

ROSETTABOOKS™

1. I am currently employed by Random House, Inc. (“Random House”) as Executive Vice President, as President of Random House New Media and Corporate Development Group, and as President of Random House Ventures, L.L.C., a wholly owned subsidiary of Random House. I submit this affidavit in support of Random House’s Motion for a Preliminary Injunction.

2. I have served as President of Random House New Media and Corporate Development Group since October 1, 2000, but have been in charge of New Media at Random House and its predecessor Bantam Doubleday Dell since 1995. I have served as President of Random House Ventures since March 31, 2000. My responsibilities as President of Random House New Media and Corporate Development Group include managing the company's strategy and execution in the digital arena, as well as mergers, acquisitions, joint ventures and other corporate matters. As the President of Random House Ventures I am responsible for identifying and negotiating new investments and helping management of companies in the Venture's portfolio.

3. From 1997 to 2000 I served as Random House's Executive Vice President and Chief Financial Officer. In total, I have been employed by Random House for 12 years, and have been involved in the publishing business for a total of 15 years.

4. In this affidavit I describe the following: (i) Random House's book publishing activities, including relevant background information, the scope of Random House's publishing business, Random House's royalty arrangements with authors, and the nature of Random House's promotional efforts; (ii) the Random House works at issue in this action, including Random House's efforts expended to achieve both critical and commercial success for such works; (iii) Random House's investments in digital publishing and eBooks; and (iv) the harm Random House has begun to suffer and will continue to suffer as a result of defendants' unauthorized eBook "publishing" activities.

Random House's Book Publishing: Activities

5. Random House, through its divisions – the Ballantine Publishing Group, the Bantam Dell Publishing Group, the Doubleday Broadway Publishing Group, the Knopf

Publishing Group, the Crown Publishing Group, the Random House Trade Publishing Group, Random House Children's Books, the Random House Information Group and the Random House Diversified Publishing Group – is today the world's largest English language general book publisher. Random House publishes works of nearly every genre, including fiction and non-fiction, with offerings for virtually every reading taste or interest. Random House's "backlist" (meaning, titles published more than one-year earlier), features works by many of the world's foremost and most popular authors. Among Random House's many celebrated authors are William Styron, Kurt Vonnegut, Robert B. Parker, William Faulkner, Truman Capote, Eudora Welty, James A. Michener, John Grisham, Dean Koontz, Carl Sagan, E.L. Doctorow, Maya Angelou, Norman Mailer, Danielle Steel, Louis L'Amour, David Halberstam, Ken Burns, Geoffrey Ward, Tom Brokaw, John Glenn and Colin Powell. Books published by Random House have won many major awards, among them, Pulitzer Prizes, National Book Awards, and Newbery and Caldecott Medals.

6. Built on a reputation its' publishing divisions have developed over decades (some as long as 100 years), Random House has developed a publishing backlist comprising more than 20,000 titles. As a book publisher, Random House's basic function is to present its authors' works to the reading public in whatever "book forms" meet marketplace demand. 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, versus paper, format. Random House has made significant investments to enable it to exploit the eBook format, which provides those who traditionally read books in paper form with new reading options and flexibility, and may even promise an expansion of

the base of readers of Random House works. The technological advances reflected in eBooks have altered neither the core intellectual property involved (the author's work), nor the fundamental reading experience (viewing the written word as a means of receiving and digesting ideas and creative expression).

7. Random House obtains exclusive rights to the works it licenses in order to make it economically feasible to invest substantial resources to develop a market for its titles. In return for obtaining exclusive rights to publish its authors' works "in book form" for the term of copyright, Random House generally pays an author an advance against the royalty earnings from the sale of copies of his or her book. If the book earns royalties equal to the advance, the author begins to receive additional royalties on each copy sold. However, even if the book never earns sufficient royalties to earn out the advance, which often occurs, authors are not required to refund their advances. The royalty for hard cover editions typically ranges from 10 to 15 percent of the retail cover price; for trade paperbacks, from 6 to 7 percent of the retail cover price; and for mass market paperbacks, from 8 to 10 percent of the retail cover price. As I discuss further below, with respect to eBooks, in November, 2000, Random House announced an across-the-board upward revision of its author royalty rate for eBooks, from 15 percent of eBook list price to 50 percent of Random House's net receipts. This increase applies both prospectively and retroactively.

8. Random House makes substantial expenditures in the works it publishes. For example, Random House employs more than 330 editors, who play an active role in every facet of the publishing process – from evaluating book proposals' and manuscripts' publishing merit, through extensive editing of manuscripts, and participation in the marketing

process, among other functions. It is not unusual for one or more editors to work actively with an author on a given project over a series of months or even years prior to publication.

9. Once a work is published, Random House makes further substantial expenditures to market and promote it and secure widespread distribution. In the fiscal year ending June 30, 2000, Random House spent in excess of \$100 million in promoting its publications. The promotional activities encompassed, among others, trade and consumer advertising; distribution of review and promotional copies of the book to members of the media and influential readers; in-store displays; author tours and readings; and postings on Internet web sites. Random House also employs several sales forces to call on bookstores and other retail outlets as well as wholesalers to solicit orders.

10. Random House is fundamentally in the content delivery business. Ultimately, it is a work's content, not the format in which such content is delivered, that drives sales. Stated differently, consumers do not purchase a work for the book's paper and binding, but rather for its content. Our publishing costs confirm this reality. The lion's share of Random House's expenses derive from the advances and royalties paid to authors coupled with the costs of editing, marketing, and promoting works in order to popularize them with consumers. A relatively small percentage of Random House's overall expenses go to paper, printing and binding (known in the industry as PPB). In fact, PPB accounts for only approximately 10% of the cover price of our books.

11. Due in part to Random House's editorial work with its authors and the publisher's marketing efforts, authors and books published by Random House, including those that are the subject of this lawsuit, have achieved critical acclaim and significant commercial success. These efforts, and this success, have given Random House and its

various imprints an outstanding overall reputation and earned them enormous goodwill with authors, literary agents, booksellers, and the reading public.

Random House And The Works In Issue

12. Random House holds exclusive licenses to some of the most celebrated works, such as works by William Styron including *The Confessions of Nat Turner* and *Sophie 's Choice*; works by Kurt Vonnegut, including *Slaughterhouse-Five*, *Breakfast of Champions*, *The Sirens of Titan*, *Cat's Cradle*, and *Player Piano*; and works by Robert B. Parker including *Promised Land* (the Styron, Vonnegut, and Parker works are collectively referred to herein as the "Works"). See Licensing Agreements for Works, attached hereto as Exhibits A-E.

13. As the exclusive publisher, Random House has expended incalculable resources over the years on promoting and marketing the Works. Due in part to these efforts, both the Works and their authors have achieved critical acclaim and commercial success. For example, *The Confessions of Nat Turner* won the Pulitzer Prize for Fiction in 1967 and is one of the most lauded American novels of its time. Similarly, *Sophie 's Choice*, winner of the National Book Award for Fiction in 1980, is considered a late 20th Century American masterpiece. *Slaughterhouse-Five*, published in 1952, is one of Vonnegut's signature works and became one of the most popular and enduring novels of its time. *Promised Land*, in turn, won the Edgar Allan Poe Award from the Mystery Writers of America in 1977, the most prestigious award in the realm of mystery and detective fiction.

14. To date, Random House has sold over 260,000 copies of *The Confessions of Nat Turner*, over 3.2 million copies of *Sophie 's Choice*, over 1.3 million copies of *Slaughterhouse-Five*, over 400,000 copies of *Breakfast of Champions*, over 200,000 copies

of *The Sirens of Titan*, over 600,000 copies of *Cat's Cradle*, over 20,000 copies of *Player Piano* and over 300,000 copies of *Promised Land* in combined hardcover and paperback formats.

15. Due in part to Random House's efforts on behalf of the Works, the Works have become integrally connected with Random House's outstanding overall reputation and enormous goodwill among authors, literary agents, booksellers, and the reading public.

Random House's Investments in eBook Technology

16. The accompanying affidavit of Adam Smith, Random House's Director of New Media, outlines the basic information regarding eBook technology, including current and likely future eBook reading platforms and devices. I discuss herein Random House's efforts to develop the eBook format as part of the company's overall business strategy.

17. Before addressing that subject directly, I begin by observing that the history of the book publishing industry is one characterized by significant investments in, and benefits gained from, new technology. The evolution of the typesetting process is an important, and relevant, case in point. From the 1880's to the early post war period, the publishing industry printed its books using a time-consuming method known as mechanical typesetting, which used lead plates to print books on paper. The introduction of photographic typesetting and its subsequent automation increased the speed of printing. Today, text is set directly from a digitized, *i.e.*, electronic, version of the author's work. The use of digitized text provides publishers with new flexibility as to the publishing formats in which they can cost effectively offer their books to the public. For two years, Random House has retained the digital files from its newly published books in an archive. Such files require only minor enhancements for release in various eBook formats.

18. Random House has made significant investments toward making eBooks a marketplace reality. Random House has invested more than \$5 million into the development of eBook publishing programs including investments in eBook hardware and software, human resources, consultants and digital conversion of titles, and anticipates investing approximately \$10 million in the next 3 to 5 years, based on its belief that eBooks will someday become a book format of choice for a significant segment of the book consuming public. Random House must continue to pursue this critical development in order to remain a viable competitor in the publishing industry and to provide authors publishing exposure in this growing marketplace.

19. On November 7, 2000, Random House announced that it would share its net receipts from eBooks equally with its authors, thereby dramatically increasing an author's earnings from each eBook sold. This policy provides authors with royalties that reflect the anticipated future costs savings of eBooks (lack of returns, elimination of paper and printing costs, etc.). The eBook royalty policy also reflects Random House's commitment to build this evolving format in partnership with Random House's authors, and to do so in a way that increases the authors' readership as well as their earning potential in both print and electronic form.

20. Random House currently offers more than 300 titles in eBook format, consisting of both frontlist and backlist titles from its various divisions. Within the next 12 months, it expects to offer an additional 1000 frontlist titles, and within the next 18 months, an additional 1000 backlist titles. As part of this continual eBook rollout, Random House expects to be able to offer the Works in eBook format this year. Assuming adequate

consumer demand, Random House plans to continue to publish and sell both the paper and electronic formats of books to which it has exclusive rights.

21. Among the current ebook publishing programs, Modern Library, an imprint of the Random House Trade Publishing Group, announced on November 1, 2000 that it would offer 100 classic books in electronic form from its backlist of bound book classics. These books are currently offered for sale at sites across the Web, including Internet sites that have never before sold books. Modern Library eBooks can be downloaded from a number of web sites including traditional and online bookstores. Additionally, many of the books are offered in bundles such as the complete novels of Jane Austen, the best of American Literature, and the best of Victorian novels. While many of these great works are targeted towards academia, the electronic format of the books, and their affordable cost (averaging \$4.93, will allow the books to reach a much broader audience. See Random House November 1, 2000 Press Release, *Modern Library E-Books Open New Retail Environments For Literature*, attached hereto as Exhibit F.

22. In order to make these great works available to the widest possible audience, Random House entered into a partnership with Reciprocal, Inc., a leading electronic publishing technology company, to make the books available to sites that were never before commerce-enabled, such as shakespeare.com and pemberly.com (a Jane Austen site). Modern Library is recognized as a publisher of great literature in high quality and affordable formats, and eBooks are a natural expansion of this commitment to readers. Random House publishes *The Red Badge of Courage*, for example, in hardcover, paperback, and electronic format. See id.; Random House July 31, 2000 Press Release, *Modern Library To Publish 100 Classic Titles As E-Books*, attached hereto as Exhibit G.

23. In January, 2001, Random House also became the first major trade publisher to announce publication of a complete editorial list of original electronic books, commissioned expressly for electronic format. These titles are being published by a newly created eBook imprint called AtRandom. AtRandom's first list of books comprises twenty titles covering a diverse variety of genres and categories including business, literary fiction, current events, biographies and memoirs. AtRandom will publish short, unconventional biographies of contemporary figures, nonfiction collections by outstanding journalists as well as several first-time authors. The books are offered in digital formats as well as print-on-demand trade paperback editions and are sold through online retailers as well as bricks and mortar booksellers.

24. Random House has also invested significant sums toward the creation of industry-leading production and business systems in support of its publishing programs, especially in light of the transformative growth of the Internet. We are establishing a publishing infrastructure designed to allow all Random House publishers to easily and effectively publish their books in any print or electronic format or distribution channel. As mentioned above, Random House sets text directly from digitized versions of the work, and maintains the digital file in an archive. With minor enhancements, such files can then be released in various eBook formats.

25. In addition to its in-house publishing efforts, on March 31, 2000, Random House created Random House Ventures, L.L.C., a wholly owned e-investment subsidiary in order to help achieve its goals of maintaining leadership in technologies that affect publishing. Its mandate is to invest in and support online and technology-driven companies

that have the potential to reshape traditional publishing concepts, services and relationships, as well as to complement Random House's longstanding publishing programs.

26. On October 10, 2000, Random House Ventures made a substantial investment in ebrary, a service that digitally delivers content and facilitates research by making the content of books, periodicals and other traditionally printed documents accessible on the Internet on a non-subscription, pay-per-use model. As I have publicly stated, by investing in ebrary, Random House Ventures has the opportunity to financially and strategically support a company that will transform the way research is conducted. Random House embraces ebrary's innovative yet practical approach to make content widely available in digital form, using a model that will generate additional revenue for Random House's authors while safeguarding their copyrights from unauthorized exploitation. See Random House October 10, 2000 Press Release, *Random House, Pearson, The McGraw-Hill Companies Make Landmark Allied Investment in ebrary*, attached hereto as Exhibit H.

RosettaBooks' Unauthorized Copying Has Caused And Will Continue To Cause Random House Irreparable Harm

27. As the term "eBook" implies, an eBook is a book presented in electronic format. An eBook such as those offered by RosettaBooks contains the same text as its paper counterpart and is displayed for the reader in the same linear fashion, *i.e.*, the reader reads lines of text no differently than if the work were being read in paper format. The only real difference between eBooks and their paper counterparts is that eBooks display the copyrighted material on a computer screen, rather than on paper. (For a more detailed discussion, see Affidavit of Adam Smith, at ¶ 4.)

28. The eBook is directly competitive with the paper format of the book and, under industry forecasts, will increasingly become a substitute for the paper book for many consumers in the decades to come. These forecasts predict that digital delivery of custom-printed books, textbooks, and eBooks could account for revenues as high as \$7.8 billion (17.5% of the publishing industry) in five years. Forrester Report, Books Unbound (December 2000), attached hereto as Exhibit I. It is projected that 2.6 million eBook reading devices will be in use by 2005. Id.

29. Threatened harm to Random House is imminent from RosettaBooks' efforts to exploit the Works and public announcements evidencing an intent to similarly misappropriate numerous other Random House titles. It is highly unlikely that consumers who choose to purchase eBook formats of the Works – or other Random House titles that RosettaBooks will attempt to sell if not enjoined – will also purchase such titles in their paper format (or, in the alternative, in eBook format through Random House itself).

30. RosettaBooks' unauthorized reproduction and public distribution of eBook formats of the Works devalues Random House's exclusive rights to exploit the Works and will cause Random House immeasurable harm to its ability to realize expected profits. If RosettaBooks were free to cherry-pick Random House's highly prominent works, as they have done by attempting to exploit the Works, they would thereby divert sales from Random House, and Random House would face the prospect of funding the development and marketing of a wide range of its literary offerings, but be deprived of a growing and significant part of the economic benefits of exclusivity which Random House bargained and paid for in acquiring rights to those works.

31. Additionally, RosettaBooks has indicated its intention to expand significantly the numbers of backlist titles it will publish in eBook form. Many such works will undoubtedly be works to which Random House possesses exclusive publishing rights. Such activities will, if not enjoined, not only, in and of themselves, impair Random House's ability to sell its extraordinarily valuable backlist, which generates approximately 40 percent of Random House's annual sales and incalculable goodwill; it will also invite countless other third parties to commence similar unauthorized eBook "publishing" enterprises. The injury to Random House from such a proliferation of unauthorized third-party "publishers" – none of whom will have invested even a single dollar in the development of the works involved, let alone in bringing about their commercial success – would be incalculable.

32. Moreover, as I discussed above, consistent with Random House's business strategy and in partnership with its authors, Random House has made very significant investments in its own eBook business. RosettaBooks' purloining of Random House's most successful books will, if not enjoined, hobble this important new line of business, once again in a fashion impossible to quantify.

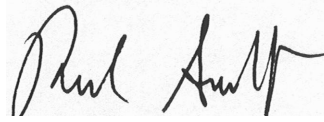
33. Further, Random House devotes significant creative and economic resources to the marketing and positioning of its authors in order to foster a particular image of the author and clear message about the content of the work. Random House also develops important distribution channel relationships and strategies to enhance the market for these books. RosettaBooks' offer of the works of Random House authors without regard for those efforts threatens to dilute the good will that both Random House and its authors have gained from such positioning efforts, thus creating additional irreparable harm.

34. Relatedly, literary agents, booksellers and the public have come to associate many noted authors with Random House. At a minimum, RosettaBooks' competing publications of works by such authors will create marketplace confusion and will diminish Random House's standing in the publishing industry -- a loss that cannot be compensated for simply by money damages.

35. Finally, as explained in a recent Random House press release, Random House's eBooks will be published with the same standards of quality that its readers have come to expect. Quality has always been an integral part of Random House's publishing philosophy, and that commitment to quality remains firmly in place in the realm of electronic books. For Random House, quality means superior production values, error-free text, and vital enhancements such as introductions and biographical notes. See Random House July 31, 2000 Press Release, *Modern Library To Publish 100 Classic Titles As E-Books*; attached hereto as Exhibit G.

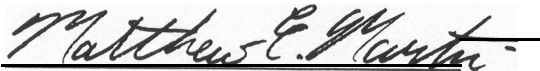
36. There is no guarantee that RosettaBooks will adhere to the same high level of quality as Random House. Absent similar quality control, RosettaBooks may well harm the market for the work and the author's reputation, both of which Random House has spent significant resources developing. Moreover, because readers associate many of Random House's most successful titles, such as the Works, with Random House -- as a direct result of, among other things, Random House's marketing and publicity efforts -- an offering to the public of eBook formats of the Works by RosettaBooks that does not meet Random House

quality control standards may cause significant harm to Random House's reputation for quality publishing as readers may wrongfully associate the lack of quality with Random House.



RICHARD SARNOFF

Sworn to before me this
26th day of February 2001



Notary Public

MATTHEW E. MARTIN
Notary Public, State of New York
No. 31-02MA4941781
Qualified in New York County
Commission Expires Aug. 29, 2002