

LITERARY RIGHTS COMMITTEE
CO-CHAIRS: JUDITH B. BASS AND JOAN S. FAIER

30 Developments in Publishing in 30 Years: A Review of New Business Models, Trends and Court Cases from 1988 to 2018

By Judith B. Bass, Joan S. Faier, and Erica Ruff



Judith B. Bass



Joan S. Faier



Erica Ruff

Probably the most significant development in launching a revolution in publishing over the last 30 years actually occurred in 1989. In that year, the World Wide Web was invented by Sir Tim Berners-Lee, along with a plan to make it accessible to the general population. All of the changes that have occurred in the publishing industry since then can be traced back to that invention, including e-books, self-publishing, and the rise of the digital publishing phenomenon.

In this article, we will look at some of the changes in the book publishing industry that have impacted authors and publishers and the relationships between them over the last 30 years. We will first highlight a few key developments in the 1990s after the internet came into being and describe some of the changes that happened in those years. We will then look at each of the next two decades and profile some new business models that arose and various trends that emerged in the publishing industry during that period and going forward. We will also review a selection of significant court cases decided in the last 30 years that have impacted the publishing industry.

I. 1988-1998

1. Rise of the Big Bookstores

In the early 1990s, the big news was the opening of very large bookstores known as “superstores.”¹ In 1992, Barnes & Noble opened a series of such superstores stocked with 100,000 books each, with plans for up to

250 additional stores by the end of the following year. Kmart acquired Borders Inc., the owner of 19 superstores. Kmart, at the time, already owned Waldenbooks and planned to open an additional 60 superstores by the end of 1993. These superstores held as much as 10 times more inventory than mall bookstores. At the time, independent bookstores still accounted for 60% of the number of retail outlets for

books in the United States. By 1994, chain bookstores were outselling independent bookstores, signaling fears that the smaller booksellers would be pushed out by the superstores.²

2. Debut of Electronic Publishing

In the mid-1990s, several newspapers launched their first online versions for the internet.³ In addition, in 1998, the first dedicated electronic reading devices were introduced, including the Rocket e-book and Softbook. These e-readers did not catch on, however; at the time, e-book selection was very limited—since various formats had to be produced, there was no continuity for reading over different devices, and the personal computer was not suitable for reading books. This period is considered a “false start” for digital publishing.⁴

3. Expansion of the Grant of Rights

With the introduction of electronic publishing, publishers began to expand the language in their contracts that previously provided for print rights or mechanical reproduction rights. These expanded rights were often broken down into “display rights” and “multimedia rights.”⁵ Display rights allowed for the reproduction, transmission and display of the verbatim contents of a book in digital media and electronic devices. Multimedia rights referred to the right to include third-party content, such as music, photographs, and video, as well as interactivity.⁶

4. Introduction of Print-on-Demand Technology

By the late 1990s, the introduction of print-on-demand (POD) technology allowed books to be printed one at a time.⁷ POD is credited as leading to the later explosion in self-publishing through websites such as Lulu, CreateSpace and iUniverse.⁸ The POD publishers offered authors low-cost self-publishing options without the need to pay for print runs, inventory, and warehousing.⁹

5. The Beginning of Amazon

Amazon was founded on July 5, 1994. Its website started as an online bookstore. By 1997, when the company went public, the *New Yorker* reported that Amazon's book inventory "could have filled six football fields."¹⁰ In 1999, it first tried to enter the publishing business by buying a defunct imprint but was unsuccessful.¹¹ It was not until a decade later that Amazon tried again.

Cases

1. *Simon & Schuster v. Members of the New York State Crime Victims' Board*¹²

In 1977, New York enacted the "Son of Sam" law to prevent criminals from profiting from their crimes by selling their stories or writing a book about their crimes. Any proceeds in violation of the "Son of Sam" law had to be surrendered to the New York State Crime Victims Board (the Board) and could later be claimed by victims of the criminal through civil suits. Ten years later, the Board ordered convicted mobster Henry Hill to turn over payments from *Wiseguy*, the book about him by Nicholas Pileggi, that was about to be published by Simon & Schuster. Simon & Schuster brought suit against the Board, arguing that the "Son of Sam" law violated the free speech clause of the First Amendment. The suit concluded in 1991 with an 8-0 ruling by the United States Supreme Court holding that the law was unconstitutional. New York subsequently adopted a new "Son of Sam" law in 2001 that applied to income of over \$10,000 received by anyone convicted of a crime from virtually any source and allowed victims of the crime to sue the perpetrator to obtain compensation from those proceeds.

2. *Dr. Seuss v. Penguin Books*¹³

Penguin Books and Dove Audio wanted to publish a book entitled *The Cat NOT in the Hat! A Parody by Dr. Juice*. The book was a rhyming summary of the murder trial of O. J. Simpson using an illustration and style similar to those used in Dr. Seuss's books. Dr. Seuss Enterprises sued to stop the publication. The Ninth Circuit Court of Appeals found that Penguin Books could not rely on a fair use defense because, quoting the Supreme Court in *Acuff-Rose*,¹⁴ the work was not a parody and the defendants made "no effort to create a transformative work with new expression, meaning, or message."¹⁵

II. 1999-2008

1. Consolidation in the Book Publishing Industry Accelerates

In the beginning of 2001, a *Publishers Weekly* article noted that after years of mergers and acquisitions among book publishers, each sector of the industry (trade, educational, and professional) was comprised of a few very big companies, a number of medium publishers, and many smaller ones. For example, at that time, Random House, which had been purchased by Bertelsmann in 1998, was the biggest trade book publisher in the U.S., and the Penguin Group, which was owned by Pearson and had just bought Dorling Kindersley in 2000, became the second largest trade publisher in the U.S., both with sales of over \$1 billion.¹⁶

The trend towards consolidation has more recently culminated in the merger of Random House and the Penguin Group in July 2013, creating Penguin Random House. According to an article in *Publishers Weekly* appearing just after the five-year anniversary of the merger, Penguin Random House is the largest trade publisher in the world, with 2017 revenues of \$3.4 billion, 275 book imprints, and sales of 700 million books annually.¹⁷ The Big Six traditional trade book publishers, as they were previously known, became the Big Five after this merger.¹⁸

2. E-book Only Publishers Arrive

As e-books become reader-friendly, e-book-only publishing companies were launched, focusing first on "backlist" books previously published in print formats but not available in digital formats. One of the first of these, Rosetta Books, started its e-book business in 2001 with a list of 100 preeminent digital titles. Open Road Integrated Media (Open Road) commenced business in 2009.

3. The Kindle and Kindle Direct Publishing Are Launched

In 2007, Amazon introduced its Kindle electronic reader as well as its Kindle Direct Publishing (KDP) free platform, offering authors the ability to publish e-books of their own.¹⁹ Before the Kindle was launched, less than 1% of books sold were e-books. Within five years, they reached 20% of the trade book market.²⁰

4. Consumer Book Review Sites Begin

In 2007, Otis Chandler and his wife, Elizabeth Khuri Chandler, founded Goodreads, an online social media site for learning about books, with the basic idea of creating a vehicle for friends to share their ideas about good books to read.²¹ The site includes many features in addition to the book reviews written by fellow readers. Amazon purchased Goodreads in 2013.²² As of 2017, the tenth anniversary of Goodreads, it had more than 65 million members, according to an article in *Publishers Weekly*. In that same article, founder Otis Chandler stated that

Goodreads helps authors and publishers with readers' abilities to discover books and also with word-of-mouth book suggestions, two important factors in book selling.²³ At the same time that Goodreads appeared on the scene, professional review sections in newspapers, written by book critics, were experiencing cutbacks.²⁴

Cases

1. *Tasini v. New York Times*²⁵

The *New York Times* and other print publishers licensed rights to copy and sell articles to LEXIS/NEXIS without first consulting the authors of those articles who were engaged as independent contractors under contracts with the publishers. The freelance journalists sued on the basis that they had not granted the publishers the rights to place the articles in electronic databases. The publishers responded that they were authorized by § 201(c) of the Copyright Act to re-publish articles that had appeared in their magazines or journals as part of that collective work or any revision of that collective work. The Supreme Court held that placement in the electronic databases was not a revision of the collective work and that the reproduction was not privileged by § 201(c). In her decision writing for the majority, Justice Ruth Bader Ginsburg said that "the parties (authors and publishers) may enter into an agreement allowing continued electronic reproduction of the authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."²⁶

2. *Suntrust Bank v. Houghton Mifflin Co.*²⁷

A 2001 novel entitled *The Wind Done Gone*, published by Houghton Mifflin, critiqued Margaret Mitchell's famous novel *Gone With the Wind* and its depiction of slavery and the South during the Civil War era. As the trustee holding the copyrights to the latter, SunTrust Bank sued Houghton Mifflin, alleging that the new novel was an infringement by virtue of its verbatim copying of certain dialogue and descriptions, summarizing of various scenes, and copying of core characters, traits and relationships. The Eleventh Circuit Court of Appeals held in favor of Houghton Mifflin, reasoning that the creation and publication of a carefully written parody novel was transformative and its borrowing from *Gone With the Wind* constituted fair use.

3. *Random House v. Rosetta Books*²⁸

In one of the first court cases to address e-book rights, Random House sought an injunction against Rosetta Books, an e-book publisher. Rosetta was selling in digital format eight specific works that Random House had the exclusive license to "print, publish and sell... in book form." The Second Circuit Court of Appeals in 2002 affirmed the district court's decision denying the injunction and holding that a book publishing contract granting to the publisher the right to publish an author's book in

"book form" did not include a grant of the e-book rights, which are retained by the authors to license elsewhere.

4. *Gaiman v. McFarlane*²⁹

Well-known author Neil Gaiman brought suit against Todd McFarlane, the creator of the comic book character Spawn, over the ownership of a series of Spawn-related characters Gaiman co-created with McFarlane in 1993 and Gaiman's entitlement to a division of proceeds from comic books in which the characters appeared. After a jury trial, the district court entered a judgment finding that Gaiman was a co-owner of the characters, ordered that he be so designated on any undistributed copies of the comic books, and that an accounting of profits be done. In 2004, the Seventh Circuit Court of Appeals affirmed.

5. *Warner Bros. Entertainment v. RDR Books*³⁰

J.K. Rowling and Warner Bros. Entertainment, author and film rights owner and distributor of the Harry Potter books, respectively, sued RDR Books over its attempted re-publication of a free online guide to the Harry Potter fictional universe entitled *The Harry Potter Lexicon*. After a trial, the United States District Court for the Southern District of New York found that the *Lexicon* was not sufficiently transformative and held in favor of the plaintiffs, while recognizing that reference guides and companion books in general are not derivative works subject to the control of authors and should be encouraged, not stifled. RDR Books subsequently released a new edition of the *Lexicon*, dropping lengthy quotes from the books and adding commentary.

III. 2009-2018

1. Roles of Independent Book Stores and Book Chains Start to Change

Increasing competition from online book sellers, including Amazon, affected the health of the book store chains and independent book stores. For example, Borders went bankrupt in 2011³¹ and Barnes & Noble closed an estimated 10% of its stores beginning in 2011.³² In 2017, the fourth biggest book store chain, Book World, which began in 1976, went out of business, its owner citing a downturn in retail shopping.³³ Independent book store numbers also dropped dramatically to around 1,600 in 2008,³⁴ down from the mid-1980s number of 3,500 independent booksellers, recollected by one industry expert.³⁵ However, in a reversal of this trend, independent book store numbers are actually now climbing slowly back up. According to the American Booksellers Association, the independent book store category has grown over 30% since 2009 with more than 2,200 stores today.³⁶

2. Self-Publishing Becomes Established

With the launch of a variety of publishing platforms such as Amazon's KDP in 2007, Barnes & Noble's Nook in 2010, and Kobo's Writing Life in 2012, authors over the last 10 years became able to publish and distribute

e-books on their own. As a result of these developments, the self-publishing industry has flourished. According to a report issued by Bowker, from 2011 to 2016, the number of ISBNs issued for self-publishers jumped by 218% from 247,210 to 786,935.³⁷ These numbers do not even include e-books self-published through Amazon's KDP program, since those e-books use ASIN identifiers rather than ISBNs. Amazon's Create Space is the largest publisher of self-published print books and Smashwords is the largest on the e-book side.³⁸ Whereas initially self-published books had somewhat of a stigma attached to them since they were not published with the quality control of a traditional publisher, more recently they are receiving an increasingly popular reception, especially in genres such as romance, science fiction, fantasy, and mystery/suspense.³⁹ As to sales numbers, the reports vary, with some authors experiencing success and others selling fewer than 100 to 150 copies.⁴⁰ One example of a self-published work that has gone on to become a runaway best seller in the traditional sphere is E. L. James' *Fifty Shades of Grey*, starting out as fan fiction and later becoming a blockbuster for Penguin.⁴¹

3. Subscription E-book Services Begin

In the fall of 2013, three different subscription e-book services debuted—Oyster, Scribd, and Entitle. These services were modeled after Netflix for movies and Spotify for music.⁴² Subscribers paid a modest monthly fee, such as \$10 or less, and had access to an unlimited number of books. The subscription services licensed books from publishers to include in their services. At the onset, publishers only offered backlist books to these services, concerned that participation would otherwise hurt sales of individual books and uncertain as to how authors would be compensated. In July 2014, Amazon launched Kindle Unlimited (KU), its e-book subscription service. At launch, KU was comprised of works from Kindle Select (Amazon's self-publishing platform), Amazon's imprints, and independent trade publishers, but none from the big five publishers.⁴³ KU's online sign-up page currently states that it has over one million books available to read.⁴⁴ Authors are paid through a revenue-sharing model based on a monthly pool established by Amazon.⁴⁵ Of the three initial subscription services mentioned previously, only Scribd still exists, although others have entered the market, such as 24symbols and Playster, some of which include audiobooks, magazines, music, and games, along with books.

4. Hybrid Publishing Gains Ground

For authors who do not want to self-publish and for whom traditional publishing is not an option by choice or otherwise, a middle ground known as hybrid publishing has become popular.⁴⁶ The business model for hybrid publishing combines key elements of traditional publishing and self-publishing. For example, rather than the traditional publisher or the self-published author bearing the financial risk, as the case may be, in the hybrid model

the parties share the risk. Accordingly, although the author generally pays an upfront fee to publish the work, the parties together recoup the costs of publication and other preapproved costs and expense, and then share the royalties received on a 50/50 basis.⁴⁷ Hybrid publishers also have a curatorial approach, choosing what they will publish and offering authors editing services.

Given the growing popularity of this model and the lack of protocols to distinguish true hybrid publishers from assisted service providers, the Independent Book Publishers Association (IBPA), an organization that represents independent publishers, including self-published authors and authors working with hybrid publishers, released a set of guidelines in February 2018 called the "IBPA Hybrid Publisher Criteria" that include nine characteristics that a "professional" hybrid publisher should possess.⁴⁸ Among the criteria are requirements that the hybrid publisher vet submissions; ensure editorial, design and production quality; pursue a range of publishing rights (e.g., both print and digital formats); provide distribution services (e.g., through online and traditional methods to wholesalers and bookstores as well); and pay authors a higher-than-standard royalty.⁴⁹

5. Online Writing Communities Become Increasingly Popular

Online social writing communities developed as a result of the existence of the internet and the popularity of social media. Wattpad, one of the best known of these writing sites, launched in 2006, and celebrated its tenth anniversary in 2016, with successful growth and expansion plans for the future.⁵⁰ On that anniversary, Wattpad had over 45 million monthly visitors⁵¹ and had grown to 65 million monthly visitors by early 2018.⁵² Wattpad writers post their works to the site, largely on a serialization basis, and use the platform to receive reader input on their stories.⁵³ Although Wattpad does not publish books itself, it has become a source for book publishers and television and film producers seeking content for projects.⁵⁴ Other social media writing sites that started somewhat after Wattpad include Penguin's Book Country in 2011,⁵⁵ Figment in 2010 (later bought by Random House in 2013)⁵⁶ and, with a slightly different business model, Kindle Worlds in 2013, a platform that allows writers to write fan fiction using characters licensed from sources, such as comic book companies, according to agreed-upon rules.⁵⁷

6. Audio Books Take on Market Share

Although recordings of books for various purposes, such as for use by the blind, have been around since the 1930s, they jumped into mainstream popularity in the mid-1980s, fueled first by the development of cassette technology and then compact discs.⁵⁸ They have become increasingly popular recently; numbers provided by the Audio Publishers Association in 2017 showed that more than 67 million people in the U.S. listened to at least one

audiobook during the year. The audiobook market is now made up largely of digital downloads and streaming rather than physical audiobooks.⁵⁹ According to industry statistics published in *Forbes*, digital audiobook revenue was up 32.1% in the first quarter of 2018, with higher sales than mass market paperbacks and e-books.⁶⁰ Some authors are even planning to release their works as audiobooks instead of using print formats.⁶¹

7. Direct-to-Consumer Selling in the Book Business Begins

Book publishers experimented with direct-to-consumer selling during this time period. For example, in July 2014, HarperCollins kicked off a new website with the ability to permit direct-to-consumer selling of its print books, audiobooks in physical form, and e-books.⁶² Although it had sold e-books from its own site previously, HarperCollins it had never sold print books this way before, eliminating the retail bookstore entirely. Links to a list of third party booksellers as well as to Amazon and Apple are included. Several months later, it also instituted a royalty incentive to authors who sold their works directly to consumers through the HarperCollins platform.⁶³ Another effort in this area was the creation of the Everywhere Store by Zola Books, which is a widget that can be placed on a bookstore, publisher or author's website, for example, enabling direct sales of books to consumers.⁶⁴

While the traditional publishers' model of selling directly to consumers cuts out the retailers, Amazon is making efforts to eliminate the publisher as well. One commentator has noted that Amazon's KDP program "is an arrow to the heart of publishers because it cuts publishers out and gives the artist the lion's share of the income."⁶⁵ Moreover, it's "Amazon's model of the future of books."⁶⁶ As publishers' revenues decrease as a result of below-cost sales by Amazon, this commentator says that it "means 'goodbye publishers' as we know them and most bookshops too. This will leave e-book publishing disintermediated like apps for your iPhone. There will still be publishers but they will be small and the industry fragmented and barely recognizable."⁶⁷ Whether this prognostication is true remains to be seen.

Cases

1. *Salinger v. Colting*⁶⁸

Fredrik Colting, a Swedish author using the pen name John David California, published a novel featuring an older version of the famous Holden Caulfield character of Salinger's *The Catcher in the Rye*. Salinger sued the author for infringing his copyright by using extensive similarities in characters, structure and scenes. The United States Court of Appeals for the Second Circuit affirmed the district court's finding that Colting was not likely to succeed in asserting a fair use defense because of his focus on the "purpose and character of the use," specifically the novel's minimally transformative purpose.

2. *Golan v. Holder*⁶⁹

The Supreme Court held in 2012 that Congress had the authority to restore copyrights to thousands of foreign works that had fallen into the public domain in the United States that were still protected by copyright in their countries of origin. Congress had restored the copyrights pursuant to the Uruguay Round Agreements Act passed in 1994 (the Act), following the adoption of the Berne Convention by the United States. As a result, owners of the works that were previously in the public domain could now receive compensation for any uses going forward. Conductor Lawrence Golan and a group of artists who had previously performed, distributed, and otherwise used certain works while they were in the public domain challenged the constitutionality of the Act on the basis that it violated the copyright clause and the First Amendment. The Supreme Court affirmed the decision of the Tenth Circuit Court of Appeals in a ruling that was 6-2, holding that changing the term of copyright was not violative of the First or Fifth Amendments.

3. *Kirtsaeng v. John Wiley & Sons*⁷⁰

The Supreme Court in 2013 held that the "first sale" doctrine, codified at 17 U.S.C. § 109 of the Copyright Act of 1976 as a limitation to the copyright owner's exclusive rights, applies to works lawfully purchased abroad so that a publisher in the United States could not stop the importation back into the United States of such copies. Thai citizen Supap Kirtsaeng, who was studying in the U.S., purchased English-language foreign edition versions of his textbooks from Thailand where they were cheaper, and then sold them to American students for a profit even though they were marked for sale exclusively abroad. John Wiley & Sons, an academic textbook publisher that frequently assigned rights to foreign subsidiaries to produce foreign editions, sued Kirtsaeng for copyright infringement; the Second Circuit Court of Appeals agreed that such copyrighted works could not be imported into the United States without the permission of the U.S. copyright owner. In 2013, the case went before the Supreme Court and it reversed, holding that because the textbooks in question were legally published in Thailand and Kirtsaeng lawfully purchased the textbooks, he did not require the copyright owner's permission to resell the books in the U.S. under the "first sale" doctrine since the doctrine had no geographic restrictions. The case was then remanded for further proceedings. The case immediately had an impact on publishers and others imposing territorial restrictions on sales that is still being felt.⁷¹

4. *HarperCollins Pub. v. Open Road*⁷²

In 2014, the same New York district court that had decided the Rosetta Books case⁷³ found that language in the 1971 author-publisher contract enabled HarperCollins to have e-book publishing rights. The case was brought by the publisher of the children's novel *Julie of the Wolves* against Open Road over the latter's publication of an e-

book version of the novel. The contract granted the publisher not only the “exclusive right to publish . . . in book form” but also provided for exclusive “subsidiary rights” and a grant of certain publication rights, including uses “in storage and retrieval and information systems and/or whether through computer, computer-stored, mechanical or other electronic means ‘now known or hereafter invented’” In the district court decision, Judge Naomi Reice Buchwald held that the contractual language was “sufficiently broad to draw within its ambit e-book publication” and that e-books constituted a “permissible new use,” even though when the 1971 contract was entered into “no commercial market for e-books existed.”⁷⁴ Judge Buchwald expressly recognized that the holding “dependent as it is on antiquated language, may be of limited applicability beyond the confines of this contract and this case” because “contemporary publication contracts explicitly address e-book publication rights.”⁷⁵

5. Authors Guild v. HathiTrust⁷⁶

Beginning in 2004, several research universities agreed to allow Google to electronically scan their book collections. Thirteen universities founded HathiTrust in 2008 to operate the HathiTrust Digital Library, which was planned as a repository for the digital copies resulting from Google’s efforts. Authors and authors’ associations, most notably the Authors Guild, brought suit against HathiTrust, arguing that the unauthorized digitization of the copyrighted works in the university collections violated the Copyright Act. A conglomeration of individuals with print disabilities, including the National Federation of the Blind, intervened in the suit. The United States District Court for the Southern District of New York granted summary judgment in favor of HathiTrust, the participating universities, and the intervenors. On appeal, the United States Second Circuit Court of Appeals affirmed, holding that HathiTrust’s use of the copyrighted works was protected and did not constitute an infringement on the authors’ rights.

6. Authors Guild v. Google⁷⁷

The Google Library Project (the Project) was a vast project involving bi-lateral agreements between Google and a number of the world’s major research libraries. The Project required scanning entire books, many of which were copyrighted, and making them available as searchable text for the general public as well as allowing the public to see displays of snippets of text. The Authors Guild, on behalf of authors of copyrighted works being copied and displayed by the Project, brought a copyright infringement action against Google. In 2013, the United States District Court for the Southern District of New York granted Google’s motion for summary judgment on the basis of the fair use doctrine. Two years later, the United States Court of Appeals for the Second Circuit found that Google’s highly transformative use and limited display of the text did not provide a significant market

substitute for the original publications, and thus Google’s Project was protected by fair use.

7. U.S. v. Apple Inc⁷⁸

In anticipation of Apple’s 2010 release of the iPad, Apple entered into negotiations with six major publishing companies in the U.S. regarding sales of e-books on the device. Five of the publishers agreed to sell e-books on the iPad pursuant to a so-called “agency” model, such that the publishers had the authority to control prices and Apple received a fee on books sold, rather than under the “wholesale” model, where the retailer controlled the ultimate price to consumers. This model was attractive to the publishers who were concerned about Amazon’s sales of newly released books and *New York Times* bestsellers under the wholesale model at \$9.99, approximately \$2 to \$5 below Amazon’s cost per book. The publishers worried that these below-cost sales would bring down book prices, lessen authors’ royalties, and hurt brick and mortar bookstores.⁷⁹ As a result, some publishers had started withholding their books from Amazon. After Apple entered into the agreements with the five publishers, Amazon sent a letter to the Federal Trade Commission complaining that certain publishers were demanding that it enter into agency model agreements as well. Amazon did in fact enter into agency agreements with four of the publishers, resulting in a price increase for new releases and *New York Times* bestsellers sold by Amazon. The United States Department of Justice, along with 33 states and territories, then brought suit against Apple alleging that Apple “orchestrated a conspiracy among the Publisher Defendants to raise the price of e-books—particularly new releases and *New York Times* bestsellers.”⁸⁰ In 2013, United States District Court Judge Denise Cote found Apple to be in violation of the Sherman Anti-Trust Act⁸¹ and state antitrust laws when it conspired with five major publishing companies (Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster) to raise the price of e-books across the expanding e-book market, and ordered a trial to assess damages. The publishers each settled before trial, admitting no liability. In June 2014, Apple settled the case, agreeing to pay \$450 million in damages. In 2015, the United States Court of Appeals for the Second Circuit concurred with Judge Cote. In March 2016, the United States Supreme Court declined to hear Apple’s appeal.

Conclusion

There is no question that the arrival of digital multimedia in the 1990s was transformational for the book publishing industry. Before that, books were printed on paper and sold in brick and mortar bookstores. Today, one is able to instantly purchase print, electronic, and audiobook versions of the same book on one’s computer and seamlessly switch from reading to listening and back again through the Kindle and Audible apps without losing one’s place. Authors can be part of a wide-ranging so-

cial writing community and then self-publish books that are distributed online and through traditional channels of distribution. Readers can access an unlimited number of e-books through subscription services and share reviews of the books with others through social media sites. While reasonable people may disagree as to whether these developments are good or bad for book publishing in particular or society in general, it is indisputable that the last 30 years has been a time of innovation and change. In some instances, the introduction of these technologies and new ways of doing business has resulted in legal challenges and re-consideration of core legal concepts as described above. For lawyers working in publishing, it also means that we must keep up to date on developments in the industry and be mindful of new models and trends in order to properly advise our author and publisher clients.

Endnotes

1. David Berreby, *The Growing Battle of the Big Bookstores*, THE NEW YORK TIMES, at 5 (Nov. 8, 1992), available at <https://www.nytimes.com/1992/11/08/business/the-growing-battle-of-the-big-bookstores.html>.
2. "Publishing Timelines," INFOPLEASE, available at <https://www.infoplease.com/arts-entertainment/trends-reading-and-publishing/publishing-timeline>.
3. *Id.*
4. *A Very Short History of Ebooks*, DIGITALPUBLISHING101.COM, available at <http://digitalpublishing101.com/digital-publishing-101/digital-publishing-basics/a-very-short-history/>.
5. F. Robert Stein, *Chapter 7: Book Publishing: Traditional Agreements—Section 7.18*, in SIEGEL ON ENTERTAINMENT (New York State Bar Association 2018).
6. *Id.*
7. Jane Friedman, *Start Here: How to Self-Publish Your Book*, WWW.JANEFRIEDMAN.COM (July 2, 2017), available at <https://www.janefriedman.com/self-publish-your-book/>.
8. *Just Press Print*, THE ECONOMIST (Feb. 25, 2010), available at <https://www.economist.com/business/2010/02/25/just-press-print>.
9. Jane Friedman, *supra* note 7.
10. Packer, George, *Cheap Words*, THE NEW YORKER (Feb. 17, 2014), available at <https://www.newyorker.com/magazine/2014/02/17/cheap-words>.
11. *Id.*
12. *Simon & Schuster v. Members of the NY State Crime Victims' Board*, 502 U.S. 105 (1991).
13. *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).
14. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
15. *Dr. Seuss*, 109 F.3d at 1401 (quoting *Acuff-Rose*, 510 U.S. at 578).
16. Jim Milliot, *The Land of the Giants*, PUBLISHERS WEEKLY (Jan. 1, 2001), available at <https://www.publishersweekly.com/pw/print/20010101/23242-the-land-of-the-giants.html>.
17. Jim Milliot, *At PRH, Producing a Publishing Powerhouse*, PUBLISHERS WEEKLY VOL. 365 ISSUE 31 (July 30, 2018), available at <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/77617-at-prh-producing-a-publishing-powerhouse.html>.
18. George Packer, *supra* note 10.
19. *Id.*
20. *A Very Short History of Ebooks*, *supra* note 10.
21. Svati Kirsten Narula, *Millions of People Reading Alone, Together: The Rise of Goodreads*, THE ATLANTIC (Feb. 12, 2014), available at <https://www.theatlantic.com/entertainment/archive/2014/02/millions-of-people-reading-alone-together-the-rise-of-goodreads/283662/>.
22. *Id.*
23. Calvin Reid, *Goodreads Marks 10 Years of Supporting Books*, READING, PUBLISHERS WEEKLY VOL. 264 ISSUE 39 (Sept. 25, 2017), available at <https://www.publishersweekly.com/pw/by-topic/digital/Apps/article/74878-goodreads-marks-10-years-of-supporting-books.html>.
24. See Heidi Benson, *L.A. Times expected to end freestanding book review*, SFGATE.COM (March 3, 2007 at 4:00am), available at <https://www.sfgate.com/news/article/L-A-Times-expected-to-end-freestanding-book-2644815.php>; Michael Connelly, *The folly of downsizing book reviews*, L.A. TIMES.COM (April 29, 2007 at 12:00am), available at <http://www.latimes.com/la-op-connelly29apr29-story.html>.
25. *New York Times Company, Inc. v. Tasini*, 533 U.S. 483 (2001).
26. *Id.* at 505.
27. *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257 (11th Cir. 2001).
28. *Random House, Inc., v. Rosetta Books LLC*, 283 F.3d 490 (2d Cir. 2002).
29. *Gaiman and Marvels and Miracles, LLC v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).
30. *Warner Bros. Ent. Inc. and J.K. Rowling v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).
31. Julie Bosman and Michael J. de la Merced, *Borders Files for Bankruptcy*, THE NEW YORK TIMES (Feb. 16, 2011), available at <https://dealbook.nytimes.com/2011/02/16/borders-files-for-bankruptcy/>.
32. David Streitfeld, *Bookstore Chains, Long in Decline, Are Undergoing a Final Shakeout*, THE NEW YORK TIMES (Dec. 29, 2017), available at <https://www.nytimes.com/2017/12/28/technology/bookstores-final-shakeout.html>.
33. *Id.*
34. Michael S. Rosenwald, *Independent bookstores turn a new page on brick-and-mortar retailing*, THE WASHINGTON POST, (Dec. 15, 2013), available at https://www.washingtonpost.com/local/independent-bookstores-turn-a-new-page-on-brick-and-mortar-retailing/2013/12/15/2ed615d8-636a-11e3-aa81-e1dab1360323_story.html?utm_term=.fc446990da0f.
35. Peter Osnos, *How Book Publishing Has Changed Since 1984*, THE ATLANTIC (April 12, 2011), available at <https://www.theatlantic.com/entertainment/archive/2011/04/how-book-publishing-has-changed-since-1984/237184/>.
36. Francis X. Clines, *Indie Bookstores Are Back, With a Passion*, THE NEW YORK TIMES (Feb. 12, 2016), available at <https://www.nytimes.com/2016/02/13/opinion/indiebookstores-are-back-with-a-passion.html>.
37. Jim Milliot, *Self-Published ISBNs Hit 786,935 in 2016*, PUBLISHERS WEEKLY.COM (Oct. 20, 2017), available at <https://www.publishersweekly.com/pw/by-topic/industry-news/manufacturing/article/75139-self-published-isbns-hit-786-935-in-2016.html>. The term "ISBN" stands for "International Standard Book Number" and is the unique identifier for each format of a book.
38. *Id.*
39. Ben Galley, *Is the self-publishing stigma fading?* THE GUARDIAN, (May 14, 2015 at 11:53am), available at <https://www.theguardian.com>.

- com/books/booksblog/2015/may/14/is-the-self-publishing-stigma-fading.
40. Alan Finder, *The Joys and Hazards of Self-Publishing on the Web*, THE NEW YORK TIMES, (Aug. 15, 2012), available at <https://www.nytimes.com/2012/08/16/technology/personaltech/ins-and-outs-of-publishing-your-book-via-the-web.html>. Later statistics for average copy sales have not been found.
 41. Hannah Ellis-Petersen, *Fifty Shades of Grey: the series that tied publishing up in knots*, THE GUARDIAN (June 18, 2015), available at <https://www.theguardian.com/books/2015/jun/18/fifty-shades-of-grey-the-series-that-tied-publishing-up-in-knots>.
 42. Bill Rosenblatt, *Subscription Services for Ebooks: Like Netflix, Like Spotify, or Not at All?* FORBES.COM (April 24, 2015), available at <https://www.forbes.com/sites/billrosenblatt/2015/04/24/subscription-services-for-ebooks-like-netflix-like-spotify-or-not-at-all/>.
 43. *Amazon Tests Its Own Ebook Subscriber Service*, PUBLISHERS WEEKLY.COM, (July 16, 2014), available at <https://www.publishersweekly.com/pw/by-topic/digital/content-and-ebooks/article/63326-amazon-tests-its-own-ebook-subscription-service.html>; see also *Amazon Makes Kindle Unlimited Official*, PUBLISHERS WEEKLY, (July 18, 2014), available at <https://www.publishersweekly.com/pw/by-topic/digital/content-and-ebooks/article/63345-amazon-makes-kindle-unlimited-official.html>.
 44. *Kindle Unlimited*, AMAZON.COM (last visited September 9, 2018), available at <https://www.amazon.com/kindle-dbs/hz/signup>.
 45. Andrew Albanese and Jim Milliot, *What's Next for Ebook Subscriptions?* PUBLISHERS WEEKLY, VOL. 262 ISSUE 39 (Sept. 25, 2015), available at <http://www.publishersweekly.com/PW/by-topic/digital/Apps/article/68193-after-oyster-what-s-next-for-ebook-subscriptions.html>.
 46. Joan Faier and Judith B. Bass, *'Hybrid' Publishing: Best of Both Worlds?*, p. 35, NYSBA ENTERTAINMENT, ARTS AND SPORTS L. J., Spring 2017 Vol. 28 No.1.
 47. Jane Friedman, *What is a Hybrid Publisher?* JANEFRIEDMAN.COM, (Dec. 7, 2016), available at <https://janefriedman.com/what-is-a-hybrid-publisher>.
 48. *IBPA's Hybrid Publisher Criteria*, WWW.IBPA-ONLINE.ORG, available at <http://www.ibpa-online.org/page/hybridpublisher>.
 49. *Id.*
 50. Calvin Reid, *How Wattpad Became a Multiplatform Entertainment Venue*, PUBLISHERS WEEKLY, VOL. 263 ISSUE 49 (Dec. 5, 2016), available at <https://www.publishersweekly.com/pw/by-topic/digital/content-and-ebooks/article/72190-how-wattpad-became-a-multiplatform-entertainment-venue.html>.
 51. *Id.*
 52. Todd Spangler, *Wattpad Banks \$51 Million from Tencent, Other Investors to Fund Entertainment Projects*, VARIETY.COM (Jan. 17, 2018 at 8:23am), available at <https://variety.com/2018/digital/news/wattpad-funding-tencent-tv-film-entertainment-1202666935>.
 53. Michelle Castillo, *Hollywood and book publishers are turning to this online platform for their next '50 Shades of Grey'*, CNBC.COM (Oct. 29, 2017 at 10:29am), available at <https://www.cnbc.com/2017/10/29/wattpad-romance-one-direction-fan-fiction-turning-into-movies-books.html>.
 54. *Id.*
 55. Julie Bosman, *Aspiring Authors Get Help Online*, THE NEW YORK TIMES (April 26, 2011), available at <https://www.nytimes.com/2011/04/26/books/book-country-an-online-site-by-penguin-group.html>.
 56. Calvin Reid, *Random House Acquires Figment*, PUBLISHERS WEEKLY.COM (Oct. 29, 2013), available at <https://www.publishersweekly.com/pw/by-topic/childrens/childrens-industry-news/article/59745-random-house-acquires-figment.html>.
 57. Lily Rothman, *Amazon Steps Into the Cloistered World of Super-Fandom*, TIME.COM (June 27, 2013), available at <http://entertainment.time.com/2013/06/27/amazon-steps-into-the-cloistered-world-of-super-fandom/>.
 58. *A Short History of the Audiobook, 20 years after the first portable digital audio device*, PBS NEWS HOUR (Nov. 22, 2017), available at <https://www.pbs.org/newshour/arts/a-short-history-of-the-audiobook-20-years-after-the-first-portable-digital-audio-device>.
 59. Ed Nawotka, *BookExpo 2017: Audiobooks Evolve in the Age of Podcasts*, PUBLISHERS WEEKLY (May 31, 2017), available at <https://www.publishersweekly.com/pw/by-topic/industry-news/beat/article/73813-bookexpo-2017-audiobooks-evolve-in-the-age-of-podcasts.html>.
 60. Adam Rowe, *The Publishing Industry's Digital Audiobook Revenue is up 32.1% in Q1 2018*, FORBES (May 28, 2018), available at <https://www.forbes.com/sites/adamrowe1/2018/03/27/the-rising-popularity-of-audiobooks-highlights-the-industrys-backwards-payscale/#335819f04723>.
 61. James Tapper, *Audio is Publishing's New Star as Sales Soar Across Genres*, THE GUARDIAN (June 9, 2018), available at <https://www.theguardian.com/uk-news/2018/jun/09/audiobooks-audible-publishing-sales-boost>.
 62. *HarperCollins Tries Direct Sales*, PUBLISHERS WEEKLY.COM, (July 8, 2014), available at <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/63227-new-hc-site-promotes-direct-sales.html>.
 63. HarperCollins Press Release, *HarperCollins Publishers Launches E-Commerce Program for Authors*, HARPERCOLLINS.COM (Oct. 20, 2014), available at <https://www.harpercollins.com/corporate/press-releases/harpercollins-publishers-launches-e-commerce-program-for-authors>.
 64. Andrew Albanese, *At the New Zola Books, Focus Is on Tech*, PUBLISHERS WEEKLY (Nov. 6, 2015), available at <https://www.publishersweekly.com/pw/by-topic/digital/content-and-ebooks/article/68615-at-the-new-zola-books-focus-is-on-tech-not-books.html>.
 65. Chambers, Clem, *Amazon, The Creative Destruction of Publishers and Book Shops*, FORBES.COM (Aug. 11, 2014), available at <https://www.forbes.com/sites/investor/2014/08/11/amazon-the-creative-destruction-of-publishers-and-book-shops/#2308a4c67e33>.
 66. *Id.*
 67. *Id.*
 68. *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).
 69. *Golan v. Holder*, 132 S. Ct. 873 (2012).
 70. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).
 71. Albanese, Andrew, *What Does Kirtsaeng v. Wiley Mean for the Industry?*, PUBLISHERS WEEKLY (March 23, 2013) available at <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/56491-a-textbook-case.html>.
 72. *HarperCollins Publishers, LLC v. Open Road Integrated Media*, 7 F. Supp. 3d 363 (S.D.N.Y. 2014).
 73. *Random House*, 283 F.3d at 490. See discussion in Section 14, above.
 74. *HarperCollins*, 7 F. Supp. 3d at 377.
 75. *Id.* at 377.
 76. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).
 77. *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).
 78. *U.S. v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

79. Parloff, Roger, *US v. Apple Could Go to the Supreme Court*, FORTUNE MAGAZINE.COM (June 5, 2013), available at <http://fortune.com/2013/06/05/us-v-apple-could-go-to-the-supreme-court/>.
80. *Id.* at 297.
81. 15 U.S.C.A. § 1.

Judy Bass is a media and entertainment attorney whose practice is dedicated to addressing the needs of clients in the creative community. She concentrates on television and film production and distribution deals, option agreements, author publisher deals, talent representation, rights licensing, book and magazine publishing, digital media, children's television and animation, licensing and merchandising, and intellectual property matters. She is a former business affairs executive and in-house counsel with over 25 years of experience both with a major law firm and at premier media and entertainment companies. She is a member of the EASL's Executive Committee), Co-Chair of EASL's Committee on Literary Works and Related Rights and a member of the NYSBA Media Law Committee. Judy is also the immediate past chair of the Entertainment Law Committee of the New York City Bar Association and a current member of the Communications and Media Law Committee. She is the co-author of *Digital Publishing: E-Books, Self-Publishing and Other Models*, a chapter in Siegel on Entertainment Law (2018). She was selected as a member of Super Lawyers for New York in Entertain-

ment & Sports. She can be reached at jbb@jbbasslaw.com.

Joan Faier is an attorney with a background in book publishing, cable television, and advertising who has also been a journalist. She worked as in-house counsel for Random House and The Interpublic Group of Companies, an advertising agency holding company, and as a business and legal affairs and standards and practices lawyer for the Lifetime cable television network. She has held a variety of journalism positions, including Deputy Managing Editor of *The National Law Journal*. Joan is a member of EASL's Executive Committee and is Co-Chair of EASL's Committee on Literary Works and Related Rights. She has previously served on the New York City Bar Association's Entertainment Law Committee, Copyright & Literary Property Committee, and Consumer Affairs Committee. She is the co-author of *Digital Publishing: E-Books, Self-Publishing and Other Models*, a chapter in Siegel on Entertainment Law (2018).

Erica Ruff is a third-year law student at the Benjamin N. Cardozo School of Law in New York City. She is currently working as the Contracts Assistant at The Public Theater and serving as a Student Liaison for the EASL Section.

NEW YORK STATE BAR ASSOCIATION

REQUEST FOR ARTICLES

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

Elissa D. Hecker
Law Office of Elissa D. Hecker
64 Butterwood Lane East
Irvington, NY 10533
eheckeresq@eheckeresq.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

