harper & Row?

23 A. Well, I think the form itself specified
24 microfilm or microfiche, so -- I don't remember,
25 however, whether I discussed that particular

1 Miller

2 provision with anybody.

3 Q. So was it your understanding that the
4 visual rights encompassed microfilm and microfiche?

5 A. Yes.

6 Q. But notwithstanding that, Harper & Row
7 wasn't exploiting that right while you were there;
8 right?

9 A. I'm not aware that Harper & Row ever
10 did, yes.

11 Q. While you were general counsel, did any
12 employee in Harper & Row ever report to you that an
13 author or agent had raised an issue with them
14 concerning electronic rights?

15 MR. RICH: Can we attempt to get a
16 definition of "electronic rights" for
17 purpose of this question?

18 MS. ZACK: No.

19 Q. In this question I mean did anybody come
20 to you and say someone has raised an issue of,
21 quote, electronic rights, unquote, whatever it
22 means?

23 MR. RICH: Okay.

24 A. I think so, yes.

25 Q. And who was that?

1 Miller

2 A. I don't remember the details.

3 Q. Do you remember what happened?

4 A. My recollection is that we were willing

5 to cede to the agents what we called visual

6 adaptation rights, but that we wouldn't relinquish

7 recording rights, verbatim recording rights.

8 Q. You're talking about audio recording?

9 A. No. This would be visual verbatim

10 recording rights.

11 Q. And you're saying that this was the

12 result of this particular discussion with your

13 employee, that that was your decision about what

14 you were willing to cede and not cede?

15 A. Yes.

16 Q. Can you recall what time frame this was?

17 Was this near the end of your tenure at Harper &

18 Row?

19 A. Well, I think it's more than in the

20 discussion of the drafting of the form agreement.

21 It was reported to me that some agents would not

22 grant visual adaptation rights and that it was

23 agreed that that was something that we could give

24 up in negotiations, but that visual verbatim

25 recording rights we would not relinquish.

1 Miller

2 Q. And the visual verbatim recording rights

3 would be the microfilm and microfiche rights?

4 A. It would include any method of

5 reproduction, including computer disk and so forth.

6 Q. And did your agreements in any form or

7 fashion mention the word "computer"?

8 A. It could have. I don't remember. It

9 certainly mentioned disks. I don't remember if it

10 mentioned computers or not.

11 Q. Do you have a current form contract with

12 the Japanese company that you represent, Kodansha?

13 A. That's the correct pronunciation.

14 Q. It is?

15 A. Yes. Most people can't pronounce it.

16 MR. RICH: When you say 'do you have,'

17 does that company use one?

18 Q. Does that company use a form contract?

19 A. We're no longer publishing in the United

20 States, but we did have a form agreement.

21 Q. When did Kodansha cease publishing in

22 the U.S.?

23 A. I think it was 1990.

24 Q. So prior to 1990 it had a form

25 agreement?

1 Miller

2 A. Yes.

3 Q. Did that form agreement use the term
4 "electronic rights"?

5 A. Yes, it did.

6 Q. And was that a form agreement that you
7 devised?

8 A. Yes.

9 Q. When did you devise it?

10 A. When I started working for them.

11 Q. So that was after '87?

12 A. Yes.

13 Q. Was there a form that you changed when
14 you joined as their general counsel?

15 A. The publishing program for U.S.
16 publishing was started after I got there.

17 Q. So that was basically the first form
18 contract --

19 A. Right.

20 Q. -- was the one that you devised;
21 correct?

22 A. That is correct.

23 Q. And that was sometime between 1987 and
24 1990?

25 A. Yes.

1 Miller

2 Q. Let me mark your affidavit. I'll mark
3 your affidavit as Exhibit 1 to your deposition.

4 (Expert Affidavit of Edward A. Miller
5 marked Defendant's Miller Exhibit 1 for
6 identification, as of this date.)

7 Q. I'm handing you Exhibit 1, Mr. Miller.
8 This is an affidavit that you signed; is that
9 correct?

10 A. That's correct.

11 Q. And it's dated February 23rd, 2001. Is
12 that when you signed it?

13 A. Yes.

14 Q. On Page 3, Paragraph 10, you talk about
15 certain standard language used in publishing
16 agreements by Random House and other publishers for
17 at least the last 50 or 60 years. Now, prior to
18 your engagement in this litigation, did you see
19 Random House form contracts?

20 A. Yes.

21 Q. And how did you come to see them?

22 A. I see publishers' agreements for various
23 purposes, and I don't remember specifically how I
24 came to see Random House agreements, but I've seen
25 many agreements over the years.

1 Miller

2 Q. And is it your testimony that the
3 language in the publishing agreements by Random
4 House and other publishers has remained the same
5 for the last 50 or 60 years?

6 MR. RICH: Is your question whether all
7 language has remained the same?

8 MS. ZACK: Certain standard language.

9 MR. RICH: Object to the form.

10 A. Could you repeat the question.

11 Q. Let me just read what you wrote. It'll
12 be easier. "Based on my experience in the
13 publishing industry, I have been asked to express
14 my opinion on the meaning of certain standard
15 language used in publishing agreements by Random
16 House and other publishers for at least the last 50
17 or 60 years."

18 Is your opinion limited to certain
19 standard language in this case?

20 A. My opinion concerns certain standard
21 language.

22 Q. What is that certain standard language?

23 A. "Publish and sell the work in book
24 form."

25 Q. And is it your experience that over the

1 Miller

2 last 50 or 60 years, that phrase, "publish and sell
3 the work in book form," has appeared in publishing
4 agreements by Random House and other publishers
5 consistently through the years?

6 A. Yes.

7 Q. And those exact words, "publish and sell
8 the work in book form"?

9 A. Yes.

10 Q. You talk later on in the paragraph about
11 text fashion. What do you mean by "text fashion"?

12 A. Can you point out what --

13 Q. Yes. The last paragraph of this
14 sentence, Paragraph 11, says, "When contracting
15 parties use such language, they clearly contemplate
16 that the publisher is being granted, at the least,
17 the right to distribute the full content of the
18 work in text fashion."

19 A. What does that mean?

20 Q. What does it mean "in text fashion"?

21 A. The full text of the work.

22 Q. You just mean all the words?

23 A. Yes.

24 Q. The word "text" doesn't have any other
25 meaning to you other than just all the words;

1 Miller

2 right? Is that correct?

3 A. Yes.

4 Q. Then your next paragraph you say,

5 "Through the years, these book forms have evolved

6 to include hardcover, trade, paperback, and mass

7 market paperback editions."

8 Did the phrase "book forms" ever mean to

9 you audio books?

10 A. No, it didn't.

11 Q. And why not?

12 A. Well, an audio book is essentially

13 different from a book printed on paper and an

14 electronic book. An electronic book and books

15 printed on paper present the text to be read, and

16 they're essentially the same, whether it's in

17 electronic form or in printed on paper form.

18 Q. What is different about an audio book?

19 A. An audio book is something that is

20 spoken and that you get the content by listening.

21 Q. But the words are the same; correct?

22 A. Audio book and audio book -- you mean

23 the same word "book" is used?

24 Q. No. I don't mean that. I'm sorry. I

25 meant the words that are read --

1 Miller

2 A. Okay.

3 Q. -- on the audio book are the same words
4 that appear on the page in the print book; correct?

5 A. Yes.

6 Q. Yet you still consider the audio book to
7 be different than the print book and not be in book
8 form; right?

9 A. I think an argument can be made that an
10 audio book is in book form.

11 Q. I'm not asking you to make an argument.
12 I'm asking you for what trade usage --

13 MR. RICH: Let him finish his answer.

14 MS. ZACK: No, no.

15 MR. RICH: Yes, yes. Let him finish
16 his answer.

17 Q. Go ahead and finish your answer. Make
18 your argument.

19 MR. RICH: That's gratuitous. He's
20 answering you.

21 A. That is a part of my opinion. My
22 opinion is that the audio book and the electronic
23 book are essentially different in that one is
24 accessed by reading and the other is accessed by
25 listening.

1 Miller

2 Q. Would you agree that in the usage of the
3 publishing trade, the audio book was considered
4 different than the print book?

5 A. Yes.

6 Q. And that has been true since when?

7 A. I think it's been true for a number of
8 years, but I don't know precise date.

9 Q. And you think an argument could be made
10 that "in book form" includes audio books; right?

11 A. Yes, I think so.

12 Q. But that's not the way it was
13 interpreted in the trade; correct?

14 A. That's correct.

15 Q. In Paragraph 12 of your affidavit, you
16 use the term "eBooks." What is your understanding
17 of what an eBook is?

18 A. An eBook is a device, electronic device,
19 for taking the author's text in digital form and
20 reproducing it on a computer screen so that it can
21 be read.

22 Q. When you say it's an electronic device,
23 what is the electronic device?

24 A. Well, an electronic device is a device
25 that converts the digital signals into text on your

1 Miller

2 computer screen.

3 Q. So you're not talking about any
4 particular electronic device. You're just talking
5 about --

6 A. Generally.

7 Q. -- generally the ability to convert?

8 A. Right. That's correct.

9 Q. And the next page of your affidavit in
10 Paragraph 13, the first sentence it says, "As eBook
11 technology has developed, a publisher can now sell
12 software that contains the text of the book in
13 digital format."

14 What is your understanding of what the
15 phrase "digital format" means?

16 A. Digital format is a series of zeros and
17 ones that can be read by a computer.

18 Q. And when you say, "As eBook technology
19 has developed," what do you mean by "eBook
20 technology"?

21 A. One of the significant developments has
22 been to create text on a computer screen that is
23 getting close to or comparable to the text that
24 appears -- the legibility of the text that appears
25 in the paper book.

1 Miller

2 Q. So you're talking about the quality of
3 the font or the print or the resolution?

4 A. At least, yes.

5 Q. Anything else that you're referring to?

6 A. I'm sure there are many other
7 developments that have let's say gone from early
8 computers to the present stage that makes this
9 feasible and easy to use.

10 Q. Have you heard expressed any time since
11 -- at any time., let me say that, have you ever
12 expressed the opinion by any agent or any author
13 that the primary right that they gave did not
14 encompass electronic rights?

15 MR. RICH: Can I hear the question,
16 because I think something may have gotten
17 garbled.

18 (Record)

19 Q. I meant to say "heard expressed." Let
20 me restate it. At any time has any agent or author
21 expressed the opinion to you that they did not give
22 electronic rights as part of the primary rights?

23 MR. RICH: This is not specific to
24 Harper or Kodansha?

25 MS. ZACK: No.

1 Miller

2 MR. RICH: This is at any time.

3 MS. ZACK: Just any time.

4 A. I think that really requires a
5 definition of "electronic rights," because if you
6 were talking about electronic adaptations, if
7 that's what you mean by "electronic rights," then
8 I've certainly heard that opinion expressed. If
9 you're talking about electronic text rights,
10 meaning simply the right to do the text in
11 electronic format without significant editions, I
12 don't think I've heard expressed by agents that
13 those rights should be retained and shouldn't
14 belong to the publisher.

15 Q. Has any agent or author said to you
16 anything about what you're saying is pure
17 electronic text rights?

18 A. That they should not go to the
19 publisher?

20 Q. What I'm asking you is, has any agent or
21 author discussed that issue with you, electronic
22 text rights, as opposed to electronic adaptation
23 rights?

24 A. Not discussed it with me personally, but
25 they have accepted the position that electronic

1 Miller

2 text rights should be in the domain of the

3 publisher.

4 Q. When you say "they have accepted" --

5 A. Yes.

6 Q. -- what are you talking about?

7 A. In negotiating publishing agreements.

8 Q. And what is your definition of

9 "electronic adaptation rights"?

10 A. An electronic version of the book in

11 which it is enhanced in some significant way with

12 let's say sound or additional visual material or

13 something that perhaps would be called a multimedia

14 work.

15 Q. And what do you mean by "enhanced"?

16 What is done to the work?

17 A. It hasn't been a commercially successful

18 thing. People talk about it. But I don't know

19 that it's really been done in a commercially

20 successful way. But people talk about enhancing

21 with sound or additional visual material that might

22 make the experience more meaningful for the reader

23 or viewer whatever.

24 Q. When you say "visual material," are you

25 talking about pictures only or something else?

1 Miller

2 A. I'm not really talking about anything.

3 I'm talking about what people, other people refer
4 to as electronic versions.

5 Q. Is it your understanding that an
6 electronic version would have, as our last witness
7 told us, hypertext links to other information,
8 whether it be other books, other audio or visual
9 material?

10 A. Perhaps, yes.

11 Q. I don't want to put words in your mouth.
12 Is that what you're talking about?

13 A. Basically my understanding of an
14 electronic version is it is the text enhanced in
15 some significant way. And I don't really have a
16 specific understanding of what the enhancements
17 might be.

18 Q. And when did you first hear about
19 electronic versions or electronic adaptations?
20 When did that phrase or those words first come to
21 your attention?

22 A. People have been talking about the
23 concept for many, many years.

24 Q. How many?

25 A. Back in the 70's I certainly remember

1 Miller

2 people talking about it.

3 Q. And is there some specific person who
4 discussed this with you?

5 A. I'm sure I discussed it with my staff at
6 Harper.

7 Q. Did Harper itself prepare any electronic
8 adaptations or electronic versions while you were
9 there?

10 A. Harper certainly at some point had set
11 up a department or division to explore the
12 possibility of doing electronic versions as I've
13 been talking about. I don't remember whether that
14 happened before or after I left Harper.

15 Q. Did the Harper & Row contract, the trade
16 department form contract, before you left did any
17 version of that include the words "electronic
18 version"?

19 A. Not that I recall.

20 Q. Now, in Paragraph 15, Page 4 of your
21 affidavit, you say, "Based on my review of the
22 contracts in issue." Now, did you actually read
23 the contracts?

24 A. Yes.

25 Q. And did you read the copies that were

1 Miller

2 attached to the complaint?

3 A. Yes. Yes, I did.

4 Q. Were you able to read the words based

5 on --

6 A. Yes.

7 Q. Referring you to Paragraph 17 on the

8 next page, Paragraph 17 says, "In sum, it is my

9 opinion that absent evidence of contrary intent in

10 the agreement, publication or sale of an eBook is a

11 publication of a work 'in book form' and,

12 therefore, included within the grant of rights

13 language in Random House's contracts at issue in

14 this action."

15 Now, when you say "absent evidence of

16 contrary intent in the agreement," do you mean that

17 a contract by contract analysis is required?

18 A. Yes.

19 Q. Have you done that analysis of these

20 particular contracts?

21 A. I have read the contracts, yes.

22 Q. Have you read any other contracts of

23 Random House?

24 MR. RICH: In connection with this

25 expert testimony?

1 Miller

2 MS. ZACK: Yes, exactly.

3 A. No.

4 Q. So you're not giving any opinion about
5 all the thousands of Random House contracts?

6 A. No, I'm not.

7 Q. Because you would have to look at them
8 on a contract by contract basis; correct?

9 A. Yes.

10 Q. You would agree that to construe a
11 contract, any contract, you have to look at the
12 contract as a whole; correct?

13 A. Yes.

14 Q. And you can't look at one phrase in
15 isolation from the rest of the provisions in the
16 contract; correct?

17 A. That's correct.

18 Q. And that's why you talk about absence of
19 evidence, that you have to look for the intent
20 throughout the agreement; correct?

21 A. You have to read the whole agreement.

22 Q. Do you also have to consider trade usage
23 in a construing a contract such as this, a
24 publishing contract?

25 MR. RICH: Construing it with respect to

1 Miller

2 what? The issue that's involved in this

3 suit?

4 MS. ZACK: Generally. No. I'm

5 talking about generally.

6 MR. RICH: If you can answer that. I

7 object.

8 A. I have a feeling this goes back to

9 Contracts I, but trade usage --

10 Q. It probably does.

11 A. Trade usage can certainly be relevant in

12 interpreting an agreement, but it really depends

13 upon the language in a particular situation.

14 Q. Isn't your entire opinion about trade

15 usage?

16 A. My entire opinion is about what I

17 understood by this language, my opinion as to this

18 language.

19 Q. Well, are you offering an opinion just

20 as a lawyer, or as a lawyer with experience in the

21 publishing industry?

22 A. That's correct.

23 Q. So you're bringing an overlay of trade

24 usage, aren't you, to your opinion?

25 A. I guess I'm bringing an overlay of

1 Miller

2 knowledge of the publishing industry.

3 Q. And you think that's relevant in this
4 case?

5 A. Yes, I do.

6 MS. ZACK: Let me mark as Miller
7 Exhibit 2 the contracts that were attached
8 to Mr. Sarnoff's affidavit.

9 MR. RICH: Yes.

10 (Copies of contracts that were annexed
11 to Mr. Sarnoff's affidavit marked
12 Defendant's Miller Exhibit 2 for
13 identification, as of this date.)

14 MR. RICH: It appears to be correct.

15 MS. ZACK: Thank you.

16 MR. RICH: Before we begin
17 examination, could we take two minutes?

18 MS. ZACK: Yes. Sure.

19 (Recess)

20 Q. Referring you to the first contract
21 here, which is April 10, 1961, between Random House
22 and William Styron, do you have that?

23 A. Yes. And it relates to the Confessions
24 of Nat Turner?

25 Q. Right. Where in this contract is that

1 Miller

2 standard language that you talk about in your

3 affidavit?

4 A. Paragraph 1(a).

5 Q. 1(a)? 1(a)(i)?

6 A. 1(a)(i).

7 Q. What does 1(a)(i) say?

8 A. "Print, publish, and sell the work in

9 book form."

10 Q. That's correct. And your affidavit says

11 "publish and sell the work in book form"; correct?

12 A. Yes.

13 Q. Is there some reason why you failed to

14 include the word "print" in your affidavit?

15 A. I don't think it was an important

16 inclusion for the opinion I was expressing.

17 Q. So did you personally make the decision

18 not to include the entire clause which reads

19 "Print, publish, and sell the work in book form" in

20 your affidavit?

21 A. Yes.

22 Q. You thought the word "print" was

23 surplusage?

24 A. I thought it wasn't necessary for the

25 discussion of that issue.

1 Miller

2 Q. And you don't think clause 1(a)(i)
3 should be read as a whole, "Print, publish, and
4 sell the work in book form"?

5 A. Obviously the entire agreement should be
6 read as a whole.

7 Q. And that includes the word "print," does
8 it not?

9 MR. RICH: Note my objection. You're
10 arguing with the witness.

11 Q. Well, does it?

12 A. Is the word "print" a part of 1(a)(i)?
13 Is that your question?

14 Q. Is that a word that must be considered
15 in construing the agreement?

16 A. Yes.

17 Q. Now, would you say that 1(a)(i) are the
18 primary rights granted in this contract, or would
19 that not be a fair characterization?

20 MR. RICH: Is the question whether
21 1(a)(i) is the exclusive grant of primary
22 rights?

23 Q. First of all, is it a grant of primary
24 rights, in your opinion, 1(a)(i)?

25 A. The exclusive license in the territory

1 Miller

2 specified to print, publish, and sell the work in
3 book form, yes.

4 Q. That, in your view, would be a primary
5 right; correct?

6 A. Yes.

7 Q. Are there other primary rights listed
8 here under 1(a), what you would consider to be
9 primary rights?

10 MS. ZACK: You know, I'm going to mark
11 this. I think this is the same document,
12 and it's a lot easier to read, as Miller
13 Exhibit 3. I haven't had a chance to
14 compare it.

15 (Document marked Defendant's Miller
16 Exhibit 3 for identification, as of this
17 date.)

18 A. Can I have the question again, please.

19 Q. I believe the question was, under 1(a),
20 these various subparagraphs, i, ii, iii, are any of
21 them, in your view, primary rights other than the
22 one "Print, publish, and sell the work in book
23 form"?

24 A. I think "Print, publish, and sell the
25 work in book form" is the primary right and the

1 Miller

2 others are not.

3 Q. So the ii, which says, "License
4 publication of the work by book clubs," that is a
5 subsidiary right, in your view?

6 A. Yes.

7 Q. And the next one which says, "License
8 publication of a reprint edition by another
9 publisher with the consent of the author," etc.,
10 that's a subsidiary right, in your view?

11 A. Yes.

12 Q. And the next one, "License after book
13 publication. The publication of the work, in whole
14 or in part, in anthologies, school book editions,
15 selections, digests, lyrics, abridgements,
16 condensations, serialization, syndication, film
17 strip, cartoon versions, and microfilming, or as
18 premiums, provided such rights are not retained by
19 the purchaser of the first serial rights," those
20 are all subsidiary rights; is that right?

21 A. That's correct.

22 Q. So those rights, in your view, the
23 rights listed here under iv, which I've just read,
24 are not encompassed within -- well, why are they
25 subsidiary rights, Mr. Miller? Is it for the

1 Miller

2 reason you gave previously?

3 A. They are subsidiary rights because they
4 are rights which the publisher at Random House
5 would license to other publishers or other
6 licensees.

7 Q. And the braille rights are subsidiary
8 rights in the next subparagraph?

9 A. Yes.

10 Q. And the broadcast rights, television and
11 radio broadcast rights, are subsidiary rights; is
12 that correct?

13 A. That's correct.

14 Q. And then that paragraph refers also to
15 motion picture rights. Those are considered
16 different than radio and broadcast rights, aren't
17 they? In the publishing industry they're
18 considered a separate right, aren't they, motion
19 picture rights?

20 A. Separate from what?

21 Q. Radio and television.

22 A. Well, this is a very limited grant of
23 radio and television rights.

24 Q. Is it a grant of motion picture rights?

25 A. No.

1 Miller

2 Q. Now, on Page 2, Paragraph 10, there is a
3 series of provisions concerning royalties. Do you
4 see that?

5 A. Yes.

6 Q. The first item, 10(a), "A royalty of
7 fifteen percent of the retail price for all copies
8 sold." Is that all copies of everything, or only
9 certain copies, or only certain types of books?

10 A. It says for all copies sold.

11 Q. So does that include all the hardback
12 and paperback?

13 A. Well, there is a provision for a modern
14 library reprint edition.

15 Q. Which provision is that?

16 A. Subparagraph e.

17 Q. So how do you read together subparagraph
18 a and e?

19 A. I would certainly read subparagraph e as
20 governing a modern library edition, and it appears
21 also to cover vintage books.

22 Q. So notwithstanding the broad language of
23 paragraph A, a royalty of fifteen percent of the
24 retail price for all copies sold, it would be your
25 interpretation that that would be refined by

1 Miller

2 subparagraph e; correct? Is that correct?

3 A. Yes. I'm just trying to see if I agree
4 with your phraseology.

5 Q. Okay. In other words, with respect to
6 vintage books, there would be a five percent, etc.,
7 royalty, not a fifteen percent royalty; correct?

8 A. The royalty provision is five cents per
9 copy of an edition reprinted in vintage books. And
10 I believe that royalty provision would be
11 applicable to a vintage book edition.

12 Q. So subparagraph a would not cover the
13 vintage book editions; subparagraph e would; right?

14 A. That's correct.

15 Q. And, similarly, subparagraph a,
16 notwithstanding its broad language, would not cover
17 the modern library royalties; that would be covered
18 by subparagraph e; correct?

19 A. That's correct.

20 Q. And you would agree that in order to
21 understand the royalty structure here, you would
22 have to read this entire paragraph quite carefully;
23 right?

24 A. I think you always have to read the
25 contract carefully.

1 Miller

2 Q. Well, you would agree that under your
3 definition, the vintage books would be within the
4 primary right, would it not?

5 A. Yes.

6 Q. And yet there is a different royalty?

7 MR. RICH: Object to the form. You can
8 answer.

9 Q. Correct?

10 A. Yes.

11 Q. So there can be different royalties for
12 items in the primary right; correct?

13 A. Yes.

14 Q. And they were subject to negotiation by
15 the authors and the publishers; correct?

16 A. Yes.

17 Q. In your experience; right?

18 A. Yes.

19 Q. And this contract evidences
20 negotiations, does it not?

21 A. Yes, it does.

22 Q. Is there any reference in this contract
23 to electronic rights?

24 A. No.

25 Q. To electronic versions?

1 Miller

2 A. No.

3 Q. To visual adaptation rights?

4 A. No.

5 Q. Did the form contract that you devised

6 in the late 70's at Harper & Row say "Print,

7 publish, and sell the work in book form," or did it

8 say "Publish and sell the work in book form"?

9 A. I don't recall.

10 Q. Is there anywhere in this agreement that

11 we've been looking at between Mr. Styron and Random

12 House entered into in 1961 that specifies a royalty

13 structure for electronic rights?

14 A. There is no specific provision that

15 specifies a royalty rate for electronic rights or

16 electronic books.

17 Q. And you would agree there are quite a

18 few specific royalty provisions in this agreement,

19 wouldn't you?

20 A. Yes.

21 Q. A through K; correct?

22 A. That's correct.

23 Q. So eleven different royalty provisions;

24 correct?

25 MR. RICH: This is argumentation. The

1 Miller

2 document speaks for itself. However many

3 subsections there are, there are.

4 MS. ZACK: No. This is

5 cross-examination.

6 MR. RICH: This is not

7 cross-examination.

8 MS. ZACK: Yes, it is.

9 MR. RICH: This is factual eliciting

10 at a deposition.

11 MS. ZACK: Depositions can be used at

12 trial as if trial testimony. This is

13 cross-examination. I'm only going to ask

14 him two more questions.

15 MR. RICH: This is argumentative.

16 MS. ZACK: Are you going to direct him

17 not to answer?

18 MR. RICH: I'm not arguing with the

19 witness. I'd rather we do probative things

20 rather than count how many subsections there

21 are.

22 MS. ZACK: You can do whatever you

23 prefer at your depositions. Are you

24 directing him not to answer?

25 MR. RICH: I'm told you I'm not

1 Miller

2 directing him not to answer.

3 MS. ZACK: All right.

4 Q. Then answer the question.

5 A. You have to remind me again what the
6 question is.

7 MS. ZACK: Could you reread the
8 question, please.

9 MR. RICH: She's asking you to confirm
10 that there are eleven subsections dealing
11 with royalties.

12 MS. ZACK: Well, let's hear the
13 question.

14 A. Yes, there are. Yes, there are.

15 MS. ZACK: I don't know if that was the
16 specific question that I asked.

17 MR. RICH: Fairly put, that's the
18 question.

19 MS. ZACK: Cross-examination doesn't
20 have to be fair. It just has to be
21 probative, which this is.

22 (Record read)

23 A. I don't know.

24 Q. You don't know?

25 A. I can't -- I mean I can't answer that

1 Miller

2 question because you -- the question presumes

3 something that preceded it. Oh, the question is

4 simply there were eleven different royalty

5 provisions? Is that the question?

6 Q. I'll rephrase the question.

7 A. Were there eleven different royalty

8 provisions?

9 Q. Are there in this agreement that

10 Mr. Styron signed with Random House eleven

11 different royalty provisions?

12 A. Yes.

13 Q. And this is a form contract that Random

14 House printed up, is that your understanding,

15 before it was negotiated and signed?

16 A. It appears to be, yes.

17 Q. Do you think they purposely left out

18 electronic rights?

19 MR. RICH: This is objectionable

20 argumentation with the witness. That's a

21 silly question asking about a 1961

22 agreement, and you know it to be a silly

23 question.

24 MS. ZACK: No, it's not a silly

25 question.

1 Miller

2 Q. Is it your belief that Random House,
3 knowing of the existence of electronic rights in
4 1961, put together a form contract with eleven
5 different royalty subparagraphs and purposely
6 didn't include one on electronic rights?

7 MR. RICH: Objection. There is a
8 predicate which has not been testified to by
9 the witness.

10 MS. ZACK: Your objection is noted.

11 MR. RICH: That Random House knew of
12 electronic rights in 1961. I don't recall
13 the witness testifying to his knowledge of
14 what Random House knew or didn't know about
15 electronic rights in 1961. I would ask you
16 to find that anywhere in the witness's
17 affidavit.

18 MS. ZACK: I'll ask the predicate
19 question.

20 Q. Did Random House know about electronic
21 rights in 1961?

22 A. I don't know.

23 Q. Did Random House know about electronic
24 rights in 1971?

25 A. I really don't know.

1 Miller

2 Q. How about 1981?

3 A. I would think so.

4 Q. How about 1977?

5 MR. RICH: Don't speculate.

6 A. I don't know.

7 Q. Are you then unable to testify that

8 electronic rights were widely known in the industry

9 in 1971?

10 MR. RICH: Object to the form.

11 A. In 1971?

12 Q. Right. Was the concept of electronic

13 rights widely known in the publishing industry in

14 1971?

15 A. I don't know.

16 Q. How about 1961?

17 A. Ten years earlier? I don't know.

18 Q. How about 1981?

19 A. I think in 1981 the concept that there

20 might well be a commercially feasible electronic

21 book was known in the industry.

22 Q. So you think that was known in '81?

23 A. Yes.

24 Q. And when do you think that became widely

25 known in the industry? What year?

1 Miller

2 A. I don't really know.

3 Q. Do you know whether or not Random House
4 at some point included a clause concerning
5 electronic rights in its form contracts?

6 A. Yes, I believe they did.

7 Q. When did they do that?

8 A. I don't know exactly.

9 Q. Is it fair to say that it was in the
10 1990's?

11 A. I don't know.

12 Q. Do you have any information as to why
13 they included that in their form contract?

14 A. I don't really think that I can
15 speculate as to their purpose.

16 Q. Well, would it be fair to say that
17 sometime within the last ten years, various
18 publishing companies have included or added clauses
19 to their form contracts to cover electronic rights,
20 not just Random House?

21 MR. RICH: Can I hear the question,
22 please.

23 (Record read)

24 MR. RICH: Is your question designed
25 to elicit whether they have done so to

1 Miller

2 include those rights for the first time, or

3 to make those rights grants explicit?

4 MS. ZACK: To include the clause in

5 the contract.

6 MR. RICH: To include words using the

7 words "electronic rights"?

8 MS. ZACK: Yes. Exactly.

9 MR. RICH: Without the intended

10 implication?

11 MS. ZACK: Well, I'm not implying one

12 thing or another.

13 Q. I'm asking as a matter of fact whether

14 in the 1990's publishing companies, Random House

15 and others, included clauses in their contracts

16 with the terms "electronic rights"?

17 A. Yes.

18 MR. RICH: I also note the witness said

19 he doesn't know when Random House did it.

20 And your question incorporates the

21 assumption that Random House --

22 MS. ZACK: That's because I have

23 independent information about when Random

24 House did it.

25 MR. RICH: But you're including it in

1 Miller

2 the question to the witness.

3 MS. ZACK: Well, fine. Within the

4 last ten years I said.

5 A. Yes.

6 MS. ZACK: If the witness doesn't

7 know, he can say he can't answer the

8 question.

9 MR. RICH: The question was multiply

10 flawed, which is why I objected.

11 MS. ZACK: Well, the question may be

12 flawed, but this is an expert witness. The

13 witness can take care of himself, I'm sure.

14 If he doesn't know the answer, he'll say he

15 doesn't know.

16 Q. I'm sorry. What was your answer?

17 A. The answer was yes.

18 Q. And I don't want you to speculate, but

19 from any communications you've had with people in

20 the publishing industry, do you have any

21 information as to why electronic rights clauses

22 were added to form contracts?

23 A. Because publishers wanted to have, if it

24 was possible, electronic rights to do electronic

25 adaptations of works, and because publishers wanted

1 Miller

2 to confirm the existence of electronic text rights

3 and the ability to license those rights to others

4 hopefully on an agreed upon royalty rate.

5 Q. What do you mean by hopefully on an

6 agreed --

7 A. Hopefully you get the author to agree as

8 to what the split would be on license fees.

9 Q. And you've seen agreements from the last

10 few years, haven't you, where there is an

11 electronic rights clause with a royalty specific to

12 electronic rights; correct?

13 A. When you use electronic rights, I mean I

14 draw the distinction between electronic text rights

15 and electronic adaptations.

16 Q. Well, let me just show you a contract

17 that I got today.

18 MS. ZACK: And I can show him this, I

19 assume?

20 MR. RICH: Sure.

21 MS. ZACK: And I only have one copy.

22 MR. RICH: We have another here.

23 Which one is that?

24 MS. ZACK: This is the Alfred Knoph.

25 It's 31120. That's the first page.

1 Miller

2 MR. RICH: You're going to mark this?

3 MS. ZACK: Yes. We can mark this.

4 Then I'll give you one more.

5 (Document numbered 31120-31131 marked

6 Defendant's Miller Exhibit 4 for

7 identification, as of this date.)

8 MS. ZACK: We'll mark the 31120 through

9 31131 as Exhibit 4, Miller Exhibit 4. And

10 then 31106 through 31119 as Miller Exhibit

11 5.

12 (Document numbered 31106-31119 marked

13 Defendant's Miller Exhibit 5 for

14 identification, as of this date.)

15 Q. I guess we were looking at these because

16 you were saying what does electronic rights mean.

17 You have two different agreements. The words of

18 the definition aren't exactly the same.

19 A. Can you point me to specific language

20 you would like me to read.

21 Q. Well, look at the Knopf contract. There

22 is a typed paragraph that appears to be added to

23 the form. Do you see that?

24 A. This one on the side here, or this one

25 here?

1 Miller

2 Q. No.

3 A. This one on the side?

4 Q. Not on the side.

5 A. Not on the side.

6 Q. It's in the text, but it looks like it

7 has larger typeface anyway, and it has X.

8 A. Roman numeral ten?

9 Q. Roman numeral X, 10, yes. It talks

10 about electronic versions of the work. Do you see

11 that?

12 A. Yes.

13 Q. Is this the type of clause that you have

14 seen added within the last ten years to publishing

15 contracts? Not these exact words, but this type of

16 clause?

17 A. Can I read it?

18 Q. Sure.

19 MR. RICH: I think the record would be

20 clearer also if you were to ask him to

21 construe it, Joanne, in conjunction with an

22 earlier subparagraph, Paragraph 1(a)(i),

23 which also makes references to electronic

24 books, if he's able to sort that out.

25 MS. ZACK: I mean he's free to look at

1 Miller

2 the whole thing.

3 Q. You asked me to point to what I was
4 interested in, but you're free to look at the whole
5 contract.

6 A. What is your question? Could you repeat
7 the question.

8 Q. I don't remember, but I'll ask now that
9 you've now read this paragraph Roman numeral X on
10 Page 2 of Exhibit 4; correct?

11 A. That's right.

12 Q. And my question is, have you seen
13 clauses of this type added by publishers to
14 agreements in the 1990's?

15 MR. RICH: "Of this type" meaning?

16 MS. ZACK: Concerning electronic
17 versions, electronic rights, whatever --

18 MR. RICH: Well, that's awfully loose,
19 if I may, because there is a separate clause
20 dealing with electronic books, and it's not
21 the one you're pointing him to.

22 MS. ZACK: I'm going to come to that.
23 I'm asking him one thing at a time.

24 MR. RICH: You're not. You put the
25 two together in your question.

1 Miller

2 MS. ZACK: I didn't say anything about
3 electronic books. I said electronic rights.

4 MR. RICH: I object to the form of the
5 question. I don't understand it. If you
6 do, you may answer it.

7 A. I have seen provisions in agreements
8 relating to electronic rights. I don't think I've
9 seen one worded in quite the way this one is
10 worded, but I have seen --

11 Q. And is it fair to say that you've seen
12 them in the last ten years?

13 A. Yes.

14 Q. Now, referring you to the provision that
15 Mr. Rich wants me to look at, happy to do it.

16 MR. RICH: I don't want you to look at
17 anything. I'm just indicating I don't
18 believe this witness has ever seen this
19 document before, so he's looking at the
20 whole thing for the first time.

21 Q. The grant of rights on the first page of
22 this document says, "The author grants to the
23 publisher during the term of copyright, including
24 renewals and extensions thereof," then it says, "A,
25 exclusive right in any and all editions," and then

1 Miller

2 it gives the territory; correct?

3 A. That's correct.

4 Q. Two, then it says, I, one, "Print,

5 publish, distribute, and sell the work in book

6 form"; correct?

7 A. That's correct.

8 Q. And that's the language that was the

9 subject matter of your -- or at least the publish

10 and sell portion in book form you opined about in

11 your affidavit; right?

12 A. That's correct.

13 Q. Now, this contract after it says, one,

14 "Print, publish, distribute, and sell the work in

15 book form," and, two, has a new clause that says,

16 "publish and distribute the work" -- I'm not going

17 to read the parenthetical -- "by any means of

18 distribution or transmission, whether now or

19 hereafter known or developed, intended to make the

20 text of and any illustrations or photographs

21 contained in the work available in visual form for

22 reading, including, but not limited to, electronic

23 or machine-readable media or on-line electronic or

24 satellite-based data transmission referred to as

25 electronic books." Do you see that?

1 Miller

2 A. Yes.

3 Q. Now, is that a definition of electronic
4 books that you've seen before or heard before?

5 A. Well, the precise definition I've never
6 heard before, but something similar I've heard
7 before.

8 Q. Have you ever heard this phrase
9 "available in visual form for reading"?

10 A. I don't think I have, no.

11 Q. And you would agree with me that this
12 provision concerning electronic books is a
13 provision that's additional to the provision that
14 says "Print, publish, distribute, and sell the work
15 in book form"?

16 A. Yes. They're two separate provisions.

17 Q. Now, referring you back to your
18 affidavit, Mr. Miller, on Page 4 that carries over
19 to Page 5, you say, "To conclude otherwise, namely,
20 that the alternative reading format provided by the
21 eBook somehow falls outside of the basic grant of
22 the right to publish in book form, would jeopardize
23 the investments publishers make in the works they
24 publish by allowing third parties to take the very
25 same content and offer it to the very same reading

1 Miller

2 public in competition with the publisher's paper

3 editions."

4 Is that a contractual opinion you're

5 offering there?

6 MR. RICH: Object to the form. You can

7 answer.

8 A. I don't know what you mean by

9 "contractual opinion."

10 Q. Is that opinion based on reading the

11 contract, or is that based on you being part of the

12 publishing industry?

13 A. It's based upon my knowledge of the

14 reality of the situation.

15 Q. Have you done any studies on whether

16 eBooks compete with print books or not?

17 A. I think eBooks is a very beginning

18 technology, or it's a technology in its -- what

19 would you say. It's beginning to be developed. It

20 certainly has the potential to be competitive with

21 the print edition of the book. Very much so.

22 Q. Well, my question was, have you

23 personally done or I'll say seen any market studies

24 that talk about whether eBooks will, in fact,

25 compete with print books? I mean obviously --

1 Miller

2 A. I don't think it's obvious.

3 Q. Take sales away from print books. I'm
4 not asking you whether it's obvious. I'm asking
5 you whether you've done a study --

6 MR. RICH: Done or seen.

7 Q. -- or read a study by others that say
8 that eBooks will take sales away from print books?

9 A. I believe I have seen that idea
10 expressed, yes.

11 Q. Have you seen expressed the idea that
12 eBooks will enhance the sale of print books?

13 A. I think Mr. Klebanoff expressed that
14 view --

15 Q. Anyone else?

16 A. -- in an article that I read in
17 Publishers Weekly.

18 Q. Anyone else?

19 A. I don't think I've seen that expressed
20 by anybody else. I don't recall that.

21 Q. You don't think that that's true?

22 A. I think it's a significant threat to --
23 eBooks are a significant threat to traditional
24 paper books.

25 Q. Do you think audio books are a threat to

1 Miller

2 traditional paper books?

3 A. No.

4 Q. Do you think paperback books are a

5 threat to hardback books?

6 A. Sure. They can be, in any event.

7 Q. You talk about the Random House royalty

8 announced for eBooks of 50 percent of Random

9 House's net revenues.

10 A. Yes.

11 Q. In your view, could Random House

12 decrease that royalty if it so chooses?

13 A. Decrease it?

14 Q. Yes. With respect to authors who signed

15 contracts that don't have a royalty provision for

16 electronic books, does Random House have the right

17 to just willy-nilly decide whatever royalty it

18 wants to grant at any given point in time?

19 A. I don't believe so.

20 Q. So where does the 50 percent come from?

21 MR. RICH: You're asking two different

22 questions? You said do they willy-nilly do

23 what they want and where does it come from.

24 Q. Where does the 50 percent royalty come

25 from?

1 Miller

2 MR. RICH: If you know.

3 A. It comes from an announcement by Random
4 House that was carried in Publishers Weekly.

5 Q. And can you find that anywhere in the
6 contract that Mr. Styron signed?

7 A. No. It's not in that contract.

8 Q. And what if Mr. Styron doesn't like that
9 royalty rate?

10 A. I believe that if Random House -- or at
11 least my advice to Random House, if they wish to
12 publish an electronic version of his book, they
13 should contact Mr. Styron and attempt to reach an
14 agreement with him as to what the royalty rate
15 would be.

16 Q. Why do you give that advice?

17 MR. RICH: I'm sorry?

18 Q. Why would you give that advice to Random
19 House?

20 A. Because I think the question of -- I
21 don't think the royalty rate for an eBook is
22 covered by the contract. I guess there is at least
23 an argument that one of the clauses cover it, but I
24 mean my belief is that Random House should attempt
25 to negotiate an agreement with Mr. Styron for

1 Miller

2 eBooks.

3 Q. What if Mr. Styron and Random House were
4 not to come to an agreement on that?

5 A. Then there would be a standoff, and
6 either one of two things could happen. Random
7 House could -- I don't know what the law is. I
8 think there are some cases where the law says that
9 if there is no provision, the publisher might have
10 the right to publish at a reasonable royalty.
11 That's one possibility. I haven't done research on
12 that issue. If that isn't the case, then there is
13 a standoff. Random House wouldn't have the right
14 to publish the book in electronic format, and
15 Mr. Styron wouldn't have the right to license
16 somebody else to do it.

17 Q. And that's based on your construction of
18 the phrase "Print, publish, and sell in book form"?

19 A. Yes.

20 Q. That Mr. Styron doesn't have the right?

21 A. Yes.

22 Q. That when Mr. Styron signed a contract
23 in 1961 giving Random House the right to print,
24 publish, and sell the work in book form, he was
25 giving electronic rights to Random House?

1 Miller

2 A. I believe that the contract covers that,

3 yes.

4 Q. And do you think he knew that?

5 A. I don't know.

6 Q. Where were you in 1961, Mr. Miller?

7 A. I was working with Winthrop, Stimpson,

8 Putnam and Roberts.

9 Q. And had the concept of the internet

10 crossed your mind at that point in 1961?

11 A. I don't think so.

12 Q. How about CD ROM's?

13 A. I don't think so.

14 Q. How about laptop computers?

15 A. I don't think so.

16 Q. Did you use a computer at any time in

17 the 60's personally?

18 A. Did I personally use a computer?

19 Q. Yes.

20 A. No.

21 Q. Do you use a computer today?

22 A. Yes.

23 Q. When did you start using one?

24 A. When I went to Kodansha.

25 Q. That was after 1987?

1 Miller

2 A. Yes.

3 Q. So all the time you were at Harper &
4 Row, you didn't use a computer?

5 A. That's right.

6 Q. Were you the only one at Harper & Row
7 who didn't use a computer?

8 A. Are you talking about the whole company?

9 Q. Right. I'll withdraw the question.

10 Have you discussed this case with anyone other than
11 counsel for Random House?

12 A. I think I mentioned to my family that I
13 was doing it. And I mentioned to Mr. Kimata, who
14 is head of Kodansha America, that I was going to be
15 an expert witness.

16 Q. And did you discuss it with anyone in
17 the publishing industry other than Mr. Kimata?

18 A. No. I don't think so.

19 Q. Have you talked to anyone at Random
20 House concerning this?

21 A. No.

22 Q. Have you talked to any authors
23 concerning this case?

24 A. No.

25 Q. Any agents?

1 Miller

2 A. No.

3 Q. Any other attorneys other than people at
4 Weil Gotshal?

5 A. No.

6 Q. Do you have any information concerning
7 how much money, if any, has been made by Random
8 House on the books at issue in this case?

9 A. No.

10 Q. Do you know whether they earned back
11 their advances paid to the authors?

12 A. I don't know.

13 Q. Have book publishers been at the
14 forefront of devising the technology used for
15 eBooks?

16 A. Well, I think book publishers have made
17 substantial investments in converting files to the
18 kind of digital files that could be used for
19 electronic books.

20 Q. They have made investments in technology
21 that has been devised by others; correct?

22 A. I don't know what you mean by that.

23 Could you be more specific.

24 Q. Are you aware of any book publisher that
25 has itself created software for eBooks?

1 Miller

2 A. I don't know.

3 Q. So you're not aware of any?

4 A. No, I'm not aware of any.

5 Q. Are you aware of any book publisher
6 that's created any kind of hardware such as these
7 little eBook devices that people keep talking
8 about? Any book publisher that's manufactured
9 them?

10 MR. RICH: The question is whether he
11 has any knowledge on the subject?

12 MS. ZACK: Yes. Right. No. Whether
13 he knows of any book publisher that's done
14 it.

15 A. No.

16 MR. RICH: The predicate should be
17 whether he has any knowledge in order to
18 form that judgment.

19 MS. ZACK: Well, that's always a
20 predicate. I'm not asking him for things he
21 doesn't know.

22 A. I don't have any knowledge about who has
23 developed eBook devices.

24 Q. Well, you are aware of what publishing
25 houses are doing; correct?

1 Miller

2 A. Yes.

3 Q. I mean you do keep abreast of what the
4 publishing houses are doing because that's part of
5 your business; correct?

6 A. Right.

7 Q. And what I'm asking you is, has it come
8 to your attention that any publishing house has
9 been involved in developing any technology for
10 eBooks as opposed to buying technology developed by
11 others?

12 A. I know that publishers have invested a
13 substantial amount of money in making it possible.
14 I am not -- the answer would be -- if that's
15 responsive to your question, that's my answer.

16 Q. That's the limit of your knowledge?

17 A. Yes.

18 Q. Now, Kodansha, is that publishing books
19 outside the United States currently?

20 A. Do they publish books?

21 Q. Outside the United States in other
22 places.

23 A. Kodansha America? No, they don't.

24 Q. Do you give any advice currently to
25 Kodansha for books that it's publishing anywhere?

1 Miller

2 I thought you said they ceased publishing in the

3 U.S.

4 A. Yes.

5 Q. Are they publishing anywhere?

6 A. Well, you're talking about Kodansha

7 America?

8 Q. Any Kodansha-related entity that you're

9 involved with. I don't care about the name.

10 A. Okay. Kodansha America has a sister

11 company in Japan, Kodansha International, which

12 publishes English language books about Japan.

13 Q. In Japan?

14 A. These books are sold throughout the

15 world, including the United States. The parent

16 company is Kodansha Limited. It's a large Japanese

17 publisher publishing in the Japanese language, for

18 the most part.

19 Q. Do you have any participation in the

20 contracts for those entities?

21 A. I have, yes.

22 Q. And did you advise them to put

23 electronic rights or book clauses in their

24 contracts?

25 MR. RICH: Governing sales anywhere?

1 Miller

2 MS. ZACK: Anywhere, or in one or more

3 places.

4 MR. RICH: And whether or not

5 involving U.S. copyright law or anything?

6 MS. ZACK: Yes.

7 A. I cannot remember whether the Kodansha

8 International form covers electronic rights. And I

9 really haven't had any involvement with the

10 publishing agreements that are used by Kodansha

11 Limited for Japanese authors.

12 Q. You mentioned in Paragraph 9 of your

13 affidavit that you were the first chair of the

14 Lawyers Committee of the Association of American

15 Publishers. Is that correct?

16 A. Yes.

17 Q. And that is the principal trade

18 association of the United States book publishing

19 industry; correct?

20 A. That's right.

21 Q. And what would you say the mission of

22 the Association of American Publishers is?

23 A. I really want to -- if they have a

24 mission statement, I'd kind of like to read it

25 before responding.

1 Miller

2 Q. Well, what did you understand the
3 purpose -- let me ask a different question -- the
4 purpose of the association to be?

5 A. Well, I mean they do a lot of things.
6 They provide education to members. They do some
7 lobbying. They have a very strong Freedom to Read
8 Committee that tries uphold the First Amendment in
9 various contexts in which it's constantly under
10 attack. They have a school committee, a school
11 division that tries to deal with the issue of
12 adoptions, and I guess make it easier for
13 publishers to comply with the adoption process that
14 is in existence in various states. So they do a
15 whole lot of things. Those are some of them.

16 Q. And do you have to be a publisher to be
17 a member?

18 A. I think so.

19 Q. Are there other trade associations whose
20 members are writers, that you are aware of?

21 A. Yes.

22 Q. What would those be?

23 A. Well, there is the Authors Guild. And I
24 think there is something called PEN, which is
25 another authors association.

1 Miller

2 Q. What about agents? Do they have an

3 association?

4 A. They do.

5 Q. What is that called?

6 A. I think it's called the Society of

7 Authors' Representatives.

8 Q. Do you know if any of those associations

9 have taken a position on the meaning of the phrase

10 "Print, publish, and sell the work in book form"?

11 MR. RICH: Independently of this

12 lawsuit?

13 MS. ZACK: Yes.

14 Q. At any time in the last ten years.

15 A. Could you repeat the question.

16 (Record read)

17 A. I think those associations have

18 expressed support in this lawsuit for the position

19 of your client.

20 Q. By "those," you're talking about Authors

21 Guild, PEN, and the agents?

22 A. I don't know about PEN, and I'm really

23 not even sure about the -- I think I've been -- I

24 can't really remember what I've read, but I think

25 I've read that one or more of those organizations

1 Miller

2 may have expressed support for the defendant in

3 this lawsuit.

4 Q. Well, taken the position that the phrase

5 "Print, publish, and sell the work in book form"

6 does not include electronic rights; is that

7 correct?

8 MR. RICH: If you know.

9 Q. Well, is that your understanding?

10 A. Yes.

11 Q. Has the Association of American

12 Publishers taken a position on this issue?

13 A. Not that I'm aware of.

14 Q. Are you aware of any other industry

15 group in publishing that's taken a position on this

16 issue?

17 A. No, I'm not.

18 Q. And is your opinion based solely on your

19 own experience?

20 MR. RICH: Opinion on anything that he's

21 testified to?

22 MS. ZACK: In this case.

23 Q. The opinions expressed in your

24 affidavit, are those based solely on a combination

25 of reading the contracts that you've identified and

1 Miller

2 said you read and your own experience?

3 A. My own experience and knowledge of the
4 industry.

5 MS. ZACK: I don't have any other
6 questions. I don't know if you do.

7 MR. RICH: Let me just consult for a
8 couple of minutes.

9 (Recess)

10 MR. RICH: We have no questions for
11 Mr. Miller.

12 (Time noted: 4:20 p.m.)

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EDWARD A. MILLER

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20 Subscribed and sworn to before me

21 this day of , 2001.

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CERTIFICATE

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, JOAN WARNOCK, a Notary Public within
and for the State of New York, do hereby
certify:

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

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

IN WITNESS WHEREOF, I have hereunto
set my hand this 29th day of March, 2001.

JOAN WARNOCK

1

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

3 WITNESS EXAMINATION BY PAGE

4 Edward Miller Ms. Zack 5

5

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

7 DIRECTIONS:

8 RULINGS:

9 TO BE FURNISHED: NONE

10 REQUESTS:

11 MOTIONS:

12

13 ----- EXHIBITS -----

14 DEFENDANT'S FOR ID.

15 1 Expert Affidavit of Edward A. 38

16 Miller

17 2 Copies of contracts that were 53

18 annexed to Mr. Sarnoff's affidavit

19 3 Document 56

20 4 Document numbered 31120-31131 72

21 5 Document numbered 31106-31119 72

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