



Cader Unravels Judge Pan's Ruling To Block PRH/S&S Merger

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With
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KENNEALLY: When the Department of Justice sued in November 2021 to block Penguin Random House's proposed acquisition of its close competitor, Simon & Schuster, the Biden administration said the deal would give PRH unprecedented control of nearly half the book market. PRH countered that their \$2 billion offer for S&S was pro-consumer, pro-author, and pro-bookseller. Following a weeks-long trial this summer, Judge Florence Pan has ruled in favor of the government and blocked the deal from moving forward.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Velocity of Content. The headline news of Judge Pan's decision broke on October 31, though the full text of her ruling was released just days ago. For a close reading of Judge Pan's opinion and how she came to her conclusion, Michael Cader, founder of Publishers Lunch and PublishersMarketplace.com, joins me now from New York City. Welcome to the program, Michael.

CADER: Hi, Chris. Nice to be with you.

KENNEALLY: Well, thank you for joining me. Judge Pan's opinion is now included in the Publishers Lunch ebook *The Trial*, which is available directly from Publishers Marketplace and on most major ebook platforms. That ebook, over 700,000 words, presents day-to-day coverage and analysis of the case as well as key documents and public testimony. And of course, it all comes down to the 80 pages of Judge Pan's memorandum opinion. So after three weeks of testimony and months of speculation about a possible outcome, was this case even close, Michael?

CADER: Apparently not, at least in the judge's mind. She makes clear in her opinion that she found resoundingly for the prosecution and was unpersuaded by nearly all of the defense's arguments, and at one point even refers to them as a medley of arguments. So she practically scoffs at some of the contentions made by the defense and clearly found nearly all of the prosecution case clear and persuasive.

KENNEALLY: The DOJ case, Michael, concerned potential harm that the merger would cause to authors. Government authors asserted the existence of a relevant market of authors for



anticipated top-selling books, and they would likely see smaller advances as a result, among other harm. Why was Judge Pan unconvinced by the defendants' arguments that advances are not the most important factor in book acquisitions?

CADER: On that particular point, she was referring in particular to a couple defense witnesses, specifically two literary agents, probably more so than a broader argument by the defense's attorneys themselves. There were a couple of agents who portrayed their process as one of selecting a good match between editor and author as being more important than how much the publishing house was willing to pay. And Judge Pan found that despite some of those contentions, that the evidence indicated books are generally sold to the highest bidder, and that agents tend not to invite anyone to bid with whom they wouldn't want to do business.

On the general issue of advances, she also found with a sort of close reading of how major publishers compete with each other that really they generally compete almost only on advances. Specifically, she was given evidence and agreed that elements like payment structure and inclusion of audio rights and ebook royalties and other elements of the standard book contract tend not to be negotiable – that the large houses have all adopted similar policies – so that kind of helped reinforce her belief that the competition is all around how much are you willing to pay up front?

KENNEALLY: And what impact did Judge Pan see if Simon & Schuster were lost as a bidder for these top-selling books?

CADER: This is where I thought the ruling was particularly interesting, because to me, the whole case was ultimately going to hinge around harm – what finding of harm, if any, would the judge make if she did agree with all the other contentions of the case? Because there was some indication that even if this market gets more concentrated that there are still lots of entities that on any given day can make a large advance and win a big book, and there was some evidence pre-trial indicating that the instances in which Simon & Schuster and Penguin Random House are head-to-head bidders – the number of occurrences in which they are number one and number two in which one loses to the other – is relatively small numerically. So the essential question was is there enough harm or enough potential harm that it's worth blocking a deal of this scale?

There, what Judge Pan found is that it would hurt the competitive landscape in multiple ways. So she said, yes, there are head-to-head situations in which there could be harm. But she went much more broadly. She saw harm in auctions in general. She found that just having S&S as an independent entity strengthened competition across all auction formats. She essentially said if you've got five large entities that are the key players in auctions for these anticipated top-selling books that taking away one and combining it with the largest is going to affect that competitive landscape.



And she went a step further and said, as the defense argued, about 60% of these big deals are actually direct one-to-one negotiations, either because the submission hasn't gone out widely or because it's a house author or a repeat author, and the house is negotiating again for future books. She found that even in those situations, that taking away the possibility of another well financed, independent bidder would tend to reduce competition and would tend to reduce advances over time.

KENNEALLY: And in your reading, Michael Cader, how does the opinion weigh on any decision by PRH and S&S to appeal?

CADER: Well, I'm always reluctant to put myself in the mind of other parties, but I think the general sense is this is a clear, well grounded opinion and will be challenging to appeal, so my suspicion is that the parties are thinking long and hard about the cost/benefit of pursuing this further. The expectation is that calculus is weighing particularly heavily on Paramount, since third-party reports indicate that the term of the original purchase agreement ends later this month, in November, and that in order to go ahead with an appeal and continue to wait on the possibility of closing this deal, there's a negotiation underway, or it would require a negotiation between Paramount and Bertelsmann to extend the current timeframe provided for. So presumably, Paramount in particular is going through that cost/benefit calculus of how much do they want to try to hang on to hope and possibility that there's still a pathway to executing this deal? Or has the court ruled, and is it time for them to think about other solutions?

KENNEALLY: Well, that's going to weigh on the mind of the folks at Bertelsmann, but at Paramount, they've got some thinking to do as well, because they have said they are committed to selling Simon & Schuster, and if it doesn't happen to Penguin Random House, then to another party – likely another publisher, possibly even private equity. So again, just in your reading of the judge's opinion, Michael Cader, what will anyone considering making such a bid make of the ruling and how it might impact their decision?

CADER: This is the subject of much debate and speculation at the moment. I believe that the ruling as stated probably does not foreclose any other options. The judge herself towards the end of the decision anticipates that other publishers might likely bid and acquire Simon & Schuster. The primary question the way the ruling is constructed now – the most likely party that might face some obstacles would be HarperCollins, since they are clearly the number-two trade publisher in the US market.

I was speaking to Brian Murray earlier this week, because HarperCollins' parent company, News Corp, reported quarterly earnings, so he often makes himself available to discuss performance when that happens. And as he said, the ruling is all about the math. So any



future deal would rely on the math. Certainly, through one reading, were HarperCollins to consider a bid, under the case as constructed, an acquisition of Simon & Schuster would make them about equal in size to Penguin Random House in this specific ATSB market.

As he raised, there's a substantial question – does the Department of Justice want to keep going back to the well here? Do they want to keep bringing cases, or did they bring this case because the threshold of competition as they saw it rose so high? In their portrayal of the market, Simon & Schuster and Penguin Random House put together would have 49% of this ATSB market, which is significant in a different way. Clearly, this opinion will give pause and consideration to other acquirers, but I don't think that it forecloses that option.

KENNEALLY: The Department of Justice brought the case on behalf of authors, Michael. So does the ruling change anything for them and their literary agents? Does it change much for readers?

CADER: Well, it doesn't change anything for today, because it preserves the status quo. (laughter) What that means for the future remains to be seen. It has meaning and value to authors, because it put front and center a number of essential issues that have come up as the business has tended to become more concentrated at the top, and certainly a number of authors saw risk, and some others saw potential, in the possible combination of Simon & Schuster and Penguin Random House. But as I said, for now, it just says things are going to stay as they are.

KENNEALLY: And in your report for Publishers Lunch, you noted that Judge Pan does not see her ruling as in any way controversial. Why does that matter?

CADER: I think it was clearly and cleverly designed to avoid the possibility of being overturned on appeal. Look, no judge likes to be overturned. Judge Pan has a relatively limited history on the federal bench and has now been elevated to the court of appeals that would oversee any appeal of this verdict. So the other judges who would review this verdict if it's appealed are her colleagues.

I think we see on the bench a wide variety of styles in justices, right? There are some justices who want to blaze a path in which they are breaking new ground, in which they are changing the interpretations and nature of the law and staking out very clear positions. And there are other justices who root themselves squarely within tradition, whether or not that's the actual nature of their rulings.

I think a substantial question going into this case – particularly since the Department of Justice was saying to the world, we're bringing a labor case, and using that as a signal to



say the department is no longer interested just in consumer welfare. We're also making a concerted effort to look out for labor and worker welfare. There was this open question of whether the judge would follow DOJ's path in also declaring this a labor-focused case and in signaling that it was meant to change the tide of where antitrust verdicts have fallen in the past decades. That, too, was a subject of great debate within the legal community.

So to me, it was telling that she took a very matter-of-fact course here, treated this like any other antitrust case, said it clearly met all of the various guidelines and thresholds, that it fell squarely within the traditions of the DC Circuit Court. So she placed it very much within the mainstream of legal practice. That could reflect simply where she's coming from as a judge or her desire to make sure that this verdict sticks, but it feels as if it was designed to make this decision hold up regardless.

KENNEALLY: And as a longtime observer of trade book publishing, Michael, what grade do you give Judge Pan as a student of the industry?

CADER: (laughter) I'm not sure I'm handing out grades today. I think as we clearly reported, and others did from the beginning of the trial, it was clear that Judge Pan has justly earned her reputation as a rising star on the federal bench. She was clearly very smart. She was presented with a lot of complex testimony.

And as I've indicated in my coverage, we shouldn't necessarily conflate understanding the case that was presented in court with understanding the publishing industry, because this wasn't a case about the publishing industry. This was a case about a particular merger within the publishing industry and an assertion of a reduction of competition in a very particular fashion. Within those boundaries, it's clear that the judge asked very smart questions, followed along with complex testimony both about our industry as well as about economic analysis, and came to a carefully reasoned, well expressed verdict. So I think we'd give her good marks for intelligence, good marks for control of her trial, and good marks for a clear, well written opinion.

KENNEALLY: Michael Cader, thank you so much for joining me today.

CADER: Thank you. Nice to be with you.

KENNEALLY: *The Trial: The DOJ's Suit to Block Penguin Random House's Acquisition of Simon & Schuster*, a Publishers Lunch ebook, is available directly from Publishers Marketplace and on most major ebook platforms.

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