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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 DONALD C. FARBER

1. I am of counsel to the law firm of Jacob Mendiger & Finnegan LLP, having its offices at 1270 Avenue of the Americas, New York, N Y 10020 Avenue of the Americas, New York, NY 10020.

2 . I have practiced law in the State of New York since I was admitted in 1950 and my practice has been exclusively in the Entertainment Industry for over 40 years. I have had seven books of mine published, five of which are still in print, *From Option to Opening, Producing, Financing*

and Distributing Film, Producing Theatre, The Fantasticks, and *Common Sense Negotiation, How* to *Win Gracefully.* In addition I am the General Editor, and write the Theatre Volumes of the ten volume series of Entertainment Industry Contracts published by Matthew Bender, which volumes are updated three times each year. I have taught Producing Theatre and Entertainment Law at York University in Toronto, Hofstra Law School, Hunter College and for many years at the New School for Social Research in New York City. I have made many contributions to the New York Law Journal and other publications.

3. Over the last 40 years I represented many book writers and negotiated a number or book publishing contracts. My clients included Kurt Vonnegut, John D. MacDonald, Paula Danziger and other authors. I believe that I have negotiated between 40 and 50 book publishing contracts and a great number of agreements with film companies who wanted to acquire rights to the books of my clients. 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 apparently dated 1977 between Random House and William Styron and an amendment dated November 13, 1990 concerning "Sophie's Choice" and three other works;

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

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

6. 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. In my opinion, the assertion by Mssrs. Miller and Green is incorrect. The words "print, publish and sell the work in book form" have never meant this to me, and does not mean this to me today.

7. 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.

8. The language of the conveyance of the publishing rights in The Styron, Vonnegut and Parker contracts listed above has always meant a grant of the rights "to print, publish and sell the work in book form" which 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. This is the accepted meaning of this phrase and it has not been understood by knowledgeable practitioners in the industry to convey any broader grant than this. The Mssrs. Styron, Vonnegut and Parker conveyance to Random House or its affiliates was not intended to convey any electronic rights.

9. The book publishing business is different than the film business and theatre and I have written extensively about this. In the film industry, it is true that a film company will acquire all rights in the screen writers script. There is a good reason for this. Historically, when the Hollywood studios engaged a writer in the 1920's and '30s and paid the writer a quarter of a million dollars a year or more, which was a fortune then, the studio wanted to own everything that came out of the writers typewriter. In theatre, the producer acquires limited stage production rights and the other rights are controlled by the playwright. With a successful production the theatre producer may end up with additional production rights and a monetary interest in the subsidiary rights, but the control stays with the playwright. Playwrights and book authors are not "employees for hire". Film studios acquired all rights in the writers work, they should have for they paid enough for it but producers of plays did not acquire all rights in the author's work and book publishing companies did not either.

10. When electronic publishing became a'viable means of distributing a book, most publishing companies quickly changed their contracts to very specifically include the acquisition of electronic publishing in addition to print publishing. The electronic rights the publishers specifically wished to obtain were most often the subject of separate and intense negotiation. One might inquire why the publishers found it necessary to include additional language or add an amendment, if the language in the Styron, Vonnegut and Parker contracts included such rights in the first place.

11. The publishing industry is one where authors as a matter of trade practice retain all rights in their work which they license for publication in various forms and formats. Publishers obtain those rights or licenses through specific contractual language. When I represent an author, I always insist on retaining those additional rights such as the dramatic, film and television rights for my author clients. These and other additional rights are negotiated separately and the electronic rights are one of those additional rights that are negotiated separately.

12. 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) some of the rights not included in this term that are separately negotiated in a publishing contract include the rights to serialize the work, reprint rights, the right to publish soft cover books and trade paperbacks, the right to record books on tape known as audio books and electronic rights.

13. 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). The argument can be made that the first serial rights belong to the author who need not share them with the Publisher because the serial rights have not yet been made valuable by the publication. After the book is published, the publisher has given value to the second serial rights if the book has any success, and it then makes sense for the author and publisher to share the income from such rights.

14. Similarly, the right of a publisher to "reprint" the author's work was 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 involved separate negotiation, separate consideration, and separate contractual language. Reprint rights included, for example, book club books, and Readers Digest Condensed Books.

15. 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 (i.e., 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. It should be noted that those rights thought of as standard rights only included the ink on paper rights, not film, not television, not theatre, not electronic rights, etc.

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. In trade usage, electronic publishing was not considered to be part of the right to "print, publish and sell in book form". As with the other rights and licenses discussed above, it involved a separate grant by the author of separate rights, separate consideration, and separate contractual language.

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 from Mr. Miller's and Mr. Green's affidavit that Random House is currently taking the position in this lawsuit that the grant of Mssrs. Vonnegut, Styron and Parker 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. In my view, Random House's new position is also contrary to the position Random House 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. Why does it suddenly become necessary for Random House to add a new clause to its contract to include electronic rights if, as they claim, those rights were included in their agreement containing the language of the contracts entered into before the new clause was added.

23. 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.

24. This statement is not my understanding of what was the trade usage. In my many years of work in this industry, I have never heard the phrase "distribute the full content of the work in a linear

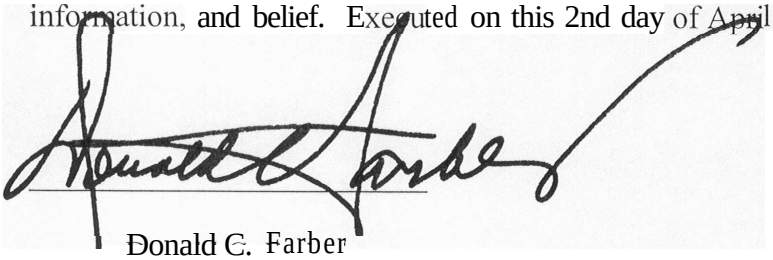
text fashion" prior to reading the Green and Miller affidavits. To my knowledge, no one' in the industry that I know of has ever used that phrase, and that phrase has never appeared in any author's contract of which I am aware. I cannot comment upon whatever subjective "reading experience" Mr. Miller 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.

25. 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.

26. "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. I have never understood this 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 2nd day of April, 2001.



Donald C. Farber