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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., .

Defendants.

DECLARATION OF CATHERINE J. FOWLER

I declare as follows:

1 . Since 1980 I have held various positions in the literary publishing profession, including the position of Associate Publisher in the Reference and Electronic Publishing Division of Random House, Inc. (“Random House”). I make this declaration in support of the response of RosettaBooks LLC and Arthur M. Klebanoff in opposition to the motion of Random House for a preliminary injunction.

2. From 1980 to 1986 I worked at Doubleday & Co., Inc., where I held various positions in editorial and business operations, and subsidiary rights. In 1985, I completed Doubleday's first electronic license for a text-based computer game based on Isaac Asimov's I, Robot.

3. From 1986 to 1991 I worked at Simon & Schuster, Inc., Prentice Hall Trade division, as Director of Domestic and Foreign Subsidiary Rights (May 1986-August 1988) and Director of Electronic Rights (August 1988-September 1991). At Simon & Schuster I created the first department in traditional book publishing devoted to new media opportunities in the early days of CD-ROM, online publishing and handheld electronic reader devices. I pioneered electronic licensing for Webster's New World Dictionaries, Frommer's Travel Guides, Mobil Travel Guides, Brady computer books, J.K. Lasser tax books, Betty Crocker cookbooks, New York Public Library Desk Reference, and many other general reference books. I licensed CD-ROM and online rights to Prodigy, Worldview, Sony and Software Toolworks (which became Mindscape). I also developed and directed the subsidiary rights department for the newly acquired Prentice Hall Trade subsidiary of Simon & Schuster.

4. From September 1991 to September 1994 I held the position of Associate Publisher in the Reference and Electronic Publishing Division of Random House. As Associate Publisher I directed the reference publishing program for that Division. I was responsible for product acquisitions, publishing, budgets, subsidiary rights, the editorial team, hiring and data base development for the Reference Division. I provided electronic publishing and/or licensing expertise and direction for many Random House publishing units or lines, including Fodor's travel

publications, Random House dictionaries, Random House Encyclopedia, Crown Publishing, Knopf Publishing, and The Modern Library.

5 . I was responsible for the publication of Random House's first CD-ROM title in September 1993, The Random House Unabridged Dictionary, through a joint venture with WordPerfect (now Corel). With respect to Fodor's travel publications, which is the world's largest travel publisher, I was responsible for working with them to develop strategies, negotiate, and manage electronic product development or licensing. I enabled the introduction of Fodor's products through a variety of electronic media publishers, including Sony, Worldview (now Travelocity), Etak, Creative Multimedia and Apple. In addition, at Random House I negotiated the electronic rights to the 50-title National Audubon Society Nature Series for Alfred A. Knopf Publishing, a subsidiary of Random House. I also evaluated and selected developers and managed the initial development of this series, which was the first electronic product fully funded by Random House.

6. At Random House I personally negotiated dozens of licensing agreements with authors and/or their agents, and in my career have participated in hundreds of other publishing rights negotiations with authors and/or their agents or third party licensees.

7. Since 1994 I have held various executive positions at content-oriented Internet companies, including licensing, strategic development, business development, web development and content acquisition, creation and management.

8. I have personal and professional 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. I also have personal knowledge of the usage at Random House of

the words used in the book publishing industry in the United States, and the process by which authors convey licenses to publishers and how publishers convey rights to third parties.

9. I understand that Random House is taking the position in this lawsuit that Messrs. Vonnegut's, Styron's and Parker's grant to Random House in the 1960's and 1970's of a license to "print, publish and sell" their works "in book form" conveyed to Random House the same "electronic publishing" rights that Random House's new "electronic publishing" clause conveyed in 1994 and that other specific language conveyed both before and after 1994.

10. 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, and is also contrary to the position Random House itself has taken in the industry prior to its filing of this lawsuit, where the initial grant to "print, publish and sell the work in book form" was not considered to include the grant of electronic rights.

11. I am aware of the clause in the some of Random House's standard publishing contracts that 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.

12. "...Xerox and other forms of copying, either now in use or hereafter developed" has meant, in the publishing industry and at Random House, the right to make hard-copy photocopies of a work. It was considered, but to my knowledge, not used at Random House to refer to electronic rights.

13. I first became aware of the possibility of “electronic” uses of published works in the early to mid-1 980s, when Isaac Asimov’s work entitled I, Robot was licensed to serve as the subject of what was called a “text-based computer game.” I negotiated the license on behalf of Doubleday with the game maker Epyx. In the course of the negotiations I obtained Isaac Asimov’s permission (through his editor) for Doubleday to exploit his work in this manner.

14. While at Simon & Schuster I pioneered the publishing licenses for electronic rights. In the 1980s Simon & Schuster included an express provision concerning electronic rights in its boilerplate author agreement, and to my knowledge did not exploit electronic rights with respect to publishing contracts that did not contain that express provision. It was my understanding (although I was not at Simon & Schuster at the time) that the electronic rights provision in Simon & Schuster’s publishing agreements arose out of Simon & Schuster’s experience with the Jane Fonda Exercise Book in the early 1980s. Ms. Fonda made an exercise video based on the book that was extremely lucrative. Simon & Schuster received no economic benefit from sales of the video – i.e., the book publishing agreement with Fonda did not expressly provide for video rights – and in the early-1 980s the company deliberately added express provisions to many (perhaps most) boilerplate agreements giving Simon & Schuster video and other enumerated rights, including electronic publishing rights.

15. In the late 1980s, while I was at Simon & Schuster, “electronic publishing” licenses were primarily for products delivering reference works such as dictionaries and encyclopedias, computer titles, and travel books on CD-Rom. In addition, published works began to appear online in the late 1980s on such first-generation internet service providers as AOL, Prodigy and Delphi.

16. Because of my experience in the electronic rights division at Simon & Schuster, in 1991 I was hired by Random House to serve as Associate Publisher of the Reference and Electronic Publishing Division. Some of my primary duties consisted of negotiating agreements with third parties seeking a license to exploit various electronic rights to works by authors who had existing publishing contracts with Random House or proprietary publishing lines, such as Fodor's.

17. At Random House, and throughout the publishing industry, rights departments have long employed a set procedure when negotiating "outgoing" agreements, *i.e.*, agreements with third parties to exploit uses of a work that are the subject of a publishing agreement between Random House and the author. The procedure was premised on an industry held axiom that the publisher holds only those rights that are expressly enumerated in the publishing agreement. Thus, it was the practice of rights managers at Random House and throughout the publishing industry to rely on the most explicit language in publishing contracts to determine the extent to which the publisher could exploit the work.

18. The procedure went as follows. A person or entity seeking a license to make a movie, audio tape, translated edition, or electronic version of, or otherwise exploit, a work that is the subject of a Random House/author publishing agreement would call the appropriate rights department at Random House and say, for example, "I'm a film maker interested in making a movie of Gone With the Wind." An employee in the rights department would say, in substance, "let me check on whether Random House has the movie rights and we will get back to you." The employee then would go to the Margaret Mitchell Gone With the Wind contract file, check the contract language and determine whether Random House had the

movie rights. There is no elaborate analysis to the determination; it is made based on whether the contract states explicitly that Random House has the right. If the contract does not so state, the rights department employee would call the film maker back and advise him or her to call the author or author's agent to negotiate a license for the movie rights. In that case Random House would generally have no further involvement with the film maker and his or her dealings with the author. This procedure has been followed universally and consistently in the publishing industry.

19. On occasion, the rights department employee would not be able to determine conclusively whether a contract conferred the right in question on the publisher. In those cases the rights department would discuss the "gray area" language or talk to the editor, publisher and/or legal department to make a decision. This occurred frequently at Simon & Schuster and at Random House with requests for electronic rights to various works because most of the time there was not explicit language covering electronic rights, particularly with older titles.

20. Specifically, I recall participating in numerous discussions at Random House concerning whether the clause "other forms of copying, either now in use or hereafter developed" could be "stretched" to include electronic rights. The result of those discussions was that no one was comfortable interpreting such language to encompass electronic rights. The language "in book form," however, was not even discussed in this context.

21. The clause "in book form" was not considered "gray area" language, and no one at Random House, to my knowledge, considered that language to include electronic rights.

22. There was not a single occasion in which I or, to my knowledge, anyone at Random House licensed the electronic rights of a work based merely on language in the contract referring to "in book form" or forms of copying "now in use or hereafter developed."

23. Prior to 1994, when Random House amended its standard publishing contracts to expressly include electronic rights, the only occasions in which Random House exploited electronic rights were in connection with publishing contracts that contained such express language as, for example, “electronic,” “on line,” or “CD-Rom,” or in connection with contracts referred to at Random House and in the industry as “all rights” contracts. All rights contracts confer on the publisher the right to exploit the work in any manner whatever.

24. In the early 1990s I prepared a document to assist me and others in determining whether contracts conferred electronic rights to Random House. I, along with my rights manager, presented this document as part of a discussion with several rights departments in the company to help them interpret contracts when they received electronic rights inquiries. The document was prepared as a result of our careful examination of language in existing Random House agreements and identifying language that (a) could be construed to confer electronic rights and (b) language that was insufficient to confer such rights. I recall specifically that the language “in book and pamphlet form,” were not mentioned in this document, that the language “other forms of copying, either now in use or hereafter developed” was included and was recognized as not being adequate to confer electronic rights on Random House, and that the only language that was so recognized at Random House were clear and unambiguous terms such as “electronic,” “online,” “CD-Ram,” and “all rights.”

25. In the early 1990s, I negotiated on behalf of Random House the electronic rights to the 50-title National Audubon Society Nature Series for Random House’s Knopf Publishing subsidiary. None of the 20 or more pre-existing publishing contracts with Chanticleer Press, Inc., which owned the copyright to the Audubon series, contained an express grant of

electronic rights. As a consequence, I negotiated on behalf of Random House for those rights. We did not consider the term “in book form” as conveying any electronic rights to the company.

26. There were two other instances I recall where ownership of electronic rights was taken up specifically with agents. First, with respect to a work by William Safire where Random House wanted to publish a software product based on a book of his previously published by Random House. In this case, something was worked out with his literary agent at Mort Janklow’s agency to clarify that Random House had the agent’s and the author’s approval to proceed with such a product. Second, there was a book by AutoIntelligence which was a guide to buying a new car. In this case, the electronic rights were a key point in the initial negotiation of the agreement with The William Morris Agency (i.e., Random House wanted them to be specified in the contract, and the agent wanted to specifically retain them).

27. Because interest and discussion about electronic rights had greatly increased among publishers, agents and authors, Random House issued a press release and revised contract language in March 1994. Alberto Vitale, then CEO, announced that Random House was amending its standard publishing contract to expressly include electronic rights so that in the future rights would not have to be renegotiated. The new provision licensing electronic rights is attached to this declaration, and reads as follows:

1.(a)(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.

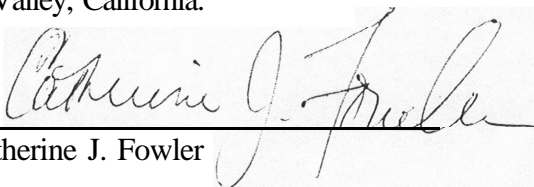
28. To me it seems inconsistent with industry practice for Random House now to take the position that the term “in book form” automatically grants publishers the rights, retroactively to publish or license digitized, electronic versions of authors’ works, when much effort was put into clarifying exactly what did comprise electronic rights on an ongoing basis. An example to consider is that Random House (and all publishers) expressly enumerate foreign translation rights in their author agreements, i.e., books written and published in a language other than English. Translated books are plainly “in book form.” But as a member of any rights department I would not consider that term to include the right to translate and publish a work in the absence of additional language expressly conveying those rights.

29. I left Random House and New York City to move to California to pursue opportunities involving the development of content-based software and Internet companies such as Excite, Direct Medical Knowledge and Healthon/WebMD. At all of these companies I negotiated for the acquisition of electronic rights to publish previously published information and publish this information online, i.e., I was in the shoes of the film maker in the example given at paragraph 18 above. In every instance, the publishers (numbering more than 70 -- both large and small publishers) with whom I or my staff dealt, including Random House, acted entirely consistently with the practices, procedures and trade usages set forth in this Declaration.

30. I left Random House on good terms, have an extremely high regard for the company's publishing tradition, still have friends from Random House, and have no axe to grind with Random House.

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, 2001 in Mill Valley, California.


Catherine J. Fowler