

RR. Bruce Rich (RBR-03 13)  
Jonathan S. Shapiro (JS-3068)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, New York 10153-0119  
Telephone: (212) 310-8000



Attorneys for Plaintiff  
Random House, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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RANDOM HOUSE, INC., . .

Plaintiff,

v.

01 Civ.

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

**EXPERT AFFIDAVIT  
OF EDWARD A. MILLER**

Defendants. . .

-----X

STATE OF NEW YORK     )  
                                  :ss.:  
COUNTY OF NEW YORK    )

EDWARD A. MILLER, being duly sworn, deposes and says:

1.     I am an attorney admitted to practice in New York State since 1960, and residing at 1006 Tower Drive, Edgewater, New Jersey. I submit this expert affidavit in support of the motion of Random House, Inc. (“Random House”) for a preliminary injunction.

2.     I graduated from Yale Law School in 1956 and was admitted to the bar of the District of Columbia in that year. I spent three years in the U.S. Navy as a Law n.

Specialist. I was associated with Winthrop, Stimson, Putnam & Roberts from 1960 until 1972.

3. In 1972 I joined Harper & Row, Publishers, Inc. ("Harper & Row") as Assistant General Counsel and became General Counsel a few months later. I have been practicing law in the book publishing business since that time.

4. During my time as General Counsel at Harper & Row, from 1972 until 1987, I supervised a legal staff and was also responsible for overseeing the operations of the Contract and Permissions Departments. The Contract Department was responsible for negotiating, maintaining and processing all publishing agreements and subsidiary rights agreements, as well as filing copyright applications and renewals. The Permissions Department was responsible for responding to requests for permission to use copyrighted material published by Harper & Row.

5. My duties at Harper & Row included supervising the company's legal staff and others who negotiated contracts with authors for the publishing rights to their works.

6. I left Harper & Row in 1987 when Harper & Row was acquired by News Corporation.

7. Since 1988 I have practiced law as a sole practitioner in the publishing field. My principal client is Kodansha America, Inc., a subsidiary of a major Japanese publisher, and I am General Counsel and Secretary of that company. Kodansha America distributes in the United States and Canada English language books published by a sister company in Japan, and well as English language books published by two unrelated Japanese companies. During the period 1993 to 2000 Kodansha America also published its own books

for distribution in the United States and Canada. During this period I was responsible for supervising the work of the contract person who handled negotiations with authors.

8. Since 1988, I have also, on a limited basis, represented authors in their contract negotiations with publishers, and other publishers concerning a broad range of legal issues.

9. In addition to the legal representation described above, I have been an active member in the Association of American Publishers, the principal trade association of the United States book publishing industry, and was the first chair of the Lawyers Committee of that Association.

10. Based on my experience in the publishing industry, I have been asked to express my opinion on the meaning of certain standard language used in publishing agreements by Random House and other publishers for at least the last fifty or sixty years.

11. The standard language at issue states that the publisher acquires the exclusive right to “publish and sell the Work in book form.” The words “in book form,” which appear in most book publishing contracts since at least the 1940s, necessarily imply the right of the publisher to transmit the full text of the author’s work to the reader. When contracting parties use such language, they clearly contemplate that the publisher is being granted, at the least, the right to distribute the full content of the work in text fashion.

12. Through the years, these “book forms” have evolved to include hardcover, trade paperback, and mass market paperback editions. As technology has continued to evolve and be applied to the book publishing process, it has begun to be economically viable to deliver books to readers in electronic format, or as they are now referred to in the industry, “eBooks.”

13. As eBook technology has developed, a publisher can now sell software that contains the text of the book in digital format. The buyer can then download the software and read the same text that appears in the paper format of the book on a desktop or laptop computer screen, on a personal digital assistant (“PDA”) or on an eBook reading device.

14. Typically, the eBook reading device -- which some industry experts believe will be the dominant manner in which consumers will, over time, read eBooks in this developing market -- is a device that looks very much like a bound paper book. It is about the same size and weight as a bound book (although it can store multiple books at once) and can be carried around by the user in the same way as a bound book. When the software is downloaded onto such device it contains the same text of a work as its bound book counterpart. The consumer can read the book in the same manner it would be read in a paper book, except that instead of turning the page the user pushes a button to advance to the next page of text.

15. Based on my review of the contracts at issue, as well as the fundamental nature of the eBook, it is clear that Random House was granted the rights to deliver the contracted-for works in “electronic” or “eBook” form. The eBook is but another format by which to transmit the full text of the author’s work to the reader. The same text is being delivered to the reader, who is provided with the same reading experience as is provided with the paper book.

16. To conclude otherwise, namely, that the alternative reading format provided by the eBook somehow falls outside of the basic grant of the right to publish in book form, would jeopardize the investments publishers make in the works they publish by

allowing third parties to take the very same content and offer it to the very same reading public, in competition with the publisher's paper editions. Such a result would, moreover, provide a disincentive to book publishers from making investments in technology designed to maximize the distribution of their authors' works to the public. Finally, the fact that Random House has announced an author eBook royalty equal to 50 percent of Random House's net revenues from eBook sales, providing royalties to its authors significantly more favorable than traditional authors royalties, eliminates any argument that interpreting the contracts to provide Random House with eBook rights would be economically unfair to its authors.

17. In sum, it is my opinion that, absent evidence of contrary intent in the agreement, publication or sale of an eBook is publication of a work "in book form" and therefore included within the grant of rights language in Random House's contracts at issue in this action.

Edward A. Miller  
EDWARD A. MILLER

Sworn to before me this  
23 day of February 2001

Jean M. Bernstein  
Notary Public

**JEAN M. BERNSTEIN**  
NOTARY PUBLIC, State of New York  
No. 01BE8012788  
Qualified in Queens County  
Commission Expires June 15, 2001