



United States of America v. Bertelsmann SE & Co., KGaA, et al.

Plaintiff's Closing Argument

August 19, 2022



Roadmap

- 1 Market Definition
- 2 Market Shares
- 3 Merger is Presumptively Unlawful
- 4 Defenses
- 5 Anticompetitive Effects



Benefit from Parties' Head-to-Head Competition

Winner:

Penguin Random House

5 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Round 4 (Final Offer)	Bonuses
Penguin Random House PPG (House Bid)	\$275,000 ³	\$305,000 ⁴	\$350,000 ⁵	\$350,000 ⁶	\$50,000 ⁷
Penguin Random House RH (Crown)					
Simon & Schuster					
Hachette (Little, Brown)					
Macmillan (Flatiron)	UNK ¹⁴				
Number of Bids	UNK ¹⁵	2 Bids ¹⁶	2 Bids ¹⁷	2 Bids ¹⁸	

+\$75,000

PX 0935B

Winner:

Penguin Random House

11 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Best Bids (Final Offer)
Penguin Random House PPG (House Bid)	\$750,000 ¹	\$850,000 ²	\$925,000 ³	\$1,000,000 ⁷
Penguin Random House RH (Crown)	\$700,000 ⁸	\$800,000 ⁹	\$925,000 ¹⁰	\$1,000,000 ¹¹
Penguin Random House KDD (Doubleday)	\$650,000 ¹²	\$800,000 ¹³	\$860,000 ¹⁴	
Simon & Schuster				
Hachette (Little, Brown)				
HarperCollins (William Morrow)	\$310,000 ¹⁵			
Publisher A	UNK	UNK	UNK	
Publisher B	UNK	UNK	UNK	
Publisher C	UNK	UNK	UNK	
Publisher D	UNK	UNK	UNK	
Publisher E	UNK	UNK	UNK	
Number of Bids	11 Bids ²²	7 Bids ²³	5 Bids ²⁴	3 Bids ²⁵

+\$75,000

PX 0936B

Winner:

Penguin Random House

4 Initial Bids

Publisher (Imprint)	Preempt	Round 1	Round 2	Tiebreaker (Final Offer)	Bonus
Penguin Random House KDD (Doubleday)	\$300,000 ⁴	\$300,000 ⁵	\$385,000 ⁶	\$390,000 ⁷	\$50,000 ⁸
Penguin Random House RH (Crown)					
Simon & Schuster					
Hachette (Perseus Books)		\$150,000 ¹³			
Number of Bids		4 Bids ¹⁶	3 Bids ¹⁷	2 Bids ¹⁸	

+\$80,000

PX 0943B

Winner:

Penguin Random House

4 Initial Bids

Publisher (Imprint)	Preempt	Best Bids	Opportunity to Improve (Final Offer)	Bonuses
Penguin Random House KDD (Doubleday)		\$900,000 ³	\$1,100,000 ⁴	\$200,000 ⁵
Penguin Random House RH (Crown)				
Hachette (Grand Central)		\$750,000 ¹⁰		
Number of Bids	>1 Bid ¹¹	UNK	2 Bids ¹²	

+\$100,000

PX 0951B

Winner:



Simon & Schuster

3 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Round 4	Round 5 (Final Round)	Bonuses
Penguin Random House PPG (House Bid)	\$300,000 ¹	\$325,000 ²	\$350,000 ³	\$425,000 ⁴	\$500,000 ⁵	\$100,000 ⁶
Penguin Random House RH (Crown)						
Publisher A	\$200,000 and \$300,000 ⁷	\$325,000 and \$400,000 ⁸				
Number of Bids	3 Bids ⁹	3 Bids ¹⁰	2 Bids ¹¹	2 Bids ¹²	2 Bids ¹³	

+\$135,000

PX 0948B

Winner:

Penguin Random House

6-7 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Round 4	Round 5	Round 6	Round 7	Round 8 (Final Offer)	Bonuses
Penguin Random House RH (Crown)	\$550k ¹	\$585k ²	\$635k ³	\$685k ⁴	\$725k ⁵	\$765k ⁶	\$805k ⁷	\$825k ⁸	\$175k ⁹
Simon & Schuster									
HarperCollins (William Morrow)									
Norton									
Bloomsbury									
Number of Bids	6 to 7 Bids ¹⁰	3 Bids ¹¹	3 Bids ¹²	2 Adv. Q. Total ¹³	2 Bids ¹⁴	2 Bids ¹⁵	2 Bids ¹⁶	2 Bids ¹⁷	

+\$140,000

PX 0941B

Winner:

Penguin Random House

8 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Round 4	Best Bids (Final Offer)
Penguin Random House PPG (House Bid)	\$250,000 ¹	\$450,000 ²	\$605,000 ³	\$731,500 ⁴	\$750,000 ⁵
Penguin Random House KDD (Doubleday)	\$100,000 ⁶	\$275,000 ⁷	\$495,000 ⁸	\$605,000 ⁹	
Penguin Random House RH (Crown)	\$200,000 ¹⁰	\$407,000 ¹¹			
Macmillan (Celadon)	\$100,000 ¹²	\$302,500 ¹³			
Hachette (Grand Central)	\$100,000 ¹⁴				
HMH	\$75,000 ¹⁵				
Number of Bids	8 Bids ¹⁶	6 Bids ¹⁷	5 Bids ¹⁸	3 Bids ¹⁹	2 Bids ²⁰

+\$145,000

PX 0938B

Winner:

Penguin Random House

8-9 Initial Bids

Publisher (Imprint)	Preempt	Round 1	Round 2	Round 3	Best Bids (Final Offer)
Penguin Random House KDD (House Bid)	\$750,000 ¹	\$885,000 ²			\$1,050,000 ³ Territory: NA and OM ⁴
Penguin Random House PPG (House Bid)	\$200,000 ⁵	\$500,000 ⁶			\$1,050,000 ⁷ Territory: NA and OM; Misc. Royalty For ⁸
Penguin Random House Crown (Crown)	\$700,000 ⁹	\$200,000 ¹⁰	\$800,000 ¹¹	\$890,000 ¹²	\$1,050,000 ¹³
Macmillan (Celadon)	\$150,000 ¹⁴	\$71,000 ¹⁵			
Hachette (Little, Brown)	\$150,000 ¹⁶				
HMH	\$100,000 ¹⁷				
Norton	\$500,000 ¹⁸				
Number of Bids		8 to 9 Bids ¹⁹	5 Adv. (6 Bids Total) ²⁰	1 Bid (Partial Round) ²¹	4 Bids ²²

+\$165,000

PX 0954B

Winner:



Simon & Schuster

5 Initial Bids

Publisher (Imprint)	Round 1	Round 2	Round 3	Initial Best Bid	Final Best Bid (Crown Final Offer)	S&S Chance to Improve (S&S Final Offer)
Penguin Random House RH (Crown)	\$700,000 ¹	\$720,000 ²	\$730,000 ³	\$730,000 ⁴	\$730,000 ⁵	\$775,000 ⁶
Penguin Random House PPG (House Bid)	\$700,000 ⁷	\$720,000 ⁸	\$730,000 ⁹	\$730,000 ¹⁰	\$730,000 ¹¹	\$775,000 ¹²
HarperCollins (William Morrow)	\$25,000 ¹³	\$260,000 ¹⁴	\$300,000 ¹⁵	\$300,000 ¹⁶	\$300,000 ¹⁷	\$300,000 ¹⁸
Hachette (Twelve)	\$200,000 ¹⁹	-\$270,000 and -\$290,000 ²⁰	\$320,000 ²¹	\$320,000 ²²	\$320,000 ²³	\$320,000 ²⁴
Number of Bids	5 Bids ²⁵	4 Adv. (5 Bids Total) ²⁶	4 Bids ²⁷	2 to 4 Bids ²⁸	2 Bids ²⁹	1 Bid ³⁰

+\$175,000

PX 0950B

Winner:



Simon & Schuster

7 Initial Bids

Publisher (Imprint)	Preempt	Round 1	Round 2	Round 3	Round 4	Round 5	Best Bids (Final Offer)
Penguin Random House PPG (House Bid)	\$300,000 ¹	\$500,000 ²	\$650,000 ³	\$800,000 ⁴	\$900,000 ⁵	\$1,100,000 ⁶	\$1,100,000 ⁷
Penguin Random House RH (Crown)							
HarperCollins (William Morrow)	\$300,000 ⁸	\$550,000 ⁹	\$700,000 ¹⁰				
Macmillan (Holt)	\$100,000 ¹¹	\$425,000 ¹²					
Sourcebooks	\$60,000 ¹³						
Number of Bids	7 Bids ¹⁴	5 Bids ¹⁵	4 Bids ¹⁶	3 Bids ¹⁷	3 Bids ¹⁸	2 Bids ¹⁹	

+\$200,000

PX 0940B

Winner:



Simon & Schuster

7 Initial Bids

Publisher (Imprint)	Round 1	Round 6	Round 7 (Final Offer)
Penguin Random House PPG (House Bid)	\$300,000 ¹	\$1,025,000 ²	\$1,250,000 ³
Penguin Random House RH (Crown)			
HarperCollins (William Morrow)	\$300,000 ⁴		
Macmillan (Holt)	\$300,000 ⁵		
Number of Bids	7 Bids ⁶	6 Bids ⁷	4 Bids ⁸

+\$475,000

PX 0939B

Winner:

Penguin Random House

3 Initial Bids

Publisher (Imprint)	Initial Offer	Opportunity to Improve (Final Offer)
Penguin Random House RH (Random House)	\$800,000 (W) ¹	\$1,500,000 ² Territory: W; Bonuses: \$500,000 ³
Simon & Schuster (S&S)	\$625,000 (W) ⁴	\$1,000,000 ⁵ Misc.: Cost of Collaborator ¹¹
Number of Bids	3 Bids ¹²	3 Bids ¹³

+\$800,000

PX 0955B



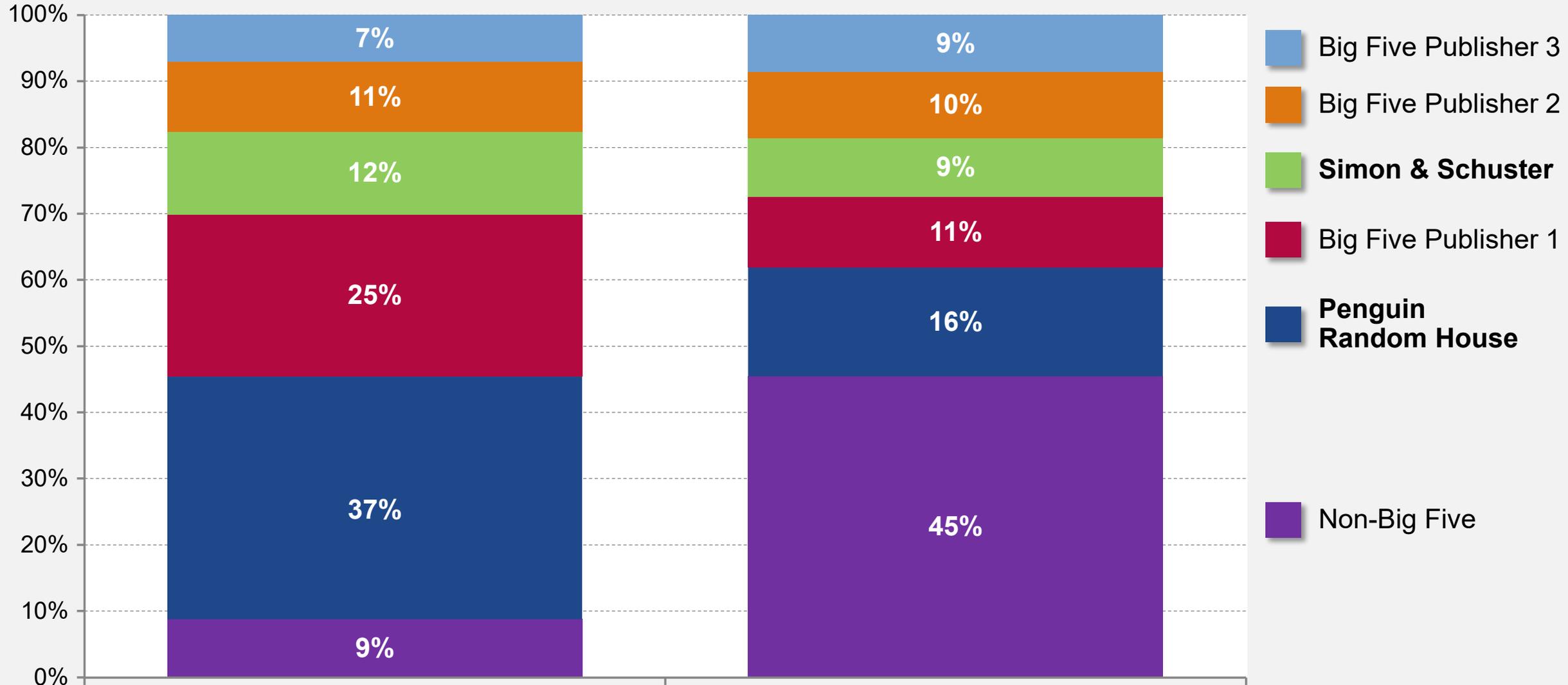
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Contract Shares for Anticipated Top Sellers and Non-Anticipated Top Sellers (2019-2021)

Share of contracts
(count)



Source: Snyder Advance Data



Markets in Creative Industries

PRECEDENT:

Syufy Enter. v. Am. Multicinema, Inc., 793 F.2d 990, 994 (9th Cir. 1986)

<i>Syufy</i> relevant market characteristics: anticipated top-grossing films	Relevant product market characteristics: anticipated top-selling books
Frequently have larger budgets	Command higher advances of \$250,000
Frequently have “famous stars, directors, and producers”	Frequently involve franchise authors or public figures
Frequently have larger advertising budgets (“national advertising support”)	Frequently have larger marketing budgets
Frequently command “guaranteed rentals” at movie theatres with “longer playtimes”	Frequently have bigger initial print runs
“Lucrative terms offered for the pictures by the exhibitors”	Command higher advances \$250,000+ and sometimes command better contract terms



Characteristics of Books with Higher Advances

- **Correlated with higher expected sales**
 - > Karp Trial Tr. 458:9 – 14
 - > Pietsch Trial Tr. 110:19 – 111:1
 - > PX 0151 at slide 9
- Correlated with more marketing support
 - > Karp Trial Tr. 490:15 – 492:15
 - > Dohle Trial Tr. 843:2 – 10
 - > Solomon Litigation Deposition, April 28, 2022 at 31:3 – 8, 31:10 – 20, and 31:22 – 33:1
 - > Walsh Trial Tr. 1827:10 – 1828:18
- Correlation between initial print runs and expected sales
 - > Murray Trial Tr. 1373:21 – 1374:3
- Correlated with customized contract terms
 - > Walsh Trial Tr. 1819:25 – 1820:2



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Hypothetical Monopsonist Test (HMT) and *Brown Shoe*

- **HMT and *Brown Shoe* are two analytical approaches for defining relevant product market**
 - > HMT alone is legally sufficient to define a relevant market
 - > Key question is reasonable interchangeability
 - > The anticipated top-selling books market satisfies both the HMT and the *Brown Shoe* factors
- Acquisition of anticipated top-selling books passes HMT
 - > Self-publishing is not a reasonable substitute
 - > Prof. Edward Snyder concedes that the HMT is satisfied
- *Brown Shoe* evidence supports relevant market definition
 - > Relevant submarkets can exist even if only some *Brown Shoe* features are present (*Staples II* and *Swedish Match*)



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Brown Shoe Practical Indicia

1

Industry Recognition

- Agent & editor recognition of anticipated top-selling books
- Approval level
- Lead titles

2

Unique Needs

- Better ability to take risks
- Stronger marketing & publicity
- Larger sales forces
- Cover design

3

Distinct Prices

- Higher advances
- Specialized terms:
 - “As is” delivery
 - Guaranteed marketing
 - Glam budget

4

Price Sensitivity

- Authors don't switch to low advance/high royalty rate offers
- Do not switch to self-publishing

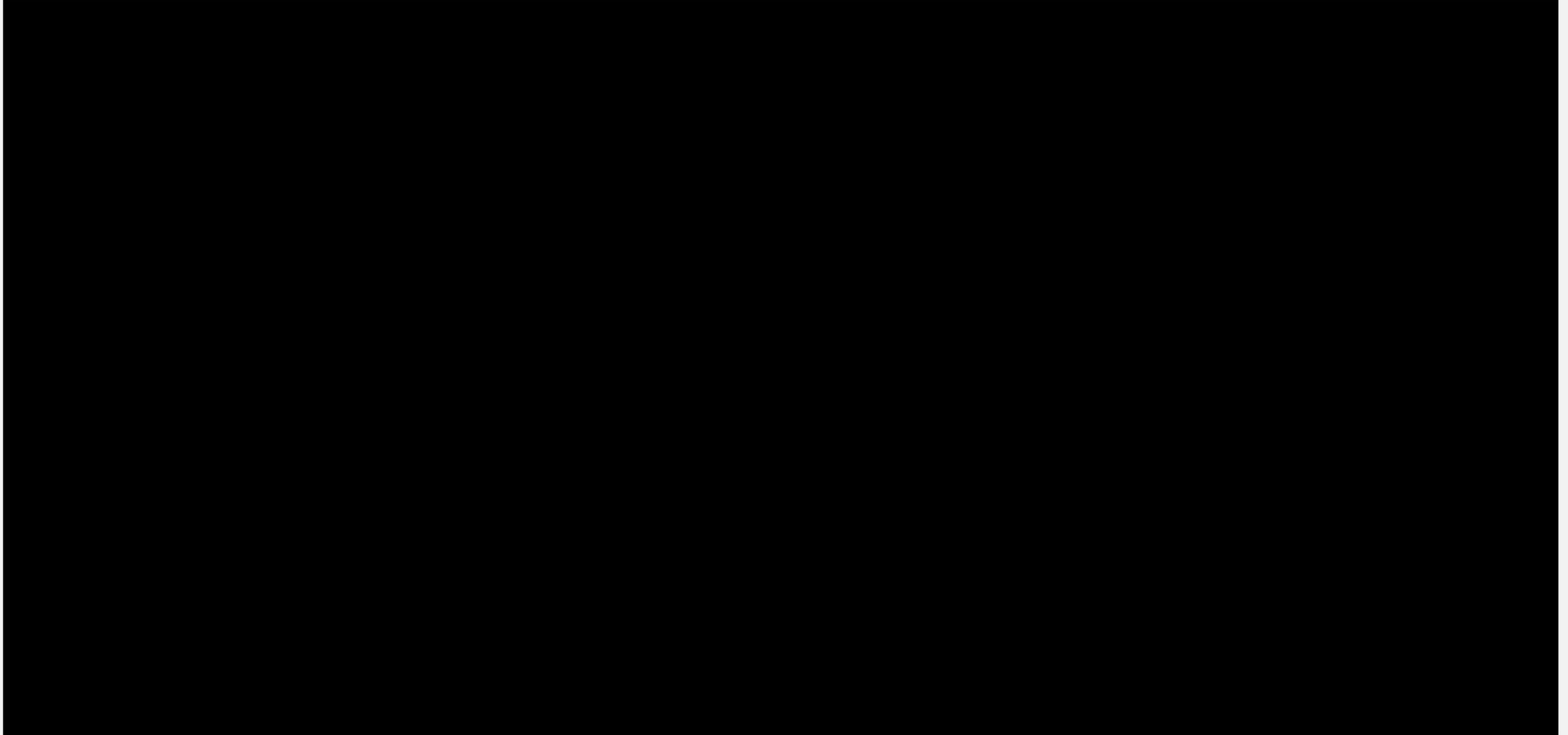
5

Special Characteristics

- Award recognition
- Bestseller status



Average Marketing Spend by Advance Level





Brown Shoe Practical Indicia

1

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Product Market: Case Law

FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 51 – 56 (D.D.C. 2018)

- Market of customers owning fleets of 10 or more vessels of a particular type

United States v. Anthem, 236 F. Supp. 3d 171, 195 – 202 (D.D.C. 2017)

- Market of companies with 5,000 or more employees

FTC v. Staples, Inc., 190 F. Supp. 3d 100, 117 – 122 (D.D.C. 2016) (*Staples II*)

- Market of customers who spend \$500,000 or more annually on office supplies

FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1037 – 1041 (D.C. Cir. 2008)

- Market of “core customers” who paid “distinct prices”

Int’l Boxing Club of New York v. United States, 348 U.S. at 242, 250 – 252 (1959)

- Market of “championship” boxing contests

O’Bannon v. NCAA., 7 F. Supp. 3d 955, 986 (N.D. Cal. 2014), *aff’d in relevant part*, 802 F.3d 1049 (9th Cir. 2015)

- Market of “elite football and basketball recruits”



Anticipated Top-Seller Market is Substantial



More than **\$1 billion** contracted in 2020



Meaningful market: advances for top-selling books account for **70% of advance spending**



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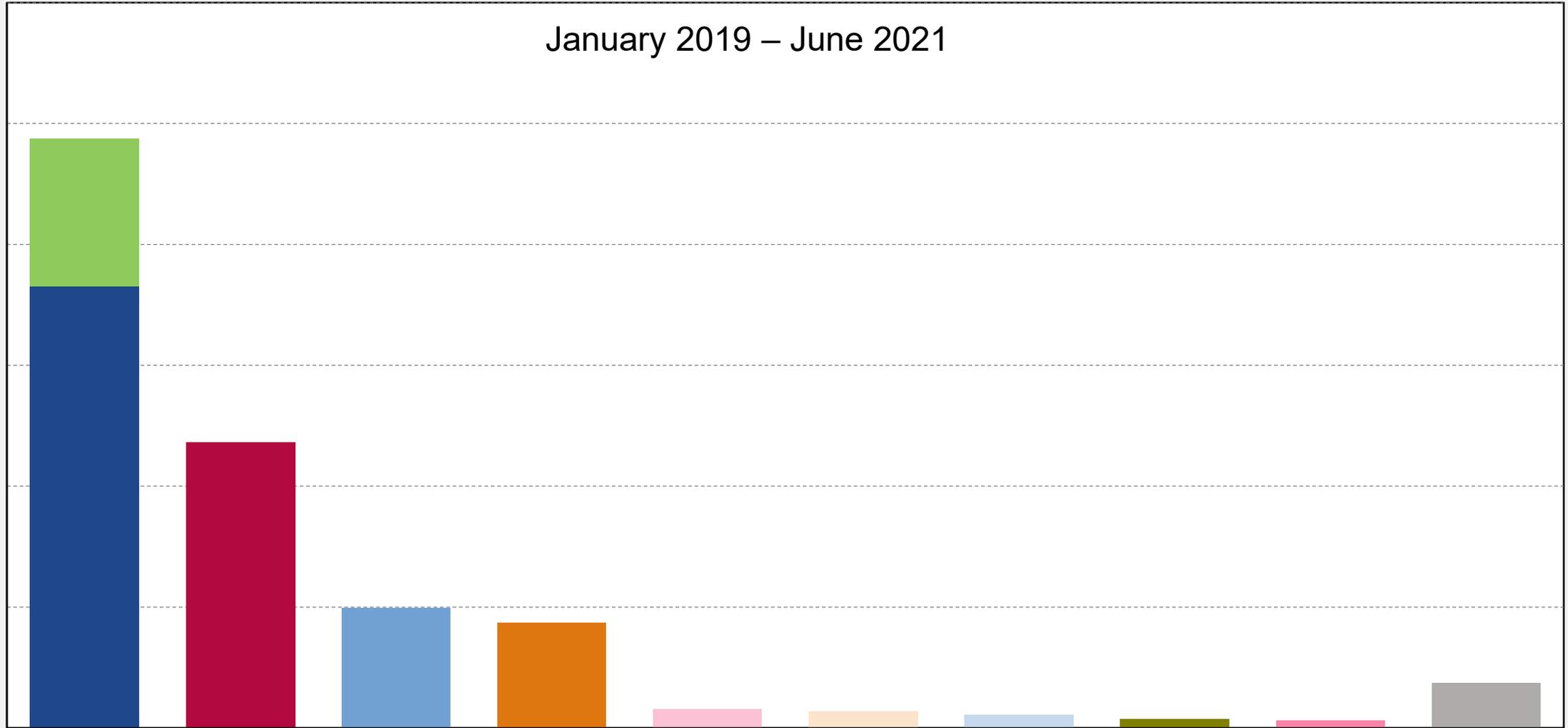


Share of Purchases of Anticipated Top Sellers

Share of purchases of anticipated top sellers

January 2019 – June 2021

50%
40%
30%
20%
10%
0%



**Penguin
Random
House + Simon
& Schuster**

Big Five
Publisher 1

Big Five
Publisher 2

Big Five
Publisher 3

Small
Publisher 1

Small
Publisher 2

Small
Publisher 3

Small
Publisher 4

Small
Publisher 5

All Other
Publishers



U.S. Publishing Industry is an Oligopoly

PRH B1/B2: Purchase of competitor (here: Simon & Schuster) – Valuation of > €1bn expected; relief in subsequent years through synergy effects and cash flow contribution

Classification of projects

Strategic thrust	1 Boosting core businesses - Consolidation -
Market characteristics	size (2018): US\$ 17.1m ¹⁾ Growth: +3% annual (2018 vs. 2016) Structure: Oligopoly, in addition to PRH only four other major trade publishers ²⁾ Cyclicality: Small, stable business Barriers to entry: High (especially reputation, sales)
Business characteristics (Simon & Schuster)	Market position: #5 Publishing house worldwide Market share: ~4-5% ³⁾ (2018) in the USA ¹⁾ EBITDA-Marge [redacted] Scalability: High Risks: Amazon's market position and falling stationary trade lead to or require margin concessions on the part of the publishers
Value-added concept	Synergies through consolidation, for example, central functions and logistics; stronger counterweight vs. Amazon; Increase attractiveness for authors

Possible financial impact⁴⁾, in €m

	● Total S&S acquisition			● Partial S&S acquisition ⁵⁾		
	T0	T1	T2	T0	T1	T2
Sales	717	717	717	359	359	359
Op. EBITDA (adj.)	[redacted]					
Synergies⁶⁾	[redacted]					
Op. EBITDA (adj.)	[redacted]					
D&A (adj.)	[redacted]					
Adjustments	[redacted]					
Op. EBIT	[redacted]					
FCF	[redacted]					
Purchase Price	[redacted]					
EV/EBITDA '18 (100%)	[redacted]					
Present value synergies	[redacted]					
Effects Financial Margin, in €m	[redacted]					

1) US publishing sales of print books, ebooks and audio downloads as well as Amazon's self-publishing sale 2) Hachette, Harper Collins, Macmillan and S&S 3) No regional sales breakdown available, if US share between 70-100% 4) Assumptions: Constant update P&L S&S 2018 (including central overhead CBS allocation) + integration effects, CCR 100%, Integration from 01/01/2021 5) 50% assumption 6) K 10% cost savings with 3 year start-up

13 October 2019 - Bertelsmann SE & Co. KGaA - Capital Allocation 2020-22

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BERTELSMANN

Jan. 8, 2021

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1:21-cv-02866-FYP
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Structure: Oligopoly, in addition to PRH only four other major trade publishers

Bertelsmann Presentation Slides

BPRH-002749216-T001

BPRH-002749216-T013

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Establishing a Presumption Usually Determinative

FTC v. Tronox Ltd.,
332 F. Supp. 3d 187 (D.D.C. 2018)

United States v. Aetna Inc.,
240 F. Supp. 3d 1 (D.D.C. 2017)

FTC v. Sysco Corp.,
113 F. Supp. 3d 1 (D.D.C. 2015)

FTC v. CCC Holdings Inc.,
605 F. Supp. 2d 26 (D.D.C. 2009)

FTC v. Wilh. Wilhelmsen Holding ASA,
341 F. Supp. 3d 27 (D.D.C. 2018)

FTC v. Staples Inc.,
190 F. Supp. 3d 100 (D.D.C. 2016)

United States v. H&R Block, Inc.,
833 F. Supp. 2d 36 (D.D.C. 2011)

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548 F.3d 1028 (D.C. Cir. 2008)



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Defenses Presented by Defendants

**Entry and
Expansion**

**Illusive Bidding
Promise**

**Buyer Power
from Agents**

**Effects of 2013
Penguin and
Radom House
Merger**



Barriers to Entry and Expansion

Entry or expansion must be “timely, likely, and sufficient” to rebut the presumption of illegality

Merger Guidelines at Section 9; *Sysco*, 113 F. Supp. 3d at 80; *H&R Block*, 833 F. Supp. 2d at 74

Multiple barriers:

- Reputation among authors
- Funding to acquire books
- Editorial and operations staff
- Supply chain relationships (printing, distribution)



Date: Saturday, September 14 2019 11:28 PM
 Subject: RE: [REDACTED] meeting (Sunday)
 From: Sawhney, Divya [REDACTED]

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Considerations on Key Takeaways
 Potential routes to build enterprise value

Potential routes	Industry context	Assessment
A Create	Imprint <ul style="list-style-type: none"> • Imprints usually created for long term (i.e. 10+ years) 	Only proven-long term business model in publishing but difficult to exit
	Company <ul style="list-style-type: none"> • Company will always have a higher cost structure than an imprint and will take a longer time to achieve profitability • No history of companies starting from scratch achieving profitability in 3-5 year time period 	Not a viable option
B Acquire	Imprint <ul style="list-style-type: none"> • Limited secondary market for imprint acquisition (distressed situations only) • Typically, imprints are shut down or stay with a publishing company 	Not a viable option
	Company <ul style="list-style-type: none"> • Significant number of deals happen annually in publishing industry • Typical multiple 0.8x-1.0x revenue 	<ul style="list-style-type: none"> • Quickest way to build EV • Comes with backlog and team • Requires capital outflow • Opportunistic, depends on availability of target + right fit

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BPRH-002744493

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 Subject: [REDACTED]
 When: Sunday, Sept
 Where: Dial-in [REDACTED]

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 LEADER PASSCODE: [REDACTED]

US v. Bertelsmann
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No history of companies starting from scratch **achieving profitability** in 3-5 year time period

PRH Presentation Slides

Not a viable option

PRH Presentation Slides



Barriers to Entry

PRH B1/B2: Purchase of competitor (here: Simon & Schuster) – Valuation of > €1bn expected; relief in subsequent years through synergy effects and cash flow contribution

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Business characteristics (Simon & Schuster)	Market position: #5 Publishing house worldwide Market share: ~4-5% ³⁾ (2018) in the USA ¹⁾ EBITDA-Marge [redacted] Scalability: High Risks: Amazon's market position and falling stationary trade lead to or require margin concessions on the part of the publishers
Value-added concept	Synergies through consolidation, for example, central functions and logistics; stronger counterweight vs. Amazon; Increase attractiveness for authors

Possible financial impact⁴⁾, in €m

	1 Total S&S acquisition			2 Partial S&S acquisition ⁵⁾		
	T0	T1	T2	T0	T1	T2
Sales	717	717	717	359	359	359
Op. EBITDA (adj.)						
Synergies ⁶⁾						
Op. EBITDA (adj.)						
D&A (adj.) before any S...						
Adjustments						
Op. EBIT						
FCF						
Purchase Price						
EV/EBITDA '18 (100%)						
Present value synergies						
Effects Financial Margin, in €m						

Barriers to entry: **High** (especially reputation, sales)

Bertelsmann Presentation Slides

1) US publishing sales of print books, e-books and audio downloads as well as Amazon's self-publishing sale 2) Hachette, Harper Collins, Macmillan and S&S 3) No regional sales breakdown available; if US share between 70%-100% 4) Assumptions: Constant update '18, S&S 2018 (including central overhead CBS allocation) + integration effects, CoR: 100%; Integration from 9/30/2021 5) 50% assumption 6) K: 10% cost savings with 3-year start-up

13 October 2019 • Bertelsmann SE & Co. KGaA • Capital Allocation 2020-22

BERTELSMANN

CONFIDENTIAL

BPRH-002749216

CONFIDENTIAL COMMERCIAL INFORMATION PURSUANT TO 28 C.F.R. § 16.7

BERTELSMANN
Jan. 8, 2021

US v. Bertelsmann
1:21-cv-02866-FYP
PX 0080-E

BPRH-002749216

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BPRH-002749216-T001

BPRH-002749216-T013

Oct



Printing Capacity

Bertelsmann
Printing Group



Penguin
Random
House

- Printing capacity is an issue in the publishing industry
- If books aren't printed, they can't be sold, and authors suffer
- Publishing companies are concerned about being beholden to Bertelsmann for printing



Printing Capacity

[O]ur current manufacturer . . . will be selling its Book Trade business to Bertelsmann who owns Penguin Random House. **We would not want to be 100% beholden to a competitor for printing.**

Carolyn Reidy, late CEO of S&S

VIACOMCBS INC.

Message

From: Eulau, Dennis [/O=EXCHANG... (FYDIBOHF23SPDLT)/CN=...]
 Sent: 2/4/2020 4:22:45 PM
 To: Bulger, Joe [/o=ExchangeL... (FYDIBOHF23SPDLT)/cn=...]
 Subject: Fwd: Printing Contract for [REDACTED]

Sent from my iPhone

Begin forwarded message:

From: "Bakish, Robert" <[REDACTED]>
 Date: February 4, 2020 at 4:20:45 PM
 To: "Spade, Christina" <[REDACTED]>
 Cc: "D'Alimonte, Christa" <[REDACTED]>
 Subject: RE: Printing Contract for App[REDACTED]

Pending the answers to chris' question

B

From: Spade, Christina <[REDACTED]>
 Sent: Tuesday, February 4, 2020 3:12
 To: Reidy, Carolyn <[REDACTED]>
 Cc: D'Alimonte, Christa <[REDACTED]>
 Subject: RE: Printing Contract for App[REDACTED]

Carolyn -

A couple questions: 1) what are the terms of the rate increases for the [REDACTED] with LSC? 2) Is this consistent with your assumption for printing costs in 2020 Budget?

Thank you - Chris

From: Reidy, Carolyn <[REDACTED]>
 Sent: Tuesday, February 4, 2020 3:06 PM
 To: Bakish, Robert <[REDACTED]>; D'Alimonte, Christa <[REDACTED]>; Jordan, Veronica <[REDACTED]>; Byrnes, David <[REDACTED]>; Eulau, Dennis <[REDACTED]>
 Subject: Printing Contract for Approval

VCBS-04811284

VIACOMCBS INC. CONFIDENTIAL TREATMENT REQUESTED

Dear Bob:

We have negotiated a deal with LSC Communications, one of the printers with whom we deal. This contract commits us to spending [REDACTED] a year for the next [REDACTED]. This [REDACTED] represents approximately 50% of our standard US Domestic Hardcover and Trade paperback work. Obviously, I need your approval for us to sign.

We have been negotiating this deal for some time but suddenly we are getting pressure to sign from LSC. We believe part of their urgency is related to our current manufacturer, Quad, with whom we have a contract that runs through 2020 and who recently asked us to change terms on the remaining year of the contract, with a [REDACTED] increase in rates. After we refused, it put itself up for sale. We expect an announcement of a sale any day now and think LSC is worried the new owner will approach us. Strong indications are that Quad will be selling its Book Trade business to Bertelsmann who owns Penguin Random House. We would not want to be 100% beholden to a competitor for printing. Because there is very limited printing capacity in the marketplace right now, we are working to make sure we reserve printing time/space. This deal not only gives us favorable pricing (and, we believe, can be almost cost neutral with our current rates) but also allows us reserved printing time.

The summary of the deal is below. Our team has reviewed all with Dave Byrnes. If you want any additional details, don't hesitate to ask.

Carolyn

LSC Deal Summary:

- [REDACTED] year deal: [REDACTED]
- New deal includes annual commitment to LSC of [REDACTED]
- S&S Option to increase work to [REDACTED]
 - o Option allows Quad sale to play out (Berryville/Bertelsmann looking promising), and we can go either way with other 50%
 - o Also provides safety net for 2020 volume if Quad falters (recent developments make that less likely)

VCBS-04811285

US v. Bertelsmann
1:21-cv-0866-FYP
PX 0682



Promise Does Not Resolve Anticipated Harm

- **Promise not a valid reason to rebut the presumption**
 - > Unenforceable
 - > Revocable
 - > Only applies to auctions
- **PRH can side-step this “promise”**
 - > Close, merge, and refocus imprints
 - > Fire editors and reduce title count
- **PRH has a history of internal coordination**



PRH Encourages Coordination Among its Publishing Divisions

Date: Friday, November 2 2018 06:31 PM
Subject: PRH Board - Nov 2018 - US Update_11-2_no appendix.pdf
From: McIntosh, Madeline [REDACTED]

To:
Att:
Hi M
this
God
that
I'll b
Tha

What's happened since April?

What I know I had to tackle in 2018:

- 1. Understand why we were losing market share and what to do about it
- 2. Try to minimize impact of terms pressure and find ways to mitigate
- 3. Manage downturn move

What happened so far:

- Listening Tour: employees & agents (ongoing)
- Town Halls (covering all US employees)
- Elevated two strategically critical areas to US Board level:
 - Consumer Marketing (appointed Sanyu Dillon)
 - Audio (Amanda D'Acierno)
- Promoted Nina von Motlke to Pres., Strategic Development
- Created market development structure in Sales (led by Amanda Close)
- Unified adult and kids educational sales teams
- Opportunity assessments: Juvenile (Publishing, Education, China) and Adult Non-fiction

←----- Random House & Crown announcement -----→

3 Confidential Business Information - To Be Distributed to Penguin Random House Board Members Only

Project
Review

HIGHLY CONFIDENTIAL

BPRH-LIT-002537204

US v. Bertelsmann
1:21-cv-02866-FYP
PX 0411

HIGHLY CONFIDENTIAL

BPRH-LIT-002537201

Increased background coordination in auctions to leverage internal demand information better and avoid internal up-bidding

PRH 2018 Board of Directors Presentation



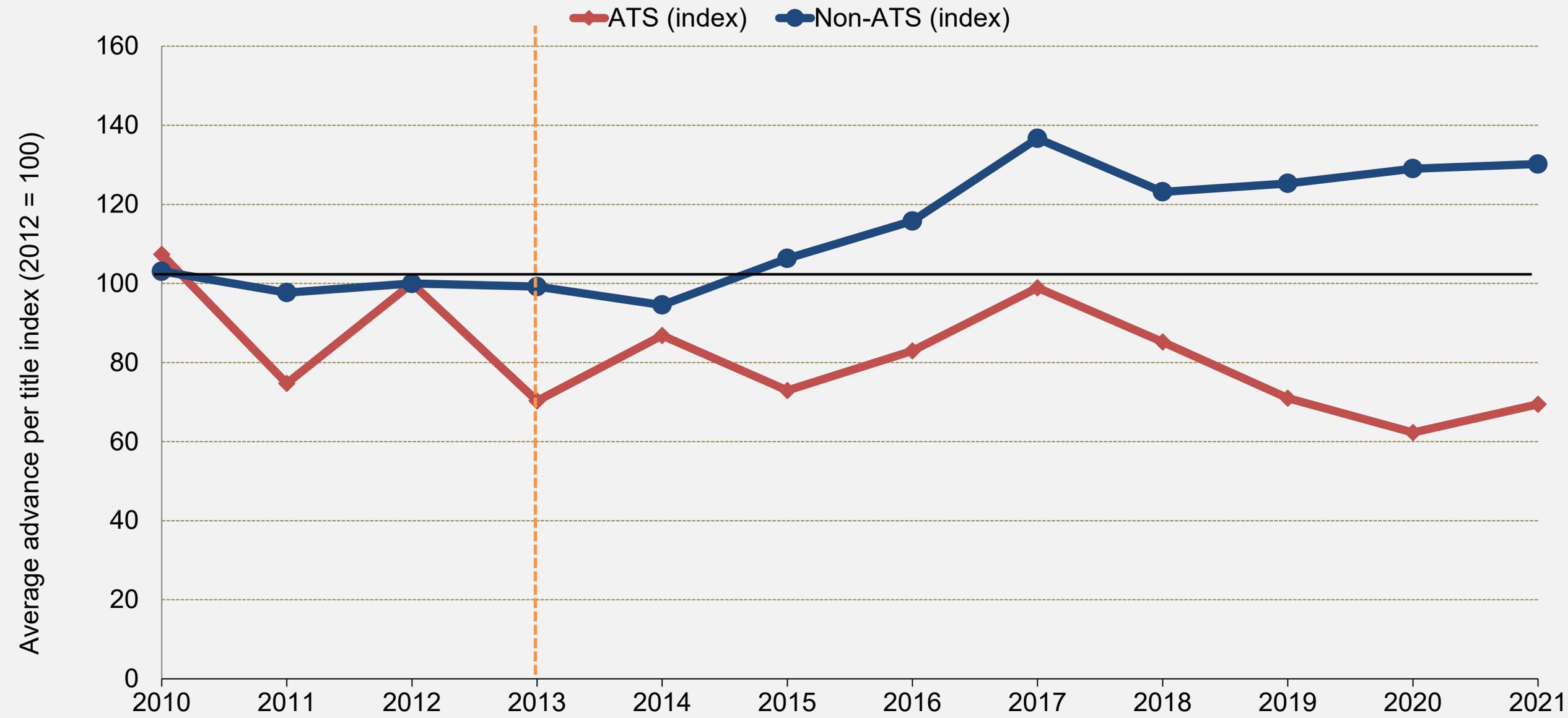
Agents Unable to Mitigate Anticompetitive Harm

“But as noted above, the evidence also shows that loss of one competitor from the four major carriers alters the RFP and negotiating dynamic, even with strong advocates on the other side. This **loss of leverage undermines the defense** contention that customers will be able to wield their seasoned human resource managers and consultants to counteract the anticompetitive effects of the merger.”

United States v. Anthem Inc., 236 F. Supp. 3d 171, 221 (D.D.C. 2017)



Advances for Anticipated Top-Sellers and Other Books After Penguin-Random House Merger





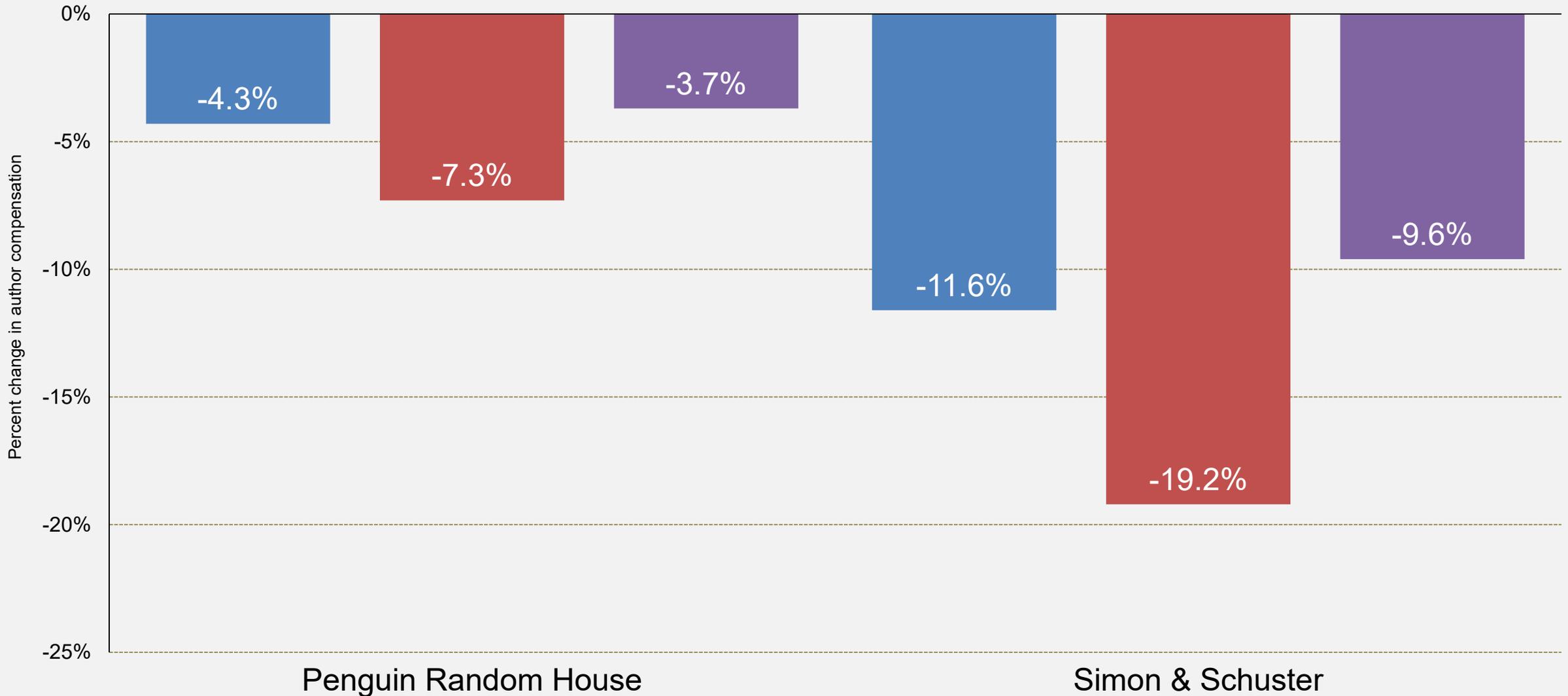
Roadmap

- 1 Market Definition
- 2 Market Shares
- 3 Merger is Presumptively Unlawful
- 4 Defenses
- 5 Anticompetitive Effects**



Unilateral Price Effects from SSA and GUPPI Models

■ Second-Score Auction Model (SSA) ■ Multi-Round GUPPI ■ Single-Round / Hybrid GUPPIs





Harm Is Substantial

Case	Harm Estimate
Penguin Random House / Simon & Schuster	<ul style="list-style-type: none">• 4% price effect for PRH authors• 11.5% price effect for S&S authors
<i>U.S. v. H&R Block, Inc.</i> , 833 F. Supp. 2d 36, 87 (D.D.C. 2011)	<ul style="list-style-type: none">• 2.2-2.5% price effect for the acquirer's customers• 10.5-12.2% price effect for the acquired's customers
<i>FTC v. Sysco Corp.</i> , 113 F. Supp. 3d 1, 66 (D.D.C. 2015)	<ul style="list-style-type: none">• 3-4% market-wide price effect• 4.2-4.5% price effect for the parties' customers¹
<i>FTC v. Hackensack Meridian Health, Inc.</i> , 2021 WL 4145062, *22 n.26 (D.N.J. 2021), <i>aff'd</i> 30 F.4th 160 (3d Cir. 2022)	<ul style="list-style-type: none">• 5.7% price effect for the merging parties' patients

¹ Calculated using the likely merger harm after factoring for divestitures, total national broadline sales estimates, and post-divestiture baseline combined shares. See 113 F. Supp. 3d at 53-54 & 66.



United States of America v. Bertelsmann SE & Co., KGaA, et al.

Plaintiff's Closing Argument

August 19, 2022