

# UNIVERSITY OF PITTSBURGH LAW REVIEW

---

Vol. 85 • Summer 2024

## DIVERSITY & INCLUSION IN AN INCREASINGLY CONSOLIDATED PUBLISHING INDUSTRY

Jacqueline Lipton

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2024.1058  
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.

**Pitt** | Open  
Library  
Publishing

This journal is published by [Pitt Open Library Publishing](http://pittopenlibrarypublishing.com).

# DIVERSITY & INCLUSION IN AN INCREASINGLY CONSOLIDATED PUBLISHING INDUSTRY

Jacqueline Lipton\*

## ABSTRACT

*In October of 2022, Judge Florence Pan in the United States District Court for the District of Columbia handed down a highly anticipated, and somewhat surprising, ruling in the antitrust case brought by the Department of Justice (DOJ) to block the acquisition of Big 5 publisher Simon & Schuster from even bigger Big 5 publisher Penguin Random House. Concerns about increasing consolidation of power in the publishing industry were not new, but the case's outcome certainly was. The ruling in the DOJ's favor was likely attributable to the careful framing of the claim as a monopsony case rather than a monopoly case: the complaint was framed in terms of decreased competition on the side of the purchaser (the publisher's purchasing authors work) rather than decreased consumer competition for the ultimate buyer. The DOJ argued that increased consolidation on the buyer side gave authors less choice and less competitive options for licensing their work to publishers.*

*The case brought authors front and center in debates about the publishing industry for the first time possibly ever. The DOJ framed its complaint to define the market with reference to midlist authors—those less famous and commanding less money than the Stephen Kings of this world, but still getting competitive deals. Many authors in this particular group hail from historically underrepresented backgrounds and, while diversity equity and inclusion (DEI) was not articulated as a specific issue in the case, when the case is considered in light of recent statistics about underrepresentation of certain groups in publishing and the #PublishingPaidMe movement of 2020, the case implicitly speaks to the plight of*

---

\* Senior Literary Agent, The Tobias Literary Agency; Associate Professor and Carol Los Mansmann Chair in Faculty Scholarship, Thomas R. Kline Duquesne School of Law. I would like to express my heartfelt gratitude to my Research Assistant, Journey Matos who helped me immeasurably with getting the research (and footnotes!) into shape for this Article. Thanks also to the amazing team of editors at the *University of Pittsburgh Law Review*. All errors and omissions are of course my own.

*historically underrepresented author groups. This Article interrogates reasons for the historical dominance of cishet white writers in the American publishing industry, and the impact of Judge Pan's decision on the status quo, including the potential impact of the recent acquisition of Simon & Schuster by a private equity firm on issues of representation in publishing. The ultimate takeaway is that while antitrust law may, paradoxically, have caused a disservice to authors from underrepresented groups in the Simon & Schuster situation, it does serve an important expressive function about the history and future direction of inclusivity in publishing.*

## INTRODUCTION

The mainstream American publishing industry has traditionally operated on a relatively elitist model,<sup>1</sup> initially the province of economically privileged white men.<sup>2</sup> It has historically raised voices of that demographic above others,<sup>3</sup> and had been administered largely as an old boy's network.<sup>4</sup> In the twentieth century, more women began to participate, but again largely from the privileged classes.<sup>5</sup> There were also presses developed by underrepresented groups that were largely segregated from the mainstream.<sup>6</sup>

The publishing industry has also been slower than other entertainment-based industries to adapt to digital technologies that enable broader access to content. For example, the first e-readers did not come online until 2007<sup>7</sup> while the movie and television industries were engaging in,<sup>8</sup> and litigating over,<sup>9</sup> digital distribution

---

<sup>1</sup> Note that I use mainstream to define what was basically the precursor to today's "Big Five" publishing model but should acknowledge alternate presses as far back as the eighteenth and nineteenth century in the United States—particularly news sheets and publications created by Black and Indigenous populations which were largely segregated from the white mainstream publications. For example, Frederick Douglass founded *The North Star*, the country's first anti-slavery newspaper, in 1847. See *Frederick Douglass Newspapers, 1847 to 1874*, LIBR. OF CONGR., <https://www.loc.gov/collections/frederick-douglass-newspapers/about-this-collection> (last visited June 30, 2024).

<sup>2</sup> JOHN B. THOMPSON, *MERCHANTS OF CULTURE: THE PUBLISHING BUSINESS IN THE TWENTY-FIRST CENTURY* 102 (2d ed. 2012) (noting the growth of large corporations in publishing derived from mergers of independent publishing houses predominantly named after and helmed by white men).

<sup>3</sup> Leah Asmelash, *Joyce Carol Oates Claims White Male Writers Are Being Shut Out. The Data Disagrees*, CNN (July 28, 2022, 11:25 AM), <https://www.cnn.com/style/article/joyce-carol-oates-white-men-publishing-ccc/index.html>.

<sup>4</sup> See THOMPSON, *supra* note 2.

<sup>5</sup> See Lyndsey Claro, *Women in the Gentlemen's Career of Publishing*, PRINCETON UNIV. PRESS (Mar. 6, 2020), <https://press.princeton.edu/ideas/women-in-the-gentlemans-career-of-publishing> (discussing women's slow entry into the publishing profession under pen names during the twentieth century).

<sup>6</sup> See Malea Walker, *Honoring African American Contributions: The Newspapers*, LIBR. OF CONGR. BLOGS: HEADLINES & HEROES (July 30, 2020), <https://blogs.loc.gov/headlinesandheroes/2020/07/honoring-african-american-contributions-the-newspapers> (discussing the struggles that early African American newspapers faced, including issues of *The Chicago Defender* refused by White paper distributors, and confiscated by the Ku Klux Klan before it could be distributed).

<sup>7</sup> JOHN B. THOMPSON, *BOOK WARS: THE DIGITAL REVOLUTION IN PUBLISHING* 146 (2021).

<sup>8</sup> See *Compact Disc*, BRITANNICA, <https://www.britannica.com/technology/compact-disc> (last visited June 9, 2024) (defining compact disk as technology used for both computers and entertainment systems).

<sup>9</sup> See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 303–04 (S.D.N.Y. 2000).

methods from the late 1990s. When publishing did face challenges from emerging digital distributors like Amazon and Apple, the legal concerns revolved more around the prices to consumers of e-books if distributors gained monopoly power and started dictating prices to publishers,<sup>10</sup> thus maintaining inappropriately high prices to consumers.<sup>11</sup> In other words, the legal concerns facing the publishing industry and monopoly power in the digital age have had more to do with prices to consumers than with protecting the livelihoods of the creators of the work consumed.

As publishing began to adapt to the twenty-first century realities of the digital marketplace, other more subtle issues started to rise to the fore of public debate, again largely fueled by digital technology—notably the rise of social media—casting light on many of the historical inequities in publishing. For example, social media and digital technology enabled the development of the “publishing paid me” movement which, for the first time, illuminated significant inequities in the amounts of advances paid to white authors versus authors of color.<sup>12</sup>

In 2014, children’s publishing saw the emergence of the We Need Diverse Books (WNDB) organization as a result of concerns about the lack of diversity on conference panels and in published works.<sup>13</sup> WNDB collated and distributed (again largely online, significantly through social media) information about major disparities in the publication of work—both text and illustrations—by members of historically underrepresented groups.<sup>14</sup> A sobering and ongoing study conducted, and regularly updated, by the Cooperative for Children’s Book Publishing (CCBP)

---

<sup>10</sup> See Jim Milliot, *Publishing Leaders Issuing Warning over Amazon’s Market Power*, PUBLISHERS WKLY. (Aug. 18, 2020), <https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/84119-publishing-leaders-issuing-warning-over-amazon-s-market-power.html>.

<sup>11</sup> See *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015); see also Bill Baer, *E-Book Retailers Distribute \$400 Million to Victims of Apple-Led Conspiracy*, ARCHIVES U.S. DEP’T OF JUST.: OFF. OF PUB. AFFS. BLOG (Mar. 3, 2017), <https://www.justice.gov/archives/opa/blog/e-book-retailers-distribute-400-million-victims-apple-led-conspiracy>.

<sup>12</sup> See Richard Jean So & Gus Wezerek, *Just How White Is the Book Industry?*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/interactive/2020/12/11/opinion/culture/diversity-publishing-industry.html> (“L.L. McKinney, an author of young-adult novels who started the #PublishingPaidMe hashtag, wasn’t surprised by the statistics on how few Black authors have been published relative to white authors.”).

<sup>13</sup> See *What does We Need Diverse Books do?*, WNDB DIVERSEBOOKS.ORG, <https://diversebooks.org/#start-here> (last visited June 9, 2024).

<sup>14</sup> See *About Us*, WNDB DIVERSEBOOKS.ORG, <https://diversebooks.org/about-wndb> (last visited June 9, 2024).

at the University of Wisconsin Madison,<sup>15</sup> demonstrated that in 2018 there were more children's books published featuring animal protagonists than all people of color combined, while well over half of the children's titles published that year featured white characters.<sup>16</sup> These statistics have slowly changed in the period between 2016 and 2020,<sup>17</sup> and particularly from 2020 onwards, when the United States faced a reckoning with its historical prejudices with respect to African Americans in the wake of the killing of George Floyd by white police officers.<sup>18</sup>

Investigating similar issues to the CCBP survey, publisher Lee & Low began conducting its "Diversity Baseline Survey" of the publishing workforce in 2015 including literary agents, interns, editors, book reviewers, sales and marketing personnel, and publishing executives.<sup>19</sup> It published a follow-up study in 2020 and found that little had changed despite the social unrest in the period.<sup>20</sup> The publishing industry in 2019 was largely white, cis-gendered and non-disabled, although women were represented in an editorial capacity in larger numbers than men.<sup>21</sup> The category that showed the greatest increase in diversity in the 2019 study was the intern category;<sup>22</sup> these positions are either unpaid or paid very little, and subsequent

---

<sup>15</sup> See *Books by and/or About Black, Indigenous and People of Color (All Years)*, COOP. CHILD.'S BOOK CTR. SCH. OF EDUC. UNIV. OF WIS.-MADISON, <https://ccbc.education.wisc.edu/literature-resources/ccbc-diversity-statistics/books-by-about-poc-fnn> (last updated May 4, 2023).

<sup>16</sup> See Sol, *There Are More Children's Books About Animals Than People of Colour*, MEDIUM (Feb. 3, 2021), <https://aninjusticemag.com/there-are-more-childrens-books-about-animals-than-people-of-colour-efdea63d1ef0>.

<sup>17</sup> See *Books by and/or About Black, Indigenous and People of Color (All Years)*, *supra* note 15.

<sup>18</sup> See Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact>.

<sup>19</sup> *Where is the Diversity in Publishing? The 2015 Diversity Baseline Survey Results*, LEE & LOW BOOKS: THE OPEN BOOK BLOG (Jan. 26, 2016), <https://blog.leeandlow.com/2016/01/26/where-is-the-diversity-in-publishing-the-2015-diversity-baseline-survey-results>.

<sup>20</sup> See *Where is the Diversity in Publishing? The 2019 Diversity Baseline Survey Results*, LEE & LOW BOOKS: THE OPEN BOOK BLOG (Jan. 28, 2020), <https://blog.leeandlow.com/2020/01/28/2019diversitybaselinesurvey>. A second follow-up study was conducted in 2023, and results have been published. See *Where Is the Diversity in Publishing? The 2023 Diversity Baseline Survey Results*, LEE & LOW BOOKS: THE OPEN BOOK BLOG (Feb. 28, 2024), <https://blog.leeandlow.com/2024/02/28/2023diversitybaselinesurvey/>.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

surveys have demonstrated how difficult it is for those interns to survive and thrive in the industry, although it is obviously still early days.<sup>23</sup>

The PEN America foundation has also bemoaned the historical lack of diversity and inclusion in the industry,<sup>24</sup> and has called for major and smaller players to make a systemic and sustained commitment to change.<sup>25</sup> In September of 2023, the Association of American Literary Agents released its own Membership Survey report and noted similar issues.<sup>26</sup>

---

<sup>23</sup> *Id.*

Interns are significantly more diverse than the industry as a whole: Of the interns surveyed in 2019, 49 percent identify as BIPOC; 49 percent are on the LGBTQIA spectrum; and 22 percent identify as having a disability. These numbers are a dramatic departure from the overall industry numbers and signal a new, more representative generation of entry-level publishing staff. The question is whether many of these interns will be retained and promoted, or whether they will burn out or leave publishing for other reasons before their presence can truly change the industry.

*Id.*

<sup>24</sup> James Tager & Clarisse Rosaz Shariyf, *Reading Between the Lines: Race, Equity and Book Publishing*, PEN AMERICA 4 (Oct. 17, 2022), <https://pen.org/wp-content/uploads/2023/01/Reading-Between-the-Lines.pdf>.

In 2020, the publishing industry entered a moment of moral urgency about the persistent lack of racial and ethnic diversity among employees and authors. The industry is disproportionately white, and the canon of published books from trade publishers is overwhelmingly so. According to one analysis, 95 percent of American fiction books published between 1950 and 2018 were written by white people. While that analysis looks at a broad sweep of time, more recent figures indicate that both the publishing industry, and the books it puts out, remain disproportionately white.

*Id.*; see So & Wezerek, *supra* note 12 (describing the study they conducted to ascertain the figure cited by the PEN America report).

<sup>25</sup> *Id.* at 5.

PEN America is convinced that the industry has embarked on current reforms with a genuine desire to make change. But systemic change requires more than goodwill. It necessitates specific, far-reaching, and sustained policy revisions and company-wide commitments that outlast any single political moment and persist despite inevitable hurdles and setbacks.

*Id.*

<sup>26</sup> AALA Releases Results of 2023 Membership Survey: Younger, Newer Agents Joining Amidst Concerns Over Industry and Income, ASS'N OF AM. LITERARY AGENTS (Sept. 28, 2023), <https://aalitagents.org/>

Why is a diverse publishing industry important and what does antitrust law have to do with any of it? This Article tackles both questions and, in particular, emphasizes that while the law can only play a limited enforcement role in actively redressing these historical disparities in publishing, it can, as Judge Pan's decision in *United States v. Bertelsmann* evidences,<sup>27</sup> illuminate some of the inequities and some of the reasons for the inequities. Whether or not such illumination ultimately engenders positive or lasting change remains to be seen, but interestingly, in the wake of the decision, Penguin Random House (PRH) itself announced an internal disaggregation of the Random House side of its operation into two separate operations: Random House and Crown.<sup>28</sup> One of the stated objectives of the move is to increase competition for authors at least under the PRH umbrella so editors can now bid competitively across three separate entities for the same project—Penguin, Random House, and Crown—rather than the two (Penguin and Random House) that have operated in the wake of the Penguin merger with Random House in 2013.<sup>29</sup> On the other hand, the failure by PRH to acquire Simon & Schuster as a result of that litigation led to the latter ultimately being acquired by a private equity firm that could

---

aala-releases-results-of-2023-membership-surveyyounger-newer-agents-joining-amidst-concerns-over-industry-and-income.

[F]or all the attention to DEI issues, the survey underscores inequities between white and BIPOC agents with regard to income levels and other important measures in an industry that remains predominantly white. The survey also revealed differences in how white and BIPOC respondents are experiencing burnout. Of all white respondents, 23% report experiencing no burnout, compared to just 5% of BIPOC respondents — and only 9% of white respondents indicate that they worry that they will not be able to remain in publishing due to their current level of burnout, compared with 21% of BIPOC respondents. This suggests that BIPOC respondents are experiencing burnout more acutely and in greater numbers.

*Id.*

<sup>27</sup> See *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1 (D.D.C. 2022).

<sup>28</sup> See Elizabeth A. Harris, *Penguin Random House Announces New Leadership After a Turbulent Period*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/books/penguin-random-house-leadership.html>.

<sup>29</sup> Jim Milliot, *Random House, Crown Made Separate Groups in PRH US Reorg*, PUBLISHERS WKLY. (Feb. 28, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/91649-random-house-crown-made-separate-groups-in-prh-reorg.html>.



break the company into pieces and sell it off,<sup>30</sup> thus potentially lessening competition across the board in publishing contracts.

Part I considers why diversity in publishing has been so difficult to achieve, and why it matters, including ways in which social media have helped drive information about lack of diversity in publishing to the fore of public debate. Part II examines the decision in *United States v. Bertelsmann* and explains its significance for the issue of diversity in publishing more generally. Part III analyzes the limited, and arguably negative impact, the decision will likely have on the authors it sought to protect, but will also highlight the potential expressive function the decision has had, and may continue to have in shaping the face of the publishing industry in light of DEI concerns.

## I. THE IMPORTANCE OF A DIVERSE PUBLISHING INDUSTRY

### A. *Why Diversity Has Been a Challenge for the Publishing Industry*

Before discussing the impact of corporate consolidation and antitrust law on publishing, and particularly on diversity in publishing, it is important to explain why diversity has been such a challenge for the publishing industry, and why we, as society more broadly, should care about this lack of diversity. For hundreds of years the United States has maintained a largely straight, White publishing dynamic both in terms of the workforce and in terms of its authors for a number of reasons, going back to the fact that historically only White men could hold property, including intellectual property such as copyrights in literary texts.<sup>31</sup> In the twentieth century, significant players in the publishing industry embraced various commitments to diversity but largely in fits and starts.<sup>32</sup>

---

<sup>30</sup> See Elizabeth Blair, *Paramount Sells Simon & Schuster to Private Investment Firm*, NPR (Aug. 7, 2023), <https://www.npr.org/2023/08/07/1192539219/simon-schuster-sold>; see also Michael Grothaus, *Paramount Global Sells Simon & Schuster to Private Equity Firm KKR. Here's What to Know*, FAST CO. (Aug. 8, 2023), <https://www.fastcompany.com/90934757/paramount-simon-schuster-sale-private-equity-kr>.

<sup>31</sup> For example, the first copyright registration made to a woman occurred in 1870. See U.S. COPYRIGHT OFF., *WOMEN IN THE COPYRIGHT SYSTEM: AN ANALYSIS OF WOMEN AUTHORS IN COPYRIGHT REGISTRATIONS FROM 1978 TO 2020*, at 2 (2022), <https://www.copyright.gov/policy/women-in-copyright-system/Women-in-the-Copyright-System.pdf> (noting that women began to register copyrights when the copyright system was centralized in a federal copyright register in 1870).

<sup>32</sup> With respect to Black voices, for example, Marie Dutton Brown (who has worked as an editor at a major publishing house and is currently a literary agent) noted that “Black life and Black culture are rediscovered

Reporting on a 2020 study emphasizing how white the publishing industry is, Richard Jean So and Gus Wezerek, in 2020 in *The New York Times* introduced some stark figures into the national debate in the wake of the killing of George Floyd at the hands of white police officers.<sup>33</sup> This information appeared to create a new inflection point in the publishing industry with respect to the need for more Black voices in particular and more diverse voices in general.<sup>34</sup>

So and Wezerek's study ascertained that from a sample of English language fiction titles published between 1950 and 2018, 95% were written by white authors.<sup>35</sup> They further noted that in 2018—a time period during which Non-Hispanic white people accounted for 60% of the total United States population—white people wrote 89% of the books in the sample.<sup>36</sup> They further found that of the 220 books featured on *The New York Times* Best Sellers list from the final five years of the study, only twenty-two were written by authors of color.<sup>37</sup>

Obviously, a major reason for the lack of diversity has to do with gatekeeping: in other words, who is making the decisions about which books are offered publishing contracts, and what those authors get paid.<sup>38</sup> If heads of publishing companies, editorial teams, and sales and marketing teams are largely made up of white people, those people historically have not necessarily sought or known how to

---

every 10 to 15 years . . . . Publishing reflects that.” So & Wezerek, *supra* note 12. See also Tager & Shariyf, *supra* note 24, at 4.

For decades, voices within and outside the publishing industry have called on publishing houses and bookstores to more fully reflect this demographic diversity. In response to calls for publishers to heed and support employees and authors of color, the publishing industry has gone through waves of diversity, equity, and inclusion (DEI) efforts. But over time, many of these gains have turned out to be temporary or insufficient.

*Id.*

<sup>33</sup> See So & Wezerek, *supra* note 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (“Of the 7,124 books for which we identified the author’s race, 95 percent were written by white people.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See LEE & LOW BOOKS, *supra* note 20.

market more diverse projects, or at least that is the current narrative to explain the lack of diversity.<sup>39</sup>

Unhelpful, and often damaging, explanations have also emerged over the years, such as the idea that white people buy more books than those of other races,<sup>40</sup> or that narratives by and about underrepresented groups fall into categories that have already been explored—such as slavery stories for Black people or frontier and settlement stories involving Indigenous people.<sup>41</sup> Additionally, some attempts to “diversify” literature fall flat because they simply insert a “diverse” character in an otherwise white narrative,<sup>42</sup> creating an inauthentic and tokenistic result that fails to understand that characters of different races, sexual and gender identities, religions, etc. experience the world in different ways. Other diversity pitfalls have abounded in literature in recent decades including criticisms of Stephanie Meyers’ *Twilight* series for dehumanizing Indigenous characters by presenting them as werewolves;<sup>43</sup> and criticisms of publishers who resist adding diverse authors to their lists on the basis that they already have one Black/Brown/Indigenous/disabled/biracial etc. author so they do not need another.<sup>44</sup> Diverse voices and identities are often seen as a category or market niche rather than as a group of participants in the industry who have a wide variety of stories to tell.<sup>45</sup>

Most of the above justifications for the lack of acquisitions of diverse book narratives have now been debunked or at least analyzed in a more granular fashion

---

<sup>39</sup> See Tager & Shariyf, *supra* note 24, at 52.

<sup>40</sup> See *id.* at 38–39.

<sup>41</sup> See So & Wezerek, *supra* note 12 (discussing this with respect to Black/slavery narratives); Tager & Shariyf, *supra* note 24 (discussing this in the context of other narratives).

<sup>42</sup> See Kekla Magoon, *Our Modern Minstrelsy*, THE HORN BOOK INC. (June 17, 2020), <https://www.hbook.com/story/our-modern-minstrelsy>.

<sup>43</sup> See Sierra Jackson, *The Problematic Portrayal of Native Americans in ‘Twilight,’* BOOKSTR (Nov. 25, 2022), <https://bookstr.com/article/the-problematic-portrayal-of-native-americans-in-twilight/>; Shea Vassar, *The Twilight Saga’s Issue with Indigenous Culture*, FILMDAZE (May 20, 2020), <https://filmdaze.net/twilight-sagas-issue-with-indigenous-culture/>; BARBARA LEIGH SMITH, NATIVE CASE STUDIES: THE TWILIGHT SAGA AND THE QUILTEUTE INDIAN TRIBE: OPPORTUNITY OR CULTURAL EXPLOITATION? 5–6 (2010), <https://nativecases.evergreen.edu/sites/default/files/case-studies/smith-the-twilight-saga-9-3-13.pdf>.

<sup>44</sup> See So & Wezerek, *supra* note 12 (“Some of Mr. Strother’s white colleagues were hesitant, though. One asked, ‘Do we need Angie Thomas if we have Jason Reynolds?’ (Mr. Reynolds is another Black author of young-adult novels.)”).

<sup>45</sup> Tager & Shariyf, *supra* note 24, at 60–61.

to understand how best to address the issues in a more meaningful way. In particular, the Black Lives Matter protests in the wake of the death of George Floyd brought about pressure for social change that impacted the publishing industry in perhaps a more significant—and hopefully permanent—way than previous moments points that have brought diverse voices to the fore.<sup>46</sup>

Before moving further into a discussion of why diversity in publishing matters, and what (if anything) the law can do about it, it is also important to note that the current inequities in publishing do not only concern whose voices get published, but also how much non-white authors are compensated for their work. The Black Lives Matter movement in 2020 also coincided with the rise of an attempt to make information about compensation more transparent than it had been in the past.<sup>47</sup>

While publishing contracts are confidential between the publisher and the author, and many carry confidentiality clauses that prevent authors from sharing information about their deals, anonymous demographic data has been compiled through grassroots digital social movements like #publishingpaidme.<sup>48</sup> The hashtag and resulting dissemination of data was the brainchild of young adult fantasy author, L.L. McKinney who furthered the conversation about the underpayment of Black authors in particular by inviting authors to Tweet about their publishing contract: notably their race, the genre they write in, and the amount of their advance.<sup>49</sup> The results were eye-opening for a number of reasons. They painted a stark picture of the

---

<sup>46</sup> *Id.* at 15 (“Some of those interviewed by PEN America express cautious optimism that a combination of attitudinal, societal, and commercial changes have combined to make progress irreversible.”). However, the PEN America report also noted that some players in the senior reaches of the publishing industry are more skeptical. For example, the report cites an interview with Chris Jackson, publisher and editor-in-chief of Penguin Random House’s One World imprint, which is dedicated to publishing books by historically underrepresented voices. *Id.* at 16. In an initial interview Jackson believed that the publishing industry had hit an irreversible inflection point after the 2020 BLM protests, but in a follow up interview he noted that: “I may have believed . . . [that change was irreversible] when the interview first took place . . . but I don’t believe it anymore. I’m pretty convinced at this point that things can definitely go back to the way they used to be.” *Id.*

<sup>47</sup> See Rachel Deahl, *How #PublishingPaidMe Exposed Racial Inequities*, PUBLISHERS WKLY. (July 10, 2020), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/83838-how-publishingpaidme-exposed-racial-inequities.html>.

<sup>48</sup> See Alison Flood, *#PublishingPaidMe: Authors Share Advances to Expose Racial Disparities*, THE GUARDIAN (June 8, 2020, 9:45 AM), <https://www.theguardian.com/books/2020/jun/08/publishingpaidme-authors-share-advances-to-expose-racial-disparities>.

<sup>49</sup> See Mary Louise Kelly, *#PublishingPaidMe: Authors Share Their Advances to Expose Racial Disparities*, NPR (June 8, 2020, 4:12 PM), <https://www.npr.org/2020/06/08/872470156/-publishingpaidme-authors-share-their-advances-to-expose-racial-disparities>.

significant disparities in advances paid to white authors and others, with a noticeable underpayment of Black authors overall.<sup>50</sup> Hugo Award winning Black science fiction and fantasy author, N.K. Jemison, for example, reported that she received advances in the low- to mid-five figures for books in two of her award-winning series, while several white male authors made high six-figure advances for similarly received work.<sup>51</sup>

In an article in *The Guardian* in 2020, L.L. McKinney commented that publishers are more likely to give white authors a second chance (and maintain a high advance for a second book) if the first fails to perform well in the market.<sup>52</sup> However, in the same situation, Black authors do not get the same consideration and the entire demographic tends to be blamed if a single Black author's book fails to perform.<sup>53</sup> This tendency by publishers to reward white authors despite failures and punish Black authors (as a general demographic group) for similar failures leads to one of the common narratives that Black-authored books do not sell as well as white-authored books.<sup>54</sup> Subsequent studies have shown that this assertion is not true.<sup>55</sup> In fact, publishing industry testimony from the *Bertelsmann* case, discussed in the final part of this Article, and especially comments by senior management officers of leading publishers, described a worrying lack of concrete information about planning and predicting successful book releases and compensating authors accordingly.<sup>56</sup>

---

<sup>50</sup> *See id.*

<sup>51</sup> Flood, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Flood, *supra* note 48 (“When books by white authors don’t perform, they’re likely to get another chance and another 100k advance. When books by black authors don’t perform, the ENTIRE demographic gets blamed and punished. Black authors are told our books don’t sell. No one wants them,” [McKinney] wrote.”).

<sup>55</sup> *See* Zachary Snowdon Smith, *Sales Are Up Nearly 9% for Print Books—But Who’s Reading Them?*, FORBES (Jan. 10, 2022, 2:59 AM), <https://www.forbes.com/sites/zacharysmith/2022/01/07/sales-are-up-nearly-9-for-print-books-but-whos-reading-them/?sh=6f0b7c6d4ee1> (analyzing a Pew Research report breaking down American reading habits largely through the lens of gender, age and economic status). *See* Tager & Shariyf, *supra* note 24, at 56 (“There is little available market research on book buyers and readers of color. This absence is seldom discussed but critical to understanding the lasting biases in the industry.”). *See also* Najah Webb, *Black Books Don’t Sell*, MEDIUM (Mar. 11, 2021), <https://medium.com/bipoc-critics-collective/black-books-dont-sell-d08a47078b8b>.

<sup>56</sup> *See Bertelsmann*, 646 F. Supp. at 30.

From the combination of statistical and anecdotal evidence disseminated about lack of diversity in publishing during the latter part of the twentieth century and early part of the twenty-first, there is no ambiguity about the fact that publishing has a diversity problem. The next obvious question is why that matters. In a world where securing a platform to speak—and publish—is easier than ever due to the rise in social media and self-publishing platforms like Amazon’s Kindle Direct program, why is it important for traditional publishing to better reflect the diversity of voices in our society? One might ask why it matters if certain groups have more trouble accessing the machinery of the traditional publishing industry if anyone can readily put just about any work out on Kindle Direct and even self-publish their own audiobooks without too much trouble or expense. The following sections delve into that question, although if you think the answers are obvious, feel free to skip over it!

### B. *Why DEI in Publishing Matters*

An obvious answer to the “why diversity matters” question lies in the contract terms offered by traditional publishers versus self-publishing. If white authors disproportionately secure book deals with traditional houses that offer advances upfront to defray the cost of creation, and those authors garner the associated prestige of publishing within this selective environment, they will typically do better than others who shoulder the costs of packaging, marketing and distribution on their own. Traditional publishing houses also have greater access to brick-and-mortar retail outlets, including institutional outlets like the school and libraries markets.<sup>57</sup>

Even though self-published books no longer hold the stigma they once did and, in some genres—such as romance, sci-fi/fantasy, and cozy mystery—self-published authors have done very well and sometimes better than traditionally published books, the fact remains that if the traditional publishing machine continues to prioritize privileged white voices over others, inequities will remain in place and authors who might otherwise have secured the wherewithal via competitive advances and marketing/publicity support do not meaningfully receive those opportunities.

A more general answer to the “diversity in publishing” question is that we should care about diversity and inclusion in this context for many of the same reasons we should care about diversity in any other aspects of our society. The more voices involved in any endeavor, the more perspectives are welcomed and the more

---

<sup>57</sup> Thomas Umstatt Jr., *How to Get Published with a Traditional Publishing House*, AUTHOR MEDIA (Sept. 30, 2020), <https://www.authormedia.com/how-to-get-published-with-a-traditional-publishing-house>.

meaningful and potentially productive the outcomes to social problems may be.<sup>58</sup> Statistics suggest that the publishing industry is by and large “whiter” than the society it reflects,<sup>59</sup> and because of its focus on communication of ideas, it is necessary to at least examine the reasons for this mismatch and what can be done about it.

Obviously these publishing disparities are simply one example of general disparities in society that need to be addressed urgently, although a discussion of each of those areas is beyond the scope of this Article. A quick scan through recent news, especially with respect to Supreme Court rulings in recent years and legislative proposals show that publishing is the tip of the iceberg. In America today, so many rights and social equities are under attack including women’s rights,<sup>60</sup> LGBTQIA+ rights,<sup>61</sup> the rights of people of color,<sup>62</sup> etc.

Alongside reflecting broader societal problems, publishing also raises specific DEI concerns of its own. The Lee & Low Book Blog, in the preamble to releasing its 2020 Diversity Baseline Survey, explains why:

The book industry has the power to shape culture in big and small ways. The people behind the books serve as gatekeepers, who can make a huge difference in determining which stories are amplified and which are shut out. If the people who work in publishing are not a diverse group, how can diverse voices truly be represented in its books?<sup>63</sup>

---

<sup>58</sup> See Renee Goyeneche, *How to Amplify Voices: Why Diversity Means Success*, FORBES (July 1, 2023, 1:27 PM), <https://www.forbes.com/sites/womensmedia/2023/07/01/how-to-amplify-voices-why-diversity-means-success/?sh=1c841315607d>.

<sup>59</sup> Tager & Shariyf, *supra* note 24, at 21 (“Although there are few publicly available numbers that break down the ethnic and demographic makeup of publishing employees, the numbers we do have affirm what numerous interviewees told PEN America: that the publishing industry remains whiter than American society overall.”).

<sup>60</sup> See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022).

<sup>61</sup> See Nina Totenberg, *Supreme Court Says 1st Amendment Entitles Web Designer to Refuse Same-Sex Wedding Work*, NPR (June 30, 2023, 7:07 PM), <https://www.npr.org/2023/06/30/1182121291/colorado-supreme-court-same-sex-marriage-decision>.

<sup>62</sup> See Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023, 7:52 PM), <https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision>.

<sup>63</sup> See LEE & LOW BOOKS, *supra* note 20.

With respect to the books we present to our children, Christopher Myers, in an influential 2015 Op-Ed in *The New York Times*, described the issue in terms of mirrors and maps: mirrors being the importance of children from underrepresented groups seeing themselves reflected in popular culture to provide a sense of self-worth and inclusion, and maps being possibilities presented to young readers for how to approach the future.<sup>64</sup> Myers focuses on the importance of maps—guidelines and aspirations for the future—given that much previous literature has focused on the importance of mirrors; of seeing yourself in books you read as a child in order to develop a solid concept of self-worth.<sup>65</sup>

It is important for both members of the dominant culture (straight, cis-het, white, largely non-disabled people) and of the underrepresented cultures to read books that present the world as it is, not a whitewashed version of it. A more nuanced presentation would arguably go a long way toward assisting with mutual acceptance and breaking down siloed barriers between the various demographics existing, often uncomfortably together, in a country that was built on principles of welcoming those who hail from underrepresented and often disadvantaged backgrounds. Of course, even this aspirational statement largely ignores the plight of Indigenous communities who were forced from their lands in the early days of European settlement and suffered displacement and erasure at the hands of the new republic.

Diverse books will obviously not automatically solve all of America's societal and political problems, but the lack of a diverse array of source material for consumers of all backgrounds certainly fails to help Americans come to a broader understanding of who we are individually and collectively. Recent statistics suggest that increasing authentic diversity in the movie industry actually increases interest in films, and the resultant profits that they can generate.<sup>66</sup> Anyone who doubts that assertion should look to the success of recent non-White success stories like the

---

<sup>64</sup> Christopher Myers, *The Apartheid of Children's Literature*, N.Y. TIMES (Mar. 15, 2014), <https://www.nytimes.com/2014/03/16/opinion/sunday/the-apartheid-of-childrens-literature.html>.

<sup>65</sup> *Id.* For a discussion on how representation in books may contribute to the development of self-appreciation, see Sandra Hughes-Hassell & Ernie J. Cox, *Inside Board Books: Representations of People of Color*, 80 LIBR. Q. 211, 211 (2010).

<sup>66</sup> Kira M. Newman, *Diverse Films Make More Money at the Box Office*, GREATER GOOD MAG. (Jan. 12, 2021), [https://greatergood.berkeley.edu/article/item/diverse\\_films\\_make\\_more\\_money\\_at\\_the\\_box\\_office](https://greatergood.berkeley.edu/article/item/diverse_films_make_more_money_at_the_box_office).



Black Panther franchise in the Marvel universe,<sup>67</sup> and the recent success of the sci-fi multiverse thrill ride, *Everything Everywhere All at Once*—which garnered the most Oscar nominations for 2022,<sup>68</sup> including the first ever Best Actress nomination (and win) for an Asian woman, Michelle Yeoh.<sup>69</sup>

The same is likely true for publishing in terms of who consumes what books, although much of the data prior to the pandemic has been based on economics, education, and age of reader and type of media consumed,<sup>70</sup> rather than on other factors like race, culture, sexual orientation, gender, religion, and disability status.<sup>71</sup> The statistics that do take these latter categories into account on the consumer side do not, overall, suggest significant differences in reading by different categories.<sup>72</sup> What the statistics may suggest, or at least support, is the notion that readers from historically underrepresented groups access books through different channels than white readers and potentially for different, or at least more complicated, reasons.<sup>73</sup>

---

<sup>67</sup> See Mark Hughes, 'Black Panther: Wakanada Forever' Tops \$800 Million Worldwide, FORBES (Dec. 26, 2022, 4:32 PM), <https://www.forbes.com/sites/markhughes/2022/12/26/black-panther-wakanda-forever-tops-800-million-worldwide/?sh=773287094ccf>.

<sup>68</sup> Laura Zornosa, *How Everything Everywhere All at Once Became a Best Picture Winner*, TIME (Mar. 13, 2023, 12:58 AM), <https://time.com/6261965/everything-everywhere-all-at-once-oscar-frontrunner>.

<sup>69</sup> Nicole Sperling, *Michelle Yeoh Makes History as the First Asian Best Actress Winner at the Oscars*, N.Y. TIMES (Mar. 12, 2023), <https://www.nytimes.com/2023/03/12/movies/michelle-yeoh-oscar-best-actress.html>.

<sup>70</sup> Smith, *supra* note 55.

<sup>71</sup> See Tager & Shariyf, *supra* note 24, at 56 ("There is little available market research on book buyers and readers of color. This absence is seldom discussed but critical to understanding the lasting biases in the industry.").

<sup>72</sup> See JAMES MURDOCH ET AL., HOW DO WE READ? LET'S COUNT THE WAYS 41 (Nat'l Endowment for the Arts ed.) (2020), <https://www.arts.gov/sites/default/files/How%20Do%20We%20Read%20report%202020.pdf> (demonstrating little difference in reading behaviors when looking at categories like age, education, sex, race, disability, and more). See also Tager & Shariyf, *supra* note 24, at 56.

There is some broad data on the reading habits of the American public and how readership breaks down along ethnic lines. According to the most recent National Endowment for the Arts Survey of Public Participation in the Arts, slightly more than half of adults (53 percent) said they had read at least one book in the past year (2017). When broken down by race, 60 percent of white adults, 47 percent of Black adults, 32 percent of Hispanic adults, and 45 percent of Asian adults said they had read at least one book in the past year.

*Id.*

<sup>73</sup> Tager & Shariyf, *supra* note 24, at 56.

The authors of the PEN America Report note, citing a Codex report conducted separately, that many Black readers, for example, report reading for purposes of self-improvement, being better informed and achieving goals, in comparison to a majority of white book buyers more in search of entertainment.<sup>74</sup> The PEN America Report cautions against accepting the argument that readers from minority groups are not interested in buying or reading books, an argument that underscores a lot of the traditional publishers' resistance to acquiring and marketing more diverse books.<sup>75</sup> The Report instead suggests that sales and marketing initiatives should be conducted more thoughtfully and granularly to capture those currently underserved readerships.<sup>76</sup>

Serious statistical studies of the publishing industry have only relatively recently been shared broadly, thanks in large part to digital media and Book Twitter.<sup>77</sup> So, there is obviously much more work to do to investigate who is reading which books and what kinds of contracts and publishing models are being employed by the Big Five<sup>78</sup> and smaller publishers with varying publishing philosophies. However, the above survey of the most recent information provides a solid foundation to turn to a discussion of the *Bertelsmann* case—the case where the Department of Justice (DOJ) successfully blocked a proposed acquisition of publishing giant Simon & Schuster by even bigger giant PRH—and the impact of that case on questions of diversity, equity and inclusion in the publishing industry.<sup>79</sup> The following sections discuss, first, the decision itself and, second, the potential impact of the decision on attempts within the publishing industry to become a more inclusive and diverse business, representing greater numbers of historically underrepresented voices and narratives.

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 56–57.

<sup>76</sup> *Id.* at 57 (“Hildick-Smith [from Codex] adds that there is much more analysis that could be done with just the data his firm collected and that overall the publishing industry could go much further in conducting foundational research to understand their consumers of color.”).

<sup>77</sup> See Sophie Vershbow, *Inside Book Twitter's Final(?) Days*, ESQUIRE (Jan. 27, 2023), <https://www.esquire.com/entertainment/books/a42638589/book-twitter-end/> (defining book twitter as an online community of writers, editors, publishers, etc. and a 24/7 writing group).

<sup>78</sup> See *infra* note 83.

<sup>79</sup> See *Bertelsmann*, 646 F. Supp.

## II. *UNITED STATES V. BERTELSMANN*

### A. *The Issues on the Record*

This section focuses on the nuts and bolts of the antitrust case brought by the DOJ to prevent the acquisition of publisher Simon & Schuster (S&S) by PRH. The DOJ successfully blocked the merger as noted above, but the impacts of the decision may not ultimately be what the DOJ desired. In the aftermath of the case, Simon & Schuster was ultimately acquired by a private equity firm<sup>80</sup> and this acquisition may have greater negative consequences for competition in the publishing sector than the result of a PRH acquisition of Simon & Schuster.

The case began when the DOJ's Antitrust Division objected to the proposed PRH acquisition.<sup>81</sup> At the time of the proposed deal, PRH was (and remains today) the largest American book publisher while Simon & Schuster was the third largest.<sup>82</sup> The American publishing industry has been dominated in recent years by five publishing houses known collectively and colloquially as “the Big Five”: PRH, HarperCollins, Simon & Schuster, Macmillan, and Hachette.<sup>83</sup> They were known as “the Big Six” prior to the 2013 merger of Penguin with Random House to form PRH.<sup>84</sup> PRH maintains an internal divide between what was previously Penguin and what was previously Random House in the sense that the two sides of the house maintain different imprints and editorial staffs.<sup>85</sup> When editors on both sides of the house are interested in the same project, they can bid against each other, although there is a limit to how competitive those bids actually end up being.<sup>86</sup>

---

<sup>80</sup> *Simon & Schuster Purchased by Private Equity Firm KKR for \$1.62 Billion*, AP NEWS (Aug. 7, 2023, 9:22 PM), <https://apnews.com/article/simon-schuster-kkr-book-publishing-penguin-random-house-797c3f383bfc1e60ea9a9bd48c6abfab>.

<sup>81</sup> *Bertelsmann*, 646 F. Supp. 3d at 11.

<sup>82</sup> *Id.* at 10–11.

<sup>83</sup> Tager & Shariyf, *supra* note 24, at 17.

<sup>84</sup> *Id.*

<sup>85</sup> *See Bertelsmann*, 646 F. Supp. 3d at 13.

<sup>86</sup> *See id.* at 18.

Agents often submit a book to more than one imprint within a publishing company . . . and publishers sometimes allow their imprints to bid against one another in auctions. For example, PRH allows competitive bidding between its divisions, so long as there also is an external bidder; but for imprints within the same division, PRH requires the division to submit a “house bid.” . . . A house bid is a single bid made on behalf of more than one imprint from a

It has been estimated that, of all the books published in the North American market (the publishing territory covering the United States and Canada), the Big Five publishers are responsible for approximately 60% of those titles.<sup>87</sup> While the American publishing industry boasts robust medium-sized and smaller houses, in terms of traditional publishing, most authors who are in the position to do so seek publication, at least initially, from the Big Five.<sup>88</sup>

As a result of the dominant position held by all of the Big Five, with special concerns about a PRH acquisition because of its dominance within the entire industry, the DOJ brought the action under Section 7 of the Clayton Act under a “monopsony” theory: where a buyer with too much market power (in this case the publisher) could lower prices or otherwise harm sellers (authors seeking to have their work published).<sup>89</sup> The monopsony approach is unusual, especially in the publishing context where previous antitrust concerns have focused on the monopoly power of major publishers and/or distributors in terms of ultimate costs passed on to book buyers, i.e., retail consumers of books.<sup>90</sup>

Another notable fact about the case is that the court accepted a fairly narrow definition of the affected market.<sup>91</sup> Rather than consider the result of the proposed merger on all authors, it limited the consideration to a lessening of competition in “the publishing rights to anticipated top-selling books” which the court defined as books that garnered an advance payment of \$250,000 or more.<sup>92</sup> This definition in itself may have disproportionately captured mostly books written by nondiverse

---

particular publisher; the house bid allows the agent to choose which imprint to work with, and each imprint might also submit a “pitch,” *i.e.*, a letter or memo describing its editorial and other services. . . . Hachette also allows its imprints to bid against one another if there is an external bidder, . . . and Macmillan appears to allow some imprint competition . . . S&S and HarperCollins, however, do not allow competitive bidding among their own imprints but instead require their imprints to submit house bids.

*Id.*

<sup>87</sup> *Id.* at 12.

<sup>88</sup> *See id.*

<sup>89</sup> *Bertelsmann*, 646 F. Supp. 3d at 11.

<sup>90</sup> *See* *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013); *see also In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 673 (S.D.N.Y. 2012).

<sup>91</sup> *See Bertelsmann*, 646 F. Supp. 3d at 25–26.

<sup>92</sup> *Id.* at 23, 25.

authors (for want of a better term), but, as we will discuss below, it was in large part the acceptance by the court of this definition of the market that allowed it to rule as it did.

The court also cited the unpredictable nature of publishing success,<sup>93</sup> which likely played into Judge Pan’s decision to accept the market definition that she did. She noted that only thirty-five of every one hundred books turns a profit and that “breakout” titles drive revenues throughout a publishing house.<sup>94</sup> In this context she cited the figure that the top 4% of titles generate 60% of a publishing house’s profitability.<sup>95</sup> These titles include books like *Where the Crawdads Sing* by Delia Owens, *Gone Girl* by Gillian Flynn, and *Girl on the Train* by Paula Hawkins, not to mention the *Fifty Shades of Grey* trilogy by E.L. James which was an unexpected runaway success.<sup>96</sup>

In effect, publishing is always a gamble for both the author and the publisher, or, as the court described it, publishing is a “portfolio” business in which a large number of high-quality books must be acquired in the expectation that a substantial number of them will not be profitable.<sup>97</sup> The books that are successful effectively subsidize those that do not earn out their advances. The advance is the upfront payment for the authors’ work that is subsequently “earned out” as royalties on sales are generated.<sup>98</sup> When the royalties earned by the author meet the figure of the initial advance, the book earns out and, at that point, the author begins to receive royalty payments above the amount of the advance already paid.<sup>99</sup> If the publisher licenses subrights (like film/TV rights, audiobook rights, foreign and translation rights, etc.), those licenses also generate revenues and those payments also count against the initial advance and help the author earn out more quickly.<sup>100</sup>

---

<sup>93</sup> See *id.* at 13.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* at 13–14.

<sup>99</sup> *Id.* at 14.

<sup>100</sup> See Alex S Bradshaw, *Publishing Contracts: Subsidiary Rights*, WORDPRESS: BLOG (Jan. 24, 2020), <https://alexbradshaw.wordpress.com/2020/01/24/publishing-contracts-subsidiary-rights>.

However, as noted above, most books do not earn out their advances so the advance is usually the most important term in the publishing contract for an author as it may be the only money the author actually receives at the end of the day.<sup>101</sup> Advances are largely calculated by a publisher on the basis of what it thinks the book will recoup in sales.<sup>102</sup> As discussed in the next section, these calculations may impact the kinds of advances given to white authors versus authors from underrepresented racial groups in particular to the extent that profit and loss (P&L) calculations likely overestimate the sales to a largely white heteronormative demographic over sales to other categories of readers.<sup>103</sup> Despite the fact that sales calculations may be skewed in this way, Judge Pan in *Bertelsmann* nevertheless seemed to accept that publisher's sales estimates are "reasonably reliable,"<sup>104</sup> noting that "there is a correlation between high advances and high book sales. Books that sell well tend to have garnered high advances, and books that receive high advances tend to sell well."<sup>105</sup> Again, this may be somewhat of a self-fulfilling prophecy if calculations of future book sales are skewed towards a particular sector of the consuming public.

In her ruling in favor of the DOJ, Judge Pan noted that the decreased competition between the publishers, particularly with respect to in-house auctions for books likely to sell well, would significantly negatively impact the market for books that would likely garner advances of \$250,000 or more.<sup>106</sup> While the CEO of PRH at the time of the litigation, Marcus Dohle promised to maintain in-house competition in auctions for these books,<sup>107</sup> Judge Pan noted that in-house bids were already limited by the merger of Penguin and Random House, raising concerns that competition would be further suppressed by the proposed acquisition.<sup>108</sup>

---

<sup>101</sup> *Bertelsmann*, 646 F. Supp. 3d at 13–14.

<sup>102</sup> *Id.* at 16.

<sup>103</sup> See Tager & Shariyf, *supra* note 24, at 56 (discussing habits of different categories of readers).

<sup>104</sup> *Bertelsmann*, 646 F. Supp. 3d at 16.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 50 (discussing concerns about in-house 'house' bids at major publishers and the limitations they impose on the money authors can earn where there is no outside bidder).

<sup>107</sup> See Hillel Italie, *Penguin Random House CEO Markus Dohle Is Stepping Down*, AP NEWS (Dec. 9, 2022, 3:38 PM), <https://apnews.com/article/business-001ab6716844e7315d6e148fe8cd2c12>.

<sup>108</sup> *Bertelsmann*, 646 F. Supp. 3d at 18–19.

Ample evidence in the record demonstrates that PRH imprints often coordinate their bids within the same auction, artificially suppressing advances. . . . They

Relevant to the below discussion of the impact of the case on DEI issues in publishing, Judge Pan made a point to highlight the significant advantages the Big Five publishers have in sales and marketing, so the ability to land a book on one of their imprint's lists is more likely to bring the book to the attention of the reading public.<sup>109</sup> To the extent that these publishers do not choose to highlight books from underrepresented groups, believing that they will be less successful than books from the heteronormative white perspective, the impact on acquisitions of underrepresented narratives arguably becomes worse with more consolidation in the industry.

Another significant issue that Judge Pan noted—and it is probably evident to anyone who buys and reads commercial or trade fiction and nonfiction—is that self-publishing has not become a serious substitute for publishing with a traditional house.<sup>110</sup> There are some genres in which self-published authors have been wildly

---

also sometimes arrange to start their bidding from a lower number. . . . Finally, PRH imprints sometimes decide to collectively “move up slowly” in their bidding, particularly if PRH is the “main driver of value.”

*Id.*

<sup>109</sup> *Id.* at 19–20.

The Big Five's sales teams can help ensure that stores not only buy books but place them in prominent displays. . . . The Big Five edge extends to the virtual marketplace; for instance, PRE [sic] hires data scientists to study Amazon's search algorithms and spends money to get books better positioned in Amazon's search results. . . . Meanwhile, marketing teams are responsible for paid advertising and use “every device possible to find that [book's] audience.” . . . In service of that goal, they produce market research and data analytics, as well as send marketing materials to traditional outlets or social media influencers. . . . The Big Five can even ensure that books look better when they reach an audience, providing multiple versions of cover art for an author to choose from. . . . By contrast, smaller publishers might have a handful of staff doing all the editing, marketing, publicity, and sales work on a book. . . . Although some of their books do well, that success is harder won and less frequent.

*Id.*

<sup>110</sup> *Bertelsmann*, 646 F. Supp. 3d at 21.

Self-publishing is not a significant factor in the publishing industry. Self-published books are rarely published in print and are typically limited to online distribution. . . . The authors of self-published books cannot pay themselves an advance. . . . Moreover, individual authors generally do not have relationships with media or distributors necessary to ensure that their books are visible to a potential audience.

successful, notably romance, cozy mystery and science fiction.<sup>111</sup> But in order for an array of voices to be successful in the self-published space, those authors generally have to have the wherewithal to put the resources upfront to write, edit, design and promote the book, and generally to be working in genres that tend to succeed in the independent publishing space.<sup>112</sup> These limitations also impact authors from marginalized groups who may have less resources to engage in the space.

### B. *The Legal Standard Under the Clayton Act*

The *Bertelsmann* case was litigated under Section 7 of the Clayton Act, which prohibits mergers and acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.”<sup>113</sup> The fundamental purpose of the law is “to arrest the trend toward concentration, the tendency to [monopoly or monopsony], before the [buyer’s or seller’s] alternatives disappear[] through merger.”<sup>114</sup> Judge Pan, in her decision, emphasized the use of the term “may” in the statute to indicate that Congress’s concern was with “probabilities, not certainties.”<sup>115</sup> She took the approach that the court’s role is to evaluate whether the proposed merger would create an appreciable danger of higher prices or other anticompetitive effects in the future.<sup>116</sup>

---

*Id.*

<sup>111</sup> See Matia Madrona Query, *Indie Success: “The Best of All Possible Worlds,”* PUBLISHERS WKLY. (Nov. 23, 2020), <https://www.publishersweekly.com/pw/by-topic/authors/pw-select/article/84952-indie-success-the-best-of-all-possible-worlds.html> (discussing unanticipated success of Hugh Howey’s self-published “Wool” series); see also Alexandra Alter, *How Colleen Hoover Rose to Rule the Best-Seller List*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2022/10/09/books/colleen-hoover.html> (discussing Colleen Hoover’s start as a self-published author and how she is now is a NY Times Bestseller).

<sup>112</sup> See Althea Storm, *How to Make Money Self-Publishing*, THINKIFIC (Dec. 12, 2022), <https://www.thinkific.com/blog/make-money-self-publishing> (discussing the upfront work required for a self-published author’s success).

<sup>113</sup> 15 U.S.C. § 18.

<sup>114</sup> *Bertelsmann*, 646 F. Supp. 3d at 21–22 (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 367 (1963)).

<sup>115</sup> *Id.* at 22 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001)).

<sup>116</sup> *Id.*



In deciding the case, she adopted what has come to be known as the *Baker Hughes* test.<sup>117</sup> The test includes three steps involving burdens of proof between the parties: (1) the government must demonstrate the existence of a relevant market which the government can use to create a presumption of anticompetitive effects by demonstrating undue concentration in that market; (2) the defendants must rebut the presumption by demonstrating that real-world conditions make market concentration alone an unreliable predictor of anti-competitive effects; and, (3) if the defendant rebuts the presumption, the burden shifts back to the government to establish the ultimate burden of persuasion in relation to anticompetitive effects.<sup>118</sup>

In this case, Judge Pan held that all the conditions were met to establish a violation of the Clayton Act.<sup>119</sup> One of the most significant points of difference between the parties was on the market definition question and it was on that question that much of the ultimate decision hinged.<sup>120</sup>

### C. *Market Definition Under the Clayton Act*

The first step—market definition—played a key role in Judge Pan’s decision.<sup>121</sup> If the market had been defined more broadly (e.g., all books purchased by Big Five publishers, not simply books garnering advances of \$250,000 or more), the result likely would have been different. By defining the market in terms of the higher value range of advances, Judge Pan was able to rely on some of the above evidence about the anticompetitive practices engaged in by Big Five publishing houses in relation to bidding at auctions for these high value books.<sup>122</sup> A consideration of most or all books published by the Big Five would likely not have evidenced as much of an anticompetitive effect, as books that garner lower advances typically do not sell at auction and often only have one publisher interested, in which case the author (as seller in the market) is in a “take it or leave it” situation. In cases of midlist and lower-advance paying titles, there is probably much more competition for authors (sellers) and the challenge is to find any publisher willing to pay an advance for the work. As we will see in the following section, this is often the situation in which

---

<sup>117</sup> *Id.* at 23. This test derives from *United States v. Baker Hughes*, 908 F.2d 981, 982–83 (D.C. Cir. 1990).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 56.

<sup>120</sup> *Id.* at 24.

<sup>121</sup> *See id.* at 23.

<sup>122</sup> *Id.* at 16–17.

authors from historically underrepresented groups find themselves disproportionately reflected.

In defining the relevant market in *Bertelsmann*, Judge Pan considered the two factors typically included in such a market analysis: the geographic reach of the market and the product market.<sup>123</sup> The parties agreed on the geographic market: “the global market for the acquisition of U.S. publishing rights.”<sup>124</sup> However, there was strenuous disagreement on the product market largely for the reasons noted in the previous paragraph:<sup>125</sup> a broader market definition would likely have led the court to find sufficient competition in the market, but a narrower definition focusing on the higher echelons of books (in terms of advances paid) suggests anti-competitive effects on the market if the merger proceeded.

The DOJ proposed the narrower market definition, pointing to practical indicia of the market that could be clearly identified and for which authors had fewer substitutes than the Big Five houses, including PRH (as the largest trade publisher in the United States) and Simon & Schuster (as the third largest).<sup>126</sup> They proposed a definition of market as revolving around “top selling” books expected to garner at least \$250,000 advances on a number of grounds:

- 1) Distinct prices can be probative in market definition;<sup>127</sup>
- 2) Books that meet this advance threshold compromise only 2% of all book acquisitions by publishers but they account for 70% of all advance spending (amounting to one billion dollars annually);<sup>128</sup>
- 3) The buyers (publishers) for this category of books are disproportionately represented by the Big Five publishers, with the Big Five holding 91% of the market for these titles while smaller publishers collectively only hold 9%.<sup>129</sup>

---

<sup>123</sup> *Bertelsmann*, 646 F. Supp. 3d at 24.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 25 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 26. This is a significant reason why it was essential to the DOJ’s case to establish such a narrow market definition. The market share in this “elite” market was so high compared to the market share of all books sold in the trade market which was closer to 55–60. *See id.* at 12; *see also* discussion *supra* Part I(B).

- 4) Books in this category are treated differently in-house than books that earn lower advances both in terms of auctions and in terms of the approvals required in-house to make offers for these higher amounts.<sup>130</sup> They also garner more in-house dollars in marketing and publicity efforts.<sup>131</sup>

PRH argued for a lower threshold if the market was going to be determined in relation to the amount of a book's advance payment and suggested a \$50,000 threshold on the basis that this is the price point at which the Big Five begin to dominate the market for book acquisitions.<sup>132</sup> In the alternative they argued for a one million dollar advance cut-off to limit the market to "books by celebrity, franchise, or award-winning authors that are most clearly destined for success."<sup>133</sup> Defining the market in either of these ways, they argued, would not support a finding of anticompetitive effects in the market.<sup>134</sup>

Judge Pan did not accept this reasoning, saying that the defendant's focus on a specific dollar amount was a "misunderstanding" of why she ultimately accepted the \$250,000 threshold.<sup>135</sup> Her reasoning was that the market the DOJ was identifying was a market for "top selling books" and that the monetary threshold was merely a proxy for that category.<sup>136</sup>

The defendants also argued that the market definition proposed by the DOJ was unworkable because no one could truly predict whether any given book was likely to be a bestseller.<sup>137</sup> In support of this argument, they cited some unexpected bestsellers such as Stephen King's *Carrie* and Marie Kondo's *The Life-Changing Magic of Tidying Up*.<sup>138</sup> However, Judge Pan rejected that line of reasoning, noting

---

<sup>130</sup> See *id.* at 29–30 (discussing the different approach to marketing and publicity of this sub-market of trade publishing).

<sup>131</sup> *Id.* at 31 ("Dr. Hill determined that S&S and PRH spend, on average, under \$10,000 on marketing for books with advances under \$250,000, and between \$40,000 and \$90,000 on marketing for books with advances over \$250,000.").

<sup>132</sup> See *id.* at 27.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 32.

<sup>138</sup> *Id.* at 32–33.

in particular the existence of competitive auctions for books publishers judge as likely to be bestsellers as evidence of a discrete market for likely bestsellers.<sup>139</sup> Additionally when a publisher pays more money for a book, one might assume they will put more marketing dollars behind the book, likely contributing to its ultimate success.<sup>140</sup>

On the supply substitution question—which is another indication of market definition—Judge Pan noted that if enough authors are able to find alternative ways of publishing their books to the extent that decreased prices from one buyer or group of buyers would be unprofitable, then the relevant market must be defined to include the alternate avenues of publication.<sup>141</sup> In this case, the only obvious alternative would be self-publishing and so few authors would make this choice that it would not likely impact the behavior of the Big Five publishers.<sup>142</sup> Self-publishing is a poor substitute for traditional publishing.<sup>143</sup>

Accepting the market definition proposed by the DOJ, Judge Pan found that there was little question that a merged PRH/S&S would produce a firm that controlled an “undue percentage share of the relevant market” and would result in an unlawful increase in concentration of firms in the relevant market.<sup>144</sup> Post-merger the consolidated PRH/S&S would control nearly half (49%) of the identified market and the next largest market participant would hold less than half that share (24%) while the third and fourth largest participants would hold 10% and 9% respectively

---

<sup>139</sup> *Id.* at 33.

[I]t is commonplace for multiple editors to gravitate to the same book, as evidenced by the routine occurrence of competitive auctions; and the defendants do not dispute that there is a general correlation between author advances and book sales . . . . Indeed, whenever a publisher submits a bid of \$250,000 or more for a book, that publisher has determined that the book is likely to be a top seller and knows that the competitors for the book are likely to be limited to the Big Five.

*Id.*

<sup>140</sup> *Id.* In this context, Judge Pan cites favorably the case of *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994–95 (9th Cir. 1986) (noting that blockbuster movies can often be identified by the marketing dollars devoted to them).

<sup>141</sup> *Id.* at 34 (citing *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015)).

<sup>142</sup> *Id.* at 35.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 37–38 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963)).

of the market for bestsellers.<sup>145</sup> The defendants did not question his calculation but rather focused on the market definition question to rebut the DOJ's complaint.<sup>146</sup>

Judge Pan also noted that on the basis of evidence provided to the court, it appears that in most cases involving auctions for bestsellers, PRH and S&S are typically the top two bidders and, when PRH loses an auction it is typically to S&S, and vice versa.<sup>147</sup> Merging the two firms thus significantly decreases competition for authors seeking book deals.<sup>148</sup> She cited evidence provided in the case of several auctions between PRH and S&S as the final two bidders where competition between the two drove the price of the advance offered up several hundred thousand dollars in one case and several million in another.<sup>149</sup> She also noted evidence presented by the DOJ that in cases where PRH and S&S were not the final two bidders, competition brought to bear by S&S's participation in an auction against other Big Five publishers also significantly raised the prices of advances ultimately offered to authors.<sup>150</sup>

Additionally, Judge Pan accepted that competition among Big Five publishers increases competition even outside the auction context because publishers interested in a book manuscript know that an agent could shop the book to other competitive publishers.<sup>151</sup> Thus, "the loss of PRH as an outside competitor would weaken authors' leverage in one-on-one negotiations with S&S, and the loss of S&S as an outside competitor would weaken authors' leverage in one-on-one negotiations with PRH."<sup>152</sup>

While somewhat outside the scope of the main arguments of this Article, Judge Pan also pointed to a history of cooperative conduct between Big Five publishers (previously Big Six publishers before the Penguin/Random House merger resulting

---

<sup>145</sup> *Id.* at 36–37.

<sup>146</sup> *Id.* at 38.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 38–39.

<sup>149</sup> *Id.* at 41.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 42.

<sup>152</sup> *Id.*

in PRH) to establish a likelihood of anticompetitive practices post merger.<sup>153</sup> Ultimately, the judge was persuaded that:

The Big Five publishers already control 91 percent of the relevant market. . . . The merger would distill the Big Five to a Big Four, with an overwhelmingly dominant top firm, PRH-S&S, controlling 49 percent of the market and dwarfing its nearest competitors. In the newly reconfigured market, the top two firms . . . would have a 74-percent market share. . . . Under such circumstances, coordinated effects are likely through “sheer market power” because the “post-merger market would feature two firms that control roughly three quarters” of the market. . . . The merger would thus increase the market’s already high susceptibility to coordination.<sup>154</sup>

The defendants attempted to rebut the presumption of reduced post-merger competition in the market with arguments such as:

- (a) Assurances from other Big Five publishers that they will remain competitive in their bidding strategies;<sup>155</sup>
- (b) Non-Big Five publishers would remain a significant competitive constraint on the merged entity in the market;<sup>156</sup>
- (c) The merged entity would retain competition in-house between its own imprints;<sup>157</sup>
- (d) Self-publishing also offers a competitive constraint on anti-competitive practices;<sup>158</sup> and
- (e) Barriers to entry into the publishing market are low and nothing prevents new publishers from entering the market and competing with the Big Five—or Big Four post-merger.<sup>159</sup>

---

<sup>153</sup> *Id.* at 45–46 (noting prior cooperative action by major publishers in the antitrust context such as the tacit collusion of the publishers with Apple against Amazon around 2015).

<sup>154</sup> *Id.* at 46.

<sup>155</sup> *Id.* at 47–48.

<sup>156</sup> *Id.* at 48–49.

<sup>157</sup> *Id.* at 49–50.

<sup>158</sup> *Id.* at 51.

<sup>159</sup> *Id.*

Judge Pan did not find any of these arguments compelling. With respect to the first two arguments, the judge was leery of the suggestion that other publishers post-merger would provide a meaningful avenue of competition.<sup>160</sup> In particular, she faulted the defendants for an argument that effectively aggregated all the smaller publishers together as if they had collective power to make up for lost competition post-merger.<sup>161</sup> She further was unpersuaded that in-house competition between imprints of the merged entity would make up for the lack of competition caused by the merger,<sup>162</sup> noting in particular that:

Although internal competition among imprints is currently permitted by some publishers . . . such competition is far from unrestrained. To the extent imprints compete internally within the confines of a house bid, they can provide more editorial choices to authors, but there is no price competition that allows authors to achieve the highest possible advance level.<sup>163</sup>

She ultimately concluded that internal imprint competition is not a plausible substitution for independent competition amongst publishing houses.<sup>164</sup>

As previously noted, Judge Pan did not accept self-publishing as a viable competitive avenue for authors as the cost structures are so different to traditional publishing and the likelihood of succeeding as an independent author is so hard to predict.<sup>165</sup> Judge Pan also disagreed with the defendants' suggestion that barriers to entry into the publishing market are low, at least in terms of the market for anticipated best-selling books.<sup>166</sup> There are many reasons for this perspective including that a new entrant into the market cannot rely on strong backlist sales to support the acquisition of riskier front list titles;<sup>167</sup> new publishers do not have

---

<sup>160</sup> *Id.* at 48.

<sup>161</sup> *Id.* at 48–49.

<sup>162</sup> *Id.* at 49–50.

<sup>163</sup> *Id.* at 50.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 51.

<sup>166</sup> *Id.* at 51–52.

<sup>167</sup> *Id.* at 52.

established marketing and sales teams;<sup>168</sup> new publishers cannot avail themselves of reputation/track records of success that make them attractive to authors;<sup>169</sup> and, new publishers cannot avail themselves of the economies of scale enjoyed by established market participants.<sup>170</sup> New publishers also do not typically have the wherewithal to create and warehouse large print runs.<sup>171</sup> Evidence of barriers to entry is supported by the fact that: “No publisher has entered the market and become a strong competitor against the Big Five in the past thirty years.”<sup>172</sup>

Judge Pan was also unconvinced of an argument by the defendants that agents would be in a position to curb the power of a merged entity noting that “agents cannot create competition where it does not exist, and competition is what ultimately increases authors’ advances.”<sup>173</sup> In supporting this view, she noted several instances in the past where agents have attempted to curb the exercise of market power by the Big Five and have failed to do so, notably with respect to linking new electronic rights (e.g., digital audio and e-books) to traditional publishing licenses and restricting royalties on electronic distribution methods.<sup>174</sup>

#### D. *The “Good Home” Argument*

The final argument made by the defendants is in fact the piece most relevant to this Article: the argument that PRH is the best home for those already working with S&S (current authors, editors and other staff).<sup>175</sup> The defendants pointed out that S&S personnel would gain significant advantages from a merger with PRH including access to the PRH distribution network and supply chain, leading to higher sales for S&S books.<sup>176</sup> The corollary to this argument was that if the merger was enjoined—as it ultimately was—the result would likely be that S&S’s parent company, Paramount Global, would sell S&S to a private equity firm that would not understand the publishing business model and would gut the company and potentially sell it off

---

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 54.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 55.

<sup>176</sup> *Id.*



in pieces.<sup>177</sup> In support of this argument, the defendants highlighted a prior situation where Blackstone sold Houghton Mifflin and basically destroyed the company, which was ultimately sold at a discount to HarperCollins,<sup>178</sup> after which many of its staff were ultimately let go and book projects fell through the cracks.<sup>179</sup>

This argument was prescient in the sense that in August of 2023, the sale of S&S by Paramount to private equity firm KKR was publicly announced.<sup>180</sup> While the media generally put a positive spin on the sale,<sup>181</sup> concerns were also raised about the future of S&S in the hands of a private equity company.<sup>182</sup>

---

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Katy Hershberger, *HMH Layoffs Add Up*, PUBLISHERSLUNCH (Oct. 7, 2021), <https://lunch.publishersmarketplace.com/2021/10/hmh-layoffs-add-up/>.

<sup>180</sup> See Mia Venkat, Justine Kenin & Mary Louise Kelly, *Publishing Company Simon & Schuster Was Sold for \$1.62 Billion to Investment Firm KKR*, NPR (Aug. 7, 2023, 5:36 PM), <https://www.npr.org/2023/08/07/1192579398/publishing-company-simon-schuster-was-sold-for-1-62-billion-to-investment-firm-k>.

<sup>181</sup> See, e.g., Jim Milliot & Andrew Albanese, *KKR Wins S&S for \$1.62 Billion*, PUBLISHERS WKLY. (Aug. 7, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/92928-kkr-wins-s-s-for-1-62-billion.html> (noting the proposed implementation of a broad-based equity ownership program for S&S staff as well as the incoming expertise of the head of media at KKR, Richard Sarnoff, who previously played a key role at Random House prior to its merger with Penguin and was one of the architects of Bertelsmann's original purchase of Random House).

<sup>182</sup> *Id.*

A private equity firm's acquisition will be viewed negatively by many who will be concerned that KKR will put profits over literature. Others, however, will see KKR's as better than S&S being bought by one of its competitors. The government trial that blocked the PRH deal made clear that most industry members did not want S&S to be acquired by another member of the Big 5; HarperCollins, which bid for S&S when it was first placed up for sale, was also bidding for the publisher in the newest sale process.”)

*Id.*;

I [(Publishers Weekly Editorial Director, Jim Milliot)] know there's going to be a lot of initial reaction to, oh, no, a private equity firm has bought it. And I understand that. You know, private equity firms don't have the greatest reputation for the way they treat companies and, you know, may not care all that much about the literary value of S&S. But I think in the end, it'll work out.

See Venkat et al., *supra* note 180.

The “best home” argument did not sway the court in the *Bertelsmann* case because it was not relevant to the Clayton Act claim under which, as Judge Pan noted, “[t]he Court is required to assess the anticompetitive effects of the merger under the applicable statute and case law, which do not contemplate consideration of the preferences of the merging parties’ employees and stakeholders, or their distaste for other potential buyers of the assets in question.”<sup>183</sup> The judge also noted that the concerns about a private-equity acquisition were highly speculative as other major publishers remained interested in an acquisition.<sup>184</sup> In fact, HarperCollins subsequently did bid competitively for the company but lost out to KKR.<sup>185</sup>

### III. DIVERSITY AND INCLUSION IN THE PUBLISHING INDUSTRY AFTER *BERTELSMANN*

#### A. *Post-Bertelsmann Industry Shakeup*

In the wake of the unsuccessful PRH/S&S merger, several shifts occurred in the publishing industry. Shortly after the *Bertelsmann* litigation, PRH announced that it was bifurcating some of its business on the Random House side, splitting the Random House group into two separate business divisions: Random House and Crown.<sup>186</sup> One of the main stated aims of separating the business units was to “revive competition” among imprints under the PRH U.S. banner.<sup>187</sup> It remains to be seen whether the reorganization does increase competition, particularly in the wake of concerns by Judge Pan in the *Bertelsmann* case about the limited impact of in-house competition within a single publishing house on the competitiveness of advances and other contract terms offered to authors.

Shortly after announcing the reorganization, PRH also announced a significant series of staff layoffs and offered buyout packages for staff,<sup>188</sup> suggesting that any

---

<sup>183</sup> *Bertelsmann*, 646 F. Supp. 3d at 55–56.

<sup>184</sup> *Id.* at 56.

<sup>185</sup> Milliot & Albanese, *supra* note 181 (“HarperCollins, which bid for S&S when it was first placed up for sale, was also bidding for the publisher in the newest sale process.”).

<sup>186</sup> Jim Milliot, *Random House, Crown Made Separate Groups in PRH US Reorg*, PUBLISHERS WKLY. (Feb. 28, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/91649-random-house-crown-made-separate-groups-in-prh-reorg.html>.

<sup>187</sup> *Id.*

<sup>188</sup> See Jim Milliot, *Layoffs Begin at Penguin Random House as Buyout Departures Come Into Focus*, PUBLISHERS WKLY. (July 18, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/92788-layoffs-begin-at-penguin-random-house-as-buyout-departures-come-into-focus.html>; Roger Friedman, *Random House Loses Dozens of Legacy Editors, Execs in a Corporate*

advantage to authors brought about by the reorganization might be tempered by the diminishing amount of editors available to bid on new projects. Voluntary buyout packages were offered to more senior staff (in terms of age).<sup>189</sup> The layoffs and buyout packages were attributed by commentators to the costs of the *Bertelsmann* litigation and the need to account for the significant legal bills faced by the company in the wake of the unsuccessful bid for S&S.<sup>190</sup>

PRH was not, in fact, the first major house to offer voluntary packages to workers in 2023, as the publishing industry faced an impending recession: Hachette and HarperCollins also offered voluntary buyouts to older workers in the midst of the threat of layoffs to come.<sup>191</sup> The Big Five were not the only publishers laying off or offering buyouts to significant members of their editorial and other staff in 2023: for example, Chicago Review Press/Triumph Books laid off a significant amount of

---

*Buy Out/Layoff Scheme that Guts the Company's History*, SHOWBIZ 411 (July 19, 2023, 9:10 PM), <https://www.showbiz411.com/2023/07/19/random-house-loses-dozens-of-legacy-editors-execs-in-a-corporate-buy-out-lay-off-scheme-that-guts-the-companys-history>.

<sup>189</sup> *PRH US Reportedly Offers Redundancy to Older Works*, BOOKS+PUBLISHING (May 8, 2023), <https://www.booksandpublishing.com.au/articles/2023/05/08/230593/prh-us-reportedly-offers-redundancy-to-older-works>.

<sup>190</sup> See Friedman, *supra* note 188.

A huge part of Random House's financial agony is attributed to their failed purchase of rival Simon & Schuster. That merger was scotched by the a [sic] federal regulatory judge last fall. Random House incurred charges of \$200 million in that failed battle. That bill was going to come due eventually, and this is the result.

*Id.*

<sup>191</sup> Michael Cader, *Penguin Random House Makes Voluntary Separation Offer*, PUBLISHERS MARKETPLACE (May 2, 2023), <https://lunch.publishersmarketplace.com/2023/05/penguin-random-house-makes-voluntary-separation-offer/>.

Following voluntary buyout offers from Hachette Book Group (to employees over 50) and HarperCollins (to employees with more than 25 years of service) earlier this year, Penguin Random House announced internally their own voluntary separation offering this week — which was offered as a benefit, to “support our colleagues professional and personal lives” and “responding to the needs and desires of our long-tenured employees.” The offer is available to employees who will be 60 or older as of the end of the year, and have 15 years of service or more.

*Id.*

their editorial staff in July.<sup>192</sup> These layoffs coincided with major layoffs at other media-based companies, notably journalism and social media (including the newly rebranded Twitter)<sup>193</sup> and are largely part of the fears of a general recession facing the United States. However, the ripples of *Bertelsmann* also loom large in the publishing industry as consolidation is no longer seen as a viable option for many publishers to help with their bottom line in a challenging economy.

### B. *Competition for Authors After Bertelsmann*

As one commentator put it, in the wake of *Bertelsmann* and the subsequent layoffs at PRH, existing authors are put in a challenging position.<sup>194</sup> Many will be handed off to other editors who did not originally acquire their projects and some will hope that their original editor may be kept on temporarily on a consulting basis to complete the project.<sup>195</sup> The bottom line is that there are fewer editors dealing with more projects. While this is not an unusual result of economic challenges (including industrial action at Big Five Publisher HarperCollins from late 2022 to early 2023)<sup>196</sup> and may be seen as a natural cycle in any industry, it does make the position of debut authors, including authors of color and authors from other historically underrepresented groups, more challenging at a time when socially and culturally diverse voices are arguably more important than ever.

The ability of more junior staff—editorial, production and other staff—at publishing houses to function effectively with greater workloads, salaries that are not particularly competitive and some pressure (although less since the pandemic) to live in or near New York City makes the prospect of remaining in these jobs long term less attractive than it has been in better economic times. As noted in the first section of this Article, even in more prosperous economic times, the industry has never been particularly welcoming to members of historically underrepresented groups. This result is partly because of existing rather homogenous corporate cultures and partly

---

<sup>192</sup> Claire Kirch, *IPG Lays Off Nine, Including Key Editors at Chicago Review Press*, PUBLISHERS WKLY. (July 18, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/92790-ipg-lays-off-nine-including-key-editors-at-chicago-review-press>.

<sup>193</sup> See Sara Fischer, *Record Number of Media Job Cuts So Far in 2023*, AXIOS (June 13, 2023), <https://www.axios.com/2023/06/13/media-job-cuts-record>; see also Kerry Flynn & Sara Fischer, *Media Layoffs Loom Large Over 2023*, AXIOS (Jan. 24, 2023), <https://www.axios.com/2023/01/24/media-layoffs-2023-vox-nbc-wapo>.

<sup>194</sup> See Friedman, *supra* note 188.

<sup>195</sup> *Id.* (“Some suddenly orphaned authors will follow their editors to new homes. Other [sic] will hope the exiting talent will get consulting deals to finish projects.”).

<sup>196</sup> See Hillel Italie, *HarperCollins Union Approves Contract, Ends 3-Month Strike*, AP NEWS (Feb. 16, 2023, 5:12 PM), <https://apnews.com/article/harpercollins-union-strike-ends-0a94238718879066d9b21af6266be526>.

because the pressures to work in or around an expensive city like New York on relatively modest salaries effectively create barriers to entry for those of lower economic status, those without spouses and other family members who can support them, and those for whom longer work hours and potential travel to New York are not possible. A dearth of editors and agents of color (and those from other underrepresented groups) arguably leads to a dearth of creatives of color and from other underrepresented groups partly because cis-het white editors and agents often do not have a strong editorial or market vision for these diverse voices and partly because creative artists from these groups do not feel as comfortable that cis-het white editors and agents necessarily understand their creative visions.

When economic challenges exacerbate the issue of a lack of diverse editors and agents, the follow-on effects for creative artists of color (writers, designers, illustrators, etc.) can be significant. While there are as yet few post-*Bertelsmann* statistics on book acquisitions in terms of the backgrounds of the authors and stories portrayed, it is not unlikely, particularly given the economic challenges in publishing in 2023, that publishers will fall back on tried-and-true authors with existing sales track records. These authors are likely to be predominantly white. Looking at the list of bestselling books identified by Publishers Weekly from 2020 through 2022, the trend is that white-authored books sell the best and there is no sign that the 2023 figures will be different.<sup>197</sup> A look at the Barnes and Noble 2023 bestsellers list bears out this assumption.<sup>198</sup> A lot of the bestsellers today are white authors with impressive (well-selling) backlists and celebrity authors who are disproportionately white.<sup>199</sup>

Recent deal announcements (for 2023) in Publishers Marketplace additionally bear out the suggestion that the big book deals are going to established, predominantly white, authors with impressive sales track records.<sup>200</sup> This trend in the latter part of 2023 is not surprising, especially given the economic challenges publishers are facing, but it does paint a somewhat bleak picture for new authors

---

<sup>197</sup> See generally *Best Books 2020*, PUBLISHERS WKLY., <https://best-books.publishersweekly.com/pw/best-books/2020/top-10#book/book-1> (last visited June 30, 2024); *Best Book 2021*, PUBLISHERS WKLY., <https://best-books.publishersweekly.com/pw/best-books/2021/top-10#book/book-1> (last visited June 30, 2024); *Best Book 2022*, PUBLISHERS WKLY., <https://best-books.publishersweekly.com/pw/best-books/2022/top-10#book/book-1> (last visited June 30, 2024).

<sup>198</sup> See *The Best Books of 2023 (So Far)*, BARNES & NOBLE, <https://www.barnesandnoble.com/h/best-books-of-the-year-so-far> (last visited June 30, 2024); *Amazon Best Sellers of 2023*, AMAZON, <https://www.amazon.com/gp/bestsellers/2023/books> (last visited June 30, 2024).

<sup>199</sup> See BARNES & NOBLE, *supra* note 198; AMAZON, *supra* note 198.

<sup>200</sup> See *Book Deals*, PUBLISHERS WKLY., <https://www.publishersweekly.com/pw/by-topic/industry-news/book-deals/archive.html> (last visited June 30, 2024).

attempting to break into the industry, including authors from historically underrepresented backgrounds. While the publishers are focusing on existing sales track records to cover their bottom lines, they are unlikely to be investigating new marketing avenues to target readers who may be more interested in debuts from newer and more diverse voices, or testing current markets to gauge appetites for these authors.

As noted in the previous section, a lot of the consolidation of the industry around books likely to “breakthrough” in the current market—the industry term for books likely to do well—has little to do with the *Bertelsmann* decision and more to do with the economic state of the country. However, the *Bertelsmann* decision arguably does play a role in publishers taking a risk-averse approach in 2023 and beyond.

As then-CEO of PRH, Markus Dohle, put it in evidence presented in the *Bertelsmann* case, “there are two ways [for a publisher] to increase market share in the industry: publish more successful books or acquire other companies that publish successful books.”<sup>201</sup> In times of economic hardship, when publishers are facing increased pressure to support their bottom line, if concerns arise about their ability to acquire other companies, they will focus more on publishing successful books. The best way to guarantee a book’s success, according to many publishers, is to focus on authors with an established backlist.<sup>202</sup> Historically, these authors are predominantly a relatively homogenous group.<sup>203</sup>

While the *Bertelsmann* decision does not prevent any publisher from acquiring any other publisher generally speaking,<sup>204</sup> it does send a message to the market that the government is concerned about over-consolidation in the industry and will scrutinize attempts to consolidate. The decision also sends a message that the government is concerned about the ability of authors to have successful careers in terms of being paid competitive advances.

This latter point is where the decision itself seems to be at odds with the ultimate market result. As noted above, S&S was ultimately acquired by a private

---

<sup>201</sup> *Bertelsmann*, 646 F. Supp. 3d at 42.

<sup>202</sup> Thad McIlroy, *We Need to Talk About the Backlist*, THE FUTURE OF PUBLISHING BLOG (May 23, 2021), <https://thefutureofpublishing.com/2021/05/we-need-to-talk-about-the-backlist>.

<sup>203</sup> See So & Wezerek, *supra* note 12.

<sup>204</sup> As noted above, Big Five publisher HarperCollins continued as a bidder for S&S even after the *Bertelsmann* decision. See Milliot & Albanese, *supra* note 181.

equity firm and many concerns have been raised about the extent to which a private equity firm will truly support the position of authors in general, rather than cutting costs wherever possible.<sup>205</sup> If the purchase of large publishers by private equity firms is more risky for authors in general, it is likely to be even more challenging for debut authors, including those from historically underrepresented groups, attempting to break into the market. Obviously, the purchase of S&S by KKR does have some countervailing advantages such as the fact that the equity firm does have some experience with publishing and may be positioned to compete effectively with other big publishers.<sup>206</sup> The result for the market remains to be seen.

Regardless of what happens to the staff of, and authors published by, S&S, the question remains whether *Bertelsmann* was objectively a good or bad development for the industry, with particular reference to the future of underrepresented participants in the industry. On the one hand, it is easy to take Judge Pan's decision at its face value: her concern about the situation of authors in a less competitive industry and her skepticism of some of the evidence provided by the publishers.<sup>207</sup> On the other hand, her acceptance of a fairly narrowly defined market for "bestselling books" can be criticized as unnecessarily narrow and somewhat arbitrary, suggesting this may have been a situation where the judge decided on the desired result and defined the market accordingly.

And of course, the decision was not framed to suggest that the concern was with supporting debut authors, authors of color, or authors from any other underrepresented group. Rather, the decision was framed in terms of the market identified: those authors likely to command an advance of \$250,000 or more.<sup>208</sup>

So, what does any of this have to do with promoting diversity in the publishing industry? On its face, arguably nothing. There is no discussion of diversity and inclusion in the case, and the authors likely to be protected under the narrow market definition are largely traditionally white authors. In fact, if the market had been defined more broadly in the case, the DOJ likely would have lost because taking into

---

<sup>205</sup> See Grothaus, *supra* note 30.

<sup>206</sup> See Elizabeth A. Harris, *Simon & Schuster Board Comes from Books, Disney and TikTok*, N.Y. TIMES (Dec. 21, 2023), <https://www.nytimes.com/2023/12/07/books/simon-schuster-board-kr.html#:~:text=Karp%20said%2C%20including%20distribution%2C%20international,has%20said%2C%20RBMedia%27s%20catalog%20doubled>.

<sup>207</sup> See *Bertelsmann*, 646 F. Supp. 3d at 18 (critiquing the publisher's argument that a publisher will effectively compete against itself in bidding for a book).

<sup>208</sup> See *id.* at 27.

account authors who receive lower advances in the market, which would include more authors from underrepresented groups, would not likely have supported the DOJ's claims of anti-competitive behavior. The defendants argued against the narrow definition of market, confining the market to bestsellers, for this very reason: a more broadly defined market would have made it much more difficult for the DOJ to have made its case. Even smaller publishers may be competitive in the market involving lower advances.

Nevertheless, the subtext of the case is that the market is overly consolidated and has been continuing in the same direction. The prior Penguin/Random House merger was criticized for decreasing, rather than increasing, competition for authors in an increasingly aggregated market.<sup>209</sup> While the notion that aggregation of large publishers may be problematic for authors (and publishing staff and agents) is not a new concern,<sup>210</sup> the fact that the DOJ opposed the S&S acquisition by PRH so forcefully is perhaps a new dimension to the conversation. In fact, many were surprised by Judge Pan's decision expecting that the case was the typical hand-waving about over-consolidation but that ultimately the publishers would get their way.<sup>211</sup>

Typically, when the publishing industry is held under the spotlight for anticompetitive practices, the large players (including Amazon) tend to win.<sup>212</sup> But typical cases involving the publishing industry are consumer-focused rather than author-focused: that is, monopoly pricing cases rather than monopsony cases. In fact, in a case decided shortly after *Bertelsmann*, but framed in terms of price fixing relating to e-books on the consumer side, the plaintiffs lost to the publisher's and distributor's (i.e. Amazon's) arguments. In *In re Amazon.com, Inc., eBook Antitrust Litigation*, the United District Court for the Southern District of New York granted a motion on behalf of the major publishers (and granted a similar motion on behalf of Amazon in part) to dismiss a class action brought by consumers complaining of

---

<sup>209</sup> Jennifer Rankin, *Plot Thickens for Authors as Penguin and Random House Merger Creates £2.6bn Powerhouse*, THE GUARDIAN: THE OBSERVER PUBL'G (July 27, 2013, 7:05 PM), <https://www.theguardian.com/books/2013/jul/28/penguin-random-house-merger-reactions> (noting concerns amongst authors about competition for publishing books within the merged entity).

<sup>210</sup> *See id.*

<sup>211</sup> *See* Hillel Italie, *Judge Blocks Penguin Random House-Simon & Schuster Merger*, AP NEWS (Oct. 31, 2022, 10:06 PM), <https://apnews.com/article/entertainment-business-government-and-politics-02310cdea6a656423380d37ed37679d6> (noting that while Judge Pan's ruling was not surprising on the facts placed before her, it was a dramatic departure from historical developments in the industry).

<sup>212</sup> *See id.*



anticompetitive pricing in relation to eBook distribution.<sup>213</sup> A similar fate befell class action retail bookseller plaintiffs who raised a claim of conspiracy by Amazon and the Big Five publishers to fix distribution prices of physical books published by the major publishers in 2022.<sup>214</sup>

Both of these cases largely centered around arguments that Amazon functioned as the leader of a collusive price-fixing conspiracy with the large publishers, based to a significant extent on a holding of the Second Circuit Court of Appeals in *United States v. Apple* in 2015.<sup>215</sup> The Southern District of New York distinguished *Apple* on the basis of immensely strong evidence of collusion between Apple and the management of the major publishers in the lead-up to Apple's release of the iPad and the iBookstore that was set up to be a major competitor to Amazon's market dominance in online bookselling.<sup>216</sup> There are many reasons why this case succeeded and later cases have failed in establishing antitrust violations on the consumer-facing side of the publishing industry, some to do with standing<sup>217</sup> and most to do with how blatant the evidence of collusion was in the 2015 litigation.<sup>218</sup>

While a detailed examination of these cases is beyond the scope of this Article, it is worthwhile noting that consumer-facing antitrust actions involving publishing have not fared as well historically as the *Bertelsmann* case framed, as it was, in terms of protecting authors as sellers *into* the market rather than downstream purchasers of products *from* the market. The ruling was a surprise to the publishing industry and in many quarters a welcome surprise, despite the fact that ultimately the market situation for authors, and indeed those who command lower advances, often from historically underrepresented groups, may not have improved. Depending on what

---

<sup>213</sup> *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 21-CV-00351 (GHW) (VF), 2023 WL 6006525, at \*26 (S.D.N.Y. July 31, 2023).

<sup>214</sup> *See Bookends & Beginnings LLC v. Amazon.com, Inc.*, No. 1:21-CV-2584-GHW-VF, 2022 WL 4586213, at \*1 (S.D.N.Y. Sept. 29, 2022) (granting publisher defendants' motion to dismiss in a putative antitrust class-action lawsuit).

<sup>215</sup> *See generally* *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

<sup>216</sup> *See In re Amazon.com*, No. 21-CV-00351 (GHW) (VF), at \*4.

<sup>217</sup> *See, e.g., id.*, at \*6 (finding that plaintiffs failed to establish standing to effectively bring an antitrust claim against Amazon's eBook pricing policies).

<sup>218</sup> *See* Andrew Albanese, *What We Learned from the Apple E-Books Case*, PUBLISHERS WKLY. (Oct. 16, 2019), <https://www.publishersweekly.com/pw/by-topic/international/frankfurt-book-fair/article/81490-frankfurt-book-fair-2019-what-we-learned-from-the-apple-e-books-case.html> (noting that Apple didn't particularly care about eBooks but rather it was a case of "raw opportunism" where Apple saw an easy profit to be made).

happens to S&S post acquisition by KKR, the situation may have become less helpful to many of those authors.

One could also argue that the focus in *Bertelsmann* on competitive advances is largely a tempest in a teacup because debut authors, many of whom are from historically underrepresented groups, generally cannot secure a publishing contract without completing a full manuscript first. While existing successful authors can sell books on proposal or outline and sample chapters and rely on the concept and their past sales record to secure a new book deal, debut authors have to prove themselves with a full manuscript to begin with.<sup>219</sup> In this context, advances are arguably immaterial because debut authors do not need the advance to write the book—the theoretical reason advances exist in the first place.

Judge Pan may have taken this reality into account when she accepted a narrow definition of market, limiting the concept to likely bestsellers who command advances of \$250,000 or above. If she had accepted the fact that advances do not necessarily motivate new authors to write and had defined the market more broadly, the DOJ would not likely have won the case.

Accepting the way the case was ultimately decided, and the fact that it certainly was not framed in a way to suggest it was intended to help debut authors in any way, what lessons can we take from Judge Pan's decision in terms of the publishing industry more generally?

### C. *Lessons from the Bertelsmann Decision*

The first big lesson from *Bertelsmann* is that the federal government, or at least the federal government under the Biden Administration, is watching publishing closely and is not eager to welcome arguments about increased consolidation benefiting authors. More specifically, a close read of the judgment provides one of the most, possibly the most, transparent look at the realities of the publishing industry to date. While much of the prior data on the state of publishing has been self-reported anonymous survey data from participants in the industry such as authors, agents, and

---

<sup>219</sup> See Jane Friedman, *Start Here: How to Get Your Book Published*, JANE FRIEDMAN BLOG (Dec. 3, 2023), <https://janefriedman.com/start-here-how-to-get-your-book-published>.

Most first-time authors must finish their manuscript before approaching editors/agents. You may be very excited about your story idea, or about having a partial manuscript, but it's almost never a good idea to submit your work at such an early stage. Finish the work first—make it the best you possibly can.

*Id.*

editors, the *Bertelsmann* litigation required CEOs of major publishing houses to explain their business practices. Expert analysis of the data provided was also included in the judgment. Whether or not the ultimate market reality post-*Bertelsmann* helps newer authors trying to make a living, clouded as it is by other economic factors,<sup>220</sup> it does shine a bright light on the big players in the industry and their policies.

The post-decision shakeup of PRH, with a new CEO and the decision to split the Random House and Crown businesses into separate divisions,<sup>221</sup> may be examples of a large publisher taking steps to appear to take the court's concerns into account. Time will tell how effective those steps are in practice. But the move certainly appears to demonstrate a concern about how the behemoth publisher is perceived in light of the decision.

The case also cast light on why the option to self-publish, as opposed to seeking a contract with a traditional publishing house, is not as attractive to authors as one might think.<sup>222</sup> The early years of the personal computer revolution and the introduction of eBooks suggested that anyone would have a platform to say anything and find their audience, but the information shared in evidence in *Bertelsmann* explains why self publishing is not a competitive option to traditional publishing in terms of the time and resources required to self-publish and market independently published books.<sup>223</sup> While there are obviously some self-published success stories, these situations are the exception, rather than the rule.<sup>224</sup>

---

<sup>220</sup> An additional factor not discussed in this article, but relevant to decisions by publishers to publish work by underrepresented authors is the rise of book banning in schools and school libraries. *See, e.g.*, Rachel Treisman, *U.S. Book Bans Are Taking a Toll on a Beloved Tradition: Scholastic Book Fairs*, NPR (Oct. 17, 2023, 12:06 PM), <https://www.npr.org/2023/10/17/1206219484/scholastic-book-fair-diversity-book-bans>. While this move can cut both ways under the argument that all publicity is good publicity, the impact of book banning on school and library markets may well discourage publishers from picking up titles by authors whose books are likely to be banned, and those authors will predominantly be from historically underrepresented groups.

<sup>221</sup> *See* Jim Milliot, *The End of an Era at Penguin Random House*, PUBLISHERS WKLY. (July 21, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/92818-the-end-of-an-era-at-penguin-random-house.html>.

<sup>222</sup> *See Bertelsmann*, 646 F. Supp. 3d at 21 (“Self-publishing is not a significant factor in the publishing industry. Self-published books are rarely published in print and are typically limited to online distribution.”).

<sup>223</sup> *See id.*

<sup>224</sup> *Id.* at 51.

In other words, the case served an important expressive function even if the practical results in the market are limited in their impact on the authors the case was intended to help. Some of the issues emphasized in the decision, particularly those highlighting the challenging position of authors in the current market, and the limited ability of agents to secure competitive deals in the face of in-house publisher policies, add a gravitas to what is already known within the industry. Anyone can follow what is affectionally (and sometimes unaffectionally) known as “book Twitter”<sup>225</sup> and see authors and agents complain about the difficulties of getting good book deals, and much of this online angst is borne out by recent survey data by PEN America, the AALA, Lee & Low, etc.<sup>226</sup>

The decision also helps provide a judicial context for future legal action that may be brought by or on behalf of authors (or potentially agents). It may also be useful groundwork for any future industrial action on the position of editors in the larger publishing houses who increasingly take on larger and larger workloads for relatively uncompetitive salaries.<sup>227</sup> Again, this argument is more about the decision’s expressive function than anything else.

Most antitrust litigation about publishing—as noted in the previous section—has revolved around wholesale and retail consumers of books and not about those who create the books. For many years (really decades, if not centuries) the focus of legal and market discussions about publishing have been on the publishers and their downstream business models. The *Bertelsmann* litigation, and its somewhat surprising decision, opens up the door for more emphasis on those creatives who

---

Anecdotes about author Brandon Sanderson raising \$40 million on Kickstarter, or author Colleen Hoover having success with self-publishing, do not change the overall picture of the industry. Sanderson’s success with self-publishing was “rare,” “a feat,” and “so incredible.” . . . Similarly, Hoover is “a cultural phenomenon” and “the hottest author in the country.” . . . Sanderson and Hoover are exceptions that prove the rule: For the overwhelming majority of authors in the relevant market, self-publishing is no real substitute for using a publishing house, and self-publishing therefore does little to constrain anticompetitive effects.

*Id.*

<sup>225</sup> For a humorous, but biting, description of how book Twitter impacts the publishing market, see recent best-seller R.F. KUANG, *YELLOWFACE* (HarperCollins, 2023).

<sup>226</sup> See LEE & LOW BOOKS, *supra* note 20; Tager & Shariyf, *supra* note 24; ASS’N OF AM. LITERARY AGENTS, *supra* note 26.

<sup>227</sup> See Arvyn Cerézo, *Underpaid and Overworked: A Look at Salaries and Benefits in Publishing*, BOOK RIOT (Feb. 23, 2023), <https://bookriot.com/salaries-and-benefits-in-publishing>.

provide the fuel for the entire marketplace: those who write the books in the first place. Going back as far as the late nineteenth and early twentieth century, publishers were loathe to center business models on authors and, in fact, several of the early giants in American publishing bristled at the advent of the literary agent profession as the rise of literary agents was an early pressure point forcing publishers to be more competitive in securing and retaining their authors.<sup>228</sup> In the context of an industry that has not historically centered the people it relies on to create its products, the *Bertelsmann* decision is a welcome treatment of the realities for those creators.

In particular, the decision is a welcome addition to the legal and market literature on the position of authors from historically underrepresented groups who have had a more challenging time than traditional white authors in securing contracts at all, and in particular, securing competitive contracts.<sup>229</sup> Those problems are particularly acute in children's publishing where the statistics remain that there are more children's books published featuring animal and other non-human characters than certain groups of color.<sup>230</sup> Book banning in schools and school libraries also disproportionately affects authors of books from underrepresented groups.<sup>231</sup>

At a time when the country is more polarized than ever and when the economy is facing significant challenges, it is more important than ever for the judiciary and market players to be sending clear signals about the importance of welcoming diverse voices into the national conversation.

## CONCLUSION

While the *Bertelsmann* litigation was not framed in terms of promoting diverse voices in publishing—in fact, it was framed in terms of protecting bestselling authors who are not necessarily all that diverse as a group—the ultimate decision does serve an important expressive function in an increasingly consolidated (and still largely

---

<sup>228</sup> THOMPSON, *supra* note 7, at 6–7 (noting how the rise of literary agents ruffled feathers at the big publishing houses because of their aggressive style to attain stronger deals for their authors).

<sup>229</sup> See So & Wezerek, *supra* note 12; see also Constance Grady, *Black Authors are on All the Bestseller Lists Right Now. But Publishing Doesn't Pay them Enough*, VOX (June 17, 2020, 12:50 PM), <https://www.vox.com/culture/2020/6/17/21285316/publishing-paid-me-diversity-black-authors-systemic-bias>.

<sup>230</sup> See Sol, *supra* note 16. For statistics across the pond, see Alison Flood, *Children's Books Eight Times as Likely to Feature Animal Main Characters as BAME People*, THE GUARDIAN (Nov. 11, 2020), <https://www.theguardian.com/books/2020/nov/11/childrens-books-eight-times-as-likely-to-feature-animal-main-characters-than-bame-people>.

<sup>231</sup> See Treisman, *supra* note 220.

homogeneous) market. It calls out the behavior of major publishers from the authors' perspective, and calls into question arguments that more consolidation is better for authors. Additionally, it provides important information on the record about the difficulties of new authors (and new publishers for that matter) breaking into the existing market.<sup>232</sup> Judge Pan's discussion in the case of how the market operates and how large publishers are disproportionately benefited by anti-competitive practices complements information widely known in the publishing industry, but perhaps not as generally well known outside the industry.

While the practical results of the case may not be to immediately increase competition for authors in the market, nor to create new opportunities for new historically underrepresented voices, the decision does add another important puzzle piece for those involved in the market and those seeking to enter the market. After all, PRH did engage in some corporate reorganization after the decision, although it remains to be seen how helpful these changes will be to authors in general and newer authors in particular. And we have yet to see the fate of S&S under its new ownership.

At the end of the day *Bertelsmann* does not so much provide a solution to consolidation in the market or anti-competitive practices impacting authors, but it does provide a step on the pathway to understanding what the market is and what it could be.

---

<sup>232</sup> See *Bertelsmann*, 646 F. Supp. 3d at 52 (arguing that new publishers face "formidable" barriers to the industry given that no new publisher has entered the market and become a strong competitor against the Big Five in thirty years).

