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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 RANDOM HOUSE, INC.,

5 Plaintiff,

6 vs. 01 Civ. 1728 (SHS)

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

10 Defendants.

11 -----X

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15 DEPOSITION OF RICHARD SARNOFF

16 New York, New York

17 Wednesday, April 4, 2001

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24 Reported by:
24 WENDY D. BOSKIND, RPR
24 Job No. 119766

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April 4, 2001

1:11 p.m.

Deposition of RICHARD SARNOFF, held at
the offices of Weil, Gotshal & Manges LLP,
767 Fifth Avenue, New York, New York,
pursuant to Notice, before Wendy D. Boskind,
a Registered Professional Reporter and
Notary Public of the State of New York.

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

WEIL, GOTSHAL & MANGES LLP

Attorneys for Plaintiff

767 Fifth Avenue

New York, New York 10153-0119

BY: R. BRUCE RICH, ESQ.

-and-

JONATHAN BLOOM, ESQ. (portions)

-and-

MATTHEW E. MARTIN,

Vice President

Associate General Counsel

LINDA STEINMAN, (portion)

Vice President

Associate General Counsel

Director of Litigation

Random House, Inc.

1540 Broadway

New York, New York 10036

1

2 A P P E A R A N C E S: (Cont'd)

3

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5 Attorneys for Defendants

6 One South Broad Street, Suite 2100

7 Philadelphia, Pennsylvania 19107-3389

8 BY: JOANNE ZACK, ESQ.

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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 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.

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2 RICHARD SARNOFF,

3 residing at 15 West 81st Street,

4 New York, New York 10024, having been

5 first duly sworn by the Notary Public,

6 (Wendy D. Boskind), was examined and

7 testified as follows:

8

9 EXAMINATION BY

10 MS. ZACK:

11 Q. Could you state your full name for the
12 record, please.

13 A. Richard Sarnoff.

14 Q. And what is your date of birth, sir?

15 A. January 15, 1959.

16 Q. You currently work for Random House,
17 Inc.; is that correct?

18 A. Yes, I do.

19 Q. And I gather, from your affidavit,
20 that you have been involved in the publishing
21 industry for 15 years?

22 A. Mm-hmm -- yes, sorry.

23 Q. For the court reporter's sake, you
24 have to say "Yes" or "No", not "mm-hmm" or
25 "mm-mmm" or shake the head.

1 Sarnoff

2 A. Okay.

3 Q. Also, for her sake, we have to wait
4 for each other to stop speaking, so --

5 A. Okay.

6 Q. -- in normal discourse, you may know
7 what I am going to say and start answering me
8 before I am done but, for her sake, you can't do
9 that.

10 I take it you are a college graduate?

11 A. I am.

12 Q. What year did you graduate?

13 A. 1981.

14 Q. And then did you begin your
15 employment?

16 A. Um -- I -- well, I began my employment
17 in general, not my employment at Random House,
18 so....

19 Q. Where did you work immediately after
20 college?

21 A. Immediately after college, I was a
22 free-lance writer for a couple of years.

23 Q. Did you --

24 A. Subsequent to that -- do we want to go
25 through, like, my whole resume?

1 Sarnoff

2 Q. If you would like, sure.

3 A. Subsequent to that, I worked at Warner
4 Publishing, which at that point was a subsidiary
5 of Warner Communications. Following that -- and
6 that was another couple of years. Following
7 that, I went to the Harvard Business School for
8 two years. Following that, I began my employment
9 with Bantam Doubleday Dell, which ultimately --
10 which is owned by Bertelsmann and, ultimately,
11 acquired Random House.

12 Q. Okay.

13 A. And, so, that's the connection with
14 Random House.

15 Q. Did you get a degree from Harvard
16 Business School?

17 A. Yes, I did.

18 Q. What year was that?

19 A. 1987.

20 Q. And it was after that that you joined
21 Bantam Doubleday Dell?

22 A. Yes.

23 Q. At that time, was Bantam Doubleday
24 Dell part of the Bertelsmann Group?

25 A. Yes, it was.

1 Sarnoff

2 Q. Do you know the year that Bertelsmann
3 acquired Random House?

4 A. Yeah, it was three years ago, it was
5 1998.

6 Q. So your association with Random House
7 began in 1998 when Bertelsmann acquired Random
8 House; is that correct?

9 A. That is correct.

10 Q. When you were hired in 1987 by Bantam
11 Doubleday Dell, was that your first work in
12 publishing?

13 A. No, I worked for Warner Publishing
14 previously.

15 Q. Oh, I'm sorry.

16 And that was in what time period,
17 then?

18 A. That was 1984, 1995.

19 Q. And what was your job at Warner
20 Publishing?

21 A. I had a couple of them.

22 I was involved at a title -- something
23 like manager of new product development, was my
24 final title, and then I was marketing manager for
25 new products, which at that point were audio

1 Sarnoff

2 books and other computer books, et cetera.

3 Q. Did you ever work on the editorial
4 side at Warner Publishing?

5 A. The new products job had
6 editorial -- some editorial responsibilities, but
7 it also encompassed some marketing
8 responsibilities.

9 Q. Was it more marketing than editorial,
10 would you say?

11 A. I would say yes.

12 Q. And you said the new products were
13 audio books and computer books?

14 A. Mm-hmm.

15 Q. Anything else?

16 A. We did some software.

17 Q. What type of software?

18 A. Personal organizers.

19 Q. What type of computer books?

20 A. Books on popular computer software,
21 whatever that was at the time. It was kind of
22 early, so I can't remember the exact programs.
23 Visicalc, perhaps.

24 Q. Visicalc?

25 A. Precursor to EXCEL, Lotus 1-2-3, some

1 Sarnoff

2 books like that.

3 Q. What was the subject matter of the
4 books?

5 A. How to use the programs.

6 Q. So, when you say "computer books", you
7 mean books actually about computers?

8 A. Books about how to use computer
9 software.

10 Q. And were these -- what type of books,
11 were they in printed form or --

12 A. Yeah, in printed form, mostly in
13 paperback printed form.

14 Q. What type of audio books at that time?

15 A. Audio recordings, taken from
16 abridgements of popular fiction and some
17 non-fiction.

18 Q. Was that a new product for Warner
19 Publishing --

20 A. Yes.

21 Q. -- in the Eighties.

22 Were there any -- was Warner
23 Publishing, at this time period when you were
24 there, '84, '85, approximately, selling any
25 electronic books?

1 Sarnoff

2 A. Not to my knowledge.

3 Q. Then, when you were at business
4 school, did you work at the same time or was that
5 a full-time school?

6 A. No, it was full-time.

7 Q. Did you major in something at business
8 school?

9 A. At business school, no, there was no
10 opportunity of majoring.

11 Q. Not at Harvard Business School?

12 A. (Nodding.)

13 MR. RICH: (Indicating the court
14 reporter.) You have to verbalize your
15 answer.

16 A. There was no opportunity to major in a
17 specific field at Harvard Business School.

18 Q. And then, when you joined Bantam
19 Doubleday Dell, what was your first position in
20 1987?

21 A. I wish I had brought my entire
22 resume --

23 Q. Well, generally.

24 A. It was -- I was assistant to the
25 president of the sales and marketing divisions as

1 Sarnoff

2 my first role.

3 Q. And, these questions, I am more
4 concerned about what you were doing than what
5 your titles were.

6 A. Right. I was assisting the president
7 of the sales and marketing division. And I will
8 try to roll through so you don't have to ask each
9 question.

10 Q. While you are doing that, if you could
11 give me the approximate time periods for each of
12 the periods, that would be helpful. If you
13 don't, I will come back and ask you.

14 A. Okay. You know, in general, each role
15 lasts about two years.

16 Subsequent to that, I was director of
17 planning for the sales and marketing division.
18 Subsequent to that -- and, again, that was a
19 couple of years -- subsequent to that, I was
20 director of marketing for the Bantam division,
21 Bantam publishing division. Subsequent to that,
22 I was vice president of strategic planning for
23 Bantam Doubleday Dell. And then my next role was
24 vice president of diversified publishing for
25 Bantam Doubleday Dell. And in that role, so you

1 Sarnoff

2 don't have to ask, I had responsibility for Dell
3 magazines division, the audio publishing
4 division, computer books publishing division, and
5 a Disney continuity series we were doing at the
6 time. Subsequent to that, I worked for a time
7 for a different division of Bertelsmann, which
8 was their professional information division.
9 That was briefer than the rest, that was about a
10 year period. And then I became senior vice
11 president of corporate development for the
12 Bertelsmann book group, which encompassed both
13 Bantam Doubleday Dell and the Book Club
14 division. Subsequent to that, I became chief
15 financial officer of Bantam Doubleday Dell, and
16 it was in that role that we acquired Random
17 House, and I became chief financial officer for
18 the combined Random House, as it was then
19 called. I maintained responsibility for
20 corporate development, as well, during that time
21 and for new media, which was begun as part of the
22 diversified publishing area in -- I can't
23 remember the exact year, it might have been 1986,
24 '87, something like that.

25 MR. RICH: '86 or '96?

1 Sarnoff

2 A. '96, '97 -- probably '96.

3 Anyway, the more recently, as in the
4 last nine months or so, I -- we hired a separate
5 CFO for Random House, and I became president of
6 the corporate development and new media group,
7 and then, a few months later, became president of
8 Random House Ventures simultaneously, and
9 continue in those capacities to today.

10 Q. Okay. In your affidavit, you say
11 president of Random House new media and corporate
12 development group. So that is one group, new
13 media and corporate development?

14 A. Mm-hmm.

15 Q. When was it that you ceased being
16 CFO? You said about nine months ago?

17 A. Yeah, it was probably August.

18 Q. When you were CFO, were you CFO for
19 the entire --

20 A. Yes, I was.

21 Q. -- Random House bank. And when
22 Mr. Green was here, he talked about big Random
23 and little Random.

24 A. Yes.

25 Q. What's the difference?

1 Sarnoff

2 A. Okay. The Random House trade division
3 is a small publishing division that is part of
4 Random House, Inc. Other publishing divisions
5 that we have are Bantam, Doubleday, Dell, Knopf,
6 Ballantine, Crown, Children's Group, et cetera.

7 Q. So big Random House is everything, all
8 the divisions?

9 A. Correct. Little Random is just one of
10 the publishing imprints.

11 And, to clarify, little Random has
12 sub-imprints, Modern Library, atRandom, which was
13 just started, I think you heard some testimony
14 about.

15 Q. That's all within little Random?

16 A. Right. Villard is another sub-imprint
17 of little Random.

18 So you can get a sense, it's like a
19 free hierarchy.

20 Q. Does Bantam have a lot of imprints,
21 too?

22 A. Yes.

23 Q. And Doubleday?

24 A. Yes.

25 Q. Dell, I take it, does also?

1 Sarnoff

2 A. Dell and Bantam are today actually in
3 one group, as of a year-and-a-half ago.

4 Q. Are these all divisions or are any of
5 them separately incorporated now, these various
6 imprints, like Bantam Dell, is that a sub- or
7 division of Random House, Inc.?

8 A. It's a division.

9 Q. Are any of the names you have
10 mentioned subsidiaries, as opposed to divisions?

11 A. No, they are all -- the ones I have
12 mentioned are divisions.

13 Q. So they are all included in the Random
14 House, Inc. financial statements?

15 A. Yes, they are.

16 Q. Do they prepare internal financial
17 statements for their own use on a monthly basis,
18 for instance at Bantam Dell, covering only the
19 Bantam Dell operations?

20 A. Bantam Dell gets certain financial
21 reports on a monthly basis.

22 Q. That cover its own operations?

23 A. That cover its own operations. Of
24 course, you can't consider those three separate
25 company financials, since there is a lot of

1 Sarnoff

2 services.

3 Q. But, for instance, on the revenue
4 side, do they keep track of their own revenues?

5 A. Yes, they do.

6 Q. And is that true, also, for little
7 Random?

8 A. Little Random has --

9 Q. Keeps track of its own?

10 A. Yeah, they get their separate revenue
11 statement.

12 Q. Do the various imprints under little
13 Random do that, too?

14 A. Some yes, some no.

15 Q. Does Modern Library keep its own
16 revenues?

17 A. Yes, Modern Library has its own
18 revenue.

19 Q. Now, your affidavit talks about the
20 eBooks that Random House, Inc., as a whole, is
21 becoming or is involved with. And I take it
22 eBooks are being published in various different
23 places, not just one division; is that correct?

24 A. Absolutely. Each publisher is
25 publishing eBooks -- eBooks, much as they publish

1 Sarnoff

2 books printed on paper.

3 Q. In terms of the cost side of preparing
4 the book for eBook distribution, is that handled
5 in the individual divisions or is that handled by
6 another group or division within Random House,
7 Inc.?

8 MR. RICH: You are asking as a matter
9 of accounting practice?

10 MS. ZACK: Well, either accounting
11 practice or practicality.

12 MR. RICH: Object to the form.

13 You can answer.

14 A. Like other book publishing, it's
15 handled -- you know, many costs are specific to
16 the imprints and some costs are shared and then
17 allocated to the division.

18 Q. Is the new media and corporate
19 development group responsible for digitizing
20 books that will be eBooks at Random House, Inc.?

21 A. To some extent, yes. The IT
22 department takes some aspects of that. And in
23 some cases the divisions, I imagine, editorial
24 and other areas divisions, take some
25 responsibility for aspects of that.

1 Sarnoff

2 Q. Since you are the CFO, as a practical
3 matter, how did you keep track of the costs of
4 digitizing eBooks?

5 MR. RICH: Object to the form.

6 You can answer.

7 A. How did we take care of it? I don't
8 understand.

9 Q. How did you account for it or know how
10 much costs you were actually incurring?

11 MR. RICH: What do you mean by "as a
12 practical matter"?

13 MS. ZACK: Oh, forget that.

14 Q. Is there anyplace in the Random House,
15 Inc. financial statements where the cost of
16 digitizing eBooks appears as a line item?

17 A. No.

18 Q. Where would it appear on the financial
19 statements?

20 A. It would appear in a number of places
21 in the -- in our IT departmental expenses to some
22 extent, in our new media expenses to some extent,
23 in departmental production to some extent, and in
24 division overhead expenses to some extent. It's
25 all -- and with marketing expenditures, it would

1 Sarnoff

2 be in our marketing line for the division.

3 Q. And is there within new media,
4 how -- do you keep track of the expenses
5 associated with a given eBook?

6 MR. RICH: Could I hear the question,
7 please?

8 (The record was read.)

9 MS. ZACK: Let me withdraw it, because
10 I didn't really mean to say "how", I changed
11 my question.

12 Q. Within new media or any other division
13 of Random House, Inc., is there a way in which
14 Random House keeps track on an eBook-by-eBook
15 basis of the costs of publishing that eBook as an
16 eBook?

17 A. You know, I don't think there is -- if
18 you are asking is there a separate P&L that lists
19 the exact cost items associated with a specific
20 eBook, the answer is no.

21 Are there roll-ups of costs associated
22 with eBooks in specific lines? There may be some
23 of those. But, again, the costs fall into
24 different buckets in different areas. So, in
25 general, the book-by-book view here of specific

1 Sarnoff

2 costs is not going to be useful to anybody and
3 not worth doing at this point.

4 Q. When you said, in your last answer,
5 you used the term "roll-ups", what did you mean
6 by that?

7 A. I mean trying to create a separate
8 P&L, like for a business, for a specific eBook.

9 Q. Have you ever attempted to do that?

10 A. Not to my knowledge.

11 Q. Have you attempted to determine the
12 costs of all eBooks?

13 MR. RICH: All eBooks that have been
14 produced? Projected to be produced?
15 Produced by Random House?

16 MS. ZACK: No, actually, eBooks that
17 have been produced by Random House.

18 MR. RICH: To date?

19 MS. ZACK: Either that have been
20 produced to date on any periodic basis,
21 whether he did it on a monthly basis, yearly
22 basis, any-book-ever-published-to-date
23 basis.

24 A. We have estimated certain costs
25 associated with eBook publishing with the

1 Sarnoff

2 infrastructure necessary to deliver eBooks
3 appropriately and with the conversion costs
4 associated with making the right formats
5 available. We do not have a separate P&L item,
6 you know, or division for eBooks, there is no
7 such thing.

8 The publishers -- you know, just to
9 reiterate, each publisher, as part of the
10 publishing program for a book, usually has some
11 eBook plans, whether they are currently executed
12 or not, associated with that publication. So if
13 we were to take a title-by-title view, we would
14 have the view of the print book and the eBook
15 together, so whatever production costs and
16 marketing costs and other things for that book
17 would apply to the title, to the book. It
18 doesn't matter whether it's in eBook format or
19 hardcover, paperback, whatever.

20 Q. You would put all the costs associated
21 with all methods of distribution --

22 A. Right.

23 Q. -- together --

24 MR. RICH: Let her finish the
25 question.

1 Sarnoff

2 A. I'm sorry.

3 Q. All the costs associated with a book,
4 however distributed, would be grouped together?

5 A. Right, if we were doing a title P&L,
6 it would take all title costs and put them in the
7 P&L.

8 Q. Now, when did Random House first
9 establish the new media and corporate development
10 group? What year was that?

11 A. Um --

12 Q. You said '96 --

13 A. Specifically, that would -- the group
14 as a -- as an independent unit, would have been
15 established when the -- when I stopped being CFO,
16 so that is last summer.

17 Q. But did you have -- whether it was
18 independent or not, did you have something called
19 new media in corporate development group?

20 A. We had a media department for -- I'm
21 sorry.

22 MR. RICH: Go ahead.

23 A. We had a new media department for some
24 years, I think since 19-- or, 1995 or 1996.

25 Q. And what at Random House is included

1 Sarnoff

2 within the responsibilities of the new media and
3 corporate development group?

4 A. Mergers and acquisitions, joint
5 ventures -- um -- certain strategic planning
6 activities -- um -- on the new media side
7 investigation of new technologies, new
8 distribution technologies, new publishing
9 platforms, new formats, and assisting the
10 publishers and the sales groups in their own
11 investigations of new technologies.

12 Q. Were you -- since this new media and
13 corporate development group was formed, in any
14 form or fashion, have you been the most senior
15 person in it within Random House?

16 A. Yes.

17 Q. Was it your idea to start that group?

18 A. Um -- originally, back in '95, or
19 whatever it was -- it was at least partially my
20 idea.

21 Q. Who else was involved in that idea?

22 A. At that point, Jack Hoeft, who was
23 president of the company, and perhaps a few
24 others.

25 Q. Who do you currently report to?

1 Sarnoff

2 A. To Peter Olson, who is COE of Random
3 House Internet.

4 Q. And how long have you reported to
5 Mr. Olson, approximately?

6 A. A couple of -- probably between a
7 month and two months.

8 Before that, I reported to Eric
9 Engstrom, who was president and COO of Random
10 House, Inc.

11 Q. And, approximately, how long did you
12 report to him?

13 A. For three years.

14 Q. And where is Mr. Engstrom now?

15 A. He is a partner in a venture capital
16 company called General Atlantic.

17 Q. Is that based in New York?

18 A. No, it's based in Connecticut.

19 Q. Now, have you ever had any editorial
20 responsibilities since you have joined Random
21 House?

22 A. No.

23 Well, I am going to have to modify
24 that. Are we talking about since I joined Random
25 House as in Bantam Doubleday Dell, the precursor

1 Sarnoff

2 company?

3 Q. Yes, I'm sorry, I should have said
4 that.

5 A. When I was running diversified
6 publishing, the editorial function reported up to
7 me, although I had no direct editorial
8 responsibility, the senior editors who would
9 report to a publisher who would in turn report to
10 me.

11 Q. And that was within the diversified
12 publishing group?

13 A. Yes.

14 Q. And -- I don't want to make you repeat
15 what you have already said -- okay.

16 You previously said that
17 that -- correct me if I am wrong -- that that
18 diversified publishing group published audio
19 books, I guess --

20 A. Yes.

21 Q. -- computer books, Dell magazines, and
22 a Disney-type product?

23 A. Mm-hmm.

24 Q. Were those computer books the same
25 type that you previously -- that you did while

1 Sarnoff

2 you were at Warner, books about computer -- how
3 computers work?

4 A. Yeah, they were somewhat less
5 mass-marketed, a bit more professional, but they
6 were books about how to use software programs,
7 how to use sophisticated software programs, for
8 the most part.

9 Q. Okay. And did that diversified
10 publishing group, while you were in it, publish
11 any eBooks?

12 A. No.

13 Q. When, to your knowledge -- well, let
14 me ask this as a predicate.

15 Are you the person within Random House
16 who is responsible or has been for publishing
17 eBooks?

18 MR. RICH: Can I hear the question,
19 please?

20 (The record was read.)

21 MR. RICH: Do you want to break that
22 up into past or present or --

23 Q. At any time, have you had any
24 responsibility for eBooks at Random House?

25 A. Well, I am going to ask you to

1 Sarnoff

2 rephrase the question, because it's a little too
3 broad.

4 Are you talking about picking titles
5 that we -- you know, picking book titles to put
6 into eBook format?

7 Q. Well, have you had any
8 responsibilities at all relating to eBooks, other
9 than as CFO, of course you had responsibility for
10 all the divisions, but any other responsibilities
11 for eBooks?

12 MR. RICH: Object to the form of that
13 question.

14 You can answer.

15 A. Um -- my responsibilities for eBooks
16 are associated with my role at new media. New
17 media's role is to provide a service function to
18 our publishers to enable them to more effectively
19 publish eBooks. And, so, therefore, you know,
20 I -- perhaps I have some responsibility but,
21 ultimately, picking which title to do when is a
22 publisher decision.

23 Q. Okay. So the decision as to which
24 eBooks to publish would not be within the new
25 media --

1 Sarnoff

2 A. Correct.

3 Q. -- that would be basically by the
4 individual imprints.

5 A. Correct.

6 Q. And you said that new media provides a
7 service function --

8 A. Yes.

9 Q. -- concerning eBooks to the various
10 imprints; is that correct?

11 A. Right.

12 Q. Okay. What service function?

13 A. Well, it ranges, depending on the
14 imprint, from a consultive capacity, like how
15 should we do this, how should we go about picking
16 which eBook formats to use for a specific book,
17 how should we go about assessing our market out
18 there for the receptiveness among consumers to
19 eBook versions of our books, how should we -- you
20 know, from a practical matter, go about
21 converting, whether using in-house resources or
22 outside services titles, into formats that can be
23 read by various devices, and how do our
24 relationships with certain vendors affect our
25 publishing strategy. Vendors could be eBook

1 Sarnoff

2 Reader providers or people playing DRM, digitized
3 rights management, or distribution functions,
4 et cetera.

5 Q. Is the service you provide always a
6 consulting service?

7 MR. RICH: Object to the form.

8 You can answer.

9 A. Is it always a consulting service? I
10 don't know.

11 Q. You said you did consulting. Does the
12 new media group ever go out and negotiate
13 contracts for your imprints concerning eBooks
14 with vendors or --

15 A. Not specific imprint-related ones, but
16 we do corporate-level relationships with --
17 whether they are retail or service provider-types
18 that are outside the company, and we also have a
19 close relationship with our IT resources within
20 the company in order to facilitate these
21 publishing programs.

22 Q. Random House has one IT department --

23 A. Yes.

24 Q. -- that services all the imprints;
25 does it?

1 Sarnoff

2 A. Yes, it does.

3 Q. Does Random House currently have the
4 internal ability to convert its books to eBook
5 format or does it have to use outside vendors?

6 MR. RICH: You can answer.

7 A. In some cases, we have the internal
8 capacity to do so.

9 It depends on the originating file
10 formats that we have stored. For most of our new
11 books, we have internal capacity to do so.

12 Q. Yes, I saw in your affidavit, you said
13 in the last two years you keep digitized
14 information, is that correct --

15 A. Yes.

16 Q. -- concerning the book?

17 What about the books that were
18 published, first published, by Random House or
19 any of its imprints prior to two years ago? With
20 respect to those books, does Random House have
21 the internal technology to convert its books to
22 eBook format or does it have to use outside
23 vendors?

24 A. Again, sometimes yes, sometimes no,
25 depends on the book.

1 Sarnoff

2 Q. What are the factors that --

3 A. The --

4 Q. -- govern?

5 A. It's whether the book was -- has been
6 stored in a file format that we can compatibly
7 convert using internal resources to -- you know,
8 to imprint or output mechanisms in the current
9 eBook formats that are out there.

10 So, I mean, if you want me to get more
11 specific I can, but that's the correct general
12 answer.

13 Q. And with respect to books published in
14 the 1960's and Seventies, did those file formats
15 permit Random House to internally convert to
16 eBook form?

17 A. Again, it depends on whether there has
18 been a recent -- what the reprint history is and
19 whether there has been a file format that's
20 relevant.

21 Q. So I take it there has to be within
22 some time period a fairly recent reprint or first
23 printing that involved the right technology, is
24 that correct, for you to change it, to convert to
25 eBook format internally?

1 Sarnoff

2 MR. RICH: Objection, to the extent it
3 purports to characterize the prior answer.

4 But you can answer the question, if
5 you understand it.

6 Q. If you don't understand, let me know.

7 A. No, I would say it's -- sometimes, you
8 know, it doesn't necessary follow.

9 Q. Have you ever seen anything in
10 writing, internally at Random House, about the
11 criteria for when Random House will convert a
12 book to eBook form internally, as opposed to
13 out-sourcing it?

14 A. Anything in writing about criteria?

15 Q. Mm-hmm.

16 A. Nothing specific I can recall.

17 Q. Anything general?

18 A. I mean, not that I can recall.

19 I am not sure what you are asking.

20 MR. RICH: All right.

21 Q. If someone from one of the imprints
22 calls you and said: I am interested in putting
23 out this title, Title X, in eBook form, do you
24 have anything in writing that you give them, in
25 terms of guidance, of what procedures they should

1 Sarnoff

2 follow with respect to putting a given book into
3 eBook form?

4 A. No, there is not -- there is not a
5 bible of -- you know, there is nothing like
6 that.

7 Generally, there are experts or
8 relationships within divisions where people have
9 gained that knowledge over time.

10 Q. So there is nothing in writing
11 concerning it?

12 A. Not that I know of.

13 Q. Did you have any input into the
14 decision by Modern Library to choose certain
15 titles to put into eBook form?

16 A. To choose certain titles?

17 Q. Mm-hmm.

18 MR. RICH: Is the question the input
19 to do it or the specific titles themselves?

20 Q. My question is, were you involved --
21 in your affidavit, you talk about the Modern
22 Library publishing a hundred titles in eBook
23 form; correct?

24 A. Yes.

25 Q. My question is, did you participate in

1 Sarnoff

2 choosing which books would be published in eBook
3 form.

4 MR. RICH: This witness personally?

5 MS. ZACK: Yes.

6 A. Generally, no. I was involved in a
7 few meetings where titles were discussed, but
8 titles were chosen by Modern Library personnel
9 themselves.

10 Q. Was there a particular person at the
11 Modern Library imprint who had primary
12 responsibility for making that choice?

13 A. I would say David Ebershoff may have
14 had primary responsibility.

15 Q. Now, I looked at the list of titles
16 that was attached to one of your exhibits. Let
17 me see if I can find it.

18 MS. ZACK: Let's mark, as Sarnoff
19 Exhibit 1, Mr. Sarnoff's affidavit without
20 the exhibits, just the affidavit.

21 (Deposition Exhibit Defendants'
22 Sarnoff 1, Mr. Sarnoff's affidavit without
23 the exhibits, dated by the notary February
24 26, 2001, was marked for identification, as
25 of this date.)

1 Sarnoff

2 MS. ZACK: And we will mark, as
3 Sarnoff Exhibit 2, five pages. This was an
4 attachment to Mr. Sarnoff's affidavit. The
5 first page is titled Modern Library to
6 publish a hundred classic titles as eBooks.

7 MR. RICH: Is this the same document,
8 Joanne, as appears as Exhibit G to his
9 affidavit?

10 MS. ZACK: Yes.

11 MR. RICH: Thank you.

12 (Deposition Exhibit Defendants'
13 Sarnoff 2, five pages, this was an
14 attachment to Mr. Sarnoff's affidavit, the
15 first page is titled Modern Library to
16 publish a hundred classic titles as eBooks,
17 the same document as appears as Exhibit G to
18 Mr. Sarnoff's affidavit, was marked for
19 identification, as of this date.)

20 Q. Let me just hand you what's been
21 marked as Sarnoff Exhibit 1.

22 Is that an affidavit that you signed
23 in this matter?

24 A. Yes.

25 Q. And it's dated, by the notary,

1 Sarnoff

2 February 26, 2001. Is that the day you signed
3 it?

4 A. Yes.

5 Q. Is this an affidavit that you drafted
6 or did someone draft it for you?

7 A. I drafted it together with my legal
8 team.

9 Q. Okay. Referring you to Sarnoff
10 Exhibit 2 --

11 A. Yes.

12 Q. -- this refers to the Modern Library
13 imprint of Random House trade group; correct?

14 A. Yes.

15 Q. And listed here are a hundred titles
16 to be published by Modern Library in eBook form;
17 is that correct?

18 MR. RICH: Are you asking him whether
19 he can confirm that the list contains
20 exactly a hundred titles?

21 MS. ZACK: No.

22 MR. RICH: I think that was the burden
23 of your question, at least as I heard it.

24 MS. ZACK: Well --

25 A. There are a hundred titles listed.

1 Sarnoff

2 Q. Have they been published in eBook
3 form?

4 A. As far as I know, yes.

5 Q. Well, when you say as far as you
6 know --

7 A. I haven't downloaded each one.

8 Q. Okay. But to your understanding --

9 A. Yes.

10 Q. -- as an executive at Random House --

11 A. Yes.

12 Q. -- that these hundred titles have been
13 published in eBook form; correct?

14 A. That is my understanding.

15 Q. And was it an accident that a hundred
16 titles were picked or was that purposely that a
17 hundred titles were picked?

18 Did you sit down and say: Let's
19 publish a hundred titles? Or did you say: Let's
20 publish these five Jane Austin books, and somehow
21 it just magically added up to a hundred?

22 MR. RICH: First of all, objection to
23 form. I think the "you" is confusing.

24 First of all, I think we should
25 establish whether this witness made the

1 Sarnoff

2 decision at all.

3 MS. ZACK: I will withdraw the

4 question.

5 Q. Who decided to publish Modern Library

6 titles in eBook form at Random House? If you

7 know.

8 A. It was the Modern Library team and the

9 executives associated with that team.

10 Q. And were you -- do you know what

11 criteria they used to choose the titles that they

12 did choose to publish that are listed here in

13 Sarnoff Exhibit 2?

14 A. What criteria they used?

15 Q. Mm-hmm.

16 A. Um -- I would say no.

17 I can speculate, I don't know for a

18 fact.

19 MR. RICH: We don't want you to

20 speculate.

21 Q. We don't want you to speculate.

22 You said you participated in some

23 meetings. Based on your knowledge from talking

24 to people and attending meetings, my question is

25 do you know what criteria they used.

1 Sarnoff

2 MR. RICH: Knowledge, not
3 speculation.

4 Subject to that, you can answer.

5 A. I don't know for a fact what criteria
6 were used to make these selections.

7 I did participate in a meeting, and
8 contributory criteria may have come up in that
9 meeting. And my understanding was the sales
10 pattern associated with Modern Library titles was
11 considered in selecting these.

12 Q. Were titles that were selling more or
13 less copies chosen to be chosen?

14 MR. RICH: Or less than?

15 MS. ZACK: Others.

16 MR. RICH: You can answer.

17 Objection to form.

18 A. I would say titles and authors who
19 were selling more rather than less were selected.

20 Q. So titles and/or authors who were
21 selling more in hardback or paperback than other
22 authors were selected for eBook publications; is
23 that correct?

24 A. That is correct.

25 Q. And just because somebody may have

1 Sarnoff

2 answered this question, but I am not sure, does
3 the Modern Library print in hardback and
4 paperback?

5 A. Generally in paperback only, although
6 they may have occasionally printed some
7 hardbacks.

8 Q. And in consideration --

9 A. Oh, excuse me. I said it the wrong
10 way.

11 Modern Library publishes in both
12 hardcover and paperback.

13 Q. Okay.

14 A. It's not occasional, they publish
15 regularly in hardcover and paperback.

16 THE WITNESS: I don't know what I was
17 thinking.

18 Q. And when you say that authors who had
19 a good pattern of sales were selected, was
20 that -- was there a certain time period of sales,
21 recent sales or sales over the life of the book,
22 or what time period?

23 A. Again --

24 MR. RICH: If you know.

25 A. -- I am not positive which criteria

1 Sarnoff

2 were used in the title selection.

3 Q. Did you ever see anything in writing
4 concerning what criteria were used?

5 A. No, I did not.

6 Q. Or anything in writing concerning the
7 consideration as to which books to publish out of
8 the Modern Library's group?

9 A. No, again, because Modern Library
10 itself was making decisions.

11 Q. And did you personally, or through --
12 in your supervisory capacity at new media --

13 A. Mm-hmm.

14 Q. -- assist the Modern Library in any
15 way with respect to the publication of these
16 books in eBook form?

17 A. Yes.

18 Q. And those are service functions you
19 previously mentioned?

20 A. Yes.

21 Q. Did Modern Library use an outside
22 vendor to convert or did it do it internally at
23 Random House?

24 A. Mostly, this was through the use of an
25 outside vendor for these hundred books, I believe

1 Sarnoff

2 more than one outside vendor.

3 Q. And now, to your knowledge, Modern
4 Library sells these eBooks over the Internet; is
5 that correct?

6 A. Yes.

7 Q. What distribution channels do you use
8 for the eBooks?

9 A. For these (indicating) titles, we use
10 what I would consider traditional eBook
11 distribution channels, which involve channels
12 that sell these same books in print form, such as
13 Barnes & Noble.com and Amazon as well as certain
14 non-traditional channels that were set up
15 associated with this program -- um -- such as
16 The Jane Austin Society, and I think we actually
17 have this in the affidavit, which
18 non-traditional -- uh --

19 Q. Shakespeare.com?

20 A. Shakespeare.com, et cetera.

21 Q. Does Random House have its own
22 web site for selling eBooks?

23 A. For selling eBooks?

24 Q. Yes.

25 A. No, we don't sell any books, whether

1 Sarnoff

2 they are in eBook format or in print format
3 through our own web site, we refer to other web
4 sites for those sales.

5 Q. Does Random House, to your knowledge,
6 have any plans to develop its own web sites for
7 actual direct-to-consumer sales of eBooks?

8 A. No concrete plans to do so.

9 Q. In the case of a Modern Library book
10 that is sold -- eBook, that is sold by Barnes &
11 Noble.com, what revenue -- revenues, if any, does
12 Random House get from such a sale?

13 MR. RICH: Let me simply advise the
14 witness that if, in answering any of these
15 questions, you believe that this information
16 is of a confidential nature, you should
17 advise me and then we will place that
18 testimony on an appropriate non-public
19 record.

20 MS. ZACK: Okay.

21 A. Okay.

22 THE WITNESS: Okay.

23 MR. RICH: I would like to hear the
24 question back, now that I gave my little
25 statement.

1 Sarnoff

2 (The record was read.)

3 A. Again, Barnes & Noble.com is a
4 retailer --

5 Q. Mm-hmm.

6 A. -- that in some cases -- well, Barnes
7 & Noble.com perhaps does its business with Random
8 House -- perhaps in some cases goes through
9 third-party distributors to get the eBooks
10 through to the consumer, and in either case
11 Random House gets a share of the revenue from the
12 sale of the book based on the discount policy
13 with that either retail or distributor channel.

14 The discounts are between 45 and
15 50 percent.

16 Q. Of what?

17 A. That is, Random House would capture
18 between 50 -- between 50 and 55 cents out of
19 a -- off of the electronic cover price of the
20 title.

21 Q. Charged by the retailer or distributor
22 to the consumer?

23 A. No.

24 Q. In other words, let me --

25 A. This is an electronic list -- I'm

1 Sarnoff

2 sorry, go ahead.

3 Q. Let me give you -- I don't want to
4 misunderstand, go around and around on this,
5 let's take eBooks.

6 Hypothetically, this could be a
7 totally wrong price, say it sells for \$10, for
8 ease of computation.

9 MR. RICH: Sells to the consumer for
10 \$10?

11 MS. ZACK: Yes.

12 A. Yes.

13 Q. It's listed on Barnes & Noble.com's
14 web site \$10 to the consumer. It's a Modern
15 Library eBook.

16 A. Mm-hmm.

17 Q. All right. If you know, of that \$10,
18 assume it actually comes in, the consumer
19 actually pays the \$10 to Barnes & Noble.com,
20 what, if any, revenues does Random House receive?

21 A. In that case, Random House would
22 receive between \$5 and \$5.50.

23 Q. Okay.

24 A. But you need to draw the distinction
25 here, the price to -- that the consumer pays is

1 Sarnoff

2 not always the same as the list price of the
3 title, because retailers can discount and
4 discount to the consumer, and Random House does
5 not have control over discounts that retailers
6 put into practice.

7 (Discussion off the record.)

8 Q. So what Random House gets, 50 to 55
9 cents on the dollar for every collected dollar by
10 Barnes & Noble, would that be --

11 A. Incorrect.

12 Q. What's incorrect about that?

13 A. Because, again, Barnes & Noble might
14 discount to the consumer. Random House gets 50
15 to 55 cents on the list price dollar, which may
16 not relate to what the consumer ultimately pays.

17 Q. So Random House actually gets 50 to 55
18 cents of the list price dollar --

19 A. That is our current terms.

20 Q. -- even if the consumer receives a
21 discount.

22 A. Correct.

23 Q. So Random House's revenues from Barnes
24 & Noble do relate to the published list price;
25 correct?

1 Sarnoff

2 A. They relate to the -- yes, the
3 published list price of the electronic version of
4 the book.

5 Q. Okay. And I know you said that's
6 generally the case, so that would be, that 50 to
7 55 cents on the dollar, is that generally the
8 case for all your channels of distribution with
9 respect to eBooks?

10 A. That is generally the case.

11 Q. Now, in your affidavit, you talk about
12 Random House's recent -- fairly recent
13 announcement that it would -- with respect to
14 eBooks -- have a royalty rate of net 50, 50,
15 to -- between Random House and authors; is that
16 correct?

17 A. Yes, 50 percent of net receipts to
18 Random House.

19 Q. And what is it net of?

20 A. Well, it is net of -- it's the receipt
21 that Random House receives from a retailer or a
22 distributor, that is, the dollars that not
23 necessarily the consumer pays or the list price
24 has, but the dollars that we receive --

25 Q. Yes.

1 Sarnoff

2 A. -- from the retailer or from the
3 distributor for the work, and that's basically
4 it.

5 The only distinction that is worth
6 saying is if there is a term of sale with a
7 retailer associated with the sale of that title
8 that generates a co-op payment, cooperative
9 advertising payment, that also would be deducted
10 from the net receipts since that liability is
11 generated through the sale of the product.

12 It's another payment to the retailer,
13 in other words.

14 Q. All right. Well, let's assume that
15 that doesn't apply in my hypothetical and there
16 is no co-op payment --

17 A. Okay.

18 Q. -- and that the net receipt on the \$10
19 book that we previously spoke about to Random
20 House from Barnes & Noble, for ease of
21 computation, let's say it was \$5.

22 A. Mm-hmm.

23 Q. Under your understanding of the
24 announced royalty, how would the \$5 be allocated
25 between Random House --

1 Sarnoff

2 A. \$2.50 -- sorry.

3 Q. -- and the author?

4 A. \$2.50 for Random House and \$2.50 to
5 the author in that scenario.

6 Q. Okay.

7 MR. RICH: Do you need a break?

8 THE WITNESS: Yeah, we can break.

9 (Recess taken.)

10 Q. Referring you to this Exhibit 2, this
11 is a press release issued by Random House; is it
12 not?

13 A. Yes, by Random House Printing, I
14 believe.

15 Q. In other words, this is not a
16 newspaper article, this is an actual document
17 that Random House prepared and distributed to the
18 press; correct?

19 A. Yes.

20 Q. And on the second page, Mr. Ebershoff
21 is quoted, and he is, I understand from your
22 prior answer, associated with the Modern Library;
23 correct?

24 A. Yes.

25 Q. Did he have a title, that you are

1 Sarnoff

2 aware of, in July of 2000 at Modern Library?

3 A. Publishing director, or something

4 along those lines.

5 I don't remember the specific title

6 well enough to swear to it, but....

7 Q. But would it be fair to say he is on

8 the editorial side?

9 A. Yes.

10 Q. Now, AtRandom.com, is that a division

11 or a subsidiary?

12 MR. RICH: I --

13 A. That's --

14 MR. RICH: -- will --

15 MS. ZACK: Of Random House, Inc.

16 A. It's a division of Random House trade,

17 which itself is a division of Random House, Inc.

18 Q. And is that a division -- was it set

19 up to publish eBooks?

20 A. It was set up to publish new eBooks,

21 yes.

22 Q. And, when you say "new eBooks", you

23 mean by that books that have not previously been

24 published in any format before?

25 A. Correct.

1 Sarnoff

2 Q. And when was that AtRandom.com
3 division established at Random House, Inc.?

4 A. I can't remember the exact day.

5 Q. The year would be satisfactory.

6 A. One year ago, approximately, maybe a
7 bit before that, but I think a year ago, about.

8 Q. Now, in the various documents attached
9 to your affidavit --

10 A. Yes.

11 Q. -- it appears to me, from the
12 documents, that Random House first published
13 eBook -- the first published eBooks, in the year
14 2000; is that correct?

15 A. No, that's incorrect.

16 Q. Okay. When was the first eBook
17 published by Random House?

18 A. About three years ago.

19 Q. And do you know what book it was?

20 MR. RICH: The very first one?

21 MS. ZACK: The very first book
22 published by Random House.

23 A. I can't remember what the title was.

24 There were a number of them published at the same
25 time.

1 Sarnoff

2 Q. And who published them? Which
3 division?

4 A. Well, let's see. There were I believe
5 a couple of divisions involved.

6 Perhaps -- let's see -- I am trying to
7 go back to what those titles were to figure this
8 out. Fodors may have been one.

9 Q. Fodors?

10 A. "Fodors Travel Guides", I believe the
11 "Memoirs of a Geisha", which was published by
12 the Modern Library, Knopf division.

13 There were others, there was probably
14 several divisions.

15 Q. And do you believe that that -- the
16 first book or books were published about three
17 years ago?

18 A. It might have been two-and-a-half
19 years ago.

20 Q. Was it '97/'98 time period?

21 A. Certainly '98.

22 Q. Okay.

23 A. I don't think eBooks existed in '97 in
24 the company.

25 Q. Have you personally ever negotiated a

1 Sarnoff

2 publishing contract with an author or agent for

3 an author?

4 A. Have I personally?

5 MR. RICH: Whether at Random House or

6 otherwise?

7 MS. ZACK: Yes.

8 A. Um -- yes, I have.

9 Q. Was that --

10 A. Not frequently, (smiling).

11 Q. Have you done that since you have been

12 at Bertelsmann/Random House?

13 A. Very occasionally.

14 Q. Did you do it at Warner?

15 A. Not really -- again, very

16 occasionally.

17 The editors usually did that at

18 Warner.

19 Q. Can you recall a specific author or

20 agent for an author that you did negotiate a

21 contract with since you have been at Bertelsmann

22 or Random House?

23 A. Are we talking about a book contract?

24 Q. Yes.

25 A. No.

1 Sarnoff

2 Q. "No" you can't recall a specific
3 author or agent?

4 A. No, I mean, I --

5 Q. Or "no" that you haven't done that?

6 A. I haven't done that.

7 I mean, the first time you asked for
8 contracts and the second time it was book
9 contracts.

10 Q. Okay. So that was my lack of
11 clarity.

12 Have you ever negotiated -- to be
13 clear, have you ever negotiated a contract for a
14 book with an author or agent for an author?

15 A. Are we talking about at Random House
16 now or prior?

17 Q. At Bertelsmann/Random House.

18 A. At Bertelsmann/Random House --
19 uh -- no.

20 Q. How about at Warner?

21 A. Yes, a few at Warner.

22 Q. Can you recall any specific author or
23 author's agent that you negotiated a book
24 contract with while you were at Warner?

25 A. Yeah, I mean, this is going way back

1 Sarnoff

2 there, but I can recall a couple of --

3 Q. We are going back to '84/'85?

4 A. Right. A couple of mass-market
5 computer book deals that I made.

6 Q. Did you negotiate with a specific
7 author?

8 A. Author's agent.

9 Q. Agent. So you said you negotiated a
10 couple, you can recall a couple contracts.

11 A. Mm-hmm.

12 Q. Any others while at Warner?

13 A. No, those were the ones --

14 Q. Okay. What about before you were at
15 Warner?

16 A. As a free-lance writer, you mean?

17 Q. Yes.

18 A. I negotiated -- I was mostly a writer
19 in the magazine arena, not in the book arena, I
20 negotiated some for myself.

21 Q. You did?

22 A. I was not represented by an author's
23 representative.

24 Q. Those were not book contracts?

25 A. No, one was a part of a book -- there

1 Sarnoff

2 was a part of a book.

3 Q. I see, part of a collection or
4 anthology?

5 A. Yes.

6 Q. Do you consider yourself to have
7 expertise in the area of book contracts?

8 MR. RICH: What do you mean? How
9 would you define "expertise" for this
10 purpose?

11 Q. That you have expert knowledge.

12 A. I wouldn't say expert knowledge. I
13 have some familiarity as an executive of the
14 company with such contracts.

15 Q. To your knowledge, has Random House
16 published any eBook of a work written by an
17 author who signed a contract with Random House
18 prior to 1990? First signed a contract with
19 Random House prior to 1990.

20 MR. RICH: Could I hear the question?

21 (The record was read.)

22 MR. RICH: Objection to the form.

23 Your question could encompass any work
24 by any author who had signed such a
25 contract. I take it your question was

1 Sarnoff

2 respecting the works covered by such a
3 pre-1990 contract.

4 MS. ZACK: The same work, covering the
5 same work, yes.

6 MR. RICH: Do you understand the
7 question?

8 THE WITNESS: I do understand the
9 question.

10 A. I can't answer the specific. I
11 believe we probably have, but I don't know any
12 specific title that I can cite.

13 Q. And have you personally participated
14 in any negotiations with book authors concerning
15 eBooks?

16 A. With book authors?

17 Q. Or agents for the authors.

18 A. Have I personally? No.

19 Q. Now, referring you to the Exhibit 2,
20 one of the books listed in the hundred titles
21 that Modern Library has or intends to publish in
22 eBook form is "Ragtime" by E.L. Doctorow.

23 A. Yes.

24 Q. Do you know which -- did any of the
25 Bertelsmann or Random House imprints publish that

1 Sarnoff

2 book in print copy format any time?

3 MR. RICH: "Print copy" meaning paper
4 version?

5 MS. ZACK: Paper.

6 A. Okay.

7 MR. RICH: Was that your question?

8 MS. ZACK: Yes.

9 A. Print on --

10 Q. Let me restate it, just for clarity.

11 Did any of the Random House or
12 Bertelsmann imprints publish "Ragtime" in
13 hardcover or paperback at any time, to your
14 knowledge?

15 A. I believe so.

16 Q. And which division or imprint?

17 A. I believe it was Random House trade
18 group, little Random.

19 Q. And was it originally printed --
20 published by Modern Library or some other
21 imprint?

22 A. I don't know.

23 Q. Have you ever seen the contracts
24 between Random House and Mr. Doctorow?

25 A. No, I have not.

1 Sarnoff

2 Q. Is Mr. Doctorow receiving royalties
3 with respect to "Ragtime" as an eBook?

4 A. I don't know anything specific about
5 his royalties. I have never seen his royalty
6 statement. I don't know whether he has still
7 unearned or what the story is.

8 Q. Have you seen royalty statements for
9 any of the books at issue in this case?

10 A. Royalty statements?

11 MR. RICH: Royalty statements?

12 A. No, I haven't reviewed royalty
13 statements, no, no.

14 Q. Have you reviewed royalty statements
15 with respect to the "Confessions of Nat Turner"?

16 A. No.

17 Q. Or any of the other books by
18 Mr. Styron, Vonnegut, and Mr. Parker at issue in
19 this case?

20 A. No, I haven't -- I mean, I have not
21 reviewed any specific author royalty statements
22 that are in this case.

23 Q. Do you know how much revenue Random
24 House has or any of its divisions -- I mean, when
25 I say "Random House" now -- never mind.

1 Sarnoff

2 A. Random House, Inc.

3 Q. Do you know how much Random House
4 and/or Bertelsmann or any of its divisions have
5 received from the sale of Mr. Vonnegut's books
6 over the years?

7 MR. RICH: That's a compound
8 question.

9 You are saying and/or any of its
10 divisions, are you saying cumulatively? A
11 particular division?

12 MS. ZACK: Total, because it was
13 published by Dell which became part of
14 Bertelsmann which became part of Random
15 House.

16 Q. So, I don't care, all I want to know,
17 whoever recorded the royalties, have you ever
18 seen a statement of the total royalties earned
19 over the years of Mr. Vonnegut's books.

20 A. I have not seen such a statement.

21 In my testimony, I alluded to the
22 total number of copies sold and, from that, you
23 can make certain assumptions about average prices
24 and come up with some theories on how much
25 royalty might have been paid over that time.

1 Sarnoff

2 Q. How about, have you seen any documents
3 that would show the revenues received by
4 Bertelsmann/Random House or any of its divisions
5 from the sale of Mr. Vonnegut's books?

6 A. I have not personally seen those,
7 although, again, if you look at the number of
8 copies sold and make some assumption about prices
9 you could, theoretically, come up with revenues.

10 Q. Is that something that you do -- have
11 done in your business?

12 A. I haven't done it personally.

13 I mean, it's an exercise anyone can
14 do.

15 Q. Anyone who knows how to do it; right?

16 A. Right.

17 Q. And you know how to do it?

18 A. Again, it's fairly simple math, you
19 make assumptions about retail price and then
20 about discount, what the revenues would be
21 associated with the title.

22 Q. You would agree, wouldn't you, that
23 based on the numbers of copies sold of
24 Mr. Styron's books, that those books have been
25 profitable to Random House; correct?

1 Sarnoff

2 MR. RICH: Could I hear the question,
3 please?

4 (The record was read.)

5 MR. RICH: Do you have any particular
6 definition of "profit" in mind in connection
7 with that question?

8 Q. Mr. Sarnoff, do you know what the word
9 "profit" means?

10 A. There are -- again, since these are
11 not separate companies, these books, you know,
12 there are a lot of ways to define "profit".

13 I am happy to address any way you
14 would like.

15 Q. Well, how did you address it within
16 Random House when you were CFO?

17 MR. RICH: This --

18 A. Whether a title was profitable?

19 Q. Yes.

20 A. You take all the formats of that
21 title, whether they are hardcover, paperback,
22 electronic, et cetera, whatever the print is, you
23 know, on paper or on the screen, although these
24 books we haven't published yet in electronic, and
25 you take the costs that you can identify

1 Sarnoff

2 associated with those titles -- with that title,
3 manufacturing costs and marketing costs and such
4 things, and then you take a percentage of the
5 company's overhead structures, whether those are
6 information technology, financial, distribution
7 sales, et cetera and, you know, when you ascribe
8 certain of those percentages you then end up with
9 a profit number at the bottom or a loss. A lot
10 of that depends on how high the percentages are
11 of central costs that you ascribe to a title.

12 And the way publishing works, we have enormous
13 numbers of titles that we pay advances for that
14 don't earn out the advances.

15 Q. Right.

16 A. Therefore, those titles are
17 unprofitable on their face regardless of what
18 percentage you ascribe to them because,
19 essentially, the author payments outweigh any
20 possible revenue stream or profit stream from the
21 books. Those titles that sell enormous numbers
22 of copies, more than were expected at the time of
23 purchase, usually contribute to profit and defray
24 the losses of all that other publishing work that
25 had been done that wasn't profitable and then,

1 Sarnoff

2 hopefully, at the end of the day, one balances
3 the other, and you end up with a little bit of
4 net profit at the end of the publishing program.

5 Q. That's Random House's hope; right?

6 A. That's every publisher's hope.

7 Q. Now, have you seen done at Random
8 House a profit statement for a given book?

9 A. I have.

10 Q. Now, I take it that there is some rule
11 of thumb about how many copies you sell before
12 you make a profit; is that correct?

13 A. Absolutely not --

14 Q. So --

15 A. -- because it all depends on the
16 author's advance and other elements, not just on
17 how many copies you sell.

18 Q. Now, taking what you know about the
19 advances paid to the authors, let's say
20 Mr. Styron --

21 A. Mm-hmm.

22 Q. -- do you know whether the books have
23 been profitable, his books have been profitable,
24 at Random House?

25 MR. RICH: "His books" generally? The

1 Sarnoff

2 ones that we have enumerated?

3 MS. ZACK: The ones at issue in this
4 case.

5 A. The ones at issue in this case, my
6 expectation would be that they would be
7 profitable as having been very successful
8 titles.

9 I don't -- you know, again, you could
10 develop a case that outsize levels of overhead
11 costs should be burdened against the successful
12 titles since they need to pay for all of the
13 unsuccessful ones that are published because the
14 publishing game is that not all of your titles
15 are successful. If you publish a wide variety of
16 literature, you will have many more unsuccessful
17 than successful ones, the successful ones need to
18 pay for the unsuccessful ones.

19 Q. I understand that. But, based upon
20 the analysis you have done concerning the
21 profitability of books, which I assume you do at
22 Random House, when you pick a book you are not
23 picking it to be unprofitable; are you?

24 MR. RICH: You do not need to, unless
25 you fully agree with it, subscribe to the

1 Sarnoff

2 examiner's informal testimony. The examiner
3 is to pose a question, not have a dialogue.

4 MS. ZACK: Please restrain yourself
5 from objecting other than to the form,
6 Mr. Rich, as is permitted under the federal
7 rules.

8 MR. RICH: If you want to put an
9 affidavit in, you are free to do it, but I
10 would ask you to formulate questions to the
11 witness.

12 MS. ZACK: Then object to the form.

13 MR. RICH: I would like to hear the
14 question.

15 MS. ZACK: I will restate the
16 question. If you don't like it, object to
17 the form. Do not make speeches to the
18 witness, that's called "coaching", as you
19 know.

20 MR. RICH: He doesn't need coaching,
21 as you know.

22 MS. ZACK: He may not, that's why you
23 do it.

24 MR. RICH: I am trying to get a
25 roughly clean record.

1 Sarnoff

2 A. Let's keep going.

3 MS. ZACK: Yes, I don't think this
4 witness needs any help.

5 Could I hear the last question,
6 please?

7 (The record was read.)

8 Q. In other words, Random House doesn't
9 publish every book of every author that comes to
10 it and asks it to publish his or her book; do
11 they?

12 MR. RICH: Object to the form. Is
13 this the second question you want him to
14 answer?

15 MS. ZACK: This is the question that's
16 pending, sir.

17 MR. RICH: You said "in other words",
18 characterizing a prior question. Have you
19 withdrawn the prior question?

20 MS. ZACK: I have withdrawn the prior
21 question.

22 MR. RICH: Thank you.

23 A. Okay. No, Random House, like every
24 publisher, attempts to pick profitable books to
25 publish.

1 Sarnoff

2 It, however, does so in the knowledge
3 that relatively few books are truly profitable
4 and that no one has a hundred-percent batting
5 average.

6 Q. And then Random House actually does an
7 analysis of its individual titles to determine
8 whether they are profitable to Random House;
9 isn't that correct?

10 MR. RICH: May I hear the question,
11 please?

12 (The record was read.)

13 MR. RICH: You can answer.

14 A. Sometimes we do a post-publication
15 analysis of an individual title, sometimes we
16 don't.

17 Q. But Random House does do that on
18 occasion --

19 A. Yes.

20 Q. -- for certain books --

21 A. Yes.

22 Q. -- correct?

23 A. That's correct.

24 Q. And it's a methodology that's been
25 developed that Random House uses internally to

1 Sarnoff

2 determine, in its own mind, or in the minds of
3 its employees, whether a book has been profitable
4 to Random House; correct?

5 MR. RICH: Object to the form.

6 You can answer.

7 A. Yes.

8 Q. And when you answered and stated that,
9 looking at the information concerning
10 Mr. Styron's book, you believe his book was
11 profitable --

12 A. Yes.

13 Q. -- it was based on that methodology
14 that you are answering; correct?

15 MR. RICH: Object to the extent that
16 purports to characterize prior testimony.

17 You can, otherwise, answer it.

18 A. Yes.

19 Q. And I will ask you with respect to
20 Mr. Vonnegut, based on the information you have
21 concerning Mr. Vonnegut's contracts, have the
22 books by Mr. Vonnegut in issue in this lawsuit
23 been profitable to Dell, which is now part of
24 Bertelsmann and then Random House.

25 A. Again, using the definitions that were

1 Sarnoff

2 specified, yes, I would expect they would have
3 been profitable.

4 Q. What about Mr. Parker's book?

5 A. Mr. Parker's book --

6 Q. "The Promised Land", 200,000 copies.

7 A. Yes, I would expect that would be
8 profitable, as well.

9 (The following portion has been deemed
10 confidential, outside attorneys' eyes only,
11 and bound under separate cover.)

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1 Sarnoff

2

3 A. Yes.

4 Q. Have any of these authors' books been
5 published as an eBook by Random House?

6 And by "this", I mean big Random
7 House.

8 A. By big Random House -- uh -- again, I
9 am not certain.

10 I believe -- I can't be certain with
11 this author group, whether they have or not.

12 Q. I asked you previously if you ever
13 negotiated an eBook contract with an author, and
14 now I am going to ask you a related but different
15 question.

16 Have you ever discussed with any
17 author or author's agent the issue of whether a
18 book contract that you authorized with Random
19 House or any of its imprints covered eBooks.

20 A. No.

21 Q. Have you ever heard internally at
22 Random House of any such discussions that any
23 other personnel at Random House or any of its
24 imprints have had with any author or author's
25 agent?

1 Sarnoff

2 A. Have I -- I have heard that such
3 discussions have taken place.

4 Q. You have heard that such discussions
5 have taken place?

6 A. Some.

7 Q. Can you name any authors with whom
8 such discussions occurred?

9 A. No, because it was more in a
10 generic -- more generic than specifically we
11 approached some agents, and et cetera.

12 Q. And who told you that?

13 A. Different members -- usually the
14 legal -- the legal department, who is responsible
15 for contracts, et cetera.

16 Q. And can you recall any particular
17 person who -- a name with whom you had such
18 discussions?

19 A. Names of our lawyers.

20 Q. Not just the name, the name of a
21 person with whom you had such a discussion, a
22 specific name.

23 A. I'm sorry, I am not going to be
24 incredibly helpful here because, you know, if
25 there were specific names mentioned I really

1 Sarnoff

2 don't remember who the --

3 Q. No, the name of the person internally
4 at Random House that you spoke to.

5 A. Oh, sure. Mostly Harriette Dorsen.

6 Q. Is she an attorney?

7 A. She is our general counsel.

8 DI Q. And can you recall what she said to
9 you?

10 MR. RICH: Objection, and instruction
11 not to answer, invades attorney/client
12 privilege.

13 MS. ZACK: Okay.

14 Q. Now I am going to ask you a question
15 that I think can be off the confidential record.
16 Depending on your answer, we may have to go back
17 on it.

18 Are you able with respect to the
19 hundred million that's in your affidavit with
20 respect to -- how do you describe it,
21 "promoting" --

22 A. Mm-hmm.

23 Q. -- say how much of that was used to
24 promote backlist books in 2000?

25 A. I am not able, I am not sure anyone

1 Sarnoff

2 could.

3 Q. Is it fair to say that most of your
4 promotion dollars are spent on new titles?

5 MR. RICH: Object to the form.

6 You can answer.

7 Q. By "most", I mean more than
8 50 percent.

9 A. I believe so.

10 Q. Do you know if it's more than 75 spent
11 on new titles?

12 A. I don't know. I wouldn't be able to
13 give you a percentage. I believe it's more than
14 50 percent.

15 Q. Is there anybody in Random House who
16 can give that percentage?

17 A. I believe no one could.

18 Q. Why not?

19 A. Because a lot of it is spent by our
20 accounts through co-op rather than by us.

21 Q. And can you just describe, for the
22 record, what you mean by "co-op"?

23 A. Cooperative advertising money paid to
24 accounts associated with cooperative advertising
25 programs to support titles or groups of titles

1 Sarnoff

2 within the retail environment.

3 Q. Who would be an example of such an
4 account?

5 A. Barnes & Noble would be a big user and
6 a small independent bookstore would be a small
7 user.

8 Q. Now, with respect to Barnes & Noble,
9 is it your understanding that they are publishing
10 eBooks, Barnes & Noble?

11 A. Publishing eBooks?

12 Q. Yes.

13 A. Yes, my understanding is that they
14 have announced they are going to publish eBooks,
15 yes.

16 Q. Do you know if they have actually
17 published them?

18 A. I don't have personal knowledge of
19 their -- I mean, I haven't downloaded any
20 myself. My understanding is that they have
21 initiated a publishing program.

22 Q. And do you know if they have -- if
23 Barnes & Noble's has published in eBook form any
24 work that was first published in paper by Random
25 House or any of its imprints?

1 Sarnoff

2 A. I don't know for a fact, but my
3 understanding is that they have published things
4 that are either out of copyright or, you know,
5 that have reverted from publishers back to
6 original right holders, rights holders.

7 Q. And where did you get that
8 understanding?

9 A. From conversations within Random
10 House.

11 Q. And when do rights revert back to
12 authors?

13 A. Rights revert according to the
14 reversion language in the contract, at least
15 that's my understanding.

16 Q. Do you have any understanding about
17 any practice in the trade about when that occurs,
18 when rights revert?

19 MR. RICH: Are you distinguishing from
20 what may be specified in a particular
21 contract?

22 Q. Well, do you know if there is any
23 custom in the industry or standard contractual
24 language, if you are aware of any?

25 MR. RICH: Object to the form.

1 Sarnoff

2 You can answer.

3 A. When a title is out of print for a
4 certain period of time, you know, I believe the
5 standard is that the author can then request a
6 reversion in certain kinds of typical contracts.
7 That is, out of print in any format -- out of
8 print in all formats, I should say.

9 Q. And is it your understanding that the
10 publisher gives notice to the author that the
11 work is out of print in all formats and the
12 author has a right to decide whether to take a
13 reversion on the rights?

14 MR. RICH: So I understand your
15 question --

16 MS. ZACK: As a matter of practice --

17 MR. RICH: As a practice --

18 MS. ZACK: -- at Random House.

19 MR. RICH: -- initiates such a
20 notification to the author.

21 If you know.

22 A. I don't know.

23 I am not sure how different publishers
24 handle it.

25 Q. I am asking you about what Random

1 Sarnoff

2 House does.

3 A. I am not positive which way it goes,
4 whether the author initiates through receipt of a
5 royalty statement that has no new revenues on the
6 royalty statement or whether we notify someone
7 that something is out of print.

8 Q. You don't know.

9 And when is an eBook out of print?

10 A. When is an eBook out of print?

11 Q. Mm-hmm.

12 A. I imagine when it's no longer offered
13 for sale.

14 Q. When you say you "imagine", what does
15 it mean to "imagine"?

16 I mean, is that your understanding or
17 are you just speculating?

18 A. No, you know -- no, I am not
19 speculating. I am not sure this has come into
20 custom and practice since eBooks are a relatively
21 new form of books. But, the -- when an eBook is
22 no longer offered for sale or actively marketed,
23 I would expect that eBook would be then out of
24 print.

25 Q. Now, you talked about, somewhere in

1 Sarnoff

2 your affidavit, about Random House's or -- I
3 think you said Random House's plans to over the
4 next 18 months publish as eBooks approximately a
5 thousand titles; is that correct?

6 A. Yes.

7 Q. Do you have any plans beyond 18
8 months?

9 A. Sure, we will ramp along with the
10 market to publish as many titles as we think the
11 consumers want to see.

12 Q. And is this -- are you basically
13 reacting to the market?

14 Do you think there is a market demand
15 for eBooks now?

16 A. Yeah -- do I think there is a market
17 demand for eBooks? Yes, there is market demand
18 for eBooks. We are selling eBooks -- um --

19 Q. And if it turns out that the market
20 demand is smaller than you anticipated, would you
21 change your plans as to how many eBooks you would
22 publish?

23 MR. RICH: Are we now focusing on the
24 next 18-month period?

25 MS. ZACK: The future in general.

1 Sarnoff

2 MR. RICH: Presumes there is a plan in
3 place that will be changed.

4 You can answer.

5 A. We would configure our plans
6 appropriately to the market, you know -- I will
7 elaborate on this one a little bit because I
8 think it's important to understand.

9 We, as a publisher, are trying to
10 service the readers out there with the formats
11 that they would like to read in for the best
12 benefit of ourselves and our authors. And if it
13 turns out that some electronic format or more
14 than one electronic formats are ways that
15 consumers want to read these books, we will make
16 sure they get served in that -- you know, in that
17 print format or print-to-screen format, whatever
18 you are calling it.

19 If it turns out that consumers do not
20 want to experience these books -- to read these
21 books on screen and only want to read them in
22 print on paper, you know, obviously, that will
23 mean that we will plan our publication strategy
24 accordingly and perhaps not do as much or as
25 aggressive publishing in eBook format. What we

1 Sarnoff

2 know now is that, A, there is a market, it's
3 currently small but there is a growing market
4 and, B, we anticipate that market is going to be
5 very large.

6 So we have planned our publication
7 strategy accordingly.

8 Q. And can you say when it was that you
9 or Random House made the decision to publish a
10 thousand books over the next 18 months in eBook
11 format.

12 A. A thousand books over this period of
13 time, perhaps a year ago, we made -- you know,
14 set our plans in motion to do so.

15 Q. And is it fair to say that -- well,
16 let me ask you it differently.

17 Can you recall the first time since
18 you have been at Bertelsmann/Random House that
19 you participated in a meeting where eBooks or the
20 possibility of selling eBooks was discussed?

21 A. Um -- well, again, we are -- are we
22 talking about print-on-screen, reading print on
23 screens --

24 Q. Yeah.

25 A. -- as being "eBooks", even if it was

1 Sarnoff

2 delivered in a CD-ROM format versus over the
3 wire?

4 Q. Well, the definition, in your
5 contract, currently talks about a visual reading,
6 that's --

7 A. Okay. So the eBook --

8 MR. RICH: I just want to be clear if
9 the question is saying assuming that eBook
10 is defined as it is in what you term the
11 current contract when the discussions
12 encompassing that form of product first
13 occurred?

14 MS. ZACK: Mm-hmm.

15 A. Right, so that would -- actually, if
16 there were just the text of a book on a CD-ROM
17 or, for that matter, a floppy disk read on the
18 screen, that would also be a eBook; correct?

19 Q. I don't want to define it for you.

20 A. Yeah -- no, I am trying --

21 MR. RICH: You can indicate that
22 that's the --

23 Q. Really, my definition of "eBook" is
24 meaningless, I am a lawyer.

25 A. I want to make sure that I answer the

1 Sarnoff

2 question correctly because, obviously, I have
3 discussed print on screen as a way to read books
4 well before what -- you know, the current
5 versions of eBooks that we see today are -- you
6 know, have hit the market. In fact, we -- you
7 know, we did some licensing deals for things like
8 "The Pill Book", which is a publication that
9 Bantam Doubleday Dell had for CD-ROM types of use
10 of the book before the current generation of
11 eBooks was out there. So I have had many
12 conversations over many years about print on
13 screen and the experience of books through that
14 medium.

15 Q. What about eBooks as you currently
16 understand them at Random House?

17 A. Okay, eBooks to be --

18 MR. RICH: Was the question complete
19 on the record?

20 MS. ZACK: I think so.

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

23 (The record was read.)

24 Q. When did you first have internal
25 discussions about that at Random House, about

1 Sarnoff

2 marketing them at Random House?

3 A. Okay, now we are going to define it
4 first and then I will answer it.

5 EBooks as books to download to reading
6 devices, computers and other reading devices, and
7 then read the book on a screen, we have had
8 discussions about those for -- um -- I would
9 say four years or so.

10 (Deposition Exhibit Miller 4, was
11 previously marked for identification.)

12 Q. And -- well, to be fair to you, let me
13 hand you what has previously been marked as
14 Miller Exhibit 4, all right?

15 This is a Knopf contract that was
16 signed or executed November '98.

17 A. Yeah.

18 Q. It has a definition of "eBook".

19 A. Can you tell me which page?

20 Q. Yes, it's here, (indicating),
21 in -- what is this, 1, A, I, 2, if you can --
22 you can read the whole thing, but at the end you
23 will see referred to as "electronic books",
24 okay?

25 MS. STEINMAN: Off the record.

1 Sarnoff

2 A. Yes, that's perhaps different from
3 "eBooks" as we understand them today.

4 Since a few years have gone by, I am
5 not sure when this contract language was actually
6 drafted --

7 MR. RICH: No, there isn't a question
8 pending yet.

9 MS. STEINMAN: Off the record.

10 (Discussion off the record.)

11 Q. That's a contract that has a
12 definition of "electronic books"; correct?

13 A. Well, let me just read it. (Pause.)

14 Okay, the definition you are
15 describing is "work available in visual form for
16 reading including, but not limited to, electronic
17 or machine readable media or online electronic or
18 satellite-based data transmission" -- that's what
19 this says.

20 Q. And it says "referred to" in here,
21 whatever it says, "as electronic books"; correct?

22 A. It does say "referred to as electronic
23 books", absolutely.

24 Q. Okay. I am going to ask you a
25 question, if you don't know the answer you can

1 Sarnoff

2 say "I don't know", okay?

3 A. Mm-hmm.

4 Q. My question is, if you know, do you
5 have any understanding whether that definition
6 of "electronic books", which is in a Knopf
7 contract --

8 A. Right.

9 Q. -- covers CD-ROMs, books on CD-ROMs.

10 A. Okay, we are going to have to back up
11 a little bit so I can answer this question.

12 CD-ROMs have come to be known as media
13 that are capable of delivering a lot more than
14 the text. And, in fact, the typical CD-ROM, the
15 main elements are animated visual game-like
16 elements, sound, et cetera. I believe this would
17 cover CD-ROMs to the extent that the book itself
18 were in the CD-ROM, as in a book -- the book text
19 readable on the screen.

20 This would not encompass rights, for
21 example, to create and animated dramatization of
22 the book. I think that's the intent here.

23 Q. Now, you said eBooks -- you are
24 looking at a 1998 contract?

25 A. Yes.

1 Sarnoff

2 Q. And I think you said -- correct me if
3 I am wrong -- that eBooks have changed since
4 1998.

5 Am I correct about that? There has
6 been some change from 1998 to the present with
7 respect to your understanding of eBooks.

8 MR. RICH: Object to the form.

9 Q. Is that right?

10 A. Yeah, I think there -- eBooks have
11 changed, certainly, in the last three years or
12 so, and I believe our contract language may have
13 even changed with respect to eBooks.

14 Q. All right. Well, forget about the
15 contract language.

16 How has an eBook changed, in your
17 opinion, in the last three years?

18 A. Well, eBooks have evolved so that
19 there is an actual market for them where perhaps
20 three years ago there wasn't. There are new
21 reading devices that have come to market where
22 they more closely approximate in their physical
23 form factor an actual book, so you can take it
24 with you instead of sitting at a desk, for
25 example, and reading it on screen, that's fixed.

1 Sarnoff

2 You know, I don't think the act of
3 reading has changed an awful lot, if that's your
4 question. You still read text whether it's on a
5 screen or on a piece of paper.

6 Q. No, that wasn't my question.

7 My question is just what you
8 understand to be the differences in eBooks. You
9 answered the question.

10 MR. RICH: He has described the
11 evolution.

12 Q. Do you have anything further to add?

13 A. The only thing further, in the last
14 three years the capability of downloading through
15 the Internet has -- of a book has -- you know,
16 has come to be something that can be done in a
17 consumer market without too much difficulty.

18 Q. And why is that, do you think?

19 A. Development of technologies, and
20 that's about it, progress.

21 Q. Now, with respect to the difference
22 between the capability of a CD-ROM and an eBook,
23 would you agree that over the last three years
24 the ability of an eBook to have more interactive
25 features has also increased as a result of the

1 Sarnoff

2 technological changes?

3 MR. RICH: I object to the form. You
4 used "eBook" in a number of ways, you
5 encompassed within the "eBook" definition
6 CD-ROM, now you are asking him to
7 distinguish.

8 MS. ZACK: Let me restate it, it's a
9 fair objection.

10 Q. Let's talk about CD-ROMs versus an
11 Internet downloaded book that you read on a
12 screen.

13 A. Mm-hmm, yes.

14 Q. Whatever -- however you want to
15 characterize it.

16 Would you agree that over the last
17 three years that with technological advances or
18 efficiencies, whatever it may be, that the
19 interactive nature of the work on the screen has
20 increased?

21 MR. RICH: I object. I don't know
22 what you mean by "interactive nature of
23 work".

24 If you do, you may answer.

25 Q. Do you understand the question?

1 Sarnoff

2 A. I think I understand the question, and
3 I will attempt to address myself to it.

4 Q. Thank you.

5 A. The -- you know, the development of
6 Internet technologies has allowed for more
7 interactivity to be available through the
8 Internet, whether you are on a web page or doing
9 some other activity on the net itself.

10 That -- you know, that is true. Whether
11 it's -- and some of those capabilities, of full
12 motion video, et cetera, are shared with CD-ROMs
13 which are -- were given those capabilities some
14 time earlier. You know, I think that's also
15 accurate to say. I do not, however, think it's
16 accurate to say that that has in some way changed
17 eBooks, particularly backlist eBooks, you know,
18 in a fundamental way, not that I can see or
19 foresee.

20 Q. Well, I was asking you about the
21 technology.

22 A. Mm-hmm.

23 Q. You would agree that the --
24 technologically now, an eBook, whether it's a
25 backlist or a frontlist book, can be downloaded

1 Sarnoff

2 with hypertext links that take the reader of the
3 book through the Internet or web connections to
4 other places, if they choose, while they are
5 reading the book?

6 MR. RICH: Object to the form.

7 You can answer.

8 A. I think that is -- that's,
9 theoretically, possible, but the -- you know,
10 again, let's understand what that is exactly.

11 First of all, you need to be connected
12 to the Internet at the time while you are reading
13 the book, obviously on a machine that can do
14 that. And, secondly, it's the same experience
15 you would have if you were reading the book on
16 your lap and on the web and surfing for those
17 same places. You could just print the http
18 address in the book and -- you know, or in a
19 pamphlet that's attached to the book, and have
20 the same experiences.

21 You know, having -- and, actually, I
22 downloaded a Rosetta book, it turns out the
23 hyperlinks there are the kinds of things we put
24 on the flap copy of our book, or things that you
25 cannot experience or have difficulty experiencing

1 Sarnoff

2 while you are reading the book, you have to do
3 separate activity on the screen.

4 I believe over time they may get more
5 technology applied here, et cetera, but the
6 fundamental reading experience of these works
7 will not be altered.

8 Q. Can you refer to Sarnoff Exhibit 2.

9 Do you have that? This one,

10 (indicating). Here it is.

11 A. Yeah, got it.

12 Q. Now, this is the press release that
13 was issued by Modern Library.

14 And on the second page, Mr. Ebershoff
15 is quoted as saying: "But more important are the
16 options that eBook presents to the reading
17 experience." It says Mr. -- "Says
18 Mr. Ebershoff, novels like "Ulysses" with its
19 kinetic digressions and limitations in search of
20 lost time with its own internal memory, make
21 ideal eBooks. A reader can search the text in a
22 way that's never been possible on the printed
23 page", closed quote.

24 A. Yes.

25 Q. Do you agree with Mr. Ebershoff?

1 Sarnoff

2 A. Yes. I would like to describe what he
3 is saying here, though.

4 What he is saying is one of the
5 characteristics of eBooks, that is, being able to
6 search for a word, makes it easier to find a
7 particular passage or digression, you know, in
8 these long works. That's true. You are still --
9 you know, the fundamental experience of reading
10 those works is still the same.

11 Q. Well, my question is, do you agree
12 with Mr. Ebershoff's quoted statement.

13 MR. RICH: He has answered your
14 question, asked and answered.

15 Q. Is your answer "yes"?

16 MR. RICH: He didn't answer "yes", he
17 answered as he answered.

18 A. I answered as I answered.

19 Q. I am entitled to a "Yes" or "No"
20 answer.

21 MR. RICH: You are entitled to a
22 complete answer from the witness.

23 Q. You can explain --

24 MR. RICH: He said: Yes, subject to
25 my explanation.

1 Sarnoff

2 MS. ZACK: All right, I may have
3 missed that, I apologize.

4 MR. RICH: His first word was "yes",
5 subject to my explanation.

6 MS. ZACK: If he said that, fine.

7 Can you just confirm that for me?

8 MR. RICH: Let's have the beginning of
9 his prior answer read back, please.

10 (A portion of the record was read.)

11 MS. ZACK: You don't have to read the
12 rest of it.

13 Do you want to take two minutes?

14 MR. RICH: Yes, thank you.

15 (Recess taken.)

16 Q. Back to your affidavit.

17 On page 8, paragraph 18 --

18 A. Yes.

19 Q. -- you say, in the middle there,
20 that: "Random House anticipates investing
21 approximately \$10 million in the next three to
22 five years."

23 And I think, in context, that means
24 investing in eBooks; is that right?

25 A. Yes.

1 Sarnoff

2 Q. And what would you be spending -- in
3 general categories, what would you be spending
4 the \$10 million on?

5 A. In general categories, on technology
6 infrastructure to convert an archive, various
7 eBook formats, marketing money that would not
8 otherwise be spent to support additional formats
9 or distribution channels for the books, some
10 personnel costs associated with people who might
11 be dedicated to -- whether it's the production
12 process or the editorial process, associated with
13 eBooks.

14 Those would be the general categories.

15 Q. Does Random House currently have
16 personnel who are dedicated to production or the
17 editorial side of eBooks?

18 A. Yes.

19 Q. How many people?

20 A. I couldn't give you an exact number.
21 I would say on the order of more than 10 and less
22 than 20.

23 Q. And how many are on the production
24 side?

25 MR. RICH: Of the 10 to 20?

1 Sarnoff

2 MS. ZACK: Yes.

3 A. At least five people on the production
4 side, maybe a bit more.

5 Q. Are the rest all on the editorial
6 side?

7 A. No, some are on the IT infrastructure
8 side.

9 Q. So, how many would be on the IT side?

10 A. Again, this is kind of fluid, because
11 some people are doing more than one thing, but,
12 you know, if you were going -- I would say it's a
13 roughly even split between the three.

14 Q. Between production, editorial, and IT?

15 A. Yeah.

16 Q. And these are people that when -- the
17 original question was dedicated so, I mean,
18 spending most of their time --

19 A. Bulk of their time.

20 Q. And they are supporting all the
21 imprints, is that correct, that are contemplating
22 eBooks?

23 A. Except some of these people, editorial
24 people, are within the imprints.

25 Q. And if they are in an imprint, do they

1 Sarnoff

2 work on other imprints or only their own imprint?

3 A. Only their own imprint.

4 Q. All right.

5 MS. ZACK: Let me mark as Exhibit 3,
6 Sarnoff Exhibit 3, this document. It has a
7 cover dated March 28, 1994, and then a form
8 contract is attached, and it's not attached
9 to your affidavit, and the contract, the
10 form contract has nine pages.

11 (Deposition Exhibit Defendants'
12 Sarnoff 3, document, it has a cover dated
13 March 28, 1994, and then a form contract is
14 attached, it's not attached to Mr. Sarnoff's
15 affidavit, and the form contract has nine
16 pages, was marked for identification, as of
17 this date.)

18 MS. ZACK: And I believe this was
19 E-mailed to you or faxed.

20 MR. RICH: Yes, it was.

21 Q. Have you ever seen this before?

22 MR. RICH: Give him a minute to look
23 at it.

24 MS. ZACK: Yes, sure.

25 A. No, this predates my -- this was

1 Sarnoff

2 Random House before it was acquired by Bantam
3 Doubleday Dell, which I was an employee of.

4 Q. Yeah, I understand that.

5 That doesn't mean -- you could have
6 seen it.

7 A. Right, I could have, but I don't think
8 I have.

9 Q. Okay.

10 (Deposition Exhibit Miller 5, was
11 previously marked for identification.)

12 Q. Now I will hand you something that was
13 previously marked at Mr. Miller's deposition as
14 Miller Exhibit 5. It says Random House, Inc.,
15 it's a contract that appears to have been
16 executed or dated November 10, 2000.

17 A. Okay.

18 Q. You can take your time, but my
19 question is, is that a form of contract with
20 which you are familiar.

21 A. Um -- again, I don't do a lot of
22 individual title contract work, but it looks like
23 a normal book contract.

24 Q. Would you be in a position to tell me
25 whether that is the current version of the Random

1 Sarnoff

2 House contract or not?

3 A. No, I would not.

4 Q. Now, on page 4 of your affidavit, in
5 paragraph 7 --

6 A. Mm-hmm.

7 Q. -- the last two sentences, it starts:
8 "As I discuss further below".

9 Do you see that?

10 A. Yeah.

11 Q. And then you talk about Random House
12 announcing an across-the-board upward revision of
13 its author royalty rate for eBooks.

14 A. Yes.

15 Q. I may have missed it, but I looked
16 through all the attachments to your affidavit,
17 and I didn't see anything that referred to any
18 press release or -- make -- with that
19 announcement.

20 A. I am not sure we did a press release.

21 Q. Okay. So how was it announced, this
22 increase?

23 A. I think we did an internal memo. I am
24 not sure, though.

25 Mostly, it was communicated through

1 Sarnoff

2 our legal department to, you know, the agent
3 community, I guess.

4 Q. All right.

5 RQ MS. ZACK: I request a copy, if there
6 is any document that announces this, I would
7 request a copy of it.

8 I think it would have been encompassed
9 in our document request.

10 MR. RICH: We will take that under
11 advisement.

12 MS. ZACK: Okay.

13 Q. Now, did you ever participate in
14 actually deciding what royalty -- let me withdraw
15 that.

16 Did you participate at any time in
17 paying royalties for any eBooks?

18 MR. RICH: Could I hear that, please?

19 (The record was read.)

20 MR. RICH: Did this witness
21 participate personally in paying royalties?

22 Q. Well, you could have approved a
23 royalty payment or something like that.

24 A. No. I mean, the royalty statements,
25 again, would have been part of the overall

1 Sarnoff

2 royalty statement for the book.

3 Q. Mm-hmm.

4 A. I didn't look over or approve

5 individual royalty statements.

6 Q. Because it says here that you

7 announced an increase from 15 percent of eBook

8 list price to 50 percent of Random House's net

9 receipts.

10 That's what you say in your affidavit;

11 correct?

12 A. Yes.

13 Q. Did you ever personally see any

14 document where Random House was paying 15 percent

15 of eBook list price as a royalty to a specific

16 actual author?

17 A. Did I ever see one? No.

18 It's my understanding that's what our

19 previous policy and practice was, so I imagine

20 there are plenty.

21 Q. And where does that understanding come

22 from, of your previous policy and practice?

23 A. Because we generated royalty

24 statements every six months, and to the extent

25 there were eBook sales of any particular work --

1 Sarnoff

2 um -- they would have appeared on the royalty
3 statement at a 15 percent eBook -- 15 percent of
4 eBook list price, you know, for whatever period
5 that was our policy.

6 Q. That's your understanding --

7 A. Yes.

8 Q. -- correct? But you never actually
9 saw a royalty statement that reflected that;
10 right?

11 A. No, but I never saw a royalty
12 statement that didn't reflect that, either.

13 Q. I understand.

14 A. I didn't look at the individual
15 royalty statement.

16 Q. All right.

17 (Deposition Exhibit Green 4, was
18 previously marked for identification.)

19 Q. Let me show you this Dell contract
20 that appears to be dated January 4, 1995.

21 A. January 4, 1995, okay.

22 Q. And it's Green Exhibit 4.

23 And Dell was part of Bertelsmann --

24 A. Yes.

25 Q. -- or is part of Bertelsmann; correct?

1 Sarnoff

2 A. Yes.

3 Q. It's now part of Random House?

4 A. Yes.

5 Q. But in 1995 Dell was part of
6 Bertelsmann, not Random House; correct?

7 A. 1995, it was part of Bantam Doubleday
8 Dell, which was owned by Bertelsmann. Random
9 House is also owned by Bertelsmann.

10 Q. So, just so the record is clear, when
11 you said when you announced this royalty increase
12 in November 2000, Random House, was that intended
13 to cover Bantam Doubleday Dell or just Random
14 House?

15 A. When we announced the 50 percent
16 royalty?

17 Q. Yes.

18 A. That's a Random House, Inc.
19 announcement which includes Bantam Doubleday Dell
20 as well as all the Random House --

21 Q. Okay, I just wanted to make it clear.

22 A. Yeah.

23 Q. So -- I'm sorry, I only have one copy
24 of this contract, which is a Dell contract dated
25 1995. There appears to be a royalty for

1 Sarnoff

2 electronic format.

3 Do you see that, (indicating)?

4 A. "Storage and retrieval"?

5 Q. Mm-hmm.

6 A. "Storage and retrieval of the text,
7 including any visual material, in whole or in
8 part, in complete, condensed, or abridged form,
9 including microfilm, microfiche, digital media,
10 or other electronic format."

11 Q. Do you see that?

12 A. Yes.

13 Q. And you see it as a 50/50 royalties,
14 (indicating); correct?

15 A. That's not a royalty, that's a
16 subsidiary right split, I believe.

17 Q. Okay. And does that language there
18 cover electronic books?

19 A. Um --

20 Q. The language you read, the storage and
21 retrieval language.

22 A. Does it cover -- it covers the
23 sub-licensing perhaps of an electronic book or
24 version of the work. It doesn't cover the --
25 necessarily, the publication ourselves of such a

1 Sarnoff

2 work.

3 Q. And, when you say "sub-licensing",
4 what do you mean?

5 A. That means licensing the right to
6 publish to someone else, to another company.

7 Q. And is there anywhere in that
8 contract, then, where there is a royalty for
9 electronic books?

10 MR. RICH: A royalty that would
11 encompass electronic books or that
12 specifically uses the words "for electronic
13 books"?

14 MS. ZACK: That covers it.

15 MR. RICH: "Covers it", okay, fair
16 enough.

17 A. Do you want me to read this?

18 Q. This is -- I don't want you to read
19 through it, if this is not a form that you are
20 familiar with.

21 A. This --

22 MR. RICH: Wait a minute, Richard.

23 You didn't ask him a question.

24 I think it's fair to learn whether you
25 are familiar with this document.

1 Sarnoff

2 Q. Is this a form of contract that you
3 are familiar with?

4 A. Again, we have so many different forms
5 of contract, I would say I am not intimately
6 familiar with this form.

7 However, given enough time, which
8 wouldn't be a ton of time, I can probably find
9 the right place and let you know.

10 Q. Well, let me ask you this.

11 Have you ever actually physically
12 taken a contract, any of the Dell Bantam
13 Doubleday, Random House, Knopf, contracts, and
14 searched through it to find a royalty provision
15 so that you could determine what royalty should
16 be paid?

17 A. Yes, I have.

18 Q. And have you ever done that with
19 respect to eBooks?

20 A. Yes.

21 Q. Okay. And has it ever been a Dell
22 contract?

23 A. Um -- yes.

24 Q. And did you ever do that in the --
25 with respect to contracts signed in about the

1 Sarnoff

2 1995 period, as opposed to more recently?

3 A. Um -- I can't tell you exactly which
4 years that I have reviewed Dell contracts.

5 I believe there is one in this case,
6 and I have certainly reviewed that one, the
7 Seymour Lawrence, but if you would like I will go
8 through and --

9 Q. No.

10 A. -- answer your question.

11 Q. Well, based on what you have said, why
12 don't you do that.

13 A. Okay.

14 MR. RICH: The question is to identify
15 which royalty provision or provisions would
16 cover eBooks, if any.

17 MS. ZACK: If there is.

18 Q. Let me ask this as a predicate.

19 Was Dell publishing eBooks so they
20 would have had a royalty provision for eBooks in
21 1995 --

22 MR. RICH: Objection.

23 Q. -- as opposed to a subsidiary rights
24 split agreement?

25 MR. RICH: You are asking -- you are

1 Sarnoff

2 assuming that the right did not exist unless
3 they were physically publishing at that
4 point.

5 Is that what you are asking him to
6 ascribe to as the premise of your question?

7 MS. ZACK: I am asking him whether the
8 royalty existed in the contract.

9 MR. RICH: That wasn't your question.

10 MS. ZACK: Well, let me hear the
11 question. I forget what the question is.

12 A. I am --

13 MR. RICH: Hold on, please. It's
14 important to get a clear question.

15 A. I am happy to wait for a question.

16 In the meantime --

17 Q. Yes, go ahead.

18 (The record was read).

19 MR. RICH: Do you understand the
20 question?

21 MS. ZACK: Yeah, I don't -- I think
22 that's a good question.

23 MR. RICH: It's an objectionable and,
24 ultimately, inadmissible question.

25 MS. ZACK: Well, fine.

1 Sarnoff

2 MR. RICH: But if you understand it,
3 you can answer.

4 A. I will answer what I think I
5 understand.

6 Dell was not, in 1995, publishing
7 eBooks. Also, there is no specific language
8 about a royalty for eBooks which didn't exist at
9 that time in this contract. Those two things
10 may -- you know, aren't necessarily related. I
11 believe the right to publish eBooks is
12 encompassed in the granted rights language in
13 this contract which, you know, to read it,
14 says: "The proprietor hereby grants to Dell
15 during the full term of copyright in each country
16 where protected and any extension or renewal
17 thereof the exclusive license to publish or sell
18 any and all editions and/or formats of said work
19 in whole or in part throughout the world."

20 So, in that grant of rights is
21 encompassed eBooks.

22 Q. Yeah, but my question is not whether
23 there was a grant of rights, my question was is
24 there a royalty, as opposed to a subsidiary
25 rights split provision, in the contract that

1 Sarnoff

2 covers eBooks. That was my question.

3 A. No --

4 MR. RICH: Have you examined that?

5 A. I have examined that, and I don't see
6 a specific royalty for the eBook format.

7 Q. Okay. Are you familiar with the term
8 "subsidiary rights" in the publishing industry?

9 A. Yes, I am familiar with the term.

10 Q. Do you know what it means in the
11 publishing industry?

12 A. I believe so.

13 MR. RICH: You are asking him if he
14 has a general understanding as opposed to
15 his own conception?

16 You are assuming there is a general
17 understanding of the term, that's my problem
18 with the question.

19 MS. ZACK: I can't know unless I ask;
20 can I?

21 A. Yes, I believe I have an
22 understanding.

23 Q. And do you think other people in the
24 publishing industry have an understanding, too,
25 or are you the only one?

1 Sarnoff

2 MR. RICH: An understanding or the
3 same understanding?

4 Q. Have you heard a lot of persons use
5 the term "subsidiary rights"?

6 A. Yes.

7 Q. And when other people have used it,
8 has it appeared to you that the definitions --
9 that the meaning has been similar among the
10 people using the terms?

11 MR. RICH: Objection to the form.

12 You can answer.

13 A. Yes, yes.

14 Q. All right. So, do you think it's a
15 term that's used in the industry?

16 A. Yes, it's a term that's used in the
17 industry.

18 Q. What is your understanding of what it
19 means?

20 A. "Subsidiary right" is a right that's
21 granted to another company to -- in many cases,
22 publish, you know, some specific form or format
23 of the work, sometimes at the same time as
24 formats of the work are published by the original
25 rights holder and sometimes subsequent to.

1 Sarnoff

2 For example, the subsidiary right for
3 foreign sales can be sold to a foreign publisher,
4 although that publisher will be publishing
5 perhaps the same formats of the book that the
6 U.S. publisher is selling. So a "subsidiary
7 right" is part of the -- you know, it's a right
8 encompassed in the general grant of rights to the
9 original publisher, that that publisher decides
10 to sub-license subsidiary right to sub-license to
11 another company to exploit.

12 Q. Okay. And has Random House or any of
13 its imprints, to your knowledge, or Bertelsmann,
14 prior to it becoming -- Random House acquiring
15 it, sub-licensed to any entities the right to
16 publish eBooks at any time?

17 MR. RICH: I would like to hear that
18 question back, please.

19 (The record was read.)

20 A. Generally, no. But I would say on
21 some rare occasion we may have sub-licensed
22 rights to display the text of our books on
23 screens and to, you know, publish electronic
24 versions of our books.

25 Again, that will -- those deals will

1 Sarnoff

2 be few and far between. I can't really think of
3 too many of them.

4 I mentioned "The Pill Book" into a
5 CD-ROM environment is a license I am aware of.
6 There -- you know, there may have been others
7 but, in general, you know, those are publishing
8 rights that we look to exploit ourselves.

9 Q. When you were CFO, was there -- were
10 you aware of any dollar amount of revenues from
11 sub-licensing electronic storage and retrieval
12 rights?

13 A. Yes, we had some dollar revenues from
14 electronic storage and retrieval. I don't think
15 they were tremendously large, but I am not aware
16 of what the number was.

17 Q. When you say they are "not
18 tremendously large", and we are dealing with
19 over -- well, a lot of money, it's not that
20 helpful.

21 So, was it -- is it, are you talking
22 about less than seven figures?

23 A. Electronic storage and retrieval?

24 Q. Yeah.

25 A. I really don't know.

1 Sarnoff

2 I am guessing at maybe slightly less
3 than seven figures.

4 Q. Okay. Before I ask you about Barnes &
5 Noble, are you aware of any companies, other than
6 yourself, Barnes & Noble, and Rosetta Books, that
7 are publishing eBooks?

8 A. Yes.

9 Q. And are you aware of any companies
10 other than Rosetta Books that have published
11 eBooks that Random House claims are under license
12 to Random House?

13 A. No, I am not.

14 Q. So, as far as you know, there is no
15 other company, other than Rosetta Books, that
16 is -- has published any eBook that Random House
17 believes it has rights in?

18 MR. RICH: Object to the form.

19 And I would caution you, in any
20 answer, not to reveal possibly privileged
21 communications between you and counsel for
22 the company.

23 MS. ZACK: Well, I don't know how that
24 could be privileged. The attorney/client
25 privilege is to protect communications from

1 Sarnoff

2 a client to a lawyer for the purposes of
3 legal advice, not to immunize information
4 from discovery.

5 MR. RICH: I appreciate your advice on
6 that, but my caution to the witness stands.

7 A. I am not aware of another company that
8 is publishing a Random House work, you know,
9 prolonging our license to do so.

10 Q. And is it your -- I mean, I gather,
11 from Random House's papers, that it's Random
12 House's position that it has had, since the
13 Sixties and Seventies, with respect to these
14 books, I guess the Eighties, too, with respect to
15 Mr. Parker, the right to publish the works in
16 electronic form; is that your understanding?

17 A. Can you rephrase the question?

18 Q. Rephrase it?

19 A. Or just repeat it or restate it?

20 Q. Is it your understanding that Random
21 House takes the position in this litigation that
22 it has had the right to publish the works at
23 issue in this lawsuit since the day the contracts
24 were signed in eBook -- or electronic form?

25 MR. RICH: Object to the form.

1 Sarnoff

2 You can answer.

3 A. Yes.

4 Q. So since 1961, Random House has had
5 the right to publish the "Confessions of Nat
6 Turner" in electronic form; correct?

7 A. Has had the right to publish, yes.

8 Q. And has Random House published it in
9 electronic form since 1961?

10 A. Well, I am -- the answer is no, and I
11 will explain why.

12 In 1961, there was no available
13 audience for any such electronic form, nor in any
14 available technology for the delivery of this
15 text in electronic form to an audience who could
16 comfortably read it in this fashion. It's only
17 in the last several years that that capability
18 has arrived at the market.

19 Q. You will agree with me the audience
20 was there, it was just the technology that was
21 missing; right?

22 MR. RICH: Objection.

23 You can answer.

24 A. The audience to read his books were
25 there, they read the books in whatever forms were

1 Sarnoff

2 then available.

3 Q. Wouldn't you agree that the technology
4 didn't exist in 1961?

5 A. Yes.

6 Q. And it didn't exist in 1982, when
7 Mr. Parker published, either.

8 MR. RICH: Technology for?

9 MR. BONI: EBooks.

10 A. Well, the technology existed -- let's
11 make some distinctions here.

12 There have been screen technologies
13 for a long time. So, theoretically, the
14 technology of reading words on a screen has been
15 around for a long long time, perhaps even since
16 1961. You had some IBM equipment out perhaps at
17 that time that was, you know, reading text off of
18 screens.

19 My point was that it hasn't been a
20 commercially-viable way to deliver these works --
21 you know, these books to consumers until the last
22 few years, because there is no -- there hasn't
23 been a comfortable and normal technology path for
24 consumers to use to get them and to experience
25 the works.

1 Sarnoff

2 Q. And that's why Random House didn't
3 sell eBooks in the Sixties; right?

4 A. Yeah.

5 Q. Or the Seventies; right?

6 A. Right.

7 Q. Or the Eighties; right?

8 A. Right.

9 Q. Or at any time until 1998.

10 A. Right.

11 Q. Because there was no -- it wasn't
12 commercially feasible; was it?

13 A. There was no market and, in many
14 cases, not the appropriate technology to serve
15 the market.

16 Q. Do you think the average book reader
17 pays attention to which publisher publishes a
18 book?

19 A. The average --

20 MR. RICH: Pays attention for what
21 purpose?

22 MS. ZACK: For any purpose.

23 MR. RICH: In relation to a purchase
24 decision or reads --

25 Q. Does someone purchase a book because

1 Sarnoff

2 it's published by Random House or do they
3 purchase the book because they want to read the
4 work?

5 A. Again, that depends.

6 You know, Random House is a prematura
7 quality for -- I think for many readers, and
8 having a book with that imprint, you know, I
9 assume for many readers is a factor in the
10 decision to purchase. I don't know if it's the
11 guiding factor, but it certainly is -- you
12 know -- and Doubleday and other imprints, Knopf,
13 et cetera, have over the years, you know, with
14 their efforts, become a kind of lighthouse for
15 publishing and then symbol of quality for not
16 only the reader but authors and agents.

17 Q. I am not talking about authors and
18 agents.

19 I am asking about the person who goes
20 into the bookstore to buy a book. Do you think
21 their decision which books to purchase is
22 influenced by who the publisher is as opposed to
23 what the work is?

24 MR. RICH: Objection, asked and
25 answered.

1 Sarnoff

2 If you have anything to add, feel

3 free.

4 A. I will add something, which is that
5 the person's choice on buying a book is often
6 also determined by what books are available. And
7 Random House, with its relationships with
8 retailers, is -- you know, is able to get more
9 books in front of consumers, typically, and that
10 will help the consumer make a decision, as well.

11 Q. Yeah. Well, okay, let's assume -- I
12 am asking about someone in a bookstore, so they
13 are only looking at books that are there. We are
14 not talking about books that aren't there, that
15 never got there, for whatever reason --

16 A. Yeah.

17 Q. -- those books on the shelf. Is it
18 your view that the average consumer buying a book
19 decides what book to buy based on the publisher,
20 as opposed to the work?

21 MR. RICH: This is now a different
22 question --

23 MS. ZACK: All right.

24 MR. RICH: -- sighting as opposed to
25 pays attention to.

1 Sarnoff

2 MS. ZACK: If it's a different
3 question, that's what it's supposed to be.

4 MR. RICH: Well, I think, essentially,
5 you are asking the same thing over and
6 over. That's why I want to discern if it is
7 a different question.

8 MS. ZACK: I thought you said it was a
9 different question.

10 MR. RICH: I am asking you if it was a
11 different question, you said "decide" as
12 opposed to "influence".

13 MS. ZACK: Whether it's the same or
14 different, I am asking it.

15 A. I don't think typically, on average,
16 it's the deciding factor. I think it's a factor,
17 probably, not the deciding factor.

18 There are some imprints, Random House
19 and Knopf and others among them, that, again,
20 have a certain consumer appeal, and people expect
21 a level of quality from that imprint, so I think
22 a factor if not a deciding factor.

23 Q. Let me show you something that was
24 marked as Exhibit 3 to Mr. Smith.

25 (Deposition Exhibit Smith 3, was

1 Sarnoff

2 previously marked for identification.)

3 Q. Have you seen that before?

4 A. This is The New York Observer
5 article? Yes, I have seen it.

6 Q. Okay. In that -- I don't want to
7 mischaracterize it, but the article talks about
8 AtRandom.com scaling back its eBook
9 publications. Is that right or wrong?

10 A. That's incorrect. This was poor
11 reporting --

12 Q. Okay. So --

13 A. -- in my view.

14 Q. -- you think the article is
15 incorrect.

16 A. I think, yeah, most of the article is
17 incorrect.

18 It -- you know, first of all, it
19 confuses Random House with atRandom as if --

20 Q. Well, I understand that, with respect
21 to at Random.com, that is a division you
22 previously testified set up to publish eBook as
23 part of --

24 A. As part of Random House trade
25 division, which is a part of Random House.

1 Sarnoff

2 Q. I understand.

3 And the employee of Random House is
4 quoted as saying the new eBook sales --

5 A. Mm-hmm.

6 Q. -- would -- I don't want to misquote.

7 Let me see it. I only have one copy,
8 I'm sorry.

9 A. Yeah.

10 Q. Well, the -- generally, the
11 quote -- the person is quoted or reported as
12 having said, if not quoted, that AtRandom.com was
13 going to now print in paperback some of
14 the -- their books, not just eBooks; is that
15 correct?

16 A. That is correct.

17 Q. Okay.

18 A. Although that was the plan --

19 Q. That was the plan all along, okay.

20 Was there any announcement made by
21 AtRandom.com concerning their business in this
22 time period?

23 Was there any press conference or
24 press release by AtRandom.com?

25 MR. RICH: About what aspect of their

1 Sarnoff

2 business? I'm sorry.

3 MS. ZACK: Any aspect.

4 A. Was there a press release? There was
5 an opening -- you know, sort of publication
6 party. I don't know if there was a press release
7 associated with that.

8 Q. Okay. Did AtRandom.com change any of
9 its plans after it first started up with respect
10 to how many eBooks it would publish, whether it
11 would publish only eBooks or paperback books,
12 that sort of thing?

13 MR. RICH: Strikes me as a very broad
14 question.

15 You can answer.

16 Q. You can answer.

17 A. Generally, Jonathan Karp, who started
18 AtRandom.com, was a very small activity within
19 Random House, left the company, left the company,
20 was replaced in that capacity by Mary Bahr.
21 Usually, when a new person comes over, they have
22 a slightly different editorial approach. They
23 may have changed some titles or even changed the
24 pace of publishing, although I am not aware that
25 that's true.

1 Sarnoff

2 Clearly, I think what this -- what the
3 author of this article expected somehow was the
4 leading light of fiction literature and what that
5 atRandom program is about is more a non-fiction
6 niche. Non-fiction works are usually shorter
7 than, you know, typical-length novels. And, you
8 know, for whatever reason that disappointed this
9 author.

10 But I don't --

11 Q. You mean the writer of the article?

12 A. The writer of the article, yeah.

13 I don't think we varied our plans
14 enormously here. You know, if you talk about
15 disappointment in terms of sales, yeah, I think
16 there are disappointments in terms of sales all
17 over the Internet world. You know, you have been
18 reading about them in the newspapers for the last
19 six months or so. So someone may be disappointed
20 out there.

21 I don't think the corporate
22 expectation for this line was particularly large,
23 anyway, for sales of the individual books. Given
24 the size of the market today, we think some of
25 these may be successful over time.

1 Sarnoff

2 Q. Okay. Have you ever seen a report
3 done by Eccenture, E-C-C-E-N-T-U-R-E --

4 A. A-C-C.

5 Q. -- formerly Andersen Consulting,
6 concerning projections of eBook sales?

7 A. Yes, I have seen that report, or they
8 have done probably more than one, I have seen
9 them.

10 Q. Is there anything in those reports
11 that you have found to be useful to you?

12 A. All of these reports, whether they are
13 Forester or Accenture, or somebody else, they
14 project uptake curves for the appropriate
15 hardware and for the sales of individual eBooks
16 and, you know, the markets we serve for trade
17 books and, also, for educational books and
18 others, and they are interesting to read, it's
19 interesting to find out what people's opinions
20 are and why. I wouldn't say they guide our
21 strategy, necessarily, but we read them along
22 with the other industry literature to find out
23 what people think.

24 Q. Is it your view that -- you have said
25 that there is a market for eBooks?

1 Sarnoff

2 A. Yes.

3 Q. I take it that's your view?

4 A. Yes, we are selling eBooks every day.

5 Q. Have you done any internal projections
6 as to what that market will be?

7 MR. RICH: Industry-wide? Or --

8 MS. ZACK: Either for Random House or
9 industry-wide or any subset.

10 A. We haven't done real formal
11 projections of the growth of, you know -- that we
12 sort of are earmarking.

13 We have -- you know, we have some
14 scenarios of how quickly, you know, this kind of
15 market develops and the penetration of the
16 devices, et cetera, that we have done, you know,
17 over time. But mostly -- you know, I can't point
18 to any given document. I think we have done some
19 informal stuff early on.

20 Mostly, we just rely on other people,
21 like Forester, et cetera, and just use their
22 generic estimates as a guideline.

23 Q. So, is the answer that you haven't
24 really done -- you haven't done any projections
25 internally?

1 Sarnoff

2 A. We haven't sponsored any real formal
3 studies that this would result in projections.

4 Q. You testified about your revenues in
5 the last 12-month period.

6 A. Yeah.

7 Q. Have you done projections for the next
8 12-month period for eBook sales?

9 A. You know, we haven't, because eBooks
10 are not -- again, it's like doing a projection
11 for, you know, any other -- eBooks exist in the
12 individual publishing imprints, perhaps a
13 publishing imprint may be doing some
14 projections. AtRandom, I would be doing some
15 projections of its sales, but there is no
16 overarching eBook entity to project eBook, it's
17 the eBook publishers.

18 Q. Now, if it turned out in this lawsuit
19 that Random House didn't have the rights for
20 the -- under the old contracts to publish eBooks,
21 would you still publish eBooks?

22 A. If it turned out that Random House did
23 not have the rights to publish these books,
24 (indicating)?

25 Q. Yes, would you still publish other

1 Sarnoff

2 eBooks.

3 A. Uh -- yes, I believe we would.

4 Perhaps not as aggressively, because we would
5 have less -- you know, we would have less, a lot
6 fewer books to publish.

7 Q. Well, how many books -- do you know
8 how many books on your backlist are in the public
9 domain?

10 A. How many books on our backlist are in
11 the public domain?

12 Q. Yes.

13 A. No, but it's less than a thousand, and
14 our backlist is 20,000.

15 Q. And how many books are on your
16 frontlist?

17 A. We do about 3,000, 3,500 books a year.

18 Q. And, from what I have seen, electronic
19 rights are specifically included in contracts
20 beginning in about 1994 for Random House, and it
21 appears to be true for Dell; is that right?

22 MR. RICH: When you say "specifically
23 included"?

24 MS. ZACK: I mean by name, electronic
25 rights with words are in the contract.

1 Sarnoff

2 MR. RICH: If you know.

3 A. Uh -- yes, I think that's -- I know
4 the words were introduced when the technology was
5 understood to be there, so that might be about
6 the right time.

7 Q. And with respect to those books, some
8 of them are on the backlist now because they are
9 more than a year old?

10 MR. RICH: "Those books"?

11 MS. ZACK: Books published in the
12 period '94 to '99.

13 A. Yes, some are on backlist, some out of
14 print.

15 Q. So that would be about 3,500 a year on
16 that back--

17 A. No, most of our books don't actually
18 backlist, you know --

19 Q. I see.

20 A. -- over a long period of time.

21 Q. In other words, they are not still in
22 print, that's why they are not --

23 A. I would say most of the books from
24 1995 are not still in print.

25 Q. So the rights have reverted to the

1 Sarnoff

2 author.

3 A. I wouldn't be able to give you an
4 exact percentage but, you know, many of them have
5 reverted to the author, probably most have
6 reverted to the authors. Some of them may be
7 dormant, I don't know.

8 Q. Can you say for the year 1995 how many
9 works from that originally published in that year
10 are still on the backlist?

11 A. I can't tell you today.

12 We -- you know, we could dig up that
13 information if we had to.

14 Q. That information exists at
15 readily-available form at Random House?

16 A. I don't know about "readily
17 available".

18 It could be -- with some work, it
19 could be captured.

20 Q. Well, let me ask you this.

21 Since you have had so many
22 acquisitions, do you actually have an actual list
23 in one place of all the Random House backlist
24 works, no matter who originally -- what I am --
25 originally published them.

1 Sarnoff

2 MR. RICH: Objection to the form.

3 You may answer.

4 MS. ZACK: What's the form?

5 MR. RICH: Since you have got so many
6 acquisitions, I don't know what you are
7 referring to.

8 A. We have a category, it has a format to
9 both electronically and to paper to order our
10 backlist books. It has most but not all of our
11 backlist on it, because some -- you know, we
12 might have done an acquisition last week and,
13 obviously, that wouldn't have made it on
14 the -- but that form does not necessarily have
15 the original "pub" date of a book on it.

16 Q. Do you know whether it does or doesn't
17 have the original publication date?

18 A. I know the original form does not,
19 which is why it would take some work to put that
20 together.

21 Q. I see.

22 With respect to royalty rates, have
23 you ever participated in deciding what a royalty
24 rate should be for a given format?

25 A. Yes.

1 Sarnoff

2 Q. At Bertelsmann, did you do that,
3 before it was -- became --

4 A. Yes.

5 Q. Did you do that with respect to
6 hardbacks?

7 A. No, hardback royalty rates have been
8 established for a long time.

9 Q. How about paperback rights?

10 A. Yeah, in certain instances, paperback
11 rights.

12 Q. Which instances?

13 A. When we were discussing, for example,
14 trade paperback rights, as trade paperback became
15 a kind of new commercial product for the market.

16 Q. Is there a difference between a "trade
17 paperback" and some other type of paperback?

18 A. Yes. A "trade paperback" is different
19 from a "mass-market paperback" in that
20 mass-market is done in a rack size with somewhat
21 cheaper paper. These are things you will find in
22 supermarkets, airports, drugstores, et cetera. A
23 "trade paperback" is done somewhat larger in the
24 B size, somewhat better, longer-lasting paper
25 and, you know, commensurately higher price.

1 Sarnoff

2 Q. And are there -- did Bertelsmann have
3 different royalty rates for mass paperbacks
4 versus trade paperbacks?

5 A. Yes.

6 MR. RICH: Can we put a point in time
7 on this, please?

8 Q. At any time while you have been
9 there.

10 A. Yes.

11 Q. Why do you have different royalty
12 rates for the different type of paperbacks?

13 A. The underlying economics are different
14 for the different formats.

15 Q. So is the royalty rate higher or lower
16 for a mass market?

17 A. Generally, it's lower than hardcover
18 but higher than trade paperback.

19 Q. Is that because it costs more for the
20 publisher to publish a trade paperback?

21 A. To manufacture a trade paper book?

22 Q. To --

23 A. Yeah, it costs more.

24 Q. So that's why you have the lower
25 royalty rate to the author?

1 Sarnoff

2 A. Than mass-market, yes.

3 Q. Right.

4 A. Which is cheaper to produce.

5 Q. Okay. And in the Bertelsmann
6 contracts, when the trade paperback was
7 introduced, did the contracts specify a royalty
8 for mass-market paperbacks and then a separate
9 royalty for trade paperbacks?

10 MR. RICH: Can I hear the question,
11 please?

12 A. Um --

13 MR. RICH: Hold on, I want to hear the
14 question back.

15 (The record was read.)

16 A. Um -- yes.

17 However, trade paperbacks, in general,
18 were introduced before I joined. My discussions
19 on royalty rates had more to do with harmonizing
20 different royalty rates across our different
21 imprints as we acquired them.

22 Q. Mm-hmm.

23 A. So, for example, after Bantam, which
24 was owned by Bertelsmann, acquired Doubleday and
25 Dell, there was issues of harmonizing trade

1 Sarnoff

2 paperback royalties across the entire company.

3 Q. Okay. Since we have this Dell
4 original editions agreement from 1995, which was
5 marked previously as Green Exhibit 4, if I refer
6 you to page 4, (indicating), there is a -- what
7 is this, 8, paragraph 8, says "royalties", and
8 there is various sub-paragraphs, B, trade
9 paperback, and, C, mass-market paperback.

10 Do you see those?

11 A. Yes.

12 Q. And, as you previously testified,
13 there are different royalty percentages for the
14 trade paperback than for the mass-market
15 paperback; is that right?

16 A. Yes.

17 Q. And that's consistent with your
18 testimony; correct?

19 A. Yes, it is.

20 Q. Now, is "trade paperback" defined in
21 this document somewhere?

22 MR. RICH: If you know.

23 A. I don't know that it is. I don't
24 believe that it's specifically defined. But,
25 again, you know, I haven't examined this

1 Sarnoff

2 particular contract.

3 Q. Would you say that the "trade
4 paperback" is a term that is understood in the
5 publishing industry to have a certain meaning?

6 A. Yes.

7 Q. And that's the meaning you have
8 described?

9 A. Yes.

10 Q. And the same would hold true for
11 "mass-market paperback"? That is a term that
12 has a recognized meaning in the publishing
13 industry?

14 A. Yes, it does.

15 Q. Now, was all of your responsibility at
16 Bertelsmann with respect to establishing
17 royalties in the area of harmonizing after
18 acquisitions or --

19 A. Generally, yes.

20 Q. Okay. Other than that, did you
21 have -- did you ever have any other
22 responsibilities with respect to setting royalty
23 rates?

24 A. Um -- yes.

25 Q. Okay. What responsibilities?

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2 A. I had some responsibilities in audio
3 royalty rates, as we grew that program, I had
4 responsibilities in eBook royalty rates as we
5 established that program.

6 Q. Okay. And the audio royalty rates,
7 when you had responsibility for that, what time
8 period, approximately, are we talking about?

9 A. This is the time period in which I was
10 in charge of diversified publishing. It's going
11 to be in the early to mid-Nineties, mid-Nineties
12 probably.

13 Q. And audio recordings of an author's
14 work are sometimes referred to as "audio books";
15 correct?

16 A. Yes.

17 Q. Is the right to publish audio books
18 considered a subsidiary right?

19 A. Is it considered --

20 Q. By Random House.

21 A. No, it's --

22 Q. Or by Bertelsmann.

23 I guess we are talking about
24 Bertelsmann.

25 MR. RICH: The right for the publisher

1 Sarnoff

2 itself to publish, is that a subsidiary
3 right?

4 Q. Whether it's included in the
5 subsidiary rights in a contract between -- was it
6 considered part of the subsidiary rights in
7 contracts that Bertelsmann had with its authors
8 back in this time period?

9 MR. RICH: I object to the form.

10 If you understand, you can answer.

11 A. Sometimes yes, sometimes no.

12 Audio -- rights to do an audio
13 recording of a book are sometimes included in the
14 grant of rights and sometimes not. There is a
15 key difference or distinction between audio
16 rights, the rights to record an audio edition of
17 a book, on the one hand, and eBook rights or the
18 rights to just represent the book in another
19 format.

20 In an audio work, basically, you are
21 adding creative content and interpretation to the
22 original work, that is, through hiring voice
23 talent, having that voice talent interpret the
24 work in a certain way, whether it's multivoice or
25 single voice, having a producer come in and

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2 produce it, add music, et cetera, in certain ways
3 and often abridge the work so that it fits on a
4 specified length of program.

5 And, as a result, you know, audio
6 books have grown to be a separate right that's
7 sometimes granted within the context of a
8 publishing agreement and sometimes not. And for,
9 you know, our custom and practice for major
10 authors, for important authors, it's a separate
11 contract, sometimes done in a deal at the same
12 time, but a separate contract.

13 Q. Well, is it sometimes enumerated in
14 the contract but subject -- in a form contract,
15 but then subject to negotiation with the author?

16 A. Not that I am aware of.

17 Q. Did Bertelsmann ever publish its own
18 audio books --

19 A. Yes.

20 Q. -- as opposed to sub-licensing it
21 out.

22 A. Oh, we published our own audio books,
23 yes, very frequently.

24 MR. RICH: Whenever convenient, again,
25 for another five minutes.

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2 MS. ZACK: Yes, sure, any time is
3 fine.

4 (Recess taken.)

5 Q. Just going back to this Green Exhibit
6 4, this contract has this grant of rights on
7 paragraph 2 that you looked at before, but feel
8 free to look at it again.

9 A. Okay.

10 Q. Does that cover audio books?

11 A. No, it doesn't.

12 Q. And how can you tell?

13 A. Because, again, an audio version here
14 has additional creative input in it, and it's not
15 an addition or a format of the work. It's the
16 work interpreted, you know, by an actor or
17 actors, usually redacted by a professional editor
18 to conform to a time scheme and with music or
19 other sound effects often built into -- I mean,
20 it's a dramatization. And, you know, it's a part
21 dramatization, not as much as a movie, for
22 example, but it has dramatization elements.
23 There could be in this contract some
24 dramatization language, but -- we did not get
25 performance rights in this contract, performance

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2 television/radio dramatic motion picture video
3 live merchandising, we did not get. Audio
4 reporting, we did not get.

5 Q. I am not asking you about that page, I
6 am asking you about your interpretation of the
7 first page, that language, whether that in your
8 view includes audio rights.

9 MR. RICH: His answer is trying to put
10 in the context of the whole agreement his
11 understanding of your question.

12 Q. Is it necessary to read the whole
13 agreement to understand whether that clause,
14 paragraph 2, includes audio rights?

15 A. Is it necessary to?

16 Q. Yes, to look through the entire
17 agreement.

18 A. Oh.

19 Q. For instance, does the fact that you
20 see that "audio rights" were crossed out means to
21 you that audio rights were not given?

22 A. Again, my understanding of industry
23 practice is that audio rights are conveyed
24 separately, usually by way of a separate
25 contract. And, again, that may not have been the

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2 case in 1995, but that is my understanding. And
3 this (indicating) grant of rights language here,
4 you know, "has rights or license to publish any
5 and all editions and/or formats of the work",
6 again, that does not give you an opportunity to
7 add creative content to the work and publish a
8 dramatization in audio or visual format.

9 Q. Okay. So you don't -- in your
10 understanding of trade practice is that the words
11 "to publish and sell any and all editions and/or
12 formats of said work" does not include audio
13 rights; correct?

14 A. That is correct.

15 Again, it's 1995, so, you know, audio
16 was then in existence. Since it was in existence
17 and as a market that was understood, it's useful
18 to have it specified, (indicating), but my
19 understanding would be that since the author, the
20 creator of the content here, and the sole creator
21 of the content, would be granting a right to add
22 additional creative interpretational content to
23 the work itself, thereby changing the work or
24 changing the interpretation of the work, you
25 know, fundamentally as someone is reading it and

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2 interpreting all the voices, sound effects are
3 going in, editing, et cetera, and that would not
4 be conveyed with the grant of rights.

5 Q. Okay. Now, in some of -- and, again,
6 I only want you to answer if you actually have a
7 view on this -- in some of the contracts that
8 have been produced by Random House in this case,
9 there is a definition for something called an
10 "electronic version".

11 A. Yes.

12 Q. Are you familiar with that?

13 A. Yes.

14 Q. Is an "electronic version" something,
15 in your view, that's different than an
16 "electronic book"?

17 A. Yes.

18 Q. Okay. What's the difference?

19 MR. RICH: I think it would be
20 appropriate to show him a contract that
21 indicates the language you have in mind here
22 so this isn't a memory test.

23 MS. ZACK: Well, I am not trying to
24 have --

25 Q. I would like you to -- really ask you

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2 as -- apart from the contract, as a matter of
3 trade practice, do you think that those terms
4 have a set and established meaning for
5 non-lawyers working in the publishing industry.

6 MR. RICH: Let's separate a whole lot
7 out here.

8 This case is, ultimately, about
9 language in contracts, Joanne. I suppose
10 you are entitled to ask him. You are saying
11 without regard to any specific definitions
12 of any of these terms in any Random House
13 contract --

14 MS. ZACK: Correct.

15 MR. RICH: -- is there any abstract--

16 MS. ZACK: Not abstract.

17 MR. RICH: -- abstracted from any
18 contract, you are saying is there any
19 industry understanding of these terms.

20 MS. ZACK: Yes. He is not a lawyer,
21 in his business does he have an
22 understanding of what he understands a
23 difference to be between "eBook" -- I mean
24 "electronic book" and "electronic version".

25 MR. RICH: Random House practice and

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2 separate from industry practice, you can
3 answer.

4 A. Yes. And, again, I think that term
5 was generated by perhaps previous Random House
6 executives before we acquired the company, that
7 distinction, but my understanding of the
8 electronic version language is that electronic
9 versions are derivative from the work itself, are
10 not presentations of the text of the work, but
11 are things like a CD-ROM video game that might be
12 based on the text or pieces of the text in it
13 but, you know, substantially different
14 experiences from being the text. It might be a
15 role-playing game or it might be some other audio
16 visual representation. You know, in a world
17 where audio recordings were not magnetic, as they
18 have been traditionally, an "electronic version"
19 might have been the audio version of the book
20 itself.

21 The distinguishing characteristic
22 between an "electronic version" and "electronic
23 book" is that the "electronic book" fundamentally
24 is the experience of the print itself, either,
25 you know, the print itself on a screen, it could

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2 be a portable screen or a fixed screen that's
3 read in a linear fashion, i.e., you know, line by
4 line, word by word, either from start to finish
5 or, you know, a chapter at a time or a section at
6 a time from start to finish. That's
7 fundamentally a "book".

8 It's the same reading experience as
9 reading the book on a piece of paper. That's the
10 eBook. It may have a few bells and whistles, it
11 may have some search capabilities or a dictionary
12 built in or some hyperlink text to the Internet
13 or some other bell or whistle, but those are
14 additive elements. The core experience is the
15 reading of the book, just as you would in print.

16 That is not true in electronic
17 versions. The core experience is different in
18 electronic versions. The core experience may be
19 an animated game type of experience or it might
20 be -- you know, if it's an audio book, something
21 you listen to while you drive. It's not sitting
22 down and reading the text in a linear fashion.

23 I -- you know, my understanding is
24 that that -- you know, it's going to be tough to
25 draw an absolute boundary, but it should be

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2 pretty clear to, you know, anyone who has an
3 issue of trying to define one versus the other by
4 using that type of definition.

5 Q. Has Random House, Inc. published
6 anything that it -- that you or anyone else at
7 Random House has told you is an "electronic
8 version" of a book?

9 A. Yes. You know, I think we had
10 Broderbund publish some of our children's books
11 as what they call "living books", which were
12 animated versions with all kinds of interactive
13 pop-up elements, you know, for kids where the
14 text was not the driver of the experience. To
15 the extent the text was included in the
16 experience, of course, it would need to be
17 licensed from the publisher. But, fundamentally,
18 these were "electronic versions", not "eBooks".

19 Um -- you know, I think the acid test
20 here is, you know, for example, I read "Memoirs
21 of a Geisha" on a Rocket book a year ago, or 18
22 months ago, and if someone asked me: Did you
23 read "Memoirs of a Geisha", I would say, yes, I
24 read the book, I happened to read it in
25 electronic format rather than a paper format, but

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2 I read the book. If it were an electronic
3 version and there were some sort of a Geisha game
4 or, you know, other kind of dramatic
5 interpretation, et cetera, I would say, no, I
6 didn't read the book, I played the game, I -- you
7 know, I watched the movie, I did whatever.

8 Q. What if you listened to it on audio
9 book, would you consider you read the book?

10 A. No, I would say I didn't read it, I
11 listened to it. An audio adaptation. I mean,
12 obviously, you didn't use your eyes, so you
13 didn't read it.

14 Q. And do you think the content is
15 different when you hear it over the audio as
16 opposed to reading it?

17 A. Um --

18 MR. RICH: Object to the form.

19 You can answer.

20 A. Yeah, I think the content is different
21 because it's someone else's voice interpretation
22 of the work. Often it's edited, so that it's not
23 the entire work, it's selected, you know, a
24 redaction of the work.

25 Q. Some it's not redacted?

1 Sarnoff

2 A. If it's unabridged, it's still
3 someone's voice interpretations. You know, it's
4 a different experience.

5 I don't know if you listen to audio
6 books, but audio books are experienced while you
7 are doing something else. You don't sit down and
8 listen to an audio book. The studies I am aware
9 of are that you -- the primary use is while you
10 are driving, which is a time you can't actually
11 read. The second most popular use is while you
12 are exercising, running, whatever. Again,
13 generally, you can't read while you are doing
14 these activities.

15 It's not reading the book, it's
16 listening to someone -- you know, someone's voice
17 interpretation. It's dramatic as well as the
18 text.

19 Q. And is it because of the creative
20 editions that you think it's fundamentally a
21 different reading experience?

22 MR. RICH: What's the "that" in your
23 question?

24 MS. ZACK: Well --

25 Q. I am sort of summarizing a lot of what

1 Sarnoff

2 you said, but it seemed to me a thread running
3 through all your answers was that there was some
4 creative element added to the work that makes it
5 fundamentally different from the work without the
6 extra creativities. Am I correct or incorrect?

7 MR. RICH: Does this purport to be a
8 summary of his testimony or are you asking a
9 summary question? The answer is rather
10 lengthy and complex.

11 A. It's not a summary, I disagree. It's
12 several elements.

13 Yes, there is additional creative
14 content, someone's interpretation, you know,
15 voice interp or multiplier or multirole voice
16 interpretation of the text. There is a producer
17 involved who is adding music or suggesting
18 different kinds of voice characterizations,
19 et cetera. But, also, fundamentally it's a
20 different experience. You are not reading, you
21 are listening. So it's not -- I mean, it's not
22 a -- you are not reading a book --

23 Q. Right.

24 A. -- you are listening to an audio.

25 Q. Right. And do you think that whether

1 Sarnoff

2 or not something is fundamentally one experience
3 or another is rather subjective?

4 MR. RICH: Any kind of experience?

5 MS. ZACK: Yeah.

6 Q. Whether someone says it's
7 fundamentally this or -- this -- this experience
8 is fundamentally different than that experience,
9 is that somewhat subjective?

10 A. Uh --

11 MR. RICH: Objection.

12 You can answer.

13 A. Is that somewhat subjective? No.

14 I think, though, there are objective
15 standards to what's fundamentally -- you know, to
16 what's fundamental and not fundamental. That's
17 a -- is listening to an audio book fundamentally
18 reading a book? No. I mean, I think you can say
19 that you are not using your eyes, you are not
20 reading it.

21 Q. Okay. The contract I showed you
22 didn't say anything about reading, so it talked
23 about formats.

24 A. Mm-hmm.

25 Q. Now, one could argue that an audio

1 Sarnoff

2 book is a format of a book; correct?

3 MR. RICH: Is the question whether the
4 contract bears that or one could argue that
5 one could argue that?

6 I don't know what's probative about a
7 question of that sort.

8 MS. ZACK: Are you going to direct him
9 not to answer?

10 MR. RICH: No, of course not, but that
11 is not probative of anything.

12 You can answer.

13 A. Could you argue that an audio book is
14 a format of a book?

15 Q. Yes.

16 A. Yes. You could also argue that a
17 movie is a format of a book. It's all along the
18 spectrum, they are both creative interpretations
19 of a book. One is much more faithful to the
20 text.

21 But you are -- well, I mean, I will
22 end my answer there.

23 Q. But, notwithstanding, that it's clear
24 trade practice that audio books are not
25 considered formats of books; right?

1 Sarnoff

2 MR. RICH: Object to the form,
3 "notwithstanding", that is an inappropriate
4 question.

5 Q. It's a clear trade practice that audio
6 books are not considered a format of a book?

7 MR. RICH: Is your question
8 independent now of the language he was shown
9 before?

10 MS. ZACK: Independent or inclusive --

11 MR. RICH: He answered specifically in
12 the context of that Random House agreement
13 you showed him.

14 A. Is it clear --

15 MR. RICH: Wait a second, I am asking
16 for a clarification.

17 Q. I am asking --

18 MS. ZACK: Listen, contracts
19 incorporate the English language. The word
20 "format" does not change from its normal
21 meaning by being included in a contract. I
22 am asking a question about language, not
23 about a contract.

24 MR. RICH: You can ask whatever you
25 want to ask, and you are jumping all over

1 Sarnoff

2 the place, is the problem.

3 Could I hear the question back,
4 please.

5 MS. STEINMAN: Can we save time and
6 just --

7 MS. ZACK: Yeah, I can restate it.

8 MR. RICH: Thank you.

9 Q. It's your understanding that in trade
10 practice in the publishing industry an "audio
11 book" is not considered to be a format of the
12 book; is that correct?

13 MR. RICH: Object to the form.

14 You can answer, if you understand the
15 question.

16 A. Um -- "is not considered to be a
17 format of the book".

18 Q. Right.

19 A. Yes.

20 Q. "Yes", it's correct?

21 A. Yes, today, that is my understanding.

22 Q. And earlier -- well, you know, we are
23 talking about half an hour ago -- you said that
24 since audio books are now known, it's useful to
25 have language about them in the contract; is that

1 Sarnoff

2 right?

3 A. Is it useful? Yeah, it's useful.

4 I mean, basically, your contract
5 should stipulate whether you have the right to
6 publish an audio adaptation of the work or, if
7 not, you have a separate contract or, if not, you
8 don't have the rights.

9 Q. Okay.

10 (Deposition Exhibit Green 6, was
11 previously marked for identification.)

12 Q. Let me show you what was previously
13 marked as Green Exhibit 6, Random House eBook
14 discussion executive update.

15 Are you familiar with that?

16 A. Yes.

17 Q. Did you participate at all in
18 preparing that or having that prepared?

19 A. I supervised some of the people who
20 prepared it.

21 Q. And who prepared it?

22 A. Adam Smith, and he was the -- I would
23 say he was the main preparer.

24 Q. Anyone else?

25 A. Maybe John Beuse, parts of it.

1 Sarnoff

2 Q. Now, did you ask them to prepare that
3 for you?

4 A. Um -- probably. I mean, I don't
5 remember specifically asking. I mean, I remember
6 we set up a meeting, and it was clear that it
7 would be a good idea to have some presentation
8 materials.

9 Q. Who were these to be presented to?

10 A. To me and Peter Olson and Eric
11 Engstrom.

12 Q. And why did you want it to be
13 presented to you? For what purpose, for you
14 three gentlemen?

15 A. Just as an update of what we were
16 doing in the eBook arena.

17 Q. Did you, in fact, have a meeting where
18 the three of you sat and looked through this
19 together and discussed it?

20 A. Yes.

21 Q. Was that on October 24, 2000?

22 A. That was -- I assume it was. That was
23 either the preparation date or the meeting date,
24 I am not sure.

25 Q. So was anyone else present besides the

1 Sarnoff

2 three of you and Mr. Smith?

3 A. I don't believe so.

4 Q. Was Mr. Beuse there?

5 A. I don't remember. He may have been
6 there, I can't remember.

7 Q. Other than that particular document
8 which has been marked as Exhibit 6, did you look
9 at any other documents at that meeting?

10 A. I don't think so.

11 Q. Were you the one that presented this
12 or was it actually Mr. Smith?

13 A. It was mostly Adam.

14 Q. How long was the meeting?

15 A. I am sure it was under an hour, I
16 don't know exactly how long.

17 Q. Either at the meeting or as a result
18 of the meeting, did you make any decisions
19 concerning your eBook business?

20 A. No, I don't think there were -- I
21 don't know if there were any new decisions
22 undertaken, mostly a validation of what we were
23 already doing.

24 Q. Did Mr. Smith, to your knowledge, work
25 with any outside consultants in preparing that?

1 Sarnoff

2 A. In preparing this? I don't think so.

3 Q. Do you recall telling Mr. Smith that
4 you disagreed with anything that is stated in
5 that document?

6 A. Do I recall? Not specifically. There
7 may have been something, but I don't recall
8 anything specifically.

9 Q. How about Mr. Olson or Mr. Engstrom,
10 did they express to Mr. Smith or to you any
11 disagreement with the material presented in
12 Exhibit 6?

13 A. I don't specifically recall
14 disagreements.

15 Q. Did you consider this document to be a
16 fairly good summary of the status of --

17 A. Can we make sure this document is
18 privileged? By the way --

19 Q. It is, it's been marked "attorneys'
20 eyes only".

21 MR. RICH: Any testimony you feel you
22 need to give about it, we can put on the
23 record.

24 MS. ZACK: I think so far --

25 MR. RICH: In answering these

1 Sarnoff

2 questions, if you want time to review the
3 entire document, feel free to do it.

4 A. Let's hear what the questions are.

5 MR. RICH: There is a question --

6 A. I'm sorry.

7 MR. RICH: -- pending.

8 Q. Is the status of eBook publishing at
9 Random House --

10 A. At that time?

11 Q. At the time it was written.

12 A. Yes.

13 Q. Okay. Have there been any executive
14 updates since then prepared by anyone for you or
15 anyone else --

16 A. Nothing --

17 Q. -- on the same subject matter?

18 A. -- formal like this one.

19 Q. On page 3, it says under Technology
20 infrastructure --

21 A. Yes.

22 Q. First of all, what do you mean by
23 "technology infrastructure" in this document?

24 MR. RICH: Could I see it?

25 MS. ZACK: Yes.

1 Sarnoff

2 A. That is the -- these are elements of
3 our information technology that support these
4 kinds of activities, eBooks and related
5 activities.

6 Q. Okay. And it says the current Random
7 House business systems support print books.
8 Which business systems does that refer to?

9 A. That refers to, again, our information
10 technology systems. You know, these are our core
11 business process systems or our managing
12 editorial systems, our -- you know, it's our IT,
13 our information technology infrastructure we are
14 talking about.

15 Q. It says: "Enhancements are under way
16 to start preparing for eBooks".

17 What enhancements does that refer to?

18 A. Artesia teams, the content archive,
19 which was obviously under way, the 6,000 titles
20 archive, that is a digital content repository
21 that holds in a very organized structured fashion
22 the interiors of the books, the jackets of the
23 books, the marketing copy associated with the
24 books, some of the Metadata, that is, what
25 describes the book, you know, how many pages it

1 Sarnoff

2 is, et cetera, et cetera, pricing, et cetera.

3 All those things are in the archives so that they
4 can then be, you know, appropriately used for our
5 business, whether that's our business in the
6 print editions of our books or in the electronic
7 versions of our books.

8 Q. Okay. And the other, (indicating) --

9 A. Random House --

10 Q. -- enhancements are RandomHouse.com?

11 A. Yes, Random House.com is our corporate
12 web site, and we use Random House.com to
13 disseminate information to accounts as well as to
14 consumers about title availability, marketing
15 material, sample chapters, et cetera.

16 MR. RICH: Could we pause one second,
17 please?

18 MS. ZACK: Yes, sure.

19 (Telephone interruption.)

20 Q. And I think you previously testified
21 that Random House.com does not permit an
22 individual consumer to buy an eBook; right?

23 MR. RICH: Could you --

24 MS. ZACK: Well, I mean, it's not set
25 up to do that.

1 Sarnoff

2 A. No, we are set up to refer individual
3 consumers interested in eBooks to a place where
4 they can buy them, so there is information on our
5 eBooks on the site. You hit the "buy" button,
6 and it gives you a choice of places to buy.

7 Q. And that would be the choices we
8 previously discussed, it would take you back to
9 Barnes & Noble or --.com, or Amazon.com or Jane
10 Austin Society?

11 A. Or regional book sellers, there are a
12 lot of different places.

13 Q. And "editorial management system",
14 what is that?

15 A. That is our system by, you know, the
16 way that manuscripts become both printed books
17 and eBooks. This is the process they undergo of
18 editing composition, cover, et cetera.

19 Q. Somewhere in here, there is use of
20 this DRM or digital rights management.

21 A. Yes.

22 Q. What does that mean?

23 A. "Digital rights management" is an
24 envelope that sits around a digital file, like an
25 eBook, that allows companies to control the way

1 Sarnoff

2 that file is used, whether to prevent copying or
3 process the way the thing is paid or enable
4 printing or not, et cetera.

5 Q. Now, on page 10, this talks about some
6 project done by Price Waterhouse Coopers --

7 A. Yes.

8 Q. -- and Random House.

9 Did Price Waterhouse Coopers prepare
10 something in writing?

11 A. They have had a bunch of documents
12 over time.

13 PricewaterhouseCoopers is our major IT
14 integration consultant. They worked on our SAP
15 project. We use SAP for our core business
16 processes, and they have worked on linking SAP to
17 these editorial management systems and Artesia
18 systems.

19 Q. And on page 13, what does "BMG" stand
20 for?

21 A. Bertelsmann Music Group.

22 Q. Under eBook strategic assumptions, on
23 page 14, the first bullet, or whatever it is:

24 "Random House should aim to control directly or
25 through third parties the following eBook

1 Sarnoff

2 functions", and there are some listed --

3 A. Mm-hmm.

4 Q. -- one of them being "rights

5 management".

6 What does that mean?

7 A. That means we should be the --

8 in-house, we should control the attributes of a

9 work that enable things like printing at -- if

10 it's on a computer file or pricing and discount

11 or availability to some channels and not others,

12 et cetera.

13 Q. "We should be controlling" meaning

14 who?

15 A. That means -- Random House's system

16 should have some control over that so that a

17 third party can't just decide to change and

18 enable printing on our books. That's one of the

19 things that we want to keep in-house for, you

20 know, quality control as well as business control

21 reasons.

22 Q. On the channel relationship discussion

23 on page 16 --

24 A. Yes.

25 Q. -- well, "full service retailers",

1 Sarnoff

2 that would be like Barnes & Noble, et cetera;

3 correct?

4 A. Yes.

5 Q. And distributors, could you give me a

6 couple of examples?

7 A. Lightning Source, Reciprocal.

8 Q. "Affiliate"?

9 A. Might be Jane Austin Society.

10 Q. That was an affiliate?

11 A. Yes.

12 Q. What is the relationship between

13 Random House and --

14 A. Generally --

15 Q. -- and Jane Austin Society?

16 A. No relationship. Their relationship

17 would be with a distribution company that might

18 do all of the selling and downloading functions

19 for it.

20 Q. All right. So "affiliate" is sort of

21 used loosely in that --

22 A. Yeah, it's not a legal --

23 Q. Okay. And "direct", what does that

24 refer to?

25 A. That refers to direct sales to

1 Sarnoff

2 consumers, which we currently don't do, as I
3 mentioned before).

4 (Discussion off the record.)

5 Q. Page 24, about next steps, there is a
6 discussion about: "Develop and promote new eBook
7 projects and opportunities e.g. at Random", which
8 you have already discussed, then it says "Crown
9 business".

10 What is Crown business doing with
11 eBooks?

12 A. They are experimenting with a number
13 of different eBook publication projects, some
14 involving putting an eBook version out before the
15 actual book publishes, some involving
16 simultaneous publication. You know, I can't cite
17 any specifics there. But -- in October, that was
18 one of the things that was being discussed.

19 Q. Further down on that page, there is a
20 bullet that says: "Digitized backlist based on
21 market demand and rights position."

22 MR. RICH: May I see -- if you want to
23 see any of these.

24 MS. ZACK: Yeah, I'm sorry.

25 Q. What do you mean by "rights

1 Sarnoff

2 position"?

3 MR. RICH: (Indicating.)

4 A. What we mean there is -- um -- we
5 need to --

6 MR. RICH: Let me just caution you,
7 again, while you are free to answer, you
8 should not reveal any of the substance of
9 any attorney/client privilege
10 communications.

11 MS. ZACK: I am --

12 Q. Was there a lawyer at the meeting?

13 A. I don't believe there was.

14 Q. Did Adam Smith consult with a lawyer
15 when he prepared this?

16 MR. RICH: If you know.

17 A. I don't know.

18 MR. RICH: And my instruction to you
19 stands, not to reveal the substance of any
20 communications.

21 A. "Right position" here relates to the
22 successful negotiation of royalties on contracts
23 where royalties wasn't specified for electronic
24 books.

25 Q. Have there been any such successful

1 Sarnoff

2 negotiations?

3 A. Yeah, I think quite a number.

4 Q. And was there anybody in particular
5 that you know you have had such negotiations
6 successfully with?

7 MR. RICH: You mean him personally?

8 MS. ZACK: I'm sorry, Random House.

9 A. Again, I believe most authors and
10 agents are thrilled with our royalty position.

11 Q. Yeah, can you name me a specific one
12 that's thrilled?

13 A. No, that's up to our -- I mean, again,
14 I didn't personally have the conversations.

15 Q. The only question is whether you can
16 name a specific person. If you can't, you can't,
17 that's all.

18 A. I can't.

19 I defer to my colleagues who have been
20 doing this work.

21 Q. Okay. And when you say that it
22 related to contracts where there was no royalty
23 provision, you are talking about there was no
24 royalty provision that related to eBooks?

25 A. Yeah, I am saying there was no royalty

1 Sarnoff

2 provision that related to eBooks.

3 Q. So are you talking about contracts
4 entered into before 1994?

5 MR. RICH: Please testify to your own
6 knowledge and --

7 A. My own knowledge is that we were
8 (indicating) talking about those contracts where
9 we -- you know, where we were going forth with a
10 publication because we had agreed on a royalty
11 rate. Some of them would have been after any
12 date and some of them would have been before any
13 date.

14 Q. And with respect to the Styron
15 contract for "Confessions of Nat Turner", you
16 would agree that that doesn't include a royalty
17 for electronic books; right?

18 A. I would.

19 Q. And has, to your knowledge, anyone at
20 Random House ever gone back to Mr. Styron and
21 said --

22 A. Hold on. You are talking about
23 Styron?

24 Q. Styron.

25 MR. RICH: The question was Styron.

1 Sarnoff

2 A. All right. I would actually like to
3 look at the Styron contract now --

4 Q. Okay.

5 A. -- because this one -- uh --

6 Q. Which one are you looking at?

7 A. Well, let's --

8 MR. RICH: Exhibit B to his
9 affidavit.

10 A. Exhibit B.

11 Q. Yeah, that has a lot -- is that the
12 '61 contract?

13 A. Actually, I can read Exhibit A better,
14 so maybe we ought to go to that one.

15 Q. Just tell me the date of the contract.

16 A. April --

17 MR. RICH: 1961.

18 Q. And my question is, is there a royalty
19 rate that covers eBooks.

20 MR. RICH: That's what he's about to
21 answer.

22 MS. ZACK: Okay, I want to make sure
23 we are on the same page.

24 A. (Pause.)

25 Yeah, I believe there is a royalty

1 Sarnoff

2 rate in this contract.

3 Q. Yeah, which one is that?

4 A. 15 percent of the retail price for all
5 copies sold.

6 Q. Okay.

7 A. Less returns, obviously.

8 Q. Are there any contracts at issue in
9 this case where you believe there is no royalty
10 rate for electronic books --

11 A. Um --

12 Q. -- specified. In the contract.

13 A. Well -- (pause).

14 Again, it's less clear on the Dell
15 contracts that there is a specified royalty rate
16 that covers eBooks. I am looking for a royalty
17 rate that generically covers all editions of the
18 work, and I don't see it in the Dell edition, but
19 I would like to reserve judgment to read it more
20 thoroughly, because I don't really want to take
21 the time now.

22 Q. All right. Well, when I asked you
23 originally would you agree that the contracts
24 didn't cover -- didn't have a royalty provision
25 covering electronic books, you said yes, so you

1 Sarnoff

2 must have had some contract in mind.

3 MR. RICH: But then he corrected his
4 testimony. He said wait a minute --

5 MS. ZACK: No, that's when I asked him
6 about Styron.

7 A. I took the question to mean specific
8 language covering such -- you know, a specific
9 electronic rights clause.

10 There are some of our contracts, I
11 believe Styron included, that have royalty
12 language that cover, you know, editions of the
13 work that are broad enough to encompass
14 electronic works.

15 Q. All right. Referring you to that
16 Styron contract, paragraph 10 A, which I think
17 you referred to --

18 MR. RICH: Which one, the '61
19 agreement?

20 MS. ZACK: Yes.

21 (Deposition Exhibit Miller 3, was
22 previously marked for identification.)

23 Q. It was marked as Miller Exhibit 3, in
24 a clearer readable format, but it was the same
25 thing as included in Miller Exhibit 2.

1 Sarnoff

2 A. Yes.

3 Q. I think you referred me to paragraph
4 10 A and said that that royalty covers the retail
5 price for all copies sold and that covers
6 electronic books; right?

7 A. Um -- yes.

8 Q. Okay. So, retail price of all copies
9 sold covers everything; right?

10 A. Unless it's specified below, that's my
11 understanding.

12 Q. Does it say that, anywhere, that
13 "unless specified below" that's --

14 A. "Except as hereinafter set forth" it
15 says.

16 Q. No, it doesn't say that in A, it
17 says: "Publisher shall pay to the author on
18 every copy sold, less returns (except as
19 hereinafter set forth): A period a royalty of 15
20 percent of the retail price for all copies sold."

21 A. Yes.

22 MR. RICH: Hold it, I don't hear a
23 question.

24 Q. And there is nowhere in A where it
25 says "unless set forth below"; is there?

1 Sarnoff

2 A. No, but in 10 it says "except as
3 hereinafter set forth".

4 Q. Yes, that's true.

5 Now, what royalty -- do you know what
6 royalty Random House pays on vintage books -- has
7 paid to Mr. Styron over the years on vintage
8 books under this contract?

9 MR. RICH: What royalty rate?

10 MS. ZACK: Yes.

11 A. Um -- you know, I can't really read
12 this because it's (indicating) fudged out on my
13 text.

14 MR. RICH: Do you have a better
15 version of your copy here?

16 Q. (Handing document to the witness.)

17 A. Oh, yes, this is much better.

18 Okay. So, it looks like the contract
19 says 5 percent of the retail price for vintage
20 books.

21 Q. Mm-hmm.

22 A. 5 cents per copy in the Modern
23 Library -- yeah, I don't -- you know, again, this
24 is an old contract. I don't know whether this
25 has been revised since then, but I imagine that

1 Sarnoff

2 it's the vintage books royalty that governs a
3 vintage book edition of this work.

4 Q. Now, when you previously testified
5 that there were many -- I think you said
6 many -- occasions on which contracts without
7 specific -- excuse me, let me withdraw that.

8 There are many occasions in which
9 Random House was able to negotiate a contract for
10 a royalty rate for eBooks -- with an author who
11 had a contract that didn't specify such a rate;
12 is that right?

13 MS. STEINMAN: I'm sorry, could I hear
14 the question again.

15 (The record was read.)

16 MR. RICH: Objection, I think you
17 misspoke.

18 Q. Is it true that it's your
19 understanding that Random House was able, in many
20 cases, to negotiate an agreement for a royalty
21 rate for eBooks with an author who had a previous
22 contract that didn't specify an eBook royalty
23 rate?

24 A. Yes.

25 Q. Okay. And what contracts (indicating)

1 Sarnoff

2 of which imprints are we talking about?

3 MR. RICH: "What contracts"?

4 MS. ZACK: Yes.

5 Q. The prior contract that didn't specify
6 an eBook royalty rate, was it the Random House
7 imprint contracts or was it the Dell imprint
8 contracts or the Bantam or the --

9 A. I think it was several different
10 imprints contracts, many different imprints
11 contracts.

12 Q. Including Random House?

13 A. Um --

14 MR. RICH: Don't speculate, if you
15 know.

16 A. I don't know, I don't know. I believe
17 so, I don't know.

18 Q. Well, do you know of authors who are
19 Random House authors with which -- I mean, do you
20 associate certain authors as being Random House
21 authors and other authors as being Knopf authors?

22 A. Yes.

23 Q. Are you aware of any Random House
24 author with which such an agreement was reached?

25 A. No. But, then, I am not aware of

1 Sarnoff

2 any -- I mean, as I said, I am not aware
3 specifically of any individual agreements where
4 this was reached. My impression is that there
5 are enough where this was reached where it would
6 go across various different divisions of our
7 company including Random House and Knopf,
8 et cetera.

9 MS. ZACK: Didn't we ask those
10 documents be produced, if they exist?

11 MR. RICH: Which documents?

12 MS. ZACK: Documents of such
13 agreements.

14 MR. RICH: No.

15 MS. ZACK: I think we did.

16 MR. RICH: No.

17 RQ MS. ZACK: Anyway, I don't want to
18 belabor it, I will go check.

19 Anyway, I request that such agreements
20 be produced.

21 MR. RICH: Well, the request is
22 untimely, although as a formal matter we
23 will take it under consideration.

24 MS. ZACK: Maybe we will subpoena
25 them.

1 Sarnoff

2 MR. RICH: You can seek to do whatever
3 you want. We are under the limit of a court
4 order as to --

5 MS. ZACK: Well --

6 MR. RICH: -- a boundary line -- I am
7 going to finish my statement -- as to the
8 termination of discovery, which we are
9 already accommodating by this witness
10 sitting here today.

11 MS. ZACK: Well, the witness, in
12 fairness, I mean, you know, I didn't think
13 we were going to descend to this level, the
14 witness was out of town last week.

15 MR. RICH: The witness was out of town
16 because there was no notice that he was to
17 be deposed the prior week.

18 MS. STEINMAN: The witness was on
19 vacation.

20 MS. ZACK: What's the relevance of
21 this, other than to make a statement that is
22 unfair?

23 MR. RICH: I don't think we should
24 burden the witness.

25 MS. ZACK: Do whatever you choose.

1 Sarnoff

2 MR. RICH: Anything you want --

3 MS. ZACK: I am not acquiescing it was
4 or wasn't produced, that is an issue for
5 another day. That's all.

6 MR. RICH: (Gesturing.)

7 Q. Are you aware of any -- -- I think I
8 already asked that, forget it. Have you heard of
9 any negotiations with the -- respect to William
10 Faulkner, his state concerning eBook rights?

11 A. No, I am not aware of any.

12 Q. And going back to where we went off on
13 this tangent, you say in the Dell contracts:
14 "It's less clear whether there is a specific
15 royalty provision that covers eBooks in the
16 Vonnegut and Parker Delacort press contracts."

17 Is that your testimony?

18 MR. RICH: He said based on the time
19 he had sitting here to review the
20 agreements.

21 A. If you would like to take a break, and
22 I can review them in more detail.

23 Q. No, you attached the agreements to
24 your deposition.

25 Did you read them before you put your

1 Sarnoff

2 affidavit in?

3 A. Yes.

4 Q. You attached them to your affidavit
5 which you signed February 26, 2001?

6 A. Yes.

7 Q. Did you sit and read the contracts
8 before you attached them?

9 A. I did sit and read them. I obviously
10 didn't memorize them.

11 Q. Did you read them with, in your mind,
12 the notion that this was a case about eBooks?

13 MR. RICH: Objection.

14 A. Yes.

15 Q. Okay. Did you, at the time, look for
16 a royalty provision relating to eBooks in the
17 contracts when you read them?

18 A. "Look for a" -- well, I mean, I knew I
19 wouldn't find a specific eBook language in these
20 old contracts.

21 Yeah, I did scan them for what royalty
22 provisions and grant of rights provisions they
23 had, but I didn't memorize each one, so....

24 Q. Okay. Do you recall coming to the
25 conclusion when you read them, in or about

1 Sarnoff

2 February, that one or more of the contracts did
3 not have a royalty rate that covered electronic
4 books?

5 A. I recall being a little confused, you
6 know, that -- I don't recall coming to the
7 conclusion that it absolutely did not, but I
8 don't remember a ton of clarity associated with a
9 couple of the contracts, one way or another.

10 Q. Have you discussed this litigation
11 with anyone other than your counsel?

12 A. No.

13 Q. Have you discussed it with Mr. Olson?

14 A. Uh -- not really.

15 Q. With Mr. Engstrom?

16 A. Maybe briefly, as in five minutes of
17 discussion.

18 Q. Who made the decision to bring this
19 case?

20 Was it made by you?

21 A. Um -- no, I think it was primarily
22 Harriette Dorsen and our legal department. I was
23 in the discussions as to bringing the case, but I
24 believe it was driven by our legal counsel.

25 Q. How long has Ms. Dorsen been general

1 Sarnoff

2 counsel?

3 A. I don't know, maybe -- I think she has
4 been employed at least 15 years, maybe 12, 15
5 years.

6 Q. Is she over 50?

7 A. Yes, I believe she's over 50.

8 MS. STEINMAN: What relevance?

9 MS. ZACK: Well --

10 Q. Does Ms. Dorsen -- did she negotiate
11 contracts with authors in the Sixties?

12 A. Oh, in the Sixties?

13 Q. Mm-hmm.

14 A. I doubt it.

15 I don't think she was employed in the
16 industry in the Sixties.

17 Q. How about in the Seventies?

18 MR. RICH: Don't speculate.

19 A. I don't know. In the Eighties, yes.

20 Q. Was she employed by Bertelsmann prior
21 to coming to Random House?

22 A. Yes.

23 Q. Did you discuss this litigation with
24 anyone involved in the editorial side at Random
25 House?

1 Sarnoff

2 A. No.

3 Q. Have you asked any editors what their
4 understanding is of the standard contract
5 language in the various contracts of the various
6 imprints?

7 MR. RICH: In connection with this
8 litigation?

9 MS. ZACK: Yes.

10 MR. RICH: Specifically?

11 MS. ZACK: Mm-hmm.

12 A. Any editors, no.

13 Q. Have you discussed it at any time with
14 any of the editors, not in connection with this
15 litigation, their understanding of the meaning of
16 the form contract as it relates to eBooks?

17 A. With editors?

18 Q. Mm-hmm.

19 A. No.

20 Q. Do editors -- did the editors at
21 Random House negotiate contracts, to your
22 knowledge, in the Sixties and Seventies?

23 A. Yes --

24 Q. Book contracts?

25 A. Yes, they negotiated book contracts,

1 Sarnoff

2 but the -- I am not sure they negotiated the
3 specific language associated with some of the
4 things we are discussing now.

5 Q. Other than the documents attached to
6 your affidavit, did you review any other
7 documents in connection with preparing and
8 signing your affidavit?

9 A. Any other documents?

10 Q. Mm-hmm.

11 A. Um -- no, no other documents.

12 I mean, most of this stuff is from
13 just my role working -- you know, my knowledge
14 built up over time.

15 MS. ZACK: Okay, I don't have any
16 other questions.

17 MR. RICH: Why don't you give us two
18 minutes.

19 MS. ZACK: Sure.

20 (Recess taken.)

21 (Time noted: 5:16 p.m.)

22 MR. RICH: We just have one area of
23 clarification.

24 BY MR. RICH:

25 Q. Would you turn to paragraph 14 of your

1 Sarnoff

2 affidavit, please.

3 And you will note that that paragraph
4 makes reference to the numbers of copies sold of
5 the various works at issue in this lawsuit.

6 Do you see that?

7 A. Yes, I do.

8 Q. And if you turn over to page 7, at the
9 top, with respect to "Player Piano", your
10 affidavit indicates that over 20,000 copies of
11 that work had been sold.

12 Do you see that?

13 A. Yes.

14 Q. And, based on information that you
15 have subsequently learned, do you want to correct
16 that number?

17 A. Well, technically it's still true, but
18 a more accurate number would be 200,000 copies.
19 So, we should --

20 Q. And that's in combined hardcover and
21 paperback formats, to your knowledge?

22 A. Yes.

23 Q. So, effectively, your affidavit would
24 more accurately read 200,000 copies for "Player
25 Piano"; is that correct?

1 Sarnoff

2 A. Yes, it would.

3 MR. RICH: I have no further
4 questions.

5 MS. ZACK: Okay, thank you.

6 (Time noted: 5:17 p.m.)

7

8

9

10 RICHARD SARNOFF

11

12 Subscribed and sworn to before me

13 this ____ day of _____, 2001.

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C E R T I F I C A T E

STATE OF NEW YORK)
 : ss.
COUNTY OF NEW YORK)

I, WENDY D. BOSKIND, a Registered
Professional Reporter and Notary Public
within and for the State of New York, do
hereby certify:

That RICHARD SARNOFF, the witness
whose deposition is hereinbefore set forth,
was duly sworn by me, and that such
deposition is a true and accurate 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 6th day of April 2001.

WENDY D. BOSKIND, RPR

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Defendants' Sarnoff 3, document, it has a cover dated March 28, 1994, and then a form contract is attached, it's not attached to Mr. Sarnoff's affidavit, and the form contract has nine pages..... 106

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