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Pulp Friction: 'Random House v. RosettaBooks'

Robert Lennon
The American Lawyer
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Kohn Swift's Michael Boni

Times are changing in the world of book publishing, as the term "mouse-clicker" threatens to replace the catchword "pageturner." And with the new technology comes a new player on publishing's legal scene -- Philadelphia's Kohn, Swift & Graf - - thanks, in no small measure, to relationships built by 44-year-old firm partner Michael Boni.

When Random House Inc. became the first major commercial publisher to lash out against the e-book trend by zapping the new electronic publishing outfit RosettaBooks with a copyright infringement suit in February, the fledgling company had to find outside counsel fast.

Random House, which is being represented by its regular outside counsel, New York's Weil, Gotshal & Manges, has filed suit in the U.S. District Court for the Southern District of New York against RosettaBooks for publishing e-books of works by such Random House authors as Kurt Vonnegut and William Styron. Random House argues that its original contracts with these authors give it the exclusive right to publish their works in any "book form," which, it argues, includes the digital e-books.

RosettaBooks maintains that the electronic medium falls outside the original contracts. With no regular outside counsel, RosettaBooks co-founder Arthur Klebanoff was surveying his options when a call, and eventually a referral, came from Kay Murray, general counsel and assistant director of authors' rights advocate The Authors Guild Inc.

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Proposing Boni was a no-brainer for Murray. "We were so concerned," she says regarding the organization's position on these authors' rights issues, "that we recommended [Kohn Swift], the best-kept secret on the eastern seaboard."

True, a 19-lawyer Philadelphia firm is not a typical player in the Gotham-centric world of publishing, but the guild checked out Boni in fall 1999 on the suggestion of his former University of Pennsylvania Law School classmate Robin Davis Miller, who was a guild staff attorney at the time. The case involved freelance writers and the electronic republication of their works. The guild wanted to certify the freelancers as a class for this suit, and Boni and his firm specialize in class action work. (This case was prompted by the earlier *Tasini v. New York Times Co.* and is currently stayed, pending a Supreme Court ruling on *Tasini*.)

"When we had the beauty contest, he won hands down," says Murray of Boni's procurement of that business. Working with him on the freelancers' rights case solidified her views: "I mean, he's young, relatively speaking, but he's a very sharp litigator."

The issue of freelancer rights does not entirely dovetail with the RosettaBooks battle, which rests on distinctions between traditional and electronic books, but Murray recommended Boni because she felt the skill set was transferrable. Boni sees both matters as sharing common ground. "They're indicators of the growing pains that the literary world is experiencing with the advent of digital technology."

RosettaBooks also presents unique challenges for the young attorney and his legal team. With the freelancers' rights case, Boni had *Tasini* to guide him, but now he is in uncharted territory. "This is a case of first impression for the court," says Boni. With no clear precedent, the attorneys have to draw comparisons from loosely fitting cases. Random House has cited cases involving movies to bolster its arguments.

Countering these claims and gearing up for a May 7 preliminary injunction hearing kept Boni busy after signing onto the case in early March.

And with a leading role in two prominent cases, Boni seems poised to be an ongoing player in the electronic publishing rights arena. "I like to think of these," he says, "as 'David and Goliath' cases, and I like representing David."

For today, RosettaBooks is David. But that, too, can change in the click of a mouse.