



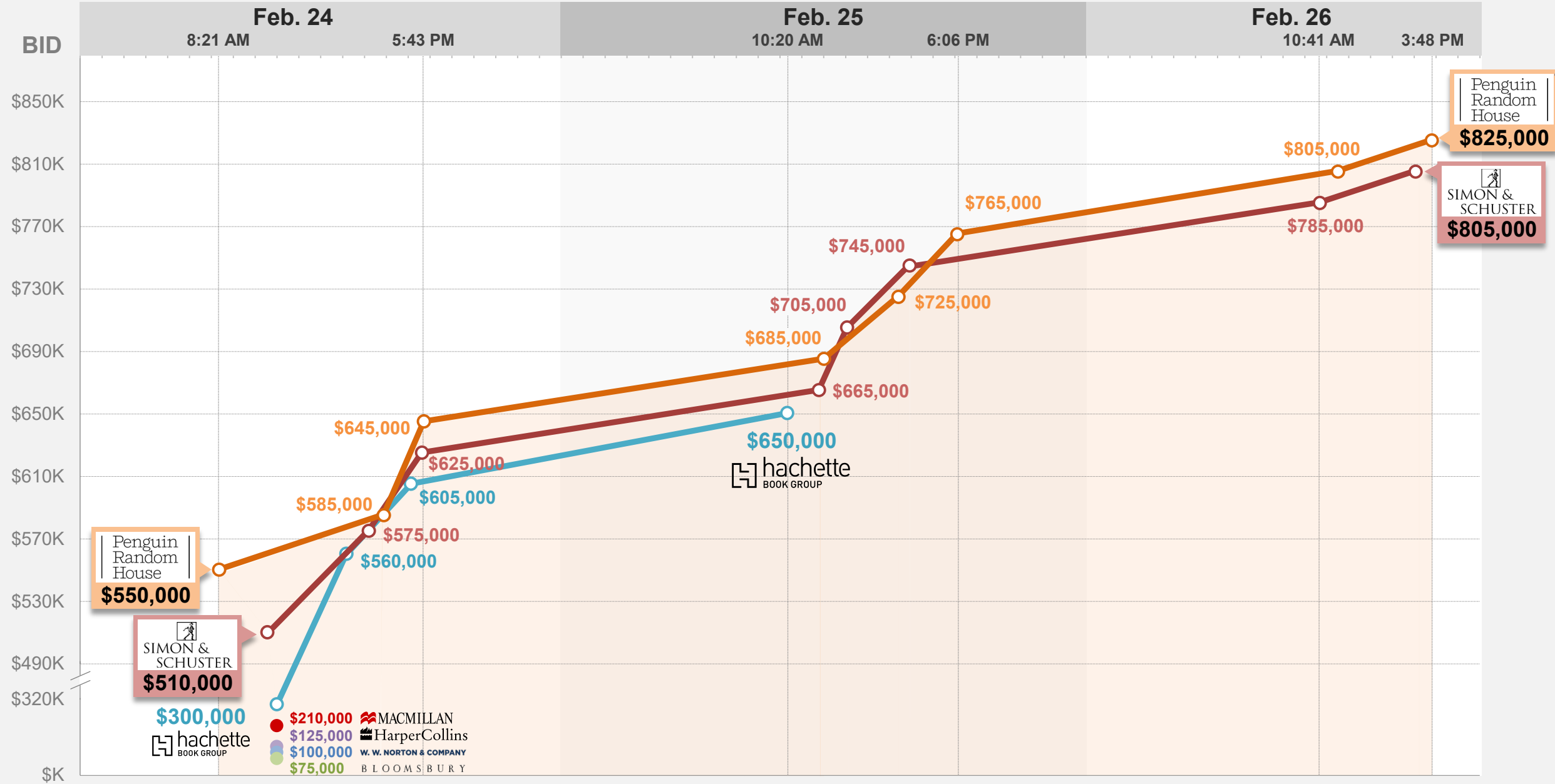
United States of America v. Bertelsmann SE & Co., KGaA, et al.

Plaintiff's Opening Statement

August 1, 2022



MEMOIR







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

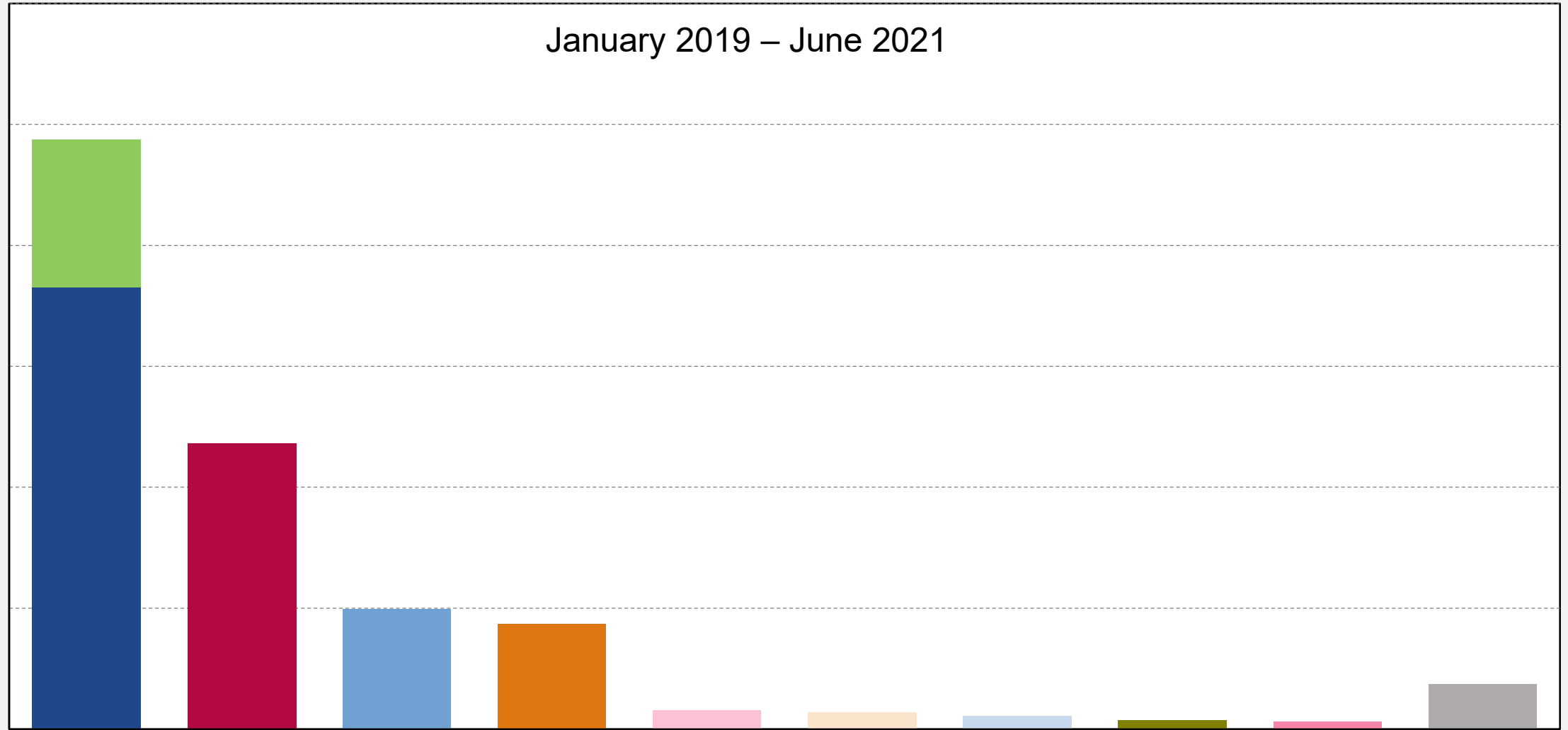
Small
Publisher 2

Small
Publisher 3

Small
Publisher 4

Small
Publisher 5

All Other
Publishers





Penguin Random House's Industry-Leading Position

Markus Dohle

2022-03-09 02:35:37

Q. Does the deal with Simon &



Roadmap

- 1 Industry Background
- 2 Legal Standard for Mergers
- 3 Product Market and Shares
- 4 Marketplace Competition and Harm
- 5 Alleged Mitigating Factors



Roadmap

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Industry Background

- **Literary agents sell the publishing rights to books on behalf of authors**



Industry Background

- Literary agents sell the publishing rights to books on behalf of authors

- **85% of authors collect only their advance paid over time**



Industry Background

- Literary agents sell the publishing rights to books on behalf of authors
- 85% of authors collect only their advance paid over time
- **Commonly-owned imprints are not independent competitors**



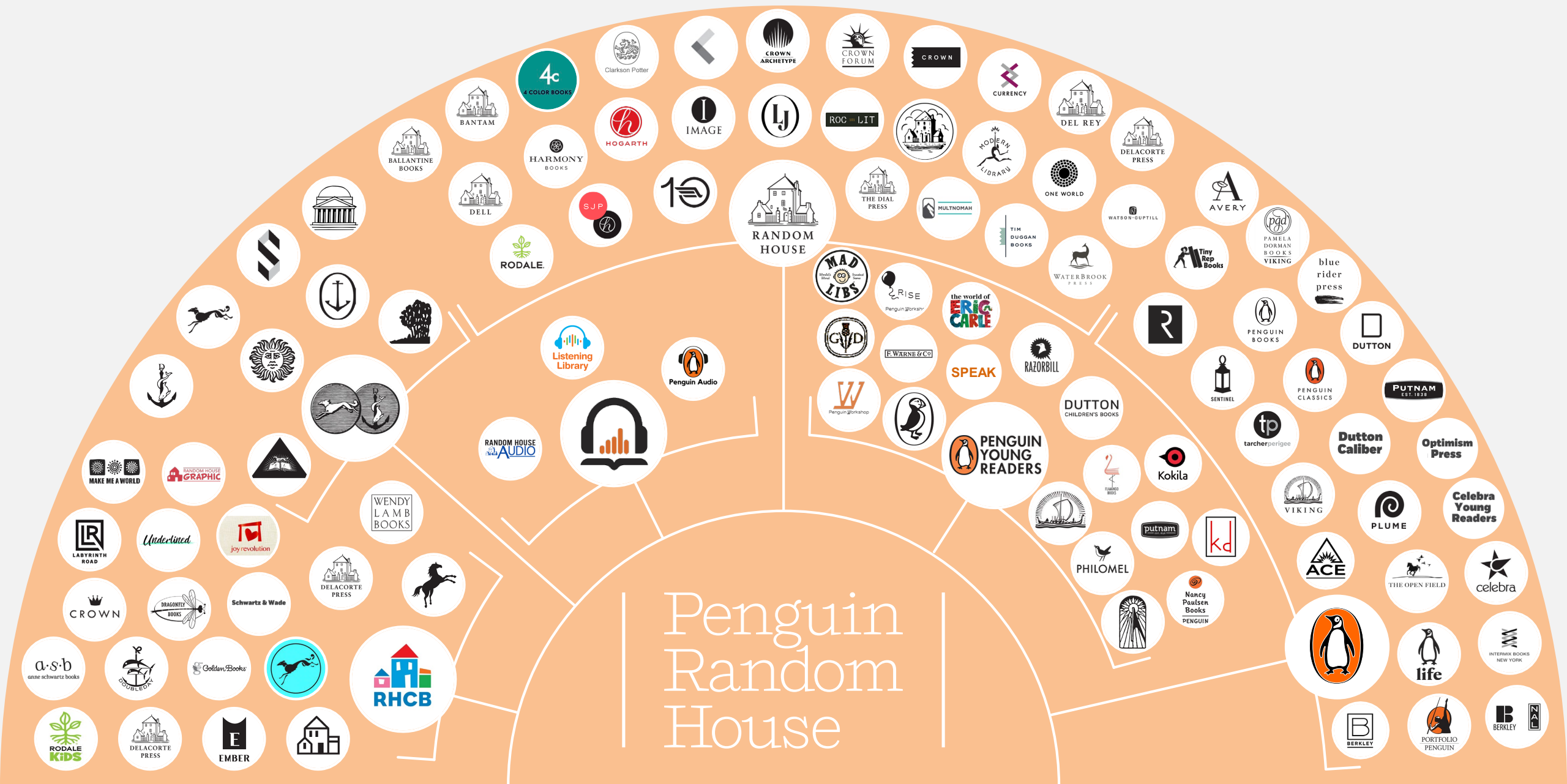
 HarperCollins

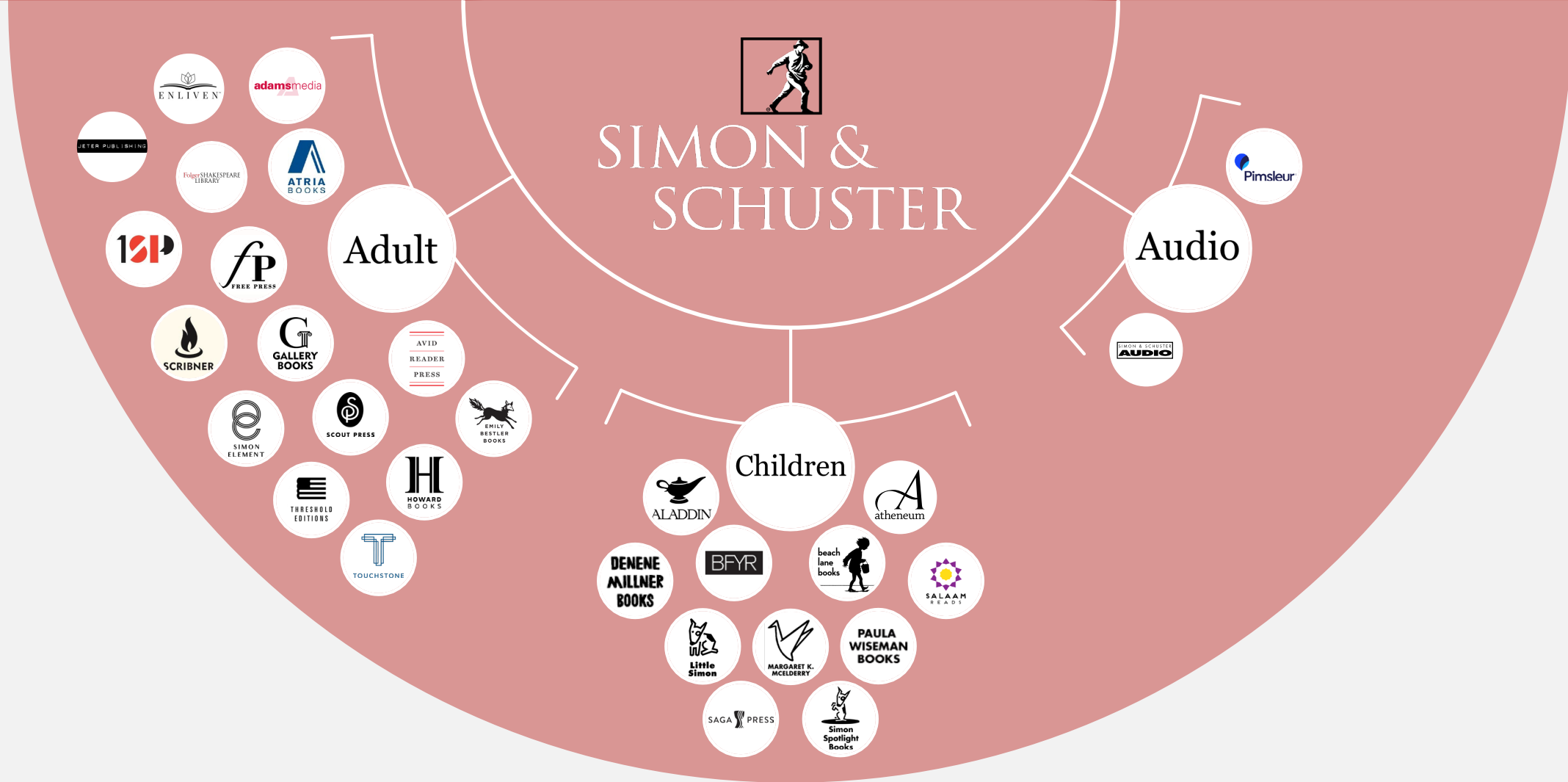

SIMON &
SCHUSTER

| Penguin
Random
House |

 macmillan
Publishers

 hachette
BOOK GROUP



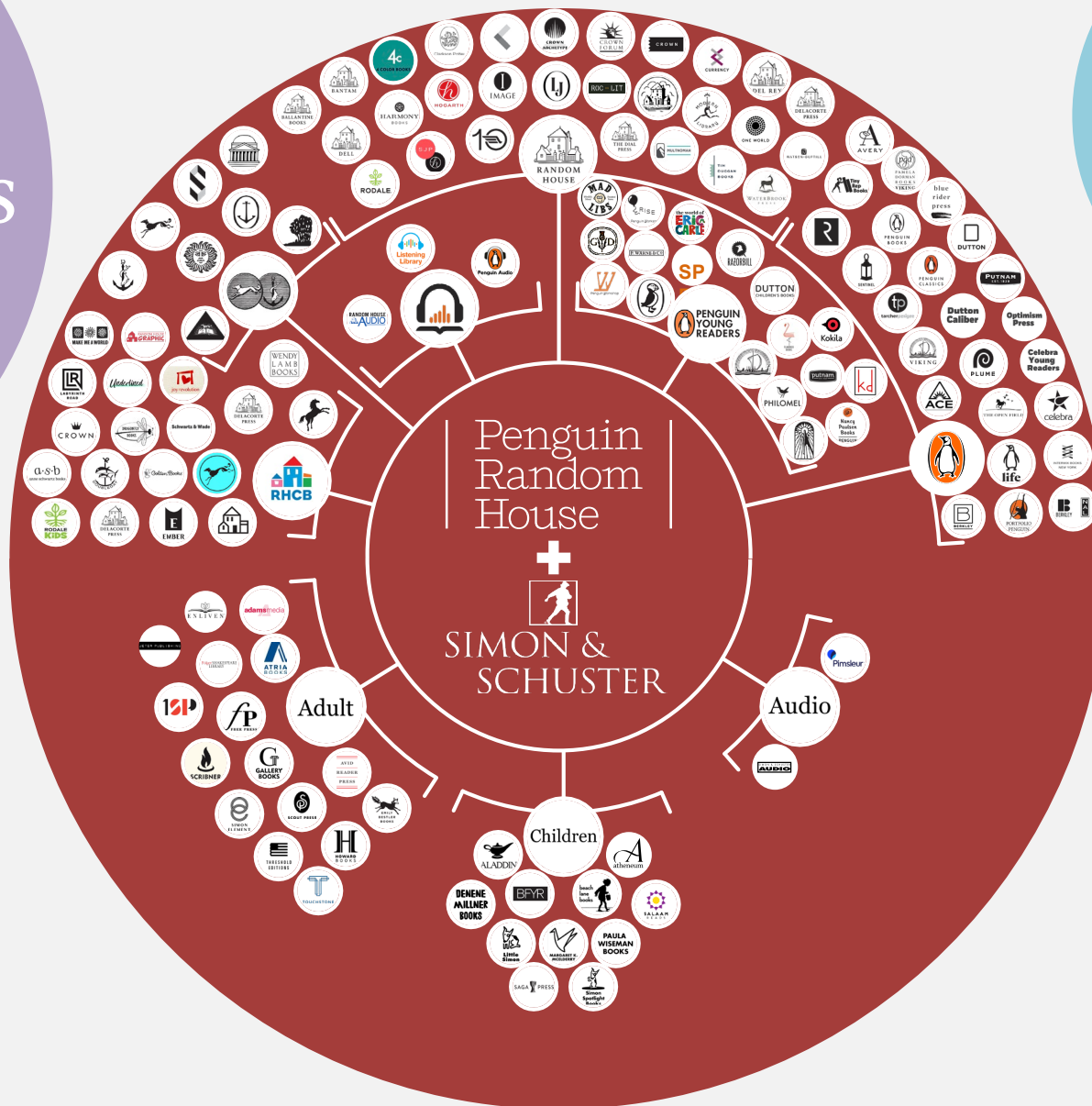




 HarperCollins

 hachette
BOOK GROUP

 macmillan
Publishers





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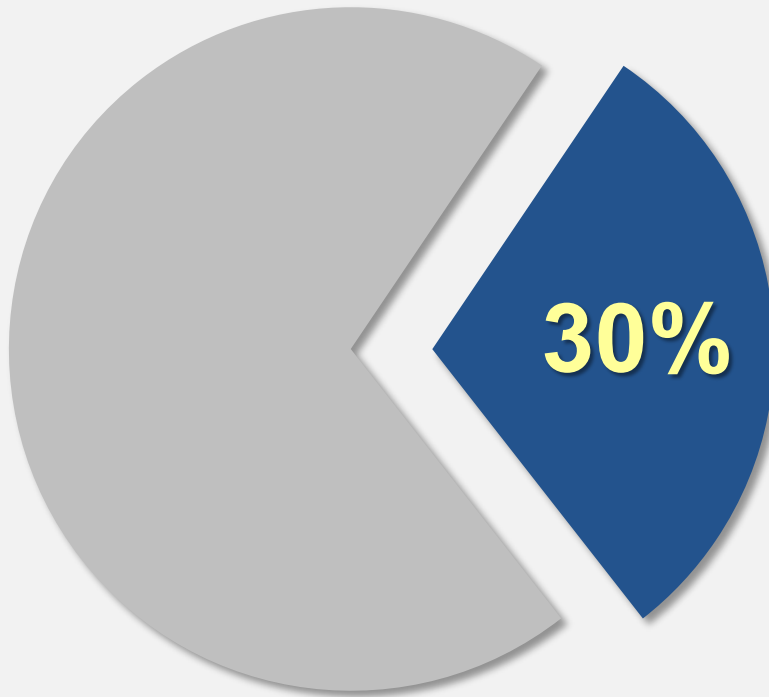
Legal Standard for Mergers

“Section 7 does **not require proof** that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an **appreciable danger** of such consequences in the future. A predictive judgment, **necessarily probabilistic** and judgmental **rather than demonstrable** is called for.”

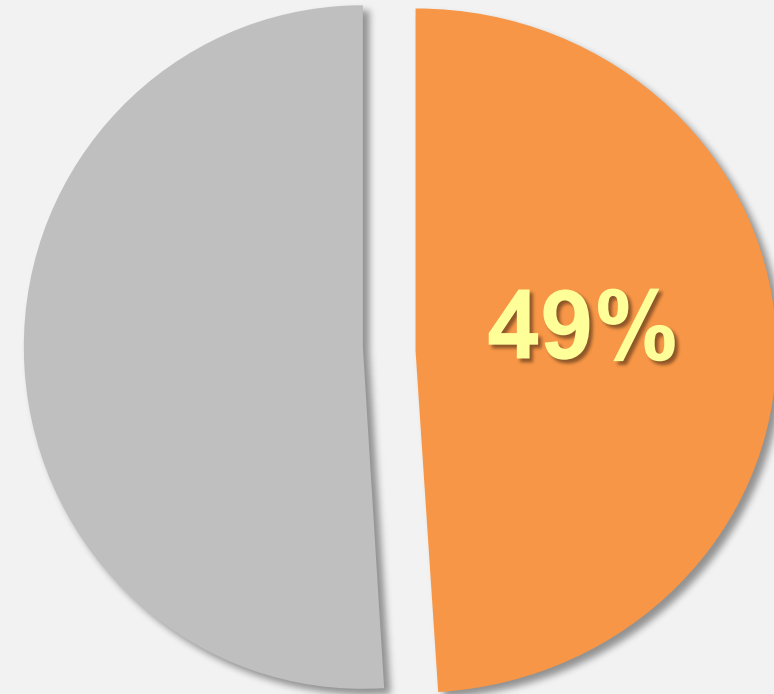
Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J) (emphasis added);
see also *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001)



Legal Presumption of Illegality



A **30% combined market share** and a **significant increase in concentration** establishes presumption of illegality



**Market Share
Post-Merger**

United States v. Phila. Nat'l Bank, 374 U.S. 321, 363-65 & n.42 (1963)



Increase in HHI

	Presumption of Illegality	This Merger
Post-Merger Concentration	2,500	3,111
Increase in Concentration	200	891



Harm



Q. Why is it important that author



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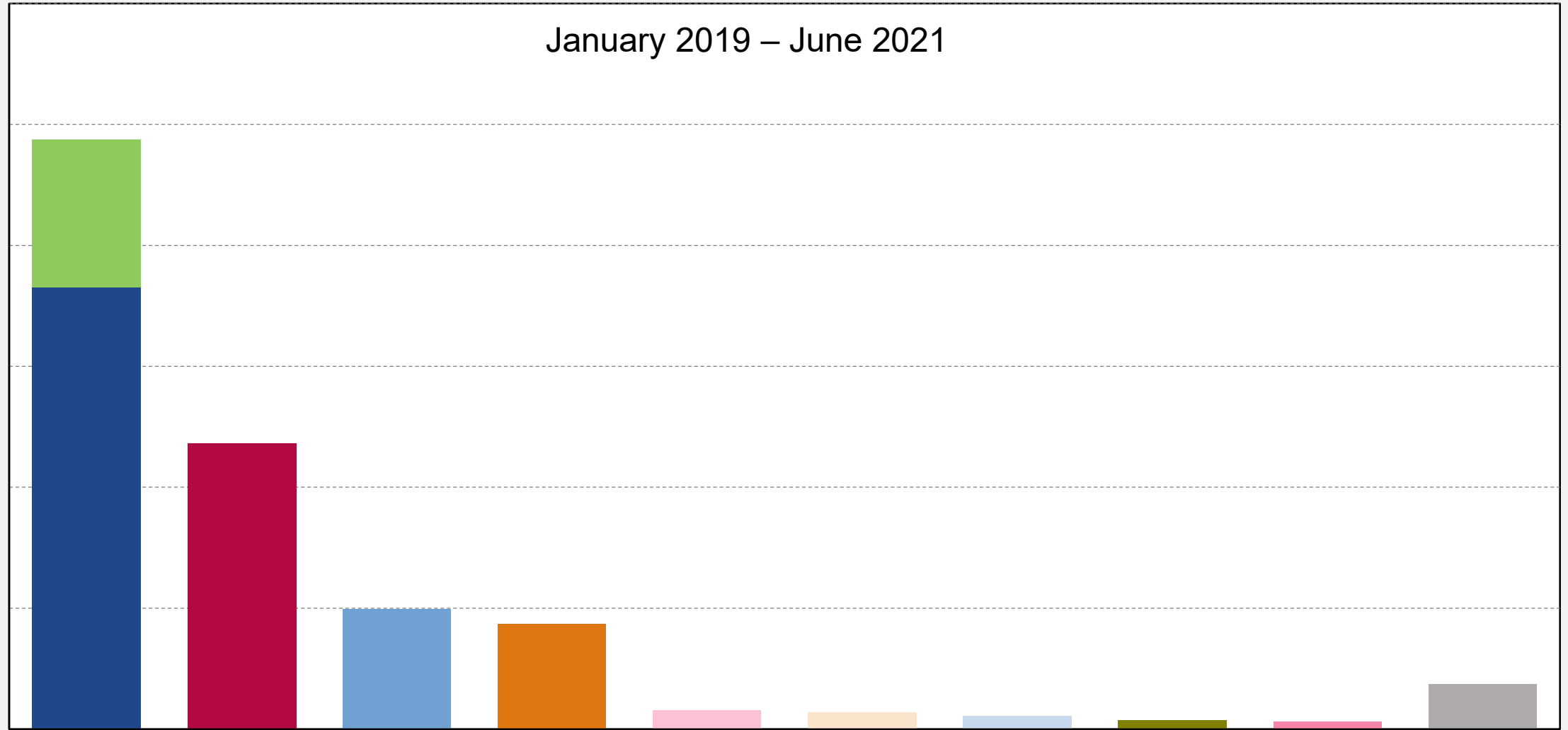
Small
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Publisher 5

All Other
Publishers



VIACOMCBS INC.

CONFIDENTIAL TREATMENT REQUESTED

Message

From: Eulau, Dennis [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP

Sent: To: VIACOMCBS INC.

CONFIDENTIAL TREATMENT REQUESTED

Subject: Project Constellation

Attach: Diligence Discussion Agenda

Import: STRICTLY CONFIDENTIAL

I would stands.

ALTHO SEEING TITLES ITS LOC

From: Sent: To: Eulau, Dennis

Cc: Re: Subject: Import

DENNIS say?

Many t

CKR

PUBLISHING

1. Business Overview and Differentiation

a. Competition: Describe the competitive landscape and the threat from other large publishers (Penguin Random House, Hachette, HarperCollins, Macmillan) vs. smaller, independent publishers vs. self-publish alternatives

AS YOU NOTE, THE US PUBLISHING MARKET IS MADE UP OF WHAT IS KNOWN AS THE 'BIG FIVE' – PRH DOMINATES WITH THE LARGEST MARKET SHARE, FOLLOWED BY HARPER COLLINS AND THEN S&S. HACHETTE IS A CLOSE FOURTH, FOLLOWED BY MACMILLAN. THESE COMPANIES ARE OUR BIGGEST COMPETITORS, ESPECIALLY FOR BOOKS BY ALREADY BESTSELLING AUTHORS AND CELEBRITIES, SINCE THEY ARE THE MOST LIKELY TO COME UP WITH HIGH ADVANCE PAYMENTS REQUIRED AND ARE KNOWN FOR THEIR STRONG EDITORIAL AND PUBLISHING SKILLS. LIKE S&S, EACH OF THESE COMPANIES IS MADE UP OF SMALLER PUBLISHING IMPRINTS, EACH WITH ITS OWN EDITORIAL FOCUS WHICH GIVES IT A REPUTATION BOTH FOR EDITORIAL AND PUBLISHING SUCCESS. AND OUR MARGINS ARE THE BEST OF THE BIG FIVE PUBLISHERS.

AUTHORS GENERALLY CHOSE TO GO WITH A PUBLISHING HOUSE THAT THEY BELIEVE WILL BRING THEM SUCCESS, AND THEIR CHOICE IS USUALLY BASED ON A COMBINATION OF EDITORIAL MATCH, A FEEL THE EDITOR AND HOUSE UNDERSTANDS WHAT THEY ARE WRITING, AND PUBLISHING VISION AS TO HOW TO BRING THE BOOK TO MARKET AND CREATE AN AUDIENCE FOR IT.

PUBLISHING HOUSES AND IMPRINTS GAIN REPUTATIONS BASED ON THE SUCCESSES THEY HAVE PUBLISHED. S&S FOR EXAMPLE HAS BEEN SEEN AS THE PREMIER SERIOUS NONFICTION PUBLISHER FOR DECADES – AS THE PUBLISHER OF ALL THE PRESIDENTS MEN (AND ALL OF BOB WOODWARD'S SUBSEQUENT TITLES), DAVID MC CULLOUGH, DORIS KEARNS GOODWIN – AS EXAMPLES. AS TO CELEBRITIES, OUR SUPERB PUBLISHING OF BRUCE SPRINGSTEEN AND HILARY CLINTON – FROM TWO VERY DIFFERENT CATEGORIES – STAND US WELL IN COMPETITION FOR THE NEXT MAJOR BOOK. SCRIBNER'S REPUTATION FOR LITERARY FICTION GOES BACK TO THE 1920S AND F SCOTT FITZGERALD AND HEMINGWAY AND THEY STILL ARE RECOGNIZED AS ONE OF THE PREMIER LITERARY FICTION PUBLISHERS AT WORK IN THE MARKET.

BY AND LARGE, WHEN WE WANT TO WIN AN AUCTION OR 'BEAUTY CONTEST' AS IT'S CALLED WHEN THE MONIES INVOLVED ARE CLOSE, WE DO. OUR EDITORS AND OUR PUBLISHING SKILLS ARE THE MATCH OF ANY OF OUR MAJOR COMPETITORS AND IN INDIVIDUAL CASES EXCEED THEM.

OF COURSE THE FIVE MAJOR PUBLISHERS MAKE UP ABOUT HALF OF THE TRADE MARKET AND THERE ARE MYRIAD SMALLER PUBLISHERS, SOME WITH ONLY A SINGLE TITLE UNDER THEIR NAME. THEY TOO CAN COMPETE WITH US FOR THE BESTSELLER LIST AT ANY ONE TIME, AS THEY IDENTIFY BOOKS THAT TAP INTO THE CULTURAL ZEITGEIST, BUT THEY RARELY COMPETE WITH US IN AUCTIONS FOR NEW PROPERTIES. OFTEN THESE PUBLISHERS BECOME FARM TEAMS FOR AUTHORS WHO THEN WANT TO MOVE TO A LARGER, MORE FINANCIALLY STABLE MAJOR PUBLISHER.

Page [PAGE] of [NUMPAGES]

VCBS-00454201

THE US PUBLISHING MARKET IS MADE UP OF WHAT IS KNOWN AS THE 'BIG FIVE' – PRH **DOMINATES** WITH THE LARGEST MARKET SHARE, FOLLOWED BY HARPER COLLINS AND THEN S&S. HACHETTE IS A CLOSE FOURTH, FOLLOWED BY MACMILLAN. THESE COMPANIES ARE OUR BIGGEST COMPETITORS, ESPECIALLY FOR BOOKS BY ALREADY **BESTSELLING AUTHORS** AND CELEBRITIES, SINCE THEY ARE THE MOST LIKELY TO COME UP WITH **HIGH ADVANCE PAYMENTS REQUIRED** AND ARE KNOWN FOR THEIR **STRONG EDITORIAL AND PUBLISHING SKILLS**.

Carolyn Reidy, late CEO of S&S

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Carolyn Reidy, late CEO of S&S



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Product Market and Shares

- **Inquiry to focus:**
 - > **“Where, in fact, competition exists”**
United States v. Continental Can, 378 U.S. 441, 453 (1964)
- Accepted product market for movies:
 - > “Industry Anticipated Top Grossing Films”
Syufy v. AMC, 793 F.2d 990, 994 (9th Cir. 1986)
- Competition is different for anticipated top-selling books



Product Market: Targeted Customers

U.S. v. Anthem, 236 F. Supp. 3d 171, 195 (D.D.C. 2017) (Jackson, J)

- Targeted customers were employers with 5,000 or more employees

FTC v. Staples, 190 F. Supp. 3d 100, 118 (D.D.C. 2016) (Sullivan, J)

- Targeted customers were those who spent \$500,000 or more on office supplies

FTC v. Wilh. Wilhelmsen Holdings ASA, 341 F. Supp. 3d 27, 51 (D.D.C. 2018) (Chutkan, J)

- Targeted companies with 10 or more globally trading vessels



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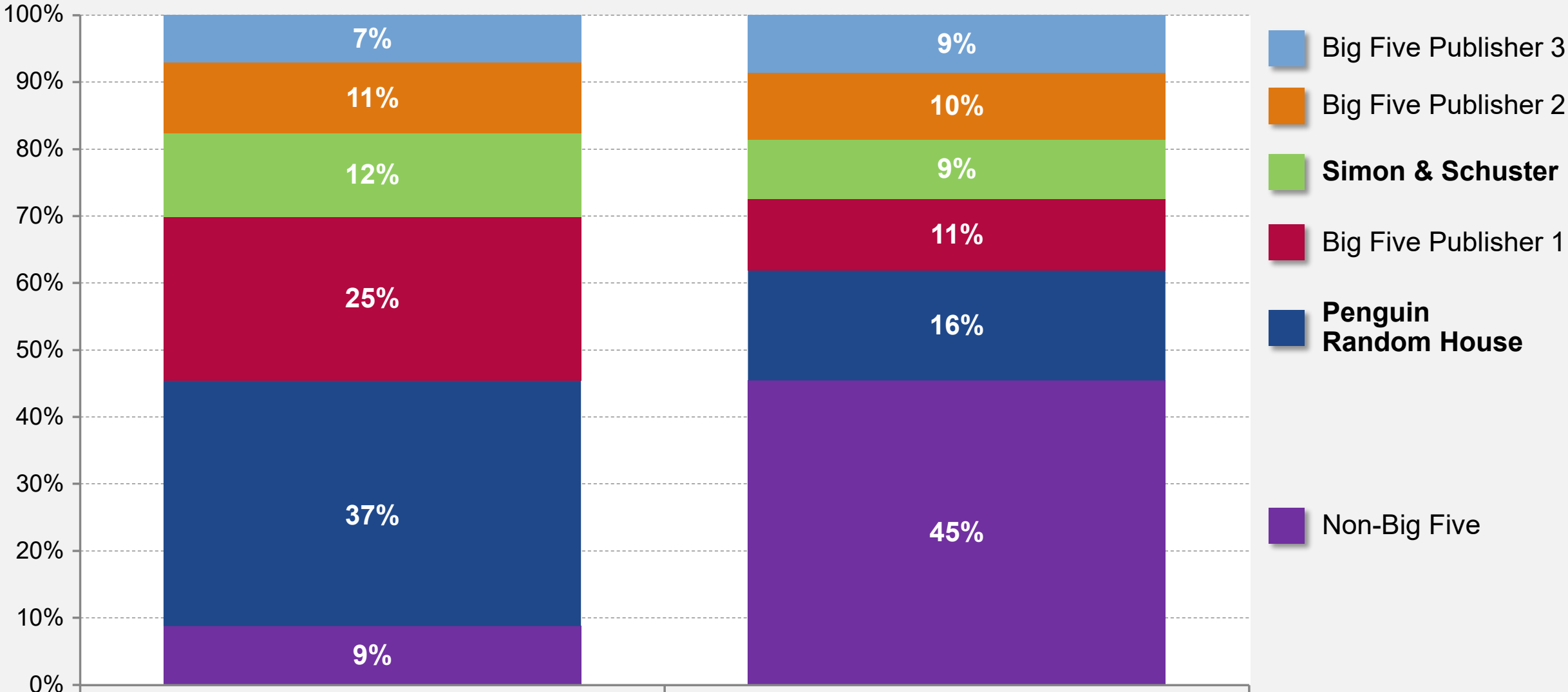


Contract Shares for Anticipated Top Sellers and Non-Anticipated Top Sellers (2019-2021)

Share of contracts
(count)

Anticipated Top Sellers

Non-Anticipated Top Sellers



Source: Snyder Advance Data

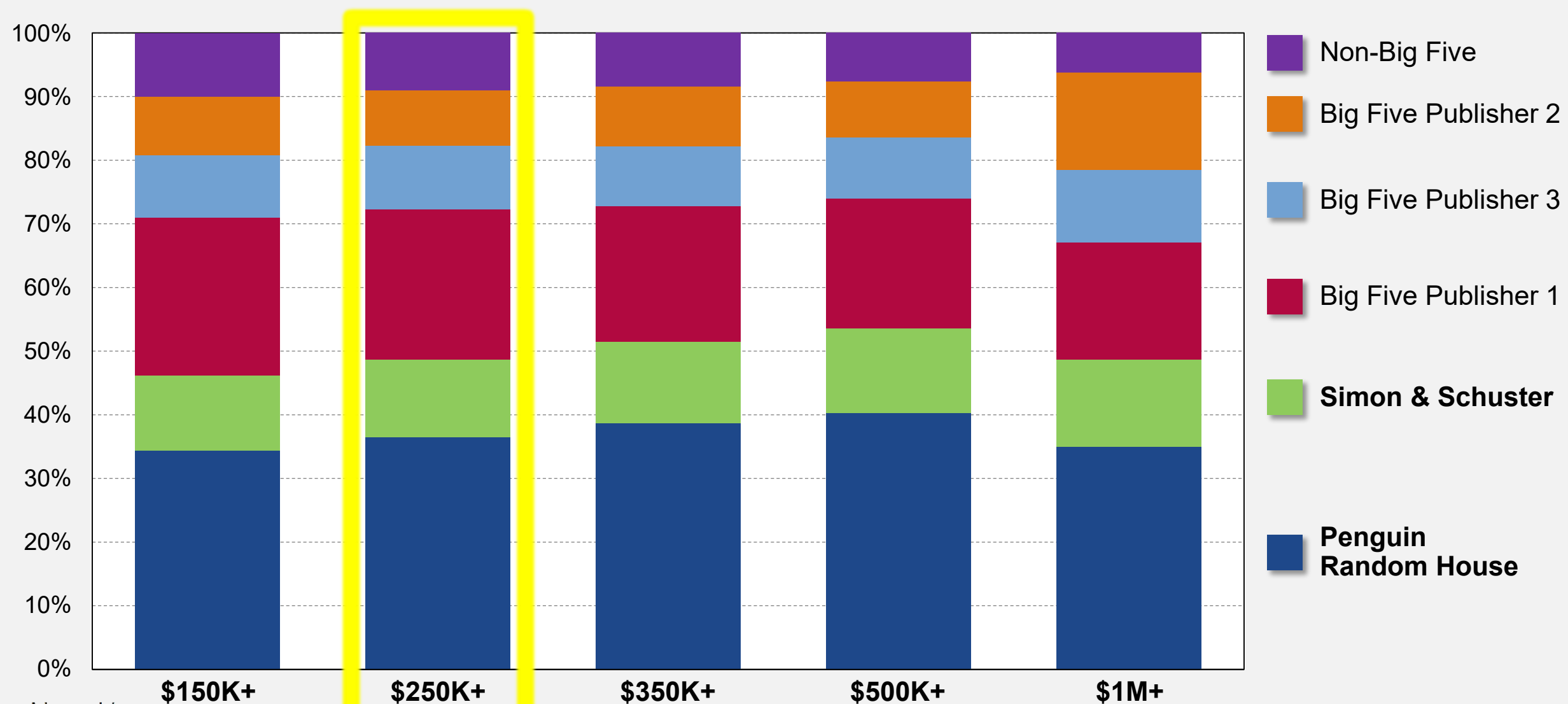


Small Publishers





Market Share by Advance Grouping (January 2019 – January 2021)





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Vigorous Head-to-Head Competition

██████████ We also lost the ██████████ auction to Crown [PRH] . . . This was the third beauty contest we lost this week to PRH.

PX 0559

██████████ I did everything I could and we lost to Random House . . . Frustrating.

PX 0624

██████████ I'm concerned that if we offer less than \$8 million, [the agency] will go back to PRH. [The agent] said they were willing to offer more.

PX 0613

██████████ Portfolio [PRH] offered \$1 million for World. To win the book, we'll have to offer \$1.1 million . . . I think we should top Portfolio [PRH] for the following reasons . . . I don't want to let PRH steal an author we've invested in and developed.

PX 0729



Small Publishers



A video deposition of Michael Jacobs, an older man with white hair and glasses, wearing a red puffer vest over a checkered shirt and large black headphones. He is in a room with a glass display case on the left and a bookshelf on the right. The video interface includes a top bar with 'Remove Spotlight', 'Recording...', and a timer at 05:45:54. A timestamp 'April 20, 2022 at 4:47:54 pm EDT' is overlaid on the video. The name 'Michael Jacobs' is visible in the bottom left corner of the video frame.

Q And when you say that if it's just who pays



Harm



A. I believe that if Simon & Schuster



Presumption of Coordinated Risk

“Merger law rests upon the theory that, where rivals are few, firms will be able to **coordinate their behavior**, either by overt collusion **or implicit understanding** in order to restrict output and achieve profits above competitive levels.” [cites omitted]

The theory follows that, **absent extraordinary circumstances**, a merger that results in an increase in concentration above certain levels “**raise[s] a likelihood of ‘interdependent anticompetitive conduct.’**” [cites omitted]

FTC v. CCC, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (emphasis added)



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Alleged Mitigating Factors

▶ Efficiencies

▶ Market expansion and entry

▶ Agent power

▶ Promise of internal bidding



Alleged Mitigating Factors

- ▶ Efficiencies
- ▶ Market expansion and entry
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Efficiencies



Q Is there an expectation the synergies will



Alleged Mitigating Factors

▶ ~~Efficiencies~~ *No verified efficiencies*

▶ Market expansion and entry

▶ Agent power

▶ Promise of internal bidding



Alleged Mitigating Factors

▶ ~~Efficiencies~~ *No verified efficiencies*

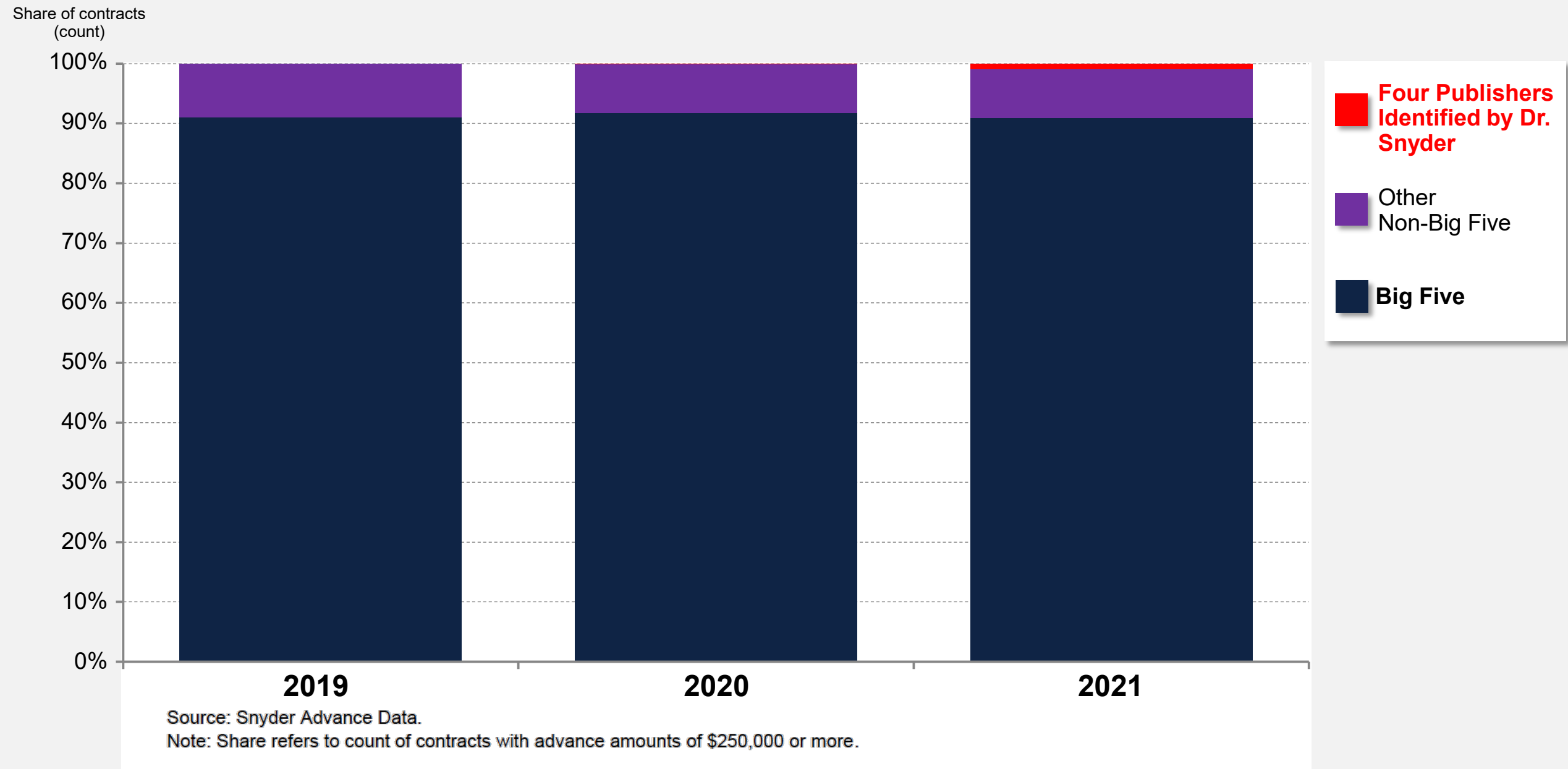
▶ Market expansion and entry

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Anticipated Top Seller Market Shares (2019-2021)





Alleged Mitigating Factors

▶ ~~Efficiencies~~ *No verified efficiencies*

▶ ~~Market expansion and entry~~ *Barriers to expansion and entry*

▶ Agent power

▶ Promise of internal bidding



Alleged Mitigating Factors

▶ ~~Efficiencies~~ *No verified efficiencies*

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- ▶ ~~Efficiencies~~ *No verified efficiencies*
- ▶ ~~Market expansion and entry~~ *Barriers to expansion and entry*
- ▶ ~~Agent power~~ *Agents cannot manufacture competition*
- ▶ Promise of internal bidding



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- ▶ ~~Efficiencies~~ *No verified efficiencies*
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Reactions within the Publishing Industry



John Cusick DIMENSION WHY 2 - it's a sequel! 10/19 @john... · 2h ...
Larger publishers are bad for writers and bad for employees of publishers. Big corporations silo departments, preventing clear communication, labor organization, and accountability. Down with behemoth publishing.



Charlie Stross @cstross · 1h
I'd like to add: I was a Penguin USA author during and until shortly after the Penguin-Random House merger. From a writer's viewpoint—even a high seller—it was a disaster. (I switched publishers after PRH cancelled a series of mine that regularly charted b/c it "wasn't selling".)



George Walkley @walkley · 1h
7/ PRH/S&S have positioned the deal as being about back office synergies, with publishing running independently. But evidence from senior PRH executives casts doubt on how achievable those synergies are.

[Show this thread](#)

There are no merger-specific efficiencies that outweigh the likely harm to competition from this merger.
Defendants have claimed that the proposed acquisition would generate synergies



Tessa Gratton @tessagrutton · 21h
Bold of PRH to suggest this merger would be good for authors, given the last 18 months of record sales across publishing and how the only result for most authors is more draconian contracts.



5



36



344



1



7



30



Christy Fletcher @FletcherChristy

Thoughts: First, I have the highest regard for the people running both publishing companies (S&S). But I think the concerns about this are not misplaced. The co will control a lot of the access to printing presses now in scarce supply, will dominate distribution...



New York Times Books @nytimesbooks · Nov 25, 2020

Breaking: ViacomCBS has agreed to sell Simon & Schuster to Penguin Random House for more than \$2 billion in a deal that will create the first megapublisher. nyti.ms/2JbWm6A

[Show this thread](#)

10:41 AM · Nov 25, 2020 · Twitter Web App



Jeanne Darst @JeanneDarst · 4h
This merger is terrible for writers and indie bookstores!!!!

Justice Dept. Sues Penguin Random House Over Simon & Schuster Deal



Sues Penguin Random House Over Simon & Schuster Deal

The Biden administration's rejection of the proposed publishing merger reflects a changing atmosphere in Washington toward consolidation.



John Scalzi @scalzi · 59m

The suit specifically says the proposed merger is likely to be bad for authors, which is both probably true and also shocking that anyone is thinking of authors at all.



Edgar Cantero @punkahoy · 11h

I am flabbergasted as to why the CEO of S&S has sent an email to *authors* to allay our concerns about the DoJ blocking Penguin from acquiring them. Like...I mean, he truly thinks *we* want it to happen?



1



7



Chris Blattman @cblatts · Nov 2

While selling my book I was shocked to learn that the hundreds of publishing companies (imprints) are in fact just 5 mega corporations. Imprints within a company "competed" for my book, just not on price. Odd. Happy to see limits on more consolidation.



nytimes.com

Justice Dept. Sues Penguin Random House Over Simon & Schuster Deal

The Biden administration's rejection of the proposed \$2.18 billion publishing merger reflects a changing atmosphere in Washington ...



3



11





Promise Not Economically Sensible



advances to agents and authors. I've seen the press



Alleged Mitigating Factors

▶ ~~Efficiencies~~ *No verified efficiencies*

▶ ~~Market expansion and entry~~ *Barriers to expansion and entry*

▶ ~~Agent power~~ *Agents cannot manufacture competition*

▶ ~~Promise of internal bidding~~ *Unenforceable bidding “promise”*



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