

13-1753-cv

*Keiler et al. v. Harlequin Enterprises LTD et al.*

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In the  
United States Court of Appeals  
For the Second Circuit

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AUGUST TERM 2013  
No. 13-1753-cv

BARBARA KEILER, MONA GAY THOMAS, AND LINDA BARRETT, ON  
BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellants,*

*v.*

HARLEQUIN ENTERPRISES LIMITED, HARLEQUIN BOOKS S.A.,  
HARLEQUIN ENTERPRISES B.V.,  
*Defendants-Appellees.*<sup>1</sup>

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Appeal from the United States District Court  
for the Southern District of New York.  
No. 12-cv-5558 — Harold Baer, Jr., *Judge.*

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ARGUED: NOVEMBER 21, 2013  
DECIDED: MAY 1, 2014

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Before: KEARSE, JACOBS, AND PARKER, *Circuit Judges.*

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<sup>1</sup> The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 Appeal from a judgment of the United States District Court for  
2 the Southern District of New York (Baer, J.) dismissing a complaint  
3 alleging breach of publishing agreements for failure to state claims.  
4 We **AFFIRM** the dismissal of plaintiffs' first, second, and third  
5 claims. We hold that the fourth claim alleged sufficient facts to  
6 plead a breach of the publishing agreements on the theory that  
7 defendants calculated plaintiffs' e-book royalties based on an  
8 unreasonable license fee. Accordingly, we **REVERSE** the dismissal  
9 of the fourth claim and **REMAND** the case to the district court for  
10 further proceedings consistent with this Opinion.

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12 DAVID B. WOLF (Michael J. Boni & John E.  
13 Sindoni, Boni & Zack LLC, Bala Cynwyd, PA, *on*  
14 *the brief*), DavidWolfLaw PLLC, New York, NY,  
15 *for Plaintiffs-Appellants.*

16 DANIEL J. LEFFELL (Jay Cohen, *on the brief*), Paul,  
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18 York, NY, *for Defendants-Appellees.*

19 JOHN R. TANDLER (F. BRITTIN CLAYTON III, *on the*  
20 *brief*), Ryley Carlock & Applewhite, Denver, CO,  
21 *for Amici Curiae, Romance Writers of America and*  
22 *The Authors Guild, supporting Plaintiffs-Appellants.*

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24 BARRINGTON D. PARKER, *Circuit Judge:*

25 Plaintiffs-Appellants Barbara Keiler, Mona Gay Thomas, and  
26 Linda Barrett are authors of romance novels who bring putative  
27 class action claims against publishing house Defendants-Appellees  
28 Harlequin Enterprises Limited ("Harlequin Enterprises") and its

1 subsidiaries Harlequin Enterprises B.V. (“HEBV”) and Harlequin  
2 Books S.A. (“HBSA,” and together with HEBV, “Harlequin  
3 Switzerland”). Plaintiffs contend that the Harlequin entities  
4 breached agreements with them and other authors (the “Publishing  
5 Agreements”) by paying them artificially low royalties on the sales  
6 of digitized versions of their books.

7 The United States District Court for the Southern District of  
8 New York (Baer, J.) concluded that plaintiffs’ allegations failed to  
9 state claims and dismissed the amended complaint pursuant to  
10 Federal Rule of Civil Procedure 12(b)(6). See *Keiler v. Harlequin*  
11 *Enters. Ltd.*, No. 12-5558, 2013 WL 1324093 (S.D.N.Y. Apr. 2, 2013).  
12 For the reasons set forth below, we hold that plaintiffs’ claims based  
13 on agency, assignment, and alter ego theories cannot serve to modify  
14 the terms of the Publishing Agreements and were properly  
15 dismissed. We also conclude that the amended complaint set forth  
16 sufficient facts to plead a breach of the Publishing Agreements on  
17 the theory that defendants calculated their e-book royalties based on  
18 an unreasonable license fee. Accordingly, we affirm the judgment in  
19 part, reverse it in part, and remand for further proceedings  
20 consistent with this Opinion.

## 21 I. BACKGROUND

22 This case arises in the context of a meteoric rise in e-book sales  
23 over the last several years.<sup>2</sup> Defendant Harlequin Enterprises is the  
24 world’s largest publisher of romance novels. Prior to 1983,  
25 Harlequin Enterprises directly contracted with authors for the  
26 publication of their works under the *Harlequin* (and related) imprints  
27 using a standard agreement which Harlequin Enterprises signed as  
28 the “Publisher.” (Am. Compl. ¶ 34).

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<sup>2</sup> Amici note that from 2008 to 2012, e-book sales grew from \$64 million annually to over \$3.0 billion annually—an increase of over 4,700 percent. *Amici Curiae Br.* at 5, Dkt. No. 51.

1 Beginning in 1983, Harlequin Enterprises changed this  
2 arrangement, ostensibly “for tax and related purposes.” (*Id.* ¶ 31). It  
3 registered a subsidiary HEBV, a Dutch company, in Fribourg,  
4 Switzerland. Thereafter, Harlequin Enterprises required authors to  
5 enter into publishing agreements substantially similar to its previous  
6 agreements, but with HEBV signing the agreements as the  
7 “Publisher” and with Harlequin Enterprises included in the  
8 agreements’ definition of a “related licensee.” (*See id.* ¶ 35).  
9 Notwithstanding this change, Harlequin Enterprises continued to  
10 draft, negotiate, and administer the publishing agreements, as well  
11 as to edit, publish, and promote the authors’ novels. (*See id.* ¶¶ 3, 40,  
12 41). HEBV, however, sent out royalty statements and payments to  
13 the authors. (*See id.* ¶¶ 41, 42). Harlequin Enterprises advised  
14 authors that the purpose of the change was to “rationalize business  
15 procedures.” (*Id.* ¶ 35).

16 In 1994, Harlequin Enterprises registered HBSA, a Swiss  
17 company, as the successor of HEBV, again “for tax and related  
18 purposes.” (*See Am. Compl.* ¶ 31). Thereafter, HBSA signed the  
19 agreements as the “Publisher” and Harlequin Enterprises continued  
20 to be defined in the Publishing Agreements as a “related licensee.”  
21 Harlequin Enterprises continued to publish, and promote the  
22 authors’ novels while HBSA sent out royalty statements and  
23 payments. (*Id.* ¶ 36). Harlequin Enterprises advised authors that the  
24 change to having HBSA sign as the “Publisher” was a name change  
25 that “would not affect” them. (*Id.*).

26 Under the terms of the Publishing Agreements, the authors  
27 granted to the “Publisher” on a “sole and exclusive basis all the  
28 rights in and to [their Works] in any country throughout the world  
29 under various imprints and trade names during the full term of  
30 copyright.” (*Id.* ¶ 49 (brackets in original)). The Publishing  
31 Agreements additionally provided that HEBV or HBSA as the

1 Publisher had “the sole and exclusive right to execute, sell, license or  
2 sublicense . . . rights subject to the sharing of net proceeds.” (*Id.*).  
3 The Publishing Agreements also detailed how authors were to be  
4 compensated in connection with the sales of various editions of their  
5 works. Specifically, author royalties on U.S. sales of mass market  
6 paperback and hardcover copies were based on a percentage of the  
7 cover price.

8 Moreover, the Publishing Agreements contained two umbrella  
9 clauses covering the potential sale, license, or distribution of the  
10 authors’ works in other media. Under the “All Other Rights” clause,  
11 the Publishing Agreements provided that the authors’ royalties  
12 would be calculated as follows:

13 On all other rights exercised by Publisher or its Related  
14 Licensees fifty percent (50%) of the Net Amount Received by  
15 Publisher for the license or sale of said rights. The Net  
16 Amount Received for the exercise, sale or license of said rights  
17 by Publisher from a Related Licensee shall, in Publisher’s  
18 estimate, be equivalent to the amount reasonably obtainable  
19 by Publisher from an Unrelated Licensee for the license or sale  
20 of the said rights.

21 (*Id.* ¶ 52). The Other Rights clause provided:

22 If Publisher licenses, sublicenses or sells to an Unrelated  
23 Licensee any of the following rights to the Work anywhere in  
24 the world, in any language, Author’s and Publisher’s share of  
25 net amount received by Publisher for said license, sublicense  
26 or sale shall be apportioned as follows . . .

27 [Author’s share] 50% [Publisher’s Share] 50%.

1 (Am. Compl. ¶ 53 (brackets in original)). In addition, the Publishing  
2 Agreements provided that the Publisher could “assign this  
3 Agreement to any related legal entity,” and could “delegate any of  
4 its editorial, administrative and/or other responsibilities pursuant to  
5 this Agreement to its parent company or to an affiliate, subsidiary or  
6 other related legal entity.” (*Id.* ¶ 49). Consistent with this provision,  
7 Harlequin Enterprises performed many of the responsibilities of the  
8 Publisher under the agreements. (*See, e.g., id.* ¶¶ 3, 39, 41-48).

9 As the market for e-books expanded, Harlequin Enterprises  
10 sold and licensed e-books and e-book rights directly to consumers  
11 on its website and to e-book licensees such as Amazon. (*Id.* ¶ 55). In  
12 2011, Harlequin Enterprises informed authors that it believed that  
13 author royalties for e-books were covered by the All Other Rights  
14 clause in the Publishing Agreements and accordingly advised the  
15 authors that their royalty payments would be calculated based on  
16 the net amount received by Harlequin Switzerland from a license to  
17 publish e-books that Harlequin Switzerland purportedly granted to  
18 Harlequin Enterprises. Harlequin Enterprises claimed that the net  
19 amount received by Harlequin Switzerland was 6 percent to 8  
20 percent of the cover price of the e-books, and that, consequently, the  
21 royalties owed to the authors were 50 percent of that amount, or 3  
22 percent to 4 percent of the cover price of the e-books. (*Id.* ¶ 56).

23 Plaintiffs commenced this putative class action seeking to  
24 represent authors who entered into Publishing Agreements with  
25 Harlequin Switzerland between 1990 and 2004. In their amended  
26 complaint, plaintiffs asserted three claims for breach of contract  
27 grounded in agency, assignment, and alter ego liability. The  
28 common contention was that, under the Publishing Agreements,  
29 Harlequin Enterprises rather than Harlequin Switzerland should be  
30 recognized as the “Publisher” when calculating royalty payments.  
31 (*Id.* ¶ 11). Under this reading, plaintiffs contended they are entitled

1 to 50 percent of the amount received on e-books by Harlequin  
2 Enterprises (which is upwards of 50 percent of the cover price),  
3 rather than the far lower 50 percent of the “Net Amount Received”  
4 by Harlequin Switzerland. (Am. Compl. ¶¶ 6, 55).

5 In addition, the amended complaint asserted a claim for  
6 breach of contract on the theory that the license fees paid to  
7 Harlequin Switzerland did not comply with the “All Other Rights”  
8 clause requiring that the net amount received from a related licensee  
9 be equivalent to the “amount reasonably obtainable” from an  
10 unrelated licensee. Finally, the amended complaint asserted a claim  
11 for unjust enrichment against Harlequin Enterprises.

12 Defendants moved under Rule 12(b)(6) to dismiss the  
13 amended complaint and the district court granted the motion. The  
14 court held that the first three claims failed because the contractual  
15 definition of “Publisher” under the Publishing Agreements was  
16 binding, and therefore, plaintiffs’ theories of agency, assignment,  
17 and alter ego could not recast the obligations in the contracts.  
18 *Harlequin*, 2013 WL 1324093, at \*2. The court dismissed the fourth  
19 claim on the ground that the amended complaint failed to allege  
20 sufficient facts supporting plaintiffs’ assertion that the licensing fees  
21 Harlequin Enterprises paid to its subsidiaries were not equivalent to  
22 “the amount reasonably obtainable from an Unrelated Licensee.” *Id.*  
23 at \*3. Finally, the district court held that plaintiffs’ contention that  
24 they were entitled to a larger share of e-book royalties fell within the  
25 scope of a written contract (the Publishing Agreement) and therefore  
26 precluded an unjust enrichment claim. *Id.* The district court entered  
27 judgment in favor of the defendants and this appeal followed.

## 28 II. DISCUSSION

29 To survive a motion to dismiss under Rule 12(b)(6), a  
30 complaint must allege sufficient facts which, taken as true, state a



1 plausible claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
2 555–56 (2007). We review *de novo* the dismissal of a complaint under  
3 Rule 12(b)(6), accepting all factual allegations (but not legal  
4 conclusions) as true and drawing all reasonable inferences in favor  
5 of the plaintiffs. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *N. J.*  
6 *Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d  
7 109, 119 (2d Cir. 2013).

8 Plaintiffs contend that the district court erred in dismissing  
9 their breach claims because, under principles of agency, assignment,  
10 and alter ego, their amended complaint plausibly alleged that  
11 Harlequin Enterprises was the “Publisher.” They also contend that  
12 they plausibly alleged that the intra-company licensing fees were not  
13 “equivalent to the amount reasonably obtainable” from an unrelated  
14 licensee.<sup>3</sup> We consider these matters in turn.

15 Under New York law, which governs the Publishing  
16 Agreements, the best evidence of what parties to a written  
17 agreement intend is what they say in their writing. *Greenfield v.*  
18 *Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). Consequently, a  
19 written agreement that is complete, clear, and unambiguous must be  
20 enforced according to its terms. *Id.*

21 A contract is unambiguous when the contractual language has  
22 a definite and precise meaning about which there is no reasonable  
23 basis for a difference of opinion. *Law Debenture Trust Co. of N. Y. v.*  
24 *Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010). By contrast,  
25 ambiguity exists where a contract’s term could objectively suggest  
26 more than one meaning to one familiar with the customs and  
27 terminology of the particular trade or business. *See id.* at 466; *Fox*  
28 *Film Corp. v. Springer*, 273 N.Y. 434, 436 (1937). Whether a contract is

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<sup>3</sup> In their briefs, plaintiffs also challenged the district court’s dismissal of their unjust enrichment claim. At oral argument, plaintiffs withdrew this claim.



1 ambiguous is a question of law. *See Bailey v. Fish & Neave*, 8 N.Y.3d  
2 523, 528 (2007); *Greenfield*, 98 N.Y.2d at 569.

3         Based on our review of the Publishing Agreements, we  
4 conclude that plaintiffs' first through third claims are not viable  
5 because the Publishing Agreements unambiguously provide that  
6 HEBV or HBSA is the "Publisher" and Harlequin Enterprises is a  
7 "Related Licensee" for purposes of computing royalty payments.  
8 The fact that Harlequin Switzerland may have delegated certain  
9 publishing and administrative duties to Harlequin Enterprises does  
10 not modify this relationship. The Publishing Agreements expressly  
11 contemplate that the "Publisher" could assign or delegate  
12 publishing duties "to any related legal entity," including "to its  
13 parent company or to an affiliate [or] subsidiary." (*See Am. Compl.*  
14 ¶ 49). These provisions are unambiguous and enforceable.

15         Plaintiffs contend that they have set forth sufficient facts  
16 regarding the parties' course of dealing tending to show that  
17 Harlequin Enterprises was actually the Publisher. But New York  
18 law is well settled that a written agreement that is complete and  
19 unambiguous is to be interpreted without the aid of extrinsic  
20 evidence and that industry practice may not be used to vary the  
21 terms of such a contract. *See Law Debenture Trust Co. of N. Y.*, 595  
22 F.3d at 467-48; *Croce v. Kurnit*, 737 F. 2d 229, 238 (2d Cir. 1984).

23         Plaintiffs rely on *Nolan v. Sam Fox Pub. Co., Inc.*, 499 F.2d 1394  
24 (2d Cir. 1974) for the proposition that, in keeping with the course of  
25 dealings between the parties, this Court could supplant the  
26 definition of Publisher in the Publishing Agreements. This reliance,  
27 however, is misplaced. In *Nolan*, the district court interpreted the  
28 word "Publisher" to cover its assignee where the named publisher in  
29 the agreement at issue had been dissolved. *See Nolan v. Williamson*  
30 *Music, Inc.*, 300 F. Supp. 1311, 1319 (S.D.N.Y. 1969). Accepting the

1 defendant's interpretation of the contract, the court reasoned, would  
2 have meant that only the dissolved publishing company would have  
3 been liable for the payment of royalties due to the plaintiff. *Id.* To  
4 avoid this impossible situation, the district court elected to define  
5 "Publisher" with reference to another provision of the contract  
6 which referred to the duties of the "Publisher, its successors and  
7 assigns." *Id.* In affirming, we observed: "Our construction of the  
8 contract [did] not reform the agreement in any way, but [wa]s more  
9 likely in keeping with the intentions of the parties." *Nolan*, 499 F.2d  
10 at 1399.

11 Here, however, the Publishing Agreements explicitly provide  
12 for the allocation of royalty payments between the Publisher  
13 (Harlequin Switzerland) and the authors where the Publisher  
14 engages the services of a related licensee such as Harlequin  
15 Enterprises. Substituting Harlequin Enterprises as the Publisher, as  
16 urged by the plaintiffs, would, in effect, require redrafting  
17 significant provisions of the contract while ignoring other express  
18 ones.

19 Moreover, as the district court observed, plaintiffs' theories of  
20 agency, assignment, and alter ego are not, strictly speaking, theories  
21 of contract interpretation, but rather theories of vicarious liability.  
22 Such theories, however, cannot displace the express terms of the  
23 Publishing Agreement. Consequently, we hold that the first three  
24 claims were properly dismissed.

25 The fourth claim alleged that defendants breached the  
26 Publishing Agreements because the licensing fees Harlequin  
27 Enterprises paid to Harlequin Switzerland—the figure on which  
28 plaintiffs' royalties were based—were not "equivalent to the amount  
29 reasonably obtainable . . . from an Unrelated Licensee." The district

1 court dismissed this claim on the ground that the factual allegations  
2 supporting it were insufficient. We disagree.

3 As we have previously observed, Federal Rule of Civil  
4 Procedure 8(a)(2) requires only a short and plain statement of the  
5 claim showing that the pleader is entitled to relief, in order to give  
6 the defendant fair notice of what the claim is and the grounds upon  
7 which it rests. *See Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 323  
8 (2d Cir. 2011); *see also Twombly*, 550 U.S. at 555. Consequently, to  
9 survive a motion under Rule 12(b)(6), a complaint does not need to  
10 contain detailed or elaborate factual allegations, but only allegations  
11 sufficient to raise an entitlement to relief above the speculative level.  
12 *See Ideal Steel Supply Corp.*, 652 F.3d at 323-24.

13 The amended complaint identified the specific contractual  
14 provision at issue, (Am. Compl. ¶ 81), and alleged how defendants  
15 breached that provision: “[t]he claimed “license” from Harlequin  
16 Switzerland to Harlequin Enterprises, in the amount of 6% to 8% of  
17 the cover price of the works, is not “equivalent to the amount  
18 reasonably obtainable by Publisher from an Unrelated Licensee for  
19 the license or sale of the said rights.” (*Id.* ¶ 82). Further, the  
20 amended complaint alleged that “[t]he amount reasonably  
21 obtainable by a publisher from an unrelated licensee for the license  
22 or sale of the said rights is, upon information and belief, much  
23 higher than 6% to 8% of cover price and is at least 50% of net  
24 receipts.” (*Id.* ¶ 83).

25 The amended complaint provided context for these  
26 allegations, contending that after Harlequin Enterprises set up its  
27 subsidiaries, ostensibly for tax purposes, it continued to control the  
28 publication, marketing, and distribution of plaintiffs’ works. (*See id.*  
29 ¶¶ 31, 35-36, 38-41, 45, 47, 48). Moreover, the amended complaint  
30 went on to allege that these actions substantially lowered the

1 plaintiffs' royalties, despite Harlequin Enterprises' assurances that  
2 its inter-affiliate licensing arrangements would not affect their rights.  
3 (*See id.* ¶¶ 7-8, 35-36). These allegations, that the amount of  
4 royalties they received were not equivalent to the amount  
5 reasonably obtainable from an unrelated licensee, nudged plaintiffs'  
6 claims across the line from conceivable to plausible. *See Twombly*,  
7 550 U.S. at 570.

8 The defendants' reliance on *Astra Media Grp., LLC v. Clear*  
9 *Channel Taxi Media, LLC*, 414 F. App'x 334, 336 (2d Cir. 2011) is not to  
10 the contrary. That case involved a predatory pricing claim, where  
11 price information is more critical. Consequently, we found the price  
12 allegations to be conclusory where "[plaintiff] provide[d] no facts to  
13 support its contention that \$170 is actually close to the standard  
14 industry cost." *Id.* Here, however, plaintiffs have provided a basis,  
15 albeit "upon information and belief," that defendants engaged in  
16 self-dealing because the industry standard is considerably higher  
17 than the 6 to 8 percent of net receipts that Harlequin Enterprises  
18 remits to its subsidiary Harlequin Switzerland (i.e. at least 50 percent  
19 of net receipts). We have observed in the past that pleading on the  
20 basis of information and belief may be appropriate under such  
21 circumstances. *See Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d  
22 Cir. 2010) (noting the *Twombly* plausibility standard does not  
23 prevent a plaintiff from pleading facts "upon information and  
24 belief" where the facts are peculiarly within the control of the  
25 defendant); *see also Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008).

26 We reach this conclusion in a context where discovery had  
27 apparently begun to adduce additional information supportive of  
28 plaintiffs' claim.<sup>4</sup> In *Ideal*, we reasoned that *Twombly* would not

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<sup>4</sup> In their opposition to defendants' motion to dismiss, plaintiffs cited a survey of royalty rates paid by romance publishers. *Harlequin*, 12 Civ. 5558, Dkt. 22, at 23 (S.D.N.Y.). At the motion hearing, plaintiffs also purported to have discovered a sublicense agreement

1 require that a complaint be dismissed if evidence had already been  
2 produced during discovery that would fill the perceived gaps in the  
3 complaint because pleadings may be amended. 652 F.3d at 324-25.  
4 We underscore that *Twombly* does not impose a probability  
5 requirement at the pleading stage. *See Arista Records LLC*, 604 F.3d at  
6 120 (citing *Twombly*, 550 U.S. at 556). It simply requires factual  
7 allegations sufficient to raise a reasonable expectation that discovery  
8 is likely to generate evidence of liability. *See id.* For these reasons,  
9 we conclude that the fourth claim should not have been dismissed.

10 **III. CONCLUSION**

11 For all the foregoing reasons, we **AFFIRM** the district court's  
12 dismissal of the first, second, and third claims. We **REVERSE** the  
13 dismissal of the fourth claim, and we **REMAND** the case to the  
14 district court for further proceedings consistent with this Opinion.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

A handwritten signature in cursive script, reading "Catherine O'Hagan Wolfe". The signature is written in black ink and is positioned over a circular official seal of the United States Court of Appeals, Second Circuit. The seal features the text "UNITED STATES COURT OF APPEALS, SECOND CIRCUIT" around its perimeter and two stars on either side of the central text.

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between Harlequin Enterprises and another subsidiary, Harlequin Digital Sales Corporation, that showed a license rate of 40 percent of the cover price, significantly higher than the 6 to 8 percent license fee purportedly paid to Harlequin Switzerland. Joint App'x at 162.