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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOM HOUSE, INC., . .

Plaintiff, . . 01 Civ. 1728 (SHS)

v. . .

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

Defendants. . .

DECLARATION OF _____Donald K. Congdon:

1. I am President of Don Congdon Associates, Inc., 156 Fifth Avenue, Suite 625, New York, NY 10010, a literary agency which currently represents over one hundred authors including William Styron, Ray Bradbury, William Manchester, Russell Baker, Thomas Berger, David Sedaris and Ellen Gilchist.

2 . I have worked in the field of publishing in the United States for 65 years; two years as a fiction editor at Colliers Magazine, three years as an editor at Simon & Schuster and ' 60 years as a literary agent, initially for the Lurton Blassingame Agency, then beginning in 1947 , with the Harold Matson Company, and in 1983 I formed the business I am president of today.

3. During this time, I have negotiated hundreds, if not thousands, of book publishing contracts. I have personal knowledge of the trade usage of the words used in the book publishing industry in the United States, and the process by which authors convey licenses to publishers.

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

- a contract dated April 10, 1961 between Random House and William Styron and an amendment dated June 3, 1965 concerning "The Confessions of Nat Turner";
- a contract dated May 30, 1977 between Random House and William Styron and an amendment dated November 13, 1990, concerning "Sophie's Choice" and three other works, which I negotiated on behalf of my client William Styron (and as an agent with the Harold Matson Company) ;
- a contract dated March 7, 1967 between Delacorte Press and Kurt Vonnegut for three untitled novels;
- a contract dated November 20, 1970 between Delacorte Press and Kurt Vonnegut concerning four titles, the first of which is "The Sirens of Titan";
- a contract dated February 4, 1982 between Delacorte Press and Robert Parker concerning four books, the first of which is "The Godwulf Manuscript";

5. I have also read the following:

- an affidavit by Edward A. Miller dated February 23,200 1
- an affidavit of Ashbel Green dated February 26, 2001

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

7. Mssrs. Miller and Green assert that the phrase "print, publish and sell the work in book form" is intended by trade usage in the book publishing industry to convey from the author to the publisher the "electronic rights" to the author's work. By "electronic rights", I refer to distribution of the work in CD Rom format, or in multi-media format, or in "e books"or other electronic formats over the internet through the world wide web. The assertion by Mssrs. Miller and Green is incorrect. The words "print, publish and sell the work in book form" have never meant this, and do not mean this today.

8. The Styron, Vonnegut and Parker contracts listed above have not been, and are not now considered, in the book publishing industry to have conveyed any electronic rights from Mssrs. Styron, Vonnegut and Parker to Random House or its affiliates.

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

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

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

12. The publishing industry is one where authors as a matter of trade practice retain all rights in their work, as to which they license publication in various forms and formats. Publishers obtain those rights or licenses through specific contractual language. For instance, the book publishing industry is fundamentally different from the motion picture business, where under trade usage the composer, writer, or performing artist conveys all rights to the producer unless specifically excepted. In the book publishing industry, the author retains all rights to his or her work, unless specifically licensed by clear and unambiguous contractual language.

13. From a historical perspective, one of the additional rights publishers sought, in addition to the right to "print, publish and sell the work in book form" (i.e., the first publication of the print form of the book) was to own (and license) the rights to serialize the work. Serializing meant selling to a magazine the right to publish the full or partial text of the author's work in installment form. Even though this involved the same verbatim text of the author's work as in the printed book, this was not considered in the trade to be encompassed in the grant to "print, publish and sell the work in book form." The license of the rights to serialize required separate negotiation between the author and publisher, and specific contractual language granting this right from the author to the publisher. Serialization was then further categorized as "first serial rights" (installment publication before the hardcover edition, which were more

valuable) or "second serial rights" (installment publication after the hardcover edition had appeared, which were less valuable). These usually involved separate contractual language.

14. Similarly, the right of a publisher to "reprint" the author's work is not considered in trade usage to be included in the grant to "print, publish and sell the work in book form." Rather, reprint rights normally involve separate negotiation, separate consideration, and separate contractual language. Reprint rights include, for example, book club editions, condensed book editions (such as "Reader's Digest" editions) and large print editions.

15. In the 1950's, the market for soft-cover or "paperback" books grew. Rights to publish a book in paperback form were not considered to be conveyed by the author to "print, publish and sell the work in book form," especially where (as is usually the case) the paperback is a reprint rather than an original first publication. The soft-cover rights normally involved separate negotiation and separate contractual language.

16. In the 1970's, the technology for recording an author's work on magnetic tape became available (e.g. "audio books", or "books on tape"). Either the author, or another, read the full or partial text of the work onto tape. This was not considered in trade usage to be included in the right to "print, publish and sell the work in book form". For the publishers to obtain these rights from the author involved separate negotiation and consideration, and separate contractual language.

17. By the 1970's, it became common to speak of an author granting to the publisher a group of "standard rights". Those "standard rights" included: the right of first publication of the hardback edition (i.e., the right to "print, publish and sell in book form"), the rights to book club, soft-cover reprints, second serialization (Le., serialization after the hardcover had been

published), and permissions (the right to grant permissions to other publishers to quote portions of the work). All other rights (such as first serialization and foreign translations) were reserved to the author.

18. In the late 80's and early 1990's, the possibility of "electronic publishing" first became available in the industry, i.e., delivering an author's work through software on a CD Rom, or more recently through the world wide web, accompanied in various degrees with features not found in printed books, such as the ability for an electronic full-text search of the work, multimedia features, hyperlinks to dictionaries and other sites, and so forth.

19. Electronic publishing was not a right that entered into my negotiations until the mid 1980's, and even then was not considered to be part of the right to "print, publish and sell in book form". In 1985 I negotiated a contract with Byron Preiss for a CD-Rom version of Ray Bradbury's "The Martian Chronicles." I had sold the book publishing rights many years earlier to Doubleday (who published the hardcover edition) and Bantam (who published a paperback edition), both companies are owned today by Random House's parent, Bertlesmann. As the other rights and licenses discussed above, it involved a separate grant by the author of separate rights, separate consideration, and separate contractual language. While both Doubleday and Bantam had been'granted rights to "The Martian Chronicles" in "book form," I licensed the software game rights to Byron Preiss, which included the rights to distribute it via "diskettes, hard and floppy disks, game cartridges, cassettes, VCS cartridges, CED and LV interactive videodisks, arcade game use, and any other software form in use now or hereinafter developed," without any objection by the two publishers.

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

> x. to prepare, reproduce, publish and sell, to distribute, transmit, download or otherwise transfer copies of, and, with the Author's consent, which consent shall not unreasonably be withheld or delayed, to license the foregoing rights in, electronic versions of the work (referred to as Electronic Versions). As used herein, Electronic Versions shall mean versions that include the text of the work and any illustrations contained in the work (in complete, condensed, adapted or abridged versions, and in compilations) for performance and display (i) in any manner intended to make such Electronic Versions of the work available in visual form for reading (whether sequentially or non-sequentially, and together with accompanying sounds and images, if any and (ii) by any electronic means, method, device, process or medium) referred to as Electronic Device or Medium. For the purpose of this subparagraph, Electronic Device or Medium shall include, but not be limited to, electronic, magnetic, digital, optical and laser-based information storage and retrieval systems, floppy diskette-based software, CD Rom, interactive software and compact discs, floptical disks, ROM card, silicon chip, on-line electronic or satellite-based data transmission and other such systems, and any other device or medium for electronic reproduction, publication, distribution or transmission, whether now or hereafter known or developed. Notwithstanding the foregoing, the rights to publish or license Electronic Versions pursuant to this subparagraph shall be revocable by the Author upon giving written notice to the Publisher with respect to any particular Electronic Device or Medium for which the Publisher has not published or licensed publication, transmission or distribution of any Electronic Version within five (5) years after first publication of the work in book form in the United States or after first development of such Electronic Device or Medium in commercially viable form, whichever is later.

21. I understand fi-om Mr. Miller's and Mr. Green's affidavit that Random House is currently taking the position in this lawsuit that the Mssrs. Styron's, Vonnegut's, and Parker's

grant to Random House in the 1960's and 1970's of a license to "print,- publish and sell" their works "in book form" conveyed to Random House the same "electronic publishing" rights that Random House's new "electronic publishing" clause conveyed in 1994 and afterwards.

22. This view is contrary to trade usage of what "print, publish and sell the work in book form" has historically meant, and what it means today. For instance, when I negotiated the May 30, 1977 contract between Random House and William Styron for "Sophie's Choice" and three other books, at no time did I consider such a grant to include electronic rights. In my view, Random House's new position is also contrary to the position Random House itself has taken in the industry from 1994 until it filed its current lawsuit, where the initial grant to "print, publish and sell the work in book form" is separate from the specific grant of electronic rights.

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

24. Mr. Green's affidavit states:

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

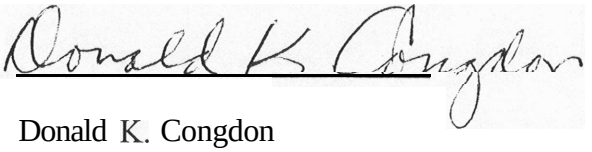
25. This statement is contrary to decades of trade usage. In my many years in this industry, I have never heard the phrase "distribute the full content of the work in a linear text fashion" prior to reading the Green and Miller affidavits. To my knowledge, no one in the industry has ever used that phrase,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

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

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

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

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 4th day of April, 200 1.



Donald K. Congdon