



Publishing & Antitrust: Where Are We Headed?

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with

- **Mary Rasenberger, CEO, Authors Guild and Authors Guild Foundation**
 - **Christopher L. Sagers, Cleveland State University**
 - **Andrew Albanese, Senior Writer, *Publishers Weekly***

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KENNEALLY: As one by one, publishers disappear, is it possible (or even inevitable) that competition in trade book publishing is on its way to becoming extinct?

Welcome to Velocity of Content. I'm Christopher Kenneally for CCC.

On May 15, I hosted a panel discussion on the future of publishing as part of the 2022 BIO Conference, cosponsored with the Leon Levy Center for Biography. Each year, BIO – the Biographers International Organization – welcomes biographers, editors, agents, publishers, and publicity professionals to a weekend-long program on all aspects of the biographer's craft. Speakers include Pulitzer Prize winners and bestselling authors.

Our own panel considered the pending PENGUIN Random House acquisition of Simon & Schuster; the antitrust case brought to stop it; and the ongoing concerns over industry consolidation. Joining me for the discussion were **Mary Rasenberger**, CEO of the Authors Guild and Authors Guild Foundation; **Christopher L. Sagers**, the James A. Thomas Professor of Law at Cleveland State University, specializing in antitrust law; and **Andrew Albanese**, Senior Writer at *Publishers Weekly* and the author of *The Battle of \$9.99: How Apple, Amazon and the "Big Six" Publishers Changed the E-Book Business Overnight*.

In November 2020, Penguin Random House announced plans to purchase rival Simon & Schuster from Viacom CBS for more than \$2 billion.

Penguin Random House, the largest book publisher in the United States, is owned by the German media conglomerate Bertelsmann, a private, family-owned multinational



corporation that is one of the world's largest media conglomerates and which includes the BMG music label. Combining with Simon & Schuster, the US's third largest publisher, would create a fearsome "book behemoth," as the New York Times noted at the time.

The PRH/S&S merger immediately raised the possibility that the US Department of Justice would seek to block it on antitrust grounds. The Biden Administration, which took office in January 2021, made clear its ambitions to step up antitrust enforcement. The president appointed Lina Khan to lead the Federal Trade Commission and Timothy Wu as a special White House Advisor responsibility for Technology and Competition policy. Both are vocal proponents of using government powers to ensure marketplace competition, especially in cases of market consolidation.

On November 2, 2021, the Dept. of Justice filed a complaint in the U.S. District Court for the District of Columbia to block Penguin Random House's proposed acquisition of Simon & Schuster.

"If the world's largest book publisher is permitted to acquire one of its biggest rivals, it will have unprecedented control over this important industry," said US Attorney General Merrick Garland.

"American authors and consumers will pay the price of this anticompetitive merger – lower advances for authors and ultimately fewer books and less variety for consumers," Garland warned.

Attorneys for PRH and S&S responded that the government just does not understand how publishing works.

"The government wants to block the merger under the misguided theory that it will diminish compensation to just the highest-paid authors," a PRH lawyer told the New York Times. "That is legally, economically and factually wrong, and it ignores the vast majority of authors who will indisputably benefit from the transaction."

Mary Rasenberger with the Authors Guild opened the program with a review of market consolidation in publishing over recent years....

RASENBERGER: I think it's important to understand this merger in the context of the mergers that have come before it. It's the culmination of six decades of prior mergers, with many prior publishers now divisions or imprints of Penguin Random House or Simon & Schuster or one of the other big five, and that this merger is sort of the last straw. The move toward consolidation started in the 1960s. As early as 1970, *BusinessWeek* wrote of an epidemic of publishing mergers. It said, "with the big fish swallowing the little fish, the book



business is becoming increasingly competitive and brutal. It is evolving into an industry of giants and dwarves, with midsize companies a vanishing species.”

I won't go into all the various mergers and acquisitions, but this trend continued throughout the '90s. Between 2009 and 2013, there was an average of a dozen transactions per year in the M&A world in publishing. And then in 2013, Random House acquired Penguin to create PRH. There were more mergers between 2014 and 2019, not just by the big five, but also consolidation among midsize publishers. And then last year, as you know, we saw two other blockbuster deals. HarperCollins bought Houghton Mifflin Harcourt, one of the few non-big five remaining midsize publishers, and Hachette then purchased Workman in September 2021.

So the merger between S&S and PRH – PRH, just to put this into perspective after all these other acquisitions, it's already twice as large as the next big publisher, which is HarperCollins – I'm talking about in the United States. The merger would create a company that would collectively control more than two-thirds of the trade book market, particularly the advance-paying book market, and it would have twice the revenue in the United States as the next three largest publishers – that is, HarperCollins, Hachette, and Macmillan. And there is some fear that the merger would force the other three to consolidate further, potentially leaving us with two or maybe three publishers. I also want to note that the combined company would control 70% of the market for literary and general fiction and 60% of the market for trade biography. So it would have an even more outsized place in the economy.

KENNEALLY: The concern you have, of course, is the impact on authors and their careers. You did not bring this case. It's a Department of Justice antitrust case. But as I understand it, the Authors Guild really strongly urged something to be done, and you do so because you're concerned that the acquisition of Simon & Schuster by PRH would have a real significant impact on authors and their careers, let alone on the marketplace and the readers and so forth. So tell us about the impact on authors, especially those authors in the market cases where advances are paid.

RASENBERGER: We did write a letter to DOJ when the proposed merger was announced. I should also say we've been talking to DOJ and FTC for years about problems with monopsonies in the industry. Quite simply, this merger would leave authors with even fewer purchasers of their manuscripts, so less leverage, which means ultimately lower advances and also worse contract terms. That is actually one of the concerns we had aside from author advances, which the DOJ complaint talks about very compellingly, is that we, the Authors Guild, would have less leverage to go to PRH or go to any publisher and say you've got to improve your terms – other terms in their standard contracts – and point to other publishers' better terms.



The merger would create a monopsony. So everyone understands, a monopsony is where there's a concentration in the buyers of goods – and I'm sure Chris Sagers will tell us more about that later – as opposed to a concentration in the consumer-facing seller of goods, which is a monopoly. This kind of monopsony would harm authors in this advance-paying market for trade books, as I said, simply because it decreases competition for manuscripts in that marketplace.

The advance-paying market is a very important market for those who live off their writing income, and I don't need to tell most of you in attendance today that, because the advance-paying market is what supports writers who write the kind of nonfiction and fiction books that take multiple years to research and write. These tend to be significant books. They tend to land the most awards, have the greatest sales, hence the greatest number of readers and the greatest influence. The kind of advances paid by the big five and a few other publishers, though not as consistently – they provide authors with the necessary time and resources to develop the kinds of books that are capable of transforming the way we see the world, the way we interact with one another.

Of course, these are generalizations, because there are many exceptions. But the way it works in the advance-paying market is an agent generally tries to get an auction going. That's where you get the greater advance. You try to bid up the advance. Often, the advance is all you ever get. And a big advance often means it's a big investment by the company, so they're more likely to put more marketing dollars or at least left behind the book. Simply, if PRH acquires S&S, there's one less company to go into a bidding war, and ultimately that will mean authors won't be able to bid up their advances. The DOJ's complaint does provide a number of examples of bidding wars between PRH imprints and S&S where the price did get bid up when it was just those two companies left, which was interesting.

I should clarify, though, that agents go out to editors at imprints. They don't go out to the big publishing houses. Sometimes, the imprints even within a big publishing house – say, PRH – have bids and bid against each other. But most companies have policies that say you can't bid each other up. Now, PRH is an exception. They at least say that they allow – even now, before the merger, they allow imprints to bid against each other up to a certain point, at which point the parent company comes in and says no more.

We asked that if the merger did go through that PRH extend this to the S&S imprints. So in other words, they allow S&S imprints to bid against each other and against PRH imprints. And we wanted DOJ to put this in a consent decree. Because ultimately, PRH did finally say, OK, we'll do that. It took a lot for them to get there, but they did. So we



went to DOJ and said, can you put this in a consent decree? And they said, no, it's non-enforceable. They then went ahead and filed the lawsuit.

I do think that the DOJ's complaint shows that it really understands that authors inevitably lose income when there's limited competition for their work. That, in turn, impacts the reading public, because fewer important books are written, simply because at some point, authors can't afford to write these kind of books.

KENNEALLY: Simon & Schuster is owned by ViacomCBS, which has publicly said it wants to sell Simon & Schuster. It intends to do so. It has its own plans for the future of Viacom that do not include that publishing house. So the sale – a sale, I should say – is going to happen one way or the other. Is there a preference, if you will, for one particular buyer over another? Obviously, some of the potential bidders for this could be in private equity. You've already brought up the concern around the focus on profit over literary concerns. Wouldn't that make things worse?

RASENBERGER: Yeah, exactly. Thank you. This isn't simple. I mean, nothing's ever simple, right? The response of agents, in fact, was very mixed. Between the time the merger was announced and DOJ brought the complaint – we filed the complaint – we did have even a lot of internal discussions among our council about this. The fear is that S&S is going to get sold anyway, and by and large, agents like PRH. They like them because they're easier to work with. They're transparent on royalties. They know how to market and sell books. Their contracts are one of the least worst, (laughter) from our perspective, in the industry. And they prefer PRH to another potential suitor, as well as and especially private equity.

So there's a real fear about private equity coming into publishing. It's already gone into journalism, the music industry. Private equity really has one interest, and that's profit. But as in the quotes I read earlier, publishing's never been a purely rational, profit-driven market, and we don't want it to become one. When people go into publishing, they do because they love books. They want to see great books published, not to get rich. More – and more diverse – books get published that way. That was our concern back in 1978. It's still our concern. And we're particularly concerned about the S&S midlist authors. What happens if private equity comes in?

So it's complicated, but ultimately our council, which is the board of the guild, decided that we had to come out strongly against the merger, because we as an organization do not support this further consolidation in the industry. It's only going to hurt authors ultimately.



KENNEALLY: Mary Rasenberger, CEO of the Authors Guild, thank you very much for that. We'll come back to you. But I want to turn now to Professor Christopher Sagers at Cleveland State University.

SAGERS: Hi. Thank you.

KENNEALLY: So tell us from your perspective as someone who watches the antitrust law evolve and has written about that where we stand today. There isn't a lot of clarity around what the focus is. We think it's about competition, but what kind of competition? Tell us about that.

SAGERS: I was not really a publishing expert, and probably still am not much of one yet, but I started thinking about publishing a whole lot about 10 years ago, when the last really big, really visible antitrust case happened in publishing, which was the famous e-books case of about 2012. I have a feeling everybody here will at least dimly remember the case in which these same publishers, these big five – at that time, they were the big six – got together and sort of tried to circle the wagons against Amazon. Man, was that an interesting case. Again, it's interesting on so many levels, so many more than I could possibly really get into. But it was the most interesting on this biggest level which I think you're asking me about, which is should we want competition? Should we force publishers to compete with each other, for example, in the wholesale prices or wholesale terms they offer to Amazon? Is competition of the unbridled capitalism that we sort of imagine that we have in the United States – is that good for books in the same way that it's good for toilet seats or staples?

I wrote a book about it. I spent 10 years thinking about it – a tragically overlooked monograph, by the way, which is on sale at bookstores near you. In that book, I came at this as a traditional antitrust generalist who leans modestly left, I guess. When the Justice Department sued the big publishers, I thought it was an easy case. These folks were caught doing things that in other industries routinely send people to prison. It was an undisguised, very obviously illegal scheme.

KENNEALLY: Professor Sagers, antitrust law in the marketplace at large has really focused on price and efficient markets in that way, and it hasn't been about the issues that Mary raised – democracy, social value, richness of ideas, diversity, and all of that. Antitrust hasn't looked at those concerns. So what we're asking it to do is to shift its focus, really. Aren't we?

SAGERS: I would say no, actually. That's the going discussion – that antitrust has been focused on very low prices. Low consumer retail prices is the only thing we care about. And many people now believe that that's a bad thing. That certainly was a theme of



popular discussion of the old e-books case. It's been a theme in every competition case involving publishing for a very long time – the theme being, well, publishing is special, this is an intellectual product, etc. Therefore, we can't just focus on having low-priced books for authors or whatever.

I would say that that discussion gets things a little bit wrong. I think antitrust has actually always cared about all of those broader values – democracy and the variety of content and quality and so on. And it cares about it at least to the extent that markets care about those things. You can be very cynical about that, and many people are. I suppose I am to some degree.

But I think possibly the best we can do in having a competition policy for books or anything else is at least try to use markets for the things that they can do reasonably well. Despite what some people say, I think that markets don't just produce very low-priced products. They do actually reward quality and variety and so on. If people want better books, markets will by and large deliver them if markets are working well. Hence people like me, I guess, and some other people think that we do actually need antitrust.

As an example, if you only have four publishing firms, one of which controls – the numbers here are breathtaking, and I forget them, even, partly because things have changed so much. But one firm is going to control like two-thirds of trade publishing, if I'm not mistaken, at least on some measures. That's really not a market that works at all. So the extent that markets can do anything well beyond just generating low consumer prices, this one probably won't do it very well. It will be clumsy and so on. And I think it will be worse with the increased concentration.

KENNEALLY: Handicap the case as an observer of antitrust law – which is evolving, which is perhaps in the process of swinging in a different direction than it has been for a while. Where do you think this is going to turn out?

SAGERS: That's a good question. I see this case as about a 50/50 kind of case. The government could win. It's not an especially uphill case as antitrust cases go now. Antitrust cases are always hard now, because our antitrust law frankly is nearly dead. But the government could definitely win this.

Without getting too much into the weeds, merger law as it exists now is almost entirely a question of counting up market shares. Deals are essentially never illegal unless they are, as we say, horizontal mergers, and this happens to be a horizontal merger. In other words, it is two firms that horizontally compete – they sell the same products to the same consumers – combining their forces. That's step one in merger law – it's horizontal, it can be illegal.



And then the question is just, well, how big will the resulting firm's market share be, and how much will the increase in its market share – how much will it increase as a result of the merger? There had been a very informal rule of thumb in Washington for a long time, which is that the Justice Department won't stop a merger unless it represents, as we say, a four to three – a merger in which there had been four major firms in a market which will be reduced to three. Many people say – notably, these merging entities and their very fancy lawyer like to say, well, this is a five-four. But this is actually a very unusual five-four, in which the acquiring firm is already so big. It's already so much larger than the remainder that even the remaining four firms will leave very, very little competition as we traditionally understand competition.

KENNEALLY: So if it's a 50/50 case, Professor Sagers, and it goes either way, one way or the other, are consumers, are readers, going to notice any differences?

SAGERS: Good question. I don't think consumers are going to notice much difference. Book prices will not change appreciably, I would take a guess, as a result of this merger. Consumer retail injury isn't really where it's at. I don't know if authors will in the way that the Justice Department says. I think that authors will probably still be fairly frustrated with publishers, as they always have been, and they probably won't notice a huge difference in their experience. Agents will tell different stories after this happens over the next five years.

Here's my deal. I think the problem in having a competition policy is that you can't let it get to the state that ours has gotten to. If you're only enforcing antitrust law when you get down to three-firm markets or four-firm markets like this one's going to be, where one of the firms is really dominant, you've already exhausted all the competition that could ever have done us any good. Consumer prices aren't going to go up, because they're already the highest a monopolist could charge, I think. If there were only one firm in the market, consumer prices might go up a little bit, but I bet they wouldn't.

KENNEALLY: I want to turn now for some commentary and editorial analysis with my colleague for the Velocity of Content podcast every Friday, Andrew Albanese, *PW*'s senior writer. Andrew, good to see you.

ALBANESE: Hey, Chris.

KENNEALLY: So you follow the case, but you also follow the publishing world. In these publishing times, tell us about what you see, what you hear, about how concerned authors and others are in the book world about the problem of consolidation.



ALBANESE: Authors are very concerned about consolidation. I think all of us are very concerned about consolidation in the industry. At the same time, I feel like maybe given the last two years and things that are going on in the publishing business, it tends to get sort of pushed to the background, right? It's an interesting time for the trade publishing market, because in terms of sales, it has been the most remarkable two years of sales I've seen in my entire career. That's either as a publisher or as a reporter for the last 24 years. And I think we're all expecting sales to cool off a bit this year, but I still believe they're going to settle in at a level that's well above pre-pandemic levels and well above where they would have been had this historic event not happened.

Since my first day as an editorial assistant in 1989 at Penguin, where we were being put together with Viking under one roof, and the acquisition of Putnam was still to come, back when I was a 22-year-old editorial assistant, there were dozens of houses you could shop your manuscript to. Now, we have five, about to be four. Those independent bidders that could once go to their independent owners and say why they needed more money for an author – well, those are now imprints in a corporate structure.

When people hear about someone getting a \$100,000 advance, it sound like a lot of money. It's not, especially if you live in New York or San Francisco. Writing a book is hard work. It's a full-time job. Especially the kind of work that this audience today produces. When you get that \$100,000 advance, maybe you get a quarter of it on signing. You get another quarter of it when you deliver the manuscript, however long that takes, and acceptance. Maybe the rest of it is dribbled out a year later on publication or a little later, if you're published on time. That's just not livable.

KENNEALLY: I do have to ask you about the reputation of Penguin Random House. Those two came together, as we have said, in 2013. What kind of a publisher has PRH turned out to be? What kind of a mega-house are they? Do they have any certain reputation, perhaps even for unfairly exerting their power over the market?

ALBANESE: As for Penguin Random House's reputation after that merger, Penguin Random House is an excellent publisher. Their CEO and their leadership is excellent. Markus Dohle is an excellent leader who really does deeply understand books and is committed to books – and not just at his own company, but he's really committed to a vibrant book business.

I don't think Penguin Random House is unfairly exerting its power, but it's unquestionably exerting its power. Questions about whether the power that Penguin Random House wields in the market is fair – I think those are fair questions, pressing questions, even, especially with Simon & Schuster now on Penguin Random House's plate. Those questions are being addressed by regulators now, which I think is what needs to happen.



AG Garland said that if the world's largest book publisher is permitted to acquire one of its biggest rivals, it will have unprecedented control over this important industry. But where was that statement a decade ago? Many in the industry, and talked about it, believe that the damage – and Chris talked about it, too – believe the damage has been done. So I do think it's positive that DOJ is now paying attention to this latest, last piece of consolidation, this huge move. But I have to really question the net effect of what blocking this move will do after inaction for all these years.

KENNEALLY: I have to ask about the elephant in the room, which is, isn't the book world more concerned about Amazon and its market dominance in bookselling than they are about any dominance of a particular publisher?

ALBANESE: Absolutely, it is. And you know what? It should be. But here's my feeling on that, too. If we're waiting for government to step in to do something about it, we may be waiting for a while, because this is not an easy nut to crack. If you think that this case, the Penguin Random House/Simon & Schuster case, has potential to get a little messy, breaking down Amazon is going to be a bloodbath.

For one, I'm just imagining that Amazon, when its turn comes, is going to argue that, hey, we actually are the one force that keeps consumer prices low. We're the ones that are protecting consumers from this cartel of major publishers. Publishers complain about Amazon's hardball tactics. There was an eye-opening government report about those tactics. But Amazon's going to say, hey, look, the publishers all negotiated their deals with us, and they all cashed the checks, and they took the growth and paid the bonuses. Amazon's also going to be able to argue that it is where it is because they're innovative, and the publishing industry has sort of allowed Amazon the upper hand there by in many ways effectively outsourcing innovation in the book business to this company. Some would call it disruption. Amazon is going to call it innovation.

KENNEALLY: I want to give the last word, because we're running out of time, to Christopher Sagers. You're our antitrust guru here. We're talking really about an antitrust case. So I think the point here is that the focus on publishing, and antitrust as it relates to publishing, may be missing the bigger picture, that antitrust is an issue that perhaps needs more attention across the entire economy.

SAGERS: Yeah. Well, I certainly agree with that. My career has been saying that out loud. Again, the most interesting thing I ever studied in doing this for 25 years was the publishing industry. I learned a lesson, I think – I taught myself what I think is a lesson from studying it, which was antitrust hasn't been effective in publishing, and its biggest challenge – it hasn't been a problem of the law not being written correctly or some



underlying theoretical aspect of the law needing a tweak or something like that. The problem has been that the law is hard to enforce. It's very hard for the government to bring these cases, because it's very hard for the government to tell a story about why a particular defendant ought to lose that captures enough of the public's support to really bring the cases.

This particular merger case will just be another in a very long series of cases proving that. It's easy for a defendant, even as big as these defendants, and even as implausible as their arguments seem to me, humbly – it's easy for them to tell a story that will be pretty persuasive to much of the public. The argument will be either that books are special, so we have to consolidate our forces, or book publishing happens to be unusually risky, because it's very hard to predict whether a particular book will make money or whatever.

The big lesson to me in writing the book was there's never been a defendant in the 130 years we've had an antitrust law that didn't think its market was special. They all do. It turns out, in my humble opinion – and let me just say I love books as much as anyone. I write them occasionally. I read a lot of them. They're dear to me. But they aren't actually that special in commercial terms. And for all the values that we care about, including the democratic values that have been discussed here a little bit, the problem of authors earning a living, quality, variety, etc., we would all be better served in all of those respects if the market were more competitive. That's my humble view. But it's not, and we're not probably going to have a competitive market in publishing, because that ship sailed a long time ago, and it's because our antitrust law is just too hard to enforce.

KENNEALLY: Christopher Sagers, professor of law at Cleveland State University, thank you very much indeed for that. And wrapping up the program, I want to thank our other participants in the conversation today. Mary Rasenberger, CEO of the Authors Guild and the Authors Guild Foundation – thank you, Mary.

RASENBERGER: Thank you. It's been a pleasure.

KENNEALLY: Andrew Albanese, senior writer at *Publishers Weekly* and my regular guest every Friday on CCC's Velocity of Content podcast, thank you very much.

ALBANESE: Thank you, Chris.

KENNEALLY: I also appreciate the participation and support of the organizers of the BIO 2022 conference, including Kai Bird, Michael Gately, and Anne Heller. And thanks to all of the biographers, editors, agents, publishers, and publicity professionals attending this conference for joining us on this important discussion. I hope you've enjoyed our



program, Bertelsmann and the Future of Publishing. I'm Christopher Kenneally. Goodbye for now.

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