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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 EUGENE H. WINICK

I declare as follows:

1. I was admitted to practice in the State of New York in March 1958. In 196 1 I became associated with the law firm Ernst, Cane, Berner & Gitlin (later Ernst, Cane, Gitlin & Winick). The firm's specialty was copyright practice in the book publishing field. It represented book publishers, authors, estates of authors and literary agents. During my practice with that firm I received a solid grounding in representing book publishers by way of representing Harcourt Brace Jovanovich, Inc., the I. T. T. publishing companies including The Bobbs-Merrill Company, Inc., Howard W. Sams, Inc., G. K. Hall, Inc. and Marquis Who's Who and other

smaller companies. I represented these publishing houses in the 1960's and 70's when, as was the practice, most publishing houses did not have in-house counsel. Consequently, I was regularly called upon to deal with all matters of a publishing industry nature, including copyright and contracts. The form (or "boilerplate") of book contracts with authors was periodically reviewed and revised where appropriate. I personally was responsible for several revisions of boilerplate contracts, and assisted in the revision of many others. Revisions were periodically required in order to correct deficiencies in contracts, some due to innovations and technological developments not previously anticipated. This is sirnilar to the e-Book situation confronting the publishing industry at this time.

2. I am past Chair of the New York State Bar Association Literary Works and Related Rights Committee, and have been a Trustee and Secretary of the Copyright Society of the U.S.A. I have taught a course titled "Books and the Law" as Adjunct Professor at Hofstra University. I have lectured to the American-Bar Association, the New York State Bar Association, Practicing Law Institute, Law Journal Seminars, Copyright Society of the U.S.A., Association of American Publishers, Authors Guild of America and in other similar forums on copyright and related publishing matters. I have testified in court proceedings as an expert witness on publishing matters. I regularly negotiate book contracts and am thoroughly familiar with the matters at issue herein.

3. My comments in this affidavit regarding the purport of contractual terms are tempered by my experience on behalf of publishers from 196 1 until 1984 when I resigned from Ernst, Cane, Gitlin and Winick to assume the presidency of one of its clients, McIntosh and Otis, Inc., a literary agency founded in 1927. I continue there to date.

4. As literary agent I represent contemporary authors and negotiate their contracts. My contract exposure on behalf of the estates I represent goes back to rights negotiated during the 1920's when some of the authors whose estates I represent were being published. I represent the estates of John Steinbeck, Erskine Caldwell, Upton Sinclair, Sinclair Lewis (I am administrator of his son Michael's estate and control his renewal copyrights), Dorothy Thompson, James Dickey, Gary Jennings (of which I am executor), Thomas Wolfe (of which I am Administrator C. T. A.), Harold Robbins and Christopher Morley.

5. I therefore enjoy the perspective of having been publishers' counsel, author's agent and counsel or literary agent for many estates based on rights and contracts going back to the early part of the 20th century. I have negotiated hundreds, probably in the thousands, of publishing agreements for rights in the United States and throughout the world. Having, I believe, established my credential as an expert witness, I make the following observations in support of Defendant's position.

6. As a copyright practitioner, I learned to view book contracts as copyright licenses, for indeed, this is what they are. The jargon in the press or in the industry may refer to the sale of rights, but "sale" is legally incorrect. The distinction is not frivolous for the Author remains licensor and proprietor of the rights. The publisher receives a mere license, which may nevertheless be exclusive. However, under existing doctrine the licensee owes a fiduciary-type duty to utilize the license in such a way as to enhance the licensor's interest (Wood v. Lucy, Ladv Duff-Gordon, 222 *NY 88,* 118 *N. E.* 214 *(1917)*). Further, the terms of a license granting rights must include provisions for consideration to be paid for the exploitation of those rights.

7. Arguendo, if plaintiffs position that it controls e-Books rights could be sustained, we find it lacks a provision for payment to the Author of royalty or other proceeds.

Plaintiff's earlier contracts provide for escalating royalties of 1 0%, 12½% and 15% of list price for sale of hardcover books, but is silent as to the extent of electronic applications granted or royalties to be paid to the author on sale of e-Books. Plaintiff's current contracts still provide escalating royalties of 1 0%, 12½% and 15% of list price but now contain grants of electronic rights and provide for payment of 50% of the proceeds to the author – a monumental revision from the earlier boilerplate contracts on which this lawsuit is based.

8. Since it is the publisher who drafts and prints the agreement, its meaning must be strictly construed against it as a matter of contract law. Even ife-Books rights could be ceded by this court to Plaintiff as requested, there is no provision defining payment upon exercise of those rights for the simple reason that the granting of electronic rights was not contemplated. The method by which other ancillary or subsidiary rights are to be shared are minutely detailed by contract for each such right (see plaintiffs contract.)

9. The Lady Duff Gordon case and its progeny affects another important aspect of the author/publisher agreement. When a book is no longer remunerative to a publisher, the publisher will permit it to "go out of print" (in the jargon of the industry.) The book will then no longer be available for sale. An industry convention was developed thanks to Lady Duff Gordon by which publishing contracts regularly provide for termination of the contracts and reversion to the Author of all rights if the publisher fails to reissue the book and "place it back in print" within six (sometimes nine) months of the Author's notice to do so. However, e-Books would decimate this convention since all a publisher need do to keep an e-Book "in print" is to digitize it and sit back. The Author will never be capable of terminating the contract and reverting rights even in the face of complete marketing inactivity by the publisher so long as the digital

version is theoretically made available to the public. E-Books have had no significant marketing impact to date. Sales generally are negligible.

10. Where I have currently negotiated e-book rights, I have provided some mechanism for termination of the contract and reversion of rights to the Author, either by way of requiring a minimum number of sales in a royalty period (usually six months), or a minimum amount of royalty payments in a royalty period, or a limit of the e-Book license for a period of years (I recently negotiated a three year e-Book license for the literary works of a prominent contemporary author). Lady Duff Gordon would be spurned without such minimal requirements, as the Author would be compelled to seek equitable relief outside the four corners of the agreement. The provision in the plaintiff's contract permitting reversion in five years (Maass affidavit par. 16) if not exercised is illusory. All the plaintiff needs to do to retain rights and defeat termination is to digitize and make the book available, even without marketing it and without result.

11. The plaintiff here is indeed seeking equitable relief To carry its request to the ultimate the court will have to determine the royalty payment to be paid by the publisher to the Author since it is not contained within the four corners of the Agreement.

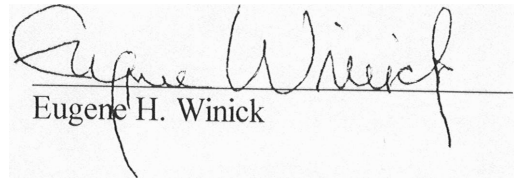
12. I have read the affidavits submitted in this proceeding by Edward A. Miller, Ashbel Green and Donald Maass. Rather than repeat what has been stated in Donald Maass' affidavit I ratify and adopt his statements with regard to the interpretation of contract provisions and I share his conclusions that e-Book rights were not previously granted. The publisher has now remediated what it obviously regards as a deficiency in its "boilerplate" contract by providing for control of e-Books and a method of payment to the Author for their exploitation. Future use is being resolved by the new contract provision. There is no provision dealing with e-Books in

book contracts executed before the day of the e-Book. Such lapse is not unusual. It occurred in the 40's and 50's when paperback reprints of hardcover books were introduced into the book industry publishing price. Another example includes the introduction of audio rights, film strips and similar innovations for which there were no provisions in book contracts executed prior to each such innovation. Indeed, authors freely exercised those newly created rights where they had not been granted to the publisher. The instant case reflects no less a similar situation. The publisher now being on notice may contract forward for such rights but not retroactively.

13. What struck me initially on learning of the instant lawsuit is the resemblance this case bears to the efforts of lobbyists before the U. S. Congress and the thrust with which arguments are presented (I have also participated in Congressional lobbying activities at various times with regard to Copyright Law legislation and am familiar with the tone and approach of those arguments). It occurs to me plaintiff is in fact lobbying for reformation of its contracts with authors since it is dissatisfied with the terms of their own prior contracts as those contracts continue to define the author/publisher relationship.

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 New York, New York.



Eugene H. Winick