NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 54
Issue 2 *Submissions Issue*

Article 3

January 2009

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Recommended Citation

Martin P. Levin, *The Contemporary Guide to Negotiating the Author-Publisher Contract*, 54 N.Y.L. SCH. L. REV. 447 (2009-2010).

VOLUME 54 | 2009/10

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The Contemporary Guide to Negotiating the Author-Publisher Contract

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I INTRODUCTION

This article is a revision of *A New Guide to Negotiating the Author Publishing Contract* written by the author and published over twenty years ago in the *Cardozo Arts & Entertainment Law Journal*.[1] Since that time, there has been a communication revolution throughout the world—much has changed. However, the negotiation process still begins with the main characters in this drama: the publisher and the author, often assisted by a lawyer, agent, or the advice of the Authors Guild.[2]

After the author's euphoria of hearing that the publisher is enthusiastic about the book the author plans to write has subsided, she is confronted by a printed contract that is eight legal-sized pages long, single-spaced, and written in a style the author last saw in a contract submitted to her by her landlord. The contract's terms are technical and the language generally seems foreign and unfriendly.

The publisher is delighted to have been fortunate enough to have convinced the author to select him as her publisher. Nevertheless, the publisher seeks to protect himself against the potential hazards involved in the creative process. This is necessary since the author's book will probably require the publisher to invest several hundred thousand dollars or more to bring the book through the publishing process to the readers. The publisher hopes that the manuscript will be received on time, is satisfactory and original, and will not embroil him in a suit for libel or invasion of privacy. Additionally, he hopes that this is the beginning of a long-term and highly profitable relationship. In their first collaborative effort, the author and publisher will review the contract, hopefully with the author's lawyer present.

This guide will frame the issues in the author-publisher contract.[3] It will suggest modifications to the publisher's "standard" contract,[4] which will assist the parties in realizing their paramount goal of creating a book that is both the best they can publish and one that will earn them both a profit for their labors.

Since the author bears the burden of suggesting any changes to the contract, this guide is written with a bias toward the author. Although the publisher prepares the contract, he will modify it only if the economic value of the deal is not seriously altered and if the changes can be supported by equity, law, or trade custom. Any modification of the publisher's "standard" contract should lead to a smoother, more satisfying working relationship. If there is vigorous, good-spirited advocacy, the author and the publisher can work together to negotiate a fair agreement.

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1. Martin P. Levin, *A New Guide to Negotiating the Author-Publisher Contract*, 6 Cardozo Arts & Ent. L.J. 411 (1988).

2. The Authors Guild has been the leading advocate for authors' interests since it was founded in 1912. It provides legal assistance and web services to its members. For more information, see The Authors Guild, http://www.authorsguild.org (last visited Sept. 16, 2009).

3. Discussion of the author-publisher contract and the overall negotiating positions advocated throughout this article are generally derived from the author's own experiences, garnered from many years of work in the publishing industry.

4. *See, e.g.*, Matthew Bender & Co., *Author-Publisher Hardcover Trade Book Contract with Commentary*, *in* 3 Entertainment Industry Contracts, FORM 41-1 (Donald C. Farber & Peter A. Cross eds., LexisNexis 2008). *See also infra* note 19.

II. THE CONTRACT

An author enchanted with her work will be chagrined to learn that the manuscript over which she has labored is merely a piece of "property."[5] Any exclusive rights in such "property" must be transferred by a written document that is executed by the owner of these rights.[6] This grant may cover the entire scope of the copyright, or it may be limited to a particular time period, territory, or medium.[7] The owner[8] of the copyright reserves any rights not expressly granted in the contract.[9]

A. The Parties to the Contract

Identifying the parties to the contract—normally a routine matter—may be the first pitfall in the author-publisher contract.

1. The Publisher

In the last decade, major publishing houses have created divisions, subsidiaries, or joint ventures operating within the major publishing houses. These units generally are identified by a distinctive imprint. For example, Random House presently has seven or more subsidiaries or imprints, such as *Crown*, *Knopf*, and *Pantheon*. The current trend is for all major publishers to have imprints with varying financial and corporate relationships. If the contract is made with the imprint of a subsidiary, the author should determine to what extent she can look toward the major owner (the "deep pocket") in the event the contracting entity does not perform. The author, if

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5. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006)).

6. 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). *See also* Library Publ'ns, Inc. v. Med. Econ. Co., 548 F. Supp. 1231 (E.D. Pa. 1982), *aff'd*, 714 F.2d 123 (3d Cir. 1983) (holding agreement granting certain exclusive rights to trade book publisher and distributor unenforceable because it was an oral rather than written agreement).

7. 17 U.S.C. § 201(d). This section, entitled "Transfer of Ownership," reads:

> (1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.
>
> (2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

Id.

8. "Owner" may be an employer of an author, if the work (1) was made by an employee within the scope of her duties; or (2) a specifically ordered work; and (3) in the case of a commissioned work the author and employer agree in writing that the work is to be considered for hire, and the work falls within any of nine specified types of work, such as a supplement to an existing work. *See id.* §§ 101, 201(a)–(b).

9. *Id.* § 201(d)(2).

concerned, should seek a written addendum to the contract in which the "deep pocket" guarantees the performance of its subsidiary or affiliate.

2. The Author

Whereas the author is concerned with the responsibility of the entity with whom she is contracting, the publisher, likewise, is concerned about the standing of the author.

The author who is an employee of a corporation. In some instances, an author has established a corporation that is the contracting party to which royalties and other earnings are paid. When a corporation is the contracting party, the publisher may seek from it an understanding that the employee (i.e., the author) is aware of the obligations assumed by the corporation in the contract and will perform the services required. The publisher also may seek a commitment that the author will perform directly for the publisher should the corporation breach the basic agreement.

The author who is a minor. It has long been accepted at common law that minors may disaffirm their contracts either during minority or upon reaching adulthood.[10] This issue most often arises in the context of recording and theatrical contracts. In New York, the applicable statute is silent on the transfer of intellectual property rights of infants[11] (i.e., persons under the age of eighteen). However, in California, the civil code expressly permits a *disaffirmance* by an author who is a minor.[12] The infant author is a rarity, but if the author is or appears to be under eighteen years old, the publisher should obtain parental consent to the contract[13] and perhaps court approval as well. Prior court approval defeats any subsequent attempt to disaffirm.

The author who is a criminal. Victim compensation laws have been enacted in about thirty states.[14] In general, these statutes require publishers to pay to a state agency any money owed to an author convicted of a crime if the author-criminal

10. *See* Hantash v. Model Mgmt. N.Y., No. 07 Civ. 3363, 2007 WL 2324326, at *1 (S.D.N.Y. Aug. 7, 2007) (stating that contract entered into by a minor is voidable and the minor has an absolute right to disaffirm); Scott Eden Mgmt. v. Kavovit, 563 N.Y.S.2d 1001, 1002 (Sup. Ct. Westchester County 1990) (holding infant's contract is voidable and infant has absolute right to disaffirm); Prinze v. Jonas, 38 N.Y.2d 570, 573–74 (1976) (holding arbitration clause valid when clause was standard, reasonable, and commonly included in entertainer-manager contracts and "minor" was 19 years old when contract was executed, several months before age of majority was lowered from 21 to 18 years). *See generally* 5 Richard A. Lord, Williston on Contracts §§ 9:2, 9:13, 9:16 (4th ed. 2009).

11. *See* N.Y. Arts & Cult. Aff. Law § 35.03 (McKinney 1984).

12. *See* Cal. Fam. Code § 6710 (West 2004) (stating generally that minors can disaffirm contracts).

13. The disaffirmance of the entertainment contract involves a separate and complex area of law. For an excellent introductory article, see Melvin Simensky, *The Rights of Minors to Disaffirm Entertainment Contracts*, N.Y. L.J. July 18, 1986, at 1, 5.

14. *See, e.g.*, Alaska Stat. §§ 12.61.010, 18.67.162 (2008); Ariz. Rev. Stat. Ann. § 13-4202 (2007); Conn. Gen. Stat. Ann. §§ 54-201, 54-218 (West 2009); Ga. Code Ann. § 17-14-31 (2008); Idaho Code Ann. §§ 19-5301–5306 (2004); 725 Ill. Comp. Stat. Ann. 145/1 (West 2008); Ind. Code Ann. § 5-2-6.1-40 (LexisNexis 2006); Ky. Rev. Stat. Ann. § 346.165 (LexisNexis 2005); Neb. Rev. Stat. § 81-1836 (2008); Nev. Rev. Stat. § 217.007 (2007); N.J. Stat. Ann. § 52:4B-61 (West 2001 & Supp. 2009); N.Y. Exec. Law § 632-a (McKinney 2005); Ohio Rev. Code Ann. § 2743.60 (LexisNexis

profits from that specific crime. A criminal can profit from his crime by selling an account of it to a publisher.[15] The state agency must hold the funds to satisfy any judgments entered in civil actions by victims against the criminal defendant.[16] In New York, any persons dealing with a criminal must report any transaction over ten thousand dollars to the state victims board as soon as they have notice that the transaction involved profits from the convict's crime.[17] The convict must notify the state victims board if the profits from his crime exceed ten thousand dollars.[18]

The co-author. The practice of having two authors create a work is increasingly popular, especially when one author is a well-known personality. Identifying joint ownership is important because the term of the copyright is dated from the death of the surviving author.[17]

When the work appears to be written by more than one person, the publisher will require the authors to define their relationship and expressly provide for the distribution of proceeds in the contract. In some instances, an anonymous collaborator (i.e., a ghost writer) is an employee of the author and does not have an ownership interest. To avoid involvement in any dispute between the writers, the publisher may insist on defining the collaboration arrangement in the publishing contract, requiring both parties to sign the publishing contract, or including the agreement between the authors as an addendum to the publishing contract.

3. Summary

So long as there is only one author who is a natural person over the age of eighteen, is not writing about a crime that she has committed, and is otherwise competent, or if there are two authors and their relationship is clearly defined, the publisher should not be concerned about the author's standing to enter into the contract and receive payment of money either earned or advanced under the contract. In drafting a contract, the identity of the parties should not be treated routinely.

2000); Okla. Stat. Ann. tit. 22, § 17 (West 2003); S.C. Code Ann. §§ 16-3-1110–1350 (2003); S.D. Codified Laws § 23A-28A-3 (1998); Wash. Rev. Code Ann. §§ 7.68.200–280 (West 2007).

15. New York State had the dubious distinction of providing the popular name for these laws. David Berkowitz, the "Son of Sam" murderer, sold his story, prompting the enactment of the first victim compensation statute. *See* N.Y. Exec. Law § 632-a. The original "Son of Sam" law was overturned by the Supreme Court in Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 502 U.S. 105 (1991). Justice Sandra Day O'Connor, writing for a unanimous Court, struck down the law, concluding a "statute is presumptively inconsistent with the *First Amendment* if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115. Forty-one states in addition to New York have established laws that meet the standard set by the Court, and the federal government established such a test in the Victims of Crime Act of 1984 (codified at 18 U.S.C. §§ 3681–3682 (2006)).

16. *See* N.Y. Exec. Law § 632-a.

17. *Id.* § 632-a(2)(a).

18. *Id.* § 632-a(2)(b). However, these statutes, and similar statutes of some states, do not extend to authors or publishers of a re-enactment of a crime to which they were not a party. *See, e.g.*, Fasching v. Kallinger, 510 A.2d 694, 702–04 (N.J. Super. Ct. App. Div. 1986).

B. Grant of Rights

There are four factors involved in the grant of rights in a publisher's "standard" contract: form, language, market (or territory), and time.[19] Grant provisions in these contracts vary widely; therefore, authors should exercise special care in reviewing these provisions.[20]

The 1976 Copyright Act contains the first explicit statutory recognition of the divisibility of copyright.[21] Presently, the owner of a copyright possesses a "bundle of exclusive rights," which can be transferred wholly or separately.[22] In the absence of a written transfer of a particular right, the copyright owner retains the right.[23] Nevertheless, the author should request that a reservation of rights clause be included in the contract to avoid ambiguity as to the scope of the grant and to signal to the court in any subsequent controversy that the issue of severability and reservation of rights has been addressed by the parties.

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19. *See* Andrew O. Shapiro, *The Standard Author Contract: A Survey of Current Draftsmanship*, 18 Copyright L. Symp. (ASCAP) 135, 136–38 (1970). "These four limitations . . . suggest the scope of the rights which a grant clause may or may not convey, depending upon its specificity or its incorporation of future clauses by reference." *Id.* at 138.

20. For a comprehensive discussion of these provisions as well as a survey of various publishers' standard contracts, see generally *id.*

21. 17 U.S.C. § 201(d)(1).

22. *See* Neil Boorstyn, Copyright Law 97 (The Lawyers Co-operative Publ'g Co. et al. eds.) (1981) (discussing 17 U.S.C. §§ 106(1)–(5)). Section 106 of the 1976 Copyright Act defines the scope of exclusive rights under copyright as follows:

> [T]he owner of copyright . . . has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; [and]
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. §§ 106(1)–(6).

23. *See supra* note 7 and accompanying text; *see also* A. Brod, Inc. v. SK&I Co., 998 F. Supp. 314, 324 (S.D.N.Y. 1998); Mellencamp v. Riva Music, Ltd., 698 F. Supp. 1154, 1162 (S.D.N.Y. 1988); *Library Publ'ns*, 548 F. Supp. at 1234 (holding, "[s]ince section 204(a) requires a writing for the valid transfer of copyright interests and here the alleged agreement between the parties was an oral one, it is invalid as a matter of law").

Some publishers are content to acquire book rights (*form*) in English (*language*) in the United States and Canada (*market*) for the life of the copyright (*time*). Some publishers' "standard" printed contracts have an overly broad grant of rights and also expect the author to negotiate restrictions in the grant. A lawyer or agent familiar with the common practices in the trade can be very useful in limiting the rights to those usually granted and thus accelerate this area of negotiation.

1. *Form*

Generally, an author grants print rights for her book, reasonably assuming that the publisher's interest and core business is the publication and sale of printed books. Since the development of the computer and personal electronic devices as alternative means of delivering information, publishers have sought to include phrases in the contract such as, "the right to publish works based on the work in and through all existing and future media and forms of distribution."[24] Innovation in technology has allowed publishers to supplement their income with electronic publication. Future technologies will likely allow for even more ways to derive income from intellectual property works. If the author has granted all "existing and future technology" rights with no caveats to the publisher, she will miss the chance to make a more advantageous bargain based on those rights at a later date.[25] In order to avoid this pitfall, the author can request the following: that the publisher charge an access fee for works on a database, to retain control over any effects added to the work electronically or to any abridged version, a reversion of any unexploited rights clause, and a good-faith renegotiation of terms immediately before the work is issued in electronic format.[26]

In some instances the publisher's "standard" contract will seek motion picture and dramatic rights. The grant-of-rights paragraph may also include a statement extending the rights to the work to include the "publication in volume form of dramatic versions or motion picture scripts based on the work and novelizations."[27] Most publishers know that authors rarely grant film or dramatic rights to their works. An author will usually choose to reserve dramatic and film rights because she may gain a separate and significant payment for those rights at a later date. The author may do this because the bundle of rights encompassed in the copyright are divisible and can be conveyed separately from publishing rights of the work.[28]

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24. This phrase, and others in this article that follow, appear in the "standard" contract of a major publisher located in New York City [hereinafter *Standard Publishing Contract*]. The publisher has asked not to be identified.

25. *See* Authors Guild, Inc., Model Trade Book Contract and Guide 37 (2000) [hereinafter Authors Guild].

26. *Id.* The Authors Guild recommends a reversion of electronic rights to the author at the end of a three to five year term "after either first book publication or invention of an electronic format." *Id.*

27. *See Standard Publishing Contract*, *supra* note 24.

28. A derivative work created from a book not only creates rights for the author of the underlying book, but creates a completely separate set of rights for the creator of the new, derivative work. *See* 17 U.S.C. § 101. The definition of a "transfer of copyright ownership" most clearly states this concept. *Id.*

Additional valuable rights include book club editions, condensations, or abridgements. Normally these "subsidiary rights," which flow from the basic grant of rights, are covered in a separate section of the contract.[29]

2. Language

The grant of language rights is generally for the English language. A contract usually includes a provision allowing the publisher to license translations. If the publisher does not have a means of reaching the foreign publishers who are likely to translate, this grant of rights will be wasted. To protect against such a contingency, a time limit—normally two years—should be set for the exercise of translation rights. If a translation in the specific language is not licensed within this time period, this right should revert to the author. This is generally known as a "use it or lose it" provision, whereby the specific rights granted by the author to the publisher revert to the author when the publisher does not use them within the specified time period. This mechanism acts both as a disincentive to the publisher to neglect the author's work and a protection for the author in case the publisher ceases efforts to profitably use the rights granted to it.[30]

3. Market or Territory

The grant of rights may be for English language publication throughout the world, or it may be limited to the United States, Canada, and the "open market."[31] The contract defines the scope of the "open market" by first identifying the countries granted to the publisher and those reserved to the author for subsequent licensing in the English language. Countries not allocated to either party are "open," and therefore, all publishers of the English language edition may sell books in these "open" countries. In practice, this creates competition between publishers in the United States and the United Kingdom.

Since significant additional income can be derived from strong English language markets, the author generally reserves the United Kingdom and Australia and employs an agent, or the United States publisher, to sell these rights. However, when the publisher is authorized to act on behalf of the author to sell these rights to a publisher in the United Kingdom, he normally receives only ten to fifteen percent of the net receipts. This is effectively an "agent's commission."[32] If the United States publisher is granted the right to sell the rights in the United Kingdom, a time limit—

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29. *See infra* notes 57–58, 60–61, 74–75 and accompanying text.

30. *See* Authors Guild, *supra* note 25, at 6–8.

31. The "open market" should be designated to comprise those countries not otherwise reserved to the author. For example, the author might reserve the United Kingdom and Australia, in which case the remainder of the world would be the "open market." If there are separate U.S. and U.K. publishers, these publishers can sell their own editions of the same book in those countries not reserved (in the open market).

32. This seemingly innocent "net receipts" provision means that the commission paid to an agent is deducted from the proceeds before allocation to the publisher.

usually one year—should be set for the sale of the rights and, as in the case of the translation right, the contract should provide for a reversion to the author.

4. *Time*

Rarely is the term of the grant less than the life of the copyright.[33] Since copyright protection may last for seventy years or more, there are two ameliorating factors. First, the 1976 Copyright Act provides the author with an inalienable termination right that can be exercised prior to the expiration of the copyright.[34] However, a more meaningful factor, and one which is regularly included in publishing contracts, is the provision that allows the author to recover the rights to her work, with notice, if the publisher fails to keep the work in print.[35] "Print on demand"[36] now makes it possible to print a nominal number of copies economically, and many publishers are adding sentences that define a book as "in print" even if the book is printed using "on demand" technologies. Too few books may be sold this way and too little royalties will be earned by the author to justify the publisher's retention of rights in the work. Instead, "in print" should be defined using a threshold number of copies sold. If the publisher is not reasonably promoting the work, it is fair to allow the author to recover her rights and to seek another publisher.

C. *Advance*

As consideration for the grant of rights, and to help the author pay her expenses while preparing the manuscript, the publisher generally agrees to pay the author an advance payment. The amount of this payment is usually subject to vigorous negotiation. Additionally, the publisher agrees to pay the author royalties. These

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33. The United States copyright term for works created today or in the future begins as soon as the work is fixed in a "tangible medium of expression." 17 U.S.C. § 102(a). In the case of an individual author, the copyright endures for the life of the author plus seventy years after the author's death. *Id.* § 302(a). If a work has joint authorship, the copyright endures for seventy years after the last author dies. *Id.* § 302(b). If the work is a "work made for hire," the statute designates the employer as the "author," and the term of copyright is ninety-five years after publication or 120 years after creation, whichever is shorter. *Id.* § 302(c).

34. *See id.* § 203. This provision permits termination of publication rights within a five-year period beginning thirty-five years from the date of publication or forty years from the date of the grant, whichever comes first. *Id.* § 203(a)(3). Thereafter, if the author follows the specified procedure, the copyright reverts to the owner. *Id.* § 203(b).

35. An "out-of-print" provision should be carefully drafted. The "standard" contract usually contains an out-of-print clause in which the rights revert to the author if the work is not available for a stated period, usually six months. The publisher often endeavors to broaden the out-of-print clause so that if any one edition, hardcover or softcover, is available anywhere in the world, it retains the rights. The author should seek to limit the clause so that if the book is out of print in the United States, the rights revert upon notice.

36. "Print on demand" is a popular digital printing technology used by many publishers for the printing of short runs of books where a limited number of copies are needed to meet demand or for reprints of books "on demand." The number of copies may be as few as one or several hundred. *See generally* Danny O. Snow, *Print-on-Demand: The Best Bridge Between New Technologies and Established Markets*, BookTech: The Magazine for Publishers, Jan.–Feb. 2001, http://www.u-publish.com/pod2.htm.

royalties are retained by the publisher along with other income from sales of subsidiary rights until the amount of the advance is recovered. If there are insufficient royalties or other income to cover the advance, and the author is not in breach, she need not return the unearned portion of the advance to the publisher. It is also possible to exclude certain earnings from the income retained by the publisher, such as "first serial rights,"[37] and to have this income flow directly to the author. In recent years, a body of law has developed concerning the right of the publisher to recover the advance payment under special circumstances.[38]

1. Failure to Deliver

When the author fails to deliver a manuscript, and the publisher is not in breach, courts have granted the publisher the return of the advance even though the contract lacked a specific provision to this effect.[39] However, the better practice is for the parties to include a provision specifying circumstances under which the advance will be retained or returned should the author fail to deliver the manuscript.[40] The parties can agree that only a portion of the advance (often fifty percent) will be repaid from the first proceeds of the work made either from a later contract, by a specific date, or upon the subsequent sale to a third party publisher. If by that date the author has not made arrangements for partial payment or obtained another publisher, she will be obligated to repay the advance out of pocket.

2. Failure to Publish

When an author has delivered a satisfactory manuscript and the publisher, without justification, fails to publish it, the author is usually allowed to keep the advance.[41] In some cases, courts have awarded damages to the author in the amount of anticipated hardcover and paperback royalties.[42] If the author sells the unpublished book to another publisher, the amount of the payment from the second publisher may reduce the award against the original publisher as a mitigation of damages.[43]

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37. One major publisher defines this right, also called "periodical selection rights," as "the exclusive right, [before the publication] to authorize others to publish in magazines or newspapers selections from . . . the Literary Work, for the purpose of aiding or exploiting the sale of the Literary Work . . . ." *Standard Publishing Contract*, *supra* note 24; *see also infra* text accompanying note 57.

38. *See infra* notes 39, 41–45 and accompanying text.

39. *See, e.g.*, J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993, 995–96 (S.D.N.Y. 1977) (finding that the publisher acted in good faith at all times, while the author acted in "complete breach and disregard" of the contract and would be unjustly enriched if allowed to keep the advance).

40. *See* Authors Guild, *supra* note 25, at 14.

41. *See* A. A. Wyn, Inc. v. Saroyan, N.Y. L.J., Nov. 16, 1956, at 7 (N.Y. Special Term, Part IV) (finding publisher's failure to accept author's manuscript was in response to failure of proposed series rather than quality of delivered manuscript).

42. *See infra* notes 146–52 and accompanying text.

43. *See* Demaris v. G.P. Putnam's Sons, 379 F. Supp. 294, 296 (C.D. Cal. 1973).

The publisher's contract will contain a provision that will allow him to refuse to publish a book that contains material that is libelous, invades the privacy of an individual, or gives information that might cause physical harm or injury to a reader. The publisher assumes the burden of proving the existence of such material in refusing to publish a manuscript that is otherwise satisfactory in form or content and is written in a professionally competent manner.

3. *Contractual Provisions for Breach*

In light of the case law addressing problems of interpretation with standard industry agreements,[44] publishers have inserted provisions in their "standard" contracts to handle breaches. Many publishers' contracts now provide that if the manuscript is not delivered by a specific date, the publisher may serve the author with a written notice of noncompliance. The author then has a thirty-day grace period, which the courts may extend if equitable. If the grace period ends, and a satisfactory manuscript has still not been delivered, the contract is terminated and the author must repay all advances.

Almost all contracts now contain a reciprocal provision that obligates the publisher to publish within a specified period (usually twelve to eighteen months) after the receipt of a satisfactory manuscript. If after receiving a written demand from the author, the publisher fails to publish within a specified period (usually ninety to 120 days), the publisher forfeits all advances paid to the author, and the publisher's obligations are thereby discharged. However, case law indicates that it is unlikely that a publisher who fails to honor his commitment to publish a satisfactory manuscript will escape with only a forfeiture of money paid. Courts have held that when damages arising out of a publisher's breach are *not* speculative—even though the amount of the damages may be uncertain—the forfeiture of the advance is not sufficient to be considered an adequate remedy.[45]

4. *Method of Payment*

Advances are normally paid in installments: one-third upon signing the contract, one-third upon delivery of the finished manuscript, and one-third upon publication. These terms are subject to negotiation, especially when the manuscript is available at the time the contract is signed. In such a case, the publisher can be encouraged to accelerate the payment generally due upon delivery of the manuscript and to pay one-half to two-thirds of the advance upon signing the contract.

44. *See, e.g.*, Doubleday & Co. v. Curtis, 763 F.2d 495 (2d Cir. 1985).

45. *See* Smith v. Positive Prods., 419 F. Supp. 2d 437, 448 (S.D.N.Y. 2005); Beeland Interests, Inc. v. Armstrong Pictures, No. 95 Civ. 8132, 1999 U.S. Dist. LEXIS 15744, at *52–54 (S.D.N.Y. Sept. 30, 1999); Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 615 (2d Cir. 1979); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977); *Demaris*, 379 F. Supp. 294.

5. *The Importance of the Advance Payment*

The amount of the advance payment is a major negotiating point for the author. A sizable advance commits the publisher to support the book with a substantial printing, adequate promotion, and a reasonable amount of advertising in order to recoup his investment and provide an audience for the book. A large advance, or its announcement, is also of great marketing value. Executives of book clubs, paperback publishers, and magazine editors, all of whom buy subsidiary rights, are impressed by the size of the advance and are more likely to give serious consideration to books with larger-than-normal advances. Major book retailers often base their orders on the size of the advance and the publisher's support.[46] Only a few authors command mega-buck advances, but a respectable advance ($50,000 or more) is an important step to successful publication.

D. *Royalties*

Specific royalty rates are also set by negotiation. The standards for hardcover, trade paperback, and mass market paperback book royalties are reasonably uniform. Indeed, they are more uniform than advance payments.

1. *The Basis for Computing Royalties*

The author's primary goal in this negotiation is to have the royalty based on the retail price. This is in line with normal negotiation procedures. The publisher might seek to base the royalty upon the net received (i.e., the amount received from his customer). If the publisher prevails, which is unlikely, he will reduce the rate of royalty significantly because the publisher receives only forty to fifty percent of the retail price from his customer. If the publisher insists on such a base, the author should seek to adjust the rate upward. Nevertheless, for professional books, children's books, or textbooks, the publisher may succeed in basing the royalty on the net price, which is one-quarter or one-third less than the list or retail price.

2. *Steps on the Royalty Scale*

The author should seek, and will normally receive, a graduated royalty scale. Typical royalties for hardcover trade books are: (1) ten percent of the list price on the first 5000 copies sold; (2) twelve and one-half percent on the next 5000; and (3) fifteen percent on all copies in excess of 10,000.[47]

Trade paperback[48] royalties vary, but they also follow a graduated scale, which often begins at six to seven and one-half percent of the retail price on the first 25,000 copies and escalates to ten to twelve and one-half percent thereafter.

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46. *See* Authors Guild, *supra* note 25, at 22. "Negotiate for as large an advance as possible. . . . Through the advance, the publisher shares this risk." *Id.*

47. *See id.* at 24.

48. A trade paperback is normally the same size as the hardcover edition and is sold at an intermediate price, i.e., a price between the price for the hardcover book and for the mass-market paperback. The

Mass market paperback books also have royalty scales that vary widely. Major best-selling books by prominent authors follow the trade hardcover scale, while lesser-known authors will receive royalties beginning at six percent.

3. *Royalty Abatements*

There are a number of less controversial "boiler plate" reductions in the royalty rates that are usually acceptable to authors. For example, the publisher may set a reduced royalty rate in order to keep an edition in print. Additionally, in the event the publisher distributes promotional copies at no charge, no royalty will be due. When books are sold at or below manufacturing cost, the publisher pays a percentage (usually ten percent) of the resale price in lieu of a royalty. To protect against possible abuse, the author should set a limit on the number of copies to which these special provisions would apply and/or specify that the reduced royalty to the author in each instance should not be less than one-half of the normal royalty.

4. *Controversial Royalty Reductions*

Most contracts also call for a reduced royalty if the publisher sells at discounts that are higher than normal. The "standard" contract provides that when the publisher is forced to sell at a discount, in excess of his normal discount, he may reduce the agreed royalty to ten percent of the net receipts.[49] The invocation of this special royalty rate deduction often reduces the author's royalty payments substantially since the largest retailers get higher discounts. At the outset, the author should require the publisher to eliminate this provision or to provide that, in any event, the author will receive at least one-half to two-thirds of the original rate. Another alternative would be for the author to propose reducing the royalty rate in proportion to the percentage of discount given on the book. This provision will allow the author to share her losses with the publisher.[50] These special discount and reduced royalty provisions are an abuse of a normal provision that allows the publisher to reduce the royalty where a bulk sale is made to an account *outside* the normal trade channels for book clubs and other special sales, enabling the publisher to make a large sale at lower than normal trade discounts.

This issue received extensive publicity in 1986, when three authors brought an action to prevent a publisher, Addison-Wesley, from reducing its royalties on sales made by the publisher in excess of the normal discounts.[51] Addison-Wesley denied

quality of the paper and the binding is superior to the mass-market paperback. It is often described as a "quality paperback" book.

49. Individual publishers select a discount level from fifty to fifty-five percent of retail in their individual contracts.

50. *See* Authors Guild, *supra* note 25, at 26.

51. Levering v. Addison-Wesley Publ'g Co., 12 Media L. Rptr. 1807, 1809–10 (N.D. Cal. 1986).

the charges and sought dismissal of the case.[52] Although the suit was settled,[53] the litigation received sufficient notice in the trade press[54] and, as a result, some publishers modified the offending contract provisions and specified that any sales made through normal trade channels, regardless of the discount, would be credited to the author's royalty account without any adjustment.

5. *Acceptable Royalty Reductions*

A reduced royalty is appropriate when the publisher sells at a premium or sells a special edition at a price that is well below the standard discount. These large bulk sales provide greater volume for the publisher and additional income to the author. It is common for the publisher to pay a royalty of ten percent on the amount received by the publisher.

6. *Semi-Annual Accounting*

The usual contract provides for the payment of royalties at prescribed times, which is normally semi-annually. For example, the "standard" contract might set January 31 and July 31 as the statement dates. However, the cut-off date for sales to appear in the statement is ninety days prior to the statement date.[55]

The Authors Guild recommends a quarterly payment schedule. Most publishers will resist changing from semi-annual to quarterly accounting because it restricts their cash flow. If there are major payments expected for subsidiary rights, the author should negotiate to have large payments accelerated.[56] The author should require the publisher to disburse his agent's percentage of earnings directly to the agent and the author's percentage of earnings directly to the author. The current practice of sending all funds to the agent who deducts her fee and remits the remainder to the author is time consuming and entails a needless risk.

7. *Reserve for Returns*

The publisher's "standard" contract usually provides for an additional offset consisting of a reserve for returns. Today, books returned by retailers and wholesalers are commonplace and are a serious concern to publishers and authors. The publisher's contract usually gives him the right to deduct and withhold, as a reserve against these returns, a "reasonable" amount in order to avoid an overpayment should returns exceed

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52. *Id.* at 1807.

53. The out-of-court settlement followed the judge's decision to deny in part and grant in part the defendant publisher's motion to dismiss. *See id.* at 1811. The court granted plaintiffs' leave to amend their complaint to add estoppel allegations. *Id.*

54. Marianne Yen, *Judge Sustains Lawsuit by Authors Against Addison-Wesley*, Publishers Wkly., Feb. 7, 1986, at 18–19.

55. To illustrate, in the example of the January 31 date, only sales up through the previous October will appear on the January statement, and only sales through April 30 will appear on the July statement.

56. *See infra* Part II.D.8.

sales. Since the author cannot easily quantify "reasonable," the contract should require the publisher to limit the reserve by quantity, such as "not to exceed thirty percent of the copies shipped in the period." The contract could also include a clause that limits the reserve by time, such as "only within the first four accounting periods."

Time limitations are not odious because returns, as a matter of practice, occur largely in the first six months and decrease during the following eighteen months. If there are continuing sales, there is likely a steady demand for the book, and the risk of returns can be comfortably borne by the publisher. If a thirty percent quantity limitation is not fair, a percentage can be set on the basis of the publisher's actual experience.

8. *Acceleration of Payments*

The royalty statement might include income from book club sales, paperback sales, foreign licensing, and sales of magazine and newspaper serialization rights. Sales of these rights might involve substantial amounts of money and the author should be entitled to payment more rapidly than semi-annually. Although most publishers resist changing from semi-annual accounting, it is possible to negotiate for payment of subsidiary rights income—especially in excess of $25,000—within ninety days of the publisher's receipt. This helps the author's cash flow without creating any material difficulty for the publisher.

9. *Spread Forward*

Until recently, many authors preferring to limit the amount paid in any one accounting period sought to spread this income into the future. Today, however, this practice is declining in popularity, except in the context of mega-deals, where it has become a practice for publishers to distribute the payment over a number of years. Publishers will not pay interest on the amount deferred and tax laws have reduced the benefits of moving income into the future.[57] Although most publishers will gladly accommodate a request to defer payment, this practice could be risky if the publisher's financial condition deteriorates.

E. *Subsidiary Rights*

The sale of subsidiary rights often generates significant income. The publisher seeks these rights because the difference between profit and loss for a trade publisher is often his income from this source. Income earned from subsidiary rights offsets the advance, and thus, provides the publisher with insurance against weak sales that do not repay him the amount of the advance.

1. *Paperback Rights*

The most profitable of the subsidiary rights for both the publisher and author is the sale of paperback rights. When the hardcover publisher sells these rights, the

57. The 1986 Tax Reform Act repealed prior provisions that permitted income averaging for individuals. I.R.C. § 1301 (2006). It was these provisions that made deferred payments attractive to authors.

income is usually divided equally between publisher and author. The publisher may agree to give the author more than fifty percent of the proceeds if a large advance is obtained from a paperback publisher. For example, the publisher may agree to give the author sixty percent of the paperback advances that exceed $100,000. However, only the "superstar" author generally expects more than the "standard" fifty-fifty split.

2. *Book Club Rights*

When a book club makes a selection, the club pays an advance to the publisher and then a royalty on each copy sold. The income is normally shared equally by the publisher and author.

3. *Magazine Rights*

Many books lend themselves to serialization in magazines.[58] The income from the first serial rights (i.e., those sold prior to publication) is divided between the author and publisher. Customarily, the author receives eighty-five percent and the publisher receives fifteen percent of this income. Income from sales to magazines after publication, or second-serial rights, is usually divided equally.

4. *Foreign Rights*

If the author grants the publisher rights to sell the English edition in the United Kingdom, or grants the rights to translation in foreign languages, the net income is shared, with seventy-five to eighty-five percent paid to the author.[59]

5. *Rights Retained*

It is a standard practice for the author to retain dramatic, film and television, and merchandising rights.[60] The sale of these rights falls outside the scope of the publisher's competence. Reserving these rights is standard even when publishers are part of an entertainment conglomerate.[61]

6. *New Technologies and Other New Uses*

The publishing industry is in a major transition. Print is not dead; rather, it is the DNA for the future transmission of information. In the last two decades, technology-based issues have found their way into the courts. There is now an extensive body of law that balances the rights and obligations of the parties.[62]

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58. *See supra* note 37.

59. The rates and division of royalties vary by the type of right being conveyed and by territory. *See* Authors Guild, *supra* note 25, at 39.

60. *See Standard Publishing Contract*, *supra* note 24.

61. For example, Simon & Schuster is owned by the CBS Corporation, the Penguin Group is owned by Pearson plc, and HarperCollins is owned by News Corporation.

62. *See generally* Jonathan D. Hart, Internet Law: A Field Guide 187–313 (BNA Books 6th ed. 2008).

Most professional journals are now delivered both in print and on-line. E-books,[63] once a rarity, have become a staple of most publishers' lists. Newspapers and magazines are now repurposing content and displaying it on their web sites. Google has a major program for delivering out-of-print (or "orphan" books[64]) and copyrighted books on-line. In the college textbook market, third parties have created "course books," selecting sections from many textbooks on a common subject and creating a new work.

Professional journal publishers and authors appear to have worked out a fair allocation of the benefits with a minimum of conflict. However, the same is not true in the repurposing of material. For example, the *New York Times* was sued in a class action and lost when it sold freelance material that appeared in print versions of the newspaper for use online without payment to the authors.[65] As a result, the *New York Times* now enters into a contract with authors that provides payments for subsequent uses. Other publishers have followed the *New York Times* model.

Settlement of the Google matter is much more complex and remains a work in progress. There, authors and publishers filed suit against Google, arguing Google was violating their copyrights by scanning copyrighted books and inserts and displaying these works without permission.[66] After almost four years of litigation, the parties reached a settlement agreement that provided, among other terms, for the payment of $125 million to publishers and authors.[67] The payment will be used for the establishment of a Book Rights Registry (similar to the American Society of Composers, Authors and Publishers (ASCAP)), which will cover past royalties earned and collect future royalties due to authors and publishers.[68] When this matter is finally approved by the courts, Google will continue its program and will create a massive library of books available on-line, resulting in future revenue to authors and publishers.

By some estimates, "course packets" or "course resource books" constitute up to half of all textbooks in use today.[69] The course packet issue was originally brought to the attention of the courts when Basic Books, along with seven other publishing companies, sued Kinko's for making unauthorized copies of segments of textbooks

63. An E-book is "a book composed in or converted to digital format for display on a computer screen or handheld device." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/e-books (last visited Oct. 15, 2009).

64. Orphan books are those for which the author is not available to transfer rights. *See* Miguel Helft, *Google's Plan for Out-of-Print Books Is Challenged*, N.Y. Times, Apr. 4, 2009, at A1.

65. Tasini v. New York Times, 206 F.3d 161 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001).

66. Complaint, Author's [sic] Guild v. Google, No. 05-CV-8136 (S.D.N.Y. 2005); Complaint, McGraw-Hill Companies v. Google, No. 05-CV-8881 (S.D.N.Y. 2005).

67. For updated information on the approval process and the final decision of the Settlement Administrator for the class action lawsuit by authors and publishers against Google, see Google Book Settlement, http://www.googlebooksettlement.com (last visited Oct. 15, 2009).

68. *See* Settlement Agreement, Authors Guild v. Google, No. 05-CV-8136 (S.D.N.Y. 2008), *available at* http://www.googlebooksettlement.com/r/view_settlement_agreement.

69. *'Textbook' Anthologies on Campuses Are Curbed by Ruling on Copyrights*, N.Y. Times, Apr. 16, 1991, at A14.

and compiling them into course packets to sell to students.[70] The court rejected Kinko's claim of "fair use,"[71] but this issue continues to generate controversy.

Coming into issue now will be the migration of published material to hand-held devices and mobile telephones. For example, travel information that originally appeared in print is now common on cell phones. It appears that the delivery of print information in a commercially viable, digital format will be a significant additional source of income to print publishers and authors.

In order to account for these developments, the author-publisher contract should change by reserving a special space as a stand-alone provision that covers new technology rights. This contract must clearly establish that the rights for "technologies now known and that may be developed in the future" are reserved to the author, subject to a future negotiation. In the event that a publisher insists on acquisition of new technology rights when entering into the original agreement, the Authors Guild recommends that the author be paid a separate advance and be given a royalty structure in line with the market value of the work.[72] Rights for publication of less than the whole of the book should be reserved to the author, and the advance and royalty should be substantial. The sale of a segment of a textbook may preclude a sale of the complete volume.

The economics for the creation of e-books is far more favorable for the publisher, so the author's share should be significantly larger than for print royalties—well above the normal fifteen percent of retail price.

Since the new technology rights now have significant value to the author, the contract should clearly allow a reversion of these rights in the event they are not used in a reasonable period, such as three to five years.[73] In the event that the publisher is not able to exploit these rights, a reasonable alternative may be to allow the publisher to be the "agent" for the sale of the rights with a payment of a typical agent's fee of ten to fifteen percent.

7. *Audio or Video Rights*

Several major publishers developed their own audio cassette programs and have asked for these rights when the book is suitable for an audio cassette. In a few cases, publishers have sought video rights. For example, partly as a result of Simon & Schuster's ("S&S") failure to acquire the video cassette rights to *Jane Fonda's Workout Book*, which was an overwhelming success, S&S added a provision to its standard contract conveying audio and video rights to the publisher,[74] despite the objections of

70. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

71. *Id.* at 1531.

72. *See generally* Authors Guild, *supra* note 25, at 37.

73. *See id.*

74. Now included as a primary right in the publisher's standard contract is the clause governing "electronic rights," which are defined as, "the sole and exclusive right to use or adapt, and to authorize others to use or adapt, the Literary Work or any portion thereof, as a basis for . . . video . . . or any other form or method of copying, recording or transmission . . . ." *Standard Publishing Contract*, *supra* note 24.

agents.[75] Presently, audio and video rights are important only to a few publishers. Here, too, the author should investigate the publisher's capacity to exploit these rights before agreeing to a grant. When in doubt, the author should either retain the rights or grant them subject to a reversion if not used in a timely manner. When granted, these rights may warrant a separate advance and royalty provisions.

8. *Hardcover-Softcover Deals*

Most publishers now have both hardcover and paperback publishing facilities that are very efficient. In order to secure both the hardcover and the paperback rights, the publisher may offer the author one advance payment and one hundred percent of the paperback royalties in exchange for these rights. Such an arrangement may be desirable when the publisher is well established in the paperback field. Obviously, if the publisher gives up his customary fifty percent share of the potential paperback royalties and pays a substantial advance for these rights as part of a hardcover-softcover deal, the author benefits and there is incentive for the publisher to exploit both rights with vigor. When the author believes that her income will be greater if the paperback rights are sold, or at least offered, to a competing paperback publisher, the author may insist that the publisher make the paperback rights available for bid, with the proviso that the hardcover publisher may retain the paperback rights if he exceeds the best bid by ten percent or more.

9. *Right of Approval*

When the author conveys transferable rights to the publisher, she should include a provision in the contract that requires her written approval of the transfer. It is customary for the publisher to require author approval, as long as such approval is not unreasonably withheld. It is often possible, for example, for the author to obtain the right to approve the jacket or cover design as well as the publisher's advertisements of the book. The author should be entitled to require that the design and advertising of the book be in accordance with the author's work and reputation.

F. *Satisfactory Manuscript*

The condition precedent that opens up all the positive benefits of the author-publisher relationship is "a satisfactory manuscript." These magic words in "standard" contracts state that the manuscript will be "in form and content completely satisfactory to the publisher." Try as an author may, publishers will rarely, if ever, strike this clause. Yet, despite universal and longstanding usage, several pivotal court decisions,[76]

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75. *Best Seller: Simon & Schuster is Setting a Fast Pace and Violating Taboos in the Book-Publishing Business*, Wall St. J., Sept. 26, 1984, at 24.

76. *See Curtis*, 763 F.2d 495; Helprin v. Harcourt, Inc., 277 F. Supp. 2d 327 (S.D.N.Y. 2003); Dell Publ'g Co. v. Whedon, 577 F. Supp. 1459 (S.D.N.Y. 1984); Harcourt Brace Jovanovich, Inc. v. Goldwater, 532 F. Supp. 619 (S.D.N.Y. 1982); Random House v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979), *aff'd* 607 F.2d 998 (2d Cir. 1979); Freund v. Wash. Square Press 34 N.Y.2d 379 (1974); Stein & Day, Inc. v.

and scholarly review of the problem,[77] the definition of what constitutes a "satisfactory manuscript" remains unclear. As a result, it is very important for authors to add language to the "standard" contract that reasonably defines the obligations of both parties relating to the submission and approval of the manuscript.

1. *Good Faith*

Early decisions allowed the publisher to reject a manuscript on purely subjective grounds.[78] In *Walker v. Edward Thompson Co.*, the plaintiff was a writer employed by a law publisher to write, without accreditation, an article in a law treatise.[79] The publisher rejected the article, and the court held in favor of the publisher.[80] The court summarized its position as follows:

> An article in a legal work is certainly as much a matter of taste as a suit of clothes. It was held in *Brown v. Foster* . . . that, where a suit of clothes was to be made to the satisfaction of the employer, he might arbitrarily reject the same.[81]

Sixty-six years later, in *Frederick A. Praeger v. Montagu*, a creative work was elevated above the three-piece suit.[82] In *Montagu*, the author had refused to make requested modifications to his manuscript.[83] The publisher rejected the manuscript

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Morgan, 5 Media L. Rptr. 1831 (Sup. Ct. N.Y. County 1979); Walker v. Edward Thompson Co., 56 N.Y.S. 326 (1st Dep't 1899).

77. For in-depth discussion of these issues, see generally Mark Fowler, *The "Satisfactory Manuscript" Clause in Book Publishing Contracts*, 10 Colum. J.L. & Arts 119 (1986); Jeremiah F. Healy, III & Beth M. Alonso, *Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts*, 15 New Eng. L. Rev. 485 (1980); Harriet F. Pilpel et al., *Contract Clauses, The Publishing Contract: Only an Option to Publish?*, 2 Comm. & L. 85 (1980); Melvin Simensky, *Redefining the Rights and Obligations of Publishers and Authors*, 5 Loy. L.A. Ent. L.J. 111 (1985).

78. *See, e.g.*, *Walker*, 56 N.Y.S. 326. The court stated:

> The defendant was the publisher of a book, for which it was seeking contributions. The contract showed that it intended to have the absolute control of all such contributions, and, further, that it reserved to itself the absolute right to reject any contributions. As the work was to be published over its name, it was responsible for its merit; and it, only, could determine whether the contributions were of such a character as they desired to adopt and publish.

Id. at 327.

79. *Id.* at 326.

80. *Id.* at 328. "[The publisher] had reserved to itself the absolute right to reject contributions; and the whole of the contract shows that it intended to, and did, reserve to itself the right to treat the articles of contributors as it might see fit." *Id.*

81. *Id.* at 328.

82. Frederick A. Praeger, Inc. v. Montagu, No. 84934 (N.Y. Civ. Ct. June 11, 1965), *in* 35 C.O. Bull. 562 (1967). The "three-piece suit" refers to a garment worn by men. In the era referred to in *Brown v. Foster*, 113 Mass. 136 (1873), the "three-piece suit" included a jacket, vest, and trousers, usually tailored to fit. The customer would pay the tailor if and when it was acceptable to his taste.

83. *Montagu*, 35 C.O. Bull. at 563.

and when the $1000 advance was not returned, he brought suit against the author.[84] The *Montagu* court refused to accept subjective style and caprice as appropriate standards and concluded that "the applicable test is merely the existence of *good faith* in the exercise of dissatisfaction."[85] The court held that the publisher, in "the exercise of judgment and sensibility,"[86] had rejected the manuscript "in good faith,"[87] and ordered the author to repay the $1000.[88]

Although the courts have failed to define the "good faith" standard with consistency or clarity, it has become the operative standard for subsequent decisions.[89] Since determination of "good faith" requires an investigation of state of mind,[90] it is a difficult test at best, and even more so when dealing with a literary work.[91]

2. Dissatisfaction with the Bargain

When a publisher becomes dissatisfied with the financial terms of his deal with an author, the question that arises is whether the publisher's rejection is in "good faith." In *Random House, Inc. v. Gold*, the publisher entered into a contract with Herbert Gold, a best-selling author, to write four novels.[92] Gold was advanced $150,000.[93] The first two novels did not meet the publisher's financial expectations.[94] When the manuscript for the third book was received, both the editor-in-chief and a second editor read the manuscript and asked that it be revised.[95] While Gold was revising his work, the editor-in-chief offered to publish the novel if Gold would take

84. *Id.*

85. *Id.* at 564 (emphasis added).

86. *Id.*

87. *Id.* at 563.

88. *Id.* at 564.

89. *See, e.g.*, NYU v. Cont'l Ins. Co., 87 N.Y.2d 308, 318 (1995); Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995); Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co., 30 N.Y.2d 34, 45 (1972) ("There is implicit in all contracts—for book publishing or house building—an implied covenant of fair dealing and good faith." (internal citations omitted)).

90. Tractebel Energy Mktg. v. AEP Power Mktg., 487 F.3d 89, 100 (2d Cir. 2007) ("Under New York law, 'good faith' connotes an actual state of mind—a state of mind motivated by proper motive.'" (quoting Polotti v. Flemming, 277 F.2d 864, 868 (2d Cir. 1960))).

91. As in cases that attempt to define pornography, it might be said that "good faith" is hard to define, but one will know it when one sees it. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [the] shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .").

92. *Gold*, 464 F. Supp. at 1307.

93. *Id.*

94. *See id.*

95. *See id.* at 1307–08.

less money for the third book.[96] The editor-in-chief was aware that if he rejected the novel, Gold would be required to pay $50,000 under the contract.[97] Nevertheless, Gold declined the new offer, the book was rejected, and Random House sued to recover not only the $50,000, but also part of the $150,000 advance.[98]

Despite the editor-in-chief's failure to remember the basis for his rejection, the court held for the publisher.[99] The court ruled that Random House had acted in "good faith" in rejecting the manuscript.[100] Furthermore, the court held that "the publisher is not bound to incur the significant costs of publication if it declines to accept the risk of financial loss."[101]

However, the court held that Random House was liable for the portion of the installments attributable to the delivered and published books.[102] In calculating the author's damages, the court divided the contract into four books and allocated $75,000 of the $150,000 advance to the first two books.[103] Since Gold had only received $60,000, he was entitled to receive an additional $15,000.[104] However, he was denied any compensation for the third or fourth book in the contract.[105] The importance of *Gold* is that the court expanded the definition of "satisfactory manuscript" to include commercial viability of the manuscript, enabling the publisher to reject the manuscript or renegotiate the terms. The court, by adding this footnote, was aware that this might lead to abuses:

> This view may permit overreaching by publishers attempting to extricate themselves from bad deals, as has arguably occurred in the instant case. As will be seen Infra, the multi-book contract in this case only allowed the publisher to avoid further losses as to future books; it did not permit the publisher to shift the entire burden of unsuccessful published books to the author.[106]

In *Gold*, it was permissible for the publisher to reject a manuscript in "good faith" if the prospect of a financial loss was present—a factor that had not been present prior to *Gold*. The *Gold* decision also put authors on notice, especially those with multi-book contracts, that it is desirable to specify the amount of liquidated damages due if the publisher should elect to cancel a contract in "good faith" for financial reasons.

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96. *See Gold*, 464 F. Supp. at 1308.

97. *See id.*

98. *See id.*

99. *Id.* at 1308, 1311.

100. *Id.* at 1311.

101. *Id.* at 1308 (footnote omitted).

102. *Id.* at 1310–11.

103. *See id.* at 1309–10.

104. *See id.* at 1310–11.

105. *Id.*

106. *Id.* at 1309 n.1.

Gold may be regarded as a setback for authors. The holding adds an additional subjective aspect to the "satisfactory manuscript" determination, i.e., the publisher's own evaluation of the financial prospect for success irrespective of whether the publisher's view is reasonable.[107]

3. *"Good Faith" Duty to Edit*

Is it in "good faith" when the publisher has provided no editorial assistance and then rejects the manuscript submitted by the author? This question was answered in the negative in *Harcourt Brace Jovanovich, Inc. v. Goldwater*, which arose after publisher Harcourt Brace Jovanovich ("HBJ") entered into a contract with Senator Barry Goldwater to write his memoirs.[108] During the writing of the manuscript, Senator Goldwater and his agent asked several times for editorial comments, but the editor assigned by HBJ remained silent.[109] When the book was completed and submitted, HBJ rejected the manuscript and asked for a return of the advance.[110] When Senator Goldwater refused to return the money, HBJ sued.[111] The court held for Senator Goldwater, stating:

> It cannot be, however, that the publisher has absolutely unfettered license to . . . reject a book for any reason whatever. If this were the case, . . . that would be an illusory contract. . . .
>
> . . . [T]here is an implied obligation in a contract . . . for the publisher to engage in appropriate editorial work with the author of a book. . . . [It is] based on the custom of the trade.[112]

Although Senator Goldwater had received an advance from HBJ and subsequently earned a substantial amount on his memoirs from another publisher, the court did not require any repayment of the advance.[113] The court's ruling was a clear message to publishers that failure to edit is likely to be costly.

The holding in *Goldwater* is important because it illustrates that "good faith" requires editing by the publisher and that such a duty is consistent with trade practice. After *Goldwater*, a publisher has a duty to edit the work in "good faith" and help the author meet the publisher's subjective standard for a "satisfactory manuscript."[114]

Goldwater was followed by *Dell Publishing Co. v. Whedon*, in which Whedon submitted a twelve-page outline to allow the publisher to determine the nature of her

107. For additional in-depth analysis of *Gold*, see Healy & Alonso, *supra* note 77, at 502–10 (1980).

108. *Goldwater*, 532 F. Supp. at 619–20.

109. *Id.* at 621–22.

110. *Id.* at 623.

111. *See id.* at 619–20.

112. *Id.* at 624.

113. *See id.* at 625.

114. *Id.* at 624–25.

proposed novel, *Over The Limit*.[115] The author received an advance upon signing the agreement and an additional advance after she delivered half of the novel.[116] According to Whedon, her editor at Dell was enthusiastic about the material and made no suggestions for revision.[117] Approximately one year later, however, Whedon submitted the second half of the manuscript, only to be informed by the same editor that it failed to meet the publisher's expectations, without further explanation.[118] About one month later, Dell formally rejected the book and sought return of the money paid.[119] The district court held for Whedon, stating:

> Having induced Whedon to write the first half of the novel in reliance on its approval of the outline, and having induced her to complete the novel in reliance on its enthusiastic reception of and payment for the first half, Dell owed Whedon something more than simply an honest belief that the manuscript was unsatisfactory as written. It owed her, at the very least, a detailed explication of the problems it saw in the manuscript, and an opportunity to revise it along the lines its editors suggested.
>
> That conclusion accords with industry practice . . . .[120]

The *Whedon* court followed *Goldwater*, especially in the murky area of "good faith."[121] In *Whedon*, as in *Goldwater*, the author was allowed to keep her advance from the original publisher as well as the money received from a subsequent publisher who edited and published the book.[122]

A publisher's duty to edit was limited by the parameters set forth by the Second Circuit in *Doubleday & Co. v. Curtis*.[123] Though he had had an earlier novel published by Doubleday, actor Tony Curtis's second novel for the publisher was characterized as "truly . . . terrible" by the executive editor.[124] The Second Circuit held that the publisher's rejection must be based upon honest dissatisfaction and that a willful failure by the publisher to respond to a request for editorial comments might amount

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115. *Whedon*, 577 F. Supp. at 1460.

116. *Id.* at 1461.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1462–63.

121. *See id.* at 1463–64.

122. *Id.* at 1465. *Whedon* and *Goldwater* bring the "satisfactory manuscript" clause closer to the mainstream of modern contract law, and thus allow the author to use generally accepted contract principles in seeking enforcement of the author-publisher contract. *See* Fowler, *supra* note 77, at 137–39.

123. *Curtis*, 763 F.2d 495. Tony Curtis was the author of *Starstruck*, the manuscript at issue. *Id.* at 498. Doubleday had published Curtis's previous novel, *Kid Cody*, "amid much fanfare." *Id.* at 497.

124. Doubleday & Co. v. Curtis, 599 F. Supp. 779, 783 (S.D.N.Y. 1984), *rev'd*, 763 F.2d 495 (2d Cir. 1985).

to bad faith.[125] In contrast to *Goldwater* and *Whedon*, however, the *Curtis* court refused to inquire into the adequacy of the publisher's editorial efforts, stating, "[t]o imply a duty to perform *adequate* editorial services in the absence of express contractual language would, in our view, represent an unwarranted intrusion into the editorial process."[126] Thus, the duty to edit set forth as an absolute obligation in *Goldwater* and *Whedon* was diminished by the *Curtis* decision.[127]

4. *Contractual Alternatives to the "Satisfactory Manuscript" Clause*

Given the unsettled state of the law, the author should endeavor to introduce an objective standard into the contract. Whenever possible, the author should affix an outline and a sample chapter of the proposed work prior to closing the contract. Additionally, the contract should include a clause stating that the publisher has seen and approved of such initial submissions. The clause should state that the manuscript shall be deemed acceptable if it is in substantial conformity with the initial materials provided by the author.[128]

The author should also seek an affirmative statement in the contract that the publisher will provide editorial assistance and, if possible, will identify the editor by name and title. The contract should state that the publisher will furnish editorial comments in writing and that the author will have a reasonable time (generally ninety days) in which to make any corrections. Additionally, the contract should provide that if the publisher fails to respond to an initial or corrected manuscript within a given period (generally sixty days), the manuscript shall be deemed to have been accepted.

The author should attempt to include a clause that would enable her to retain all money paid, without any offset, if the publisher rejects a manuscript because of market or other non-editorial reasons. This clause, or a separate provision, should also require all rights to revert to the author if the publisher rejects the work.

In summary, a publisher should not be forced to publish a book that he reasonably believes, in his good faith judgment, is editorially deficient. Likewise, an author should not be subjected to the publisher's caprice or arbitrary indifference to a work, which the author may have worked on for years. The challenge is to expand the sparse "satisfactory manuscript" clause into a series of objective standards that can be more readily and equitably measured. It is not enough to allow the essence of the enterprise to be governed by mystery.

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125. *Curtis*, 763 F.2d at 500; *see also Helprin*, 277 F. Supp. 2d at 334–35 (relying on *Curtis*, *Goldwater*, and *Whedon* for these principles).

126. *Curtis*, 763 F.2d at 500 (emphasis added).

127. *See* Fowler, *supra* note 77, at 135–40.

128. If the publisher will not affix materials to, or name the editor in, the contract, the author should ask that a letter covering these points be incorporated by reference into the contract.

G. Duty to Publish

The most important promise that the publisher makes to the author is that he will publish a satisfactory manuscript within a prescribed period (usually twelve to eighteen months) after acceptance of the manuscript. The language in the "standard" contract is sparse, usually containing nothing more than a clause stating that the publisher agrees to publish the work at its own expense.[129]

1. Implied Obligation to Use "Reasonable Best Efforts" to Publish

By analogy, the 1917 case *Wood v. Lady Duff-Gordon* sets forth an obligation requiring the publishing house to use its best efforts to print, promote, and sell an author's book.[130] In *Wood*, the defendant was a "creator of fashions" who entered into an agreement with the plaintiff whereby the plaintiff was given the exclusive right for one year to license defendant's endorsements to other manufacturers.[131] During that year, the defendant licensed her own endorsements without the plaintiff's knowledge.[132] Lady Duff-Gordon claimed that no contract existed between her and the plaintiff because the plaintiff did not bind himself in any way.[133] The New York Court of Appeals found for the plaintiff, holding that there was an implied obligation "to use reasonable efforts to bring profits and revenues into existence."[134]

2. The Extent of the Obligation to Use "Best Efforts"

It was not until 1983, in *Zilg v. Prentice-Hall*, that a court addressed the problem of "best efforts" in publishing.[135] In *Zilg*, the author wrote a book that was critical of the DuPont family.[136] Prentice-Hall was initially enthusiastic when the book was chosen to be a book club selection, believing it could sell 15,000 copies.[137] However, the DuPont family complained to the publisher, calling the author's manuscript "'scurrilous' and 'actionable.'"[138] After reading the book, the book club decided it was unsuitable for the book club and cancelled its order.[139] Nevertheless, the publisher removed the objectionable material and printed the book; however, it cut its first

129. *See, e.g.*, Authors Guild, *supra* note 25, at 21 ("Publisher agrees to expend a minimum of $____ at the time of the initial print publication of the Work in the U.S. for advertising and promoting the Work.").

130. 222 N.Y. 88 (1917).

131. *Id.* at 90.

132. *Id.*

133. *Id.*

134. *Id.* at 92.

135. 717 F.2d 671 (2d Cir. 1983).

136. *See id.* at 674.

137. *See id.*

138. *Id.* at 675.

139. *Id.*

printing from 15,000 to 10,000 copies and slashed the advertising budget from $15,000 to $5500.[140] In holding for the publisher, the Second Circuit set a test for determining the implied "best efforts" provision:

> [O]nce the obligation to undertake reasonable initial promotional activities has been fulfilled, . . . a business decision by the publisher to limit the size of a printing or advertising budget is not subject to second guessing by a trier of fact as to whether it is sound or valid.
>
> . . . Once the initial obligation is fulfilled, all that is required is a good faith business judgment.[141]

The *Zilg* decision strongly impacted subsequent cases. For example, soon after *Zilg*, author Deborah Davis brought a six million dollar breach-of-contract action against publisher Harcourt Brace Jovanovich alleging that HBJ failed to use its best efforts to promote her book, *Katharine the Great*.[142] The publisher paid Davis $100,000 in an out-of-court settlement in addition to her $35,000 advance.[143] In explaining the settlement, Davis's attorney stated, "'[c]learly under the *Zilg* decision, there is an obligation for a publishing company to give a book a fair chance. [HBJ] killed this one at the beginning of its life.'"[144]

Following *Zilg*, publishers were on notice that they must make certain "minimum" efforts to satisfy their obligations to publish in "good faith." Additionally, *Zilg* added a broader dimension to the publisher's simple promise to publish. Although authors have objected to the narrow view taken by the *Zilg* court, the case represents the court's recognition of the implied provision requiring best efforts. While setting the bar for best efforts at a minimum level, the court nevertheless put a burden on the publisher to demonstrate a commitment to make the author's work available on a reasonable basis.

3. *Damages*

Courts award damages when publishers fail to use their "best efforts." In *Contemporary Mission, Inc. v. Famous Music Corp.*, cited in *Zilg*,[145] the contract between the author and publisher specified the minimum amount of promotional expenses to be spent by the publisher, Famous Music.[146] Famous Music assigned the contract to another publisher in connection with Famous Music's sale of its record

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140. *Id.* at 676.

141. *Id.* at 680.

142. *HBJ Pays Author $100,000 Settlement*, Publishers Wkly., Nov. 18, 1983, at 16.

143. *Id.*

144. *Id.* (The complaint "charged that HBJ violated its contract with Davis when it disavowed *Katharine the Great* not long after publication, . . . destroyed copies it had not shipped and reverted the rights to Davis.").

145. *Zilg*, 717 F.2d at 679–80.

146. 557 F.2d 918, 920–21 (2d Cir. 1977).

division.[147] The assignee failed to promote the record, and as a result, the author's song, "Fear No Evil," which was number sixty-one on the best-seller chart, did not achieve the level of success that it could have had the original amount of promotional money been spent.[148] The Second Circuit considered a statistical analysis offered by the plaintiff, which demonstrated that when promoted, fifty-one percent of the songs reaching number sixty-one on the chart went on to number twenty or above.[149] The court held that once the plaintiff has proved injury, he "need only show a 'stable foundation for a reasonable estimate of royalties he would have earned had the defendant not breached,'"[150] and awarded damages based upon this projection of sales.[151] Thus, *Contemporary Mission* removes the danger that the "speculative" nature of certain injuries might bar recovery.[152]

4. *Additional Contract Provisions Needed*

Given the state of the law following *Zilg*, an author should endeavor to specify in the contract the size of the first printing, advertising schedules, author tours, and other marketing expenditures. These efforts should be stated in the contract or in a supplementary letter, which should be incorporated by reference in the contract.

H. *Warranty and Indemnity*

1. *Nature of the Warranty*

Every contract contains, among other things, a recitation of the author's warranty of the originality of the work, her ability to enter into the contract, her guarantee that her rights are unencumbered, and her assurance that none of the material in the book is libelous or invades any right of privacy.[153] Even though the author agrees to indemnify the publisher in the event of a claim or suit, the publisher reserves the right not to publish if, in his opinion, there is a potential breach of this recitation.[154]

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147. *Id.* at 921, 924.

148. *Id.* at 926–27.

149. *Id.* at 927–28.

150. *Id.* at 926 (quoting *Freund*, 34 N.Y.2d at 383). Interestingly, the dicta in *Freund* is widely used to support the proposition of a "stable foundation for a reasonable estimate," but Freund only received nominal damages. *Id.* at 383–84. *See, e.g.*, *Demaris*, 379 F. Supp. 294 (holding that if a publisher breaches by failing to publish a "satisfactory" manuscript, future hardcover and paperback royalties may be extended and recovered).

151. *See Contemporary Mission*, 557 F.2d at 928. *Cf.* Boyce v. Soundview Tech. Group, 464 F.3d 376, 391–92 (2d Cir. 2006) (utilizing a similar method for deducing what would have been plaintiff's expected profits from an investment but for the defendant's breach).

152. For further discussion on damages, see Healy & Alonso, *supra* note 77, at 510–12.

153. Shapiro, *supra* note 19, at 171.

154. *Id.* at 163. While the contractual provisions are important, even more crucial is the author's understanding of the laws of libel and privacy so that she can avoid any conflict with those laws in her work.

Previously, a number of publishers provided authors with insurance limiting the author's liability to a modest threshold—usually about $25,000. However, due to increased litigation in the areas of libel and privacy and the high costs involved in defending these suits, many publishers have discontinued this provision. If the publisher does make insurance available, the author should obtain a rider to the publishing contract ensuring her coverage.

2. *Limiting the Warranty and Indemnity*

Without insurance, the author should seek to limit the scope of the indemnity clause. To protect her reputation, an author should include a provision in the contract specifying that no settlement will be made without her approval. When necessary, ideally, the author and the publisher should select counsel jointly. However, at a minimum, the publisher should consult with the author if the publisher makes the selection of counsel.

In principle, the risk and responsibility for libel and privacy suits should be shared by both the author and publisher. Therefore, the author should also attempt to limit her liability to: (1) fifty percent of damages awarded in a final judgment not resulting from default, or fifty percent of a settlement approved by the author; and (2) fifty percent of reasonable attorney's fees to the extent that they arise out of a case in which she is also liable for damages or settlement payment. Ideally, the author should limit her liability to the amount the publisher has actually paid her for the book. The author should reserve the right to appeal any judgment, with the assessment against her delayed until a final judgment has been entered. Meanwhile, the publisher should not have the right to withhold royalties for the extended period that may be required to reach a final court decision. Finally, the author should disclaim liability for any material inserted at the direction of the publisher without her approval.

I. *Competing Works*

The "standard" contract contains the author's assurance that she will neither prepare, nor cause to be prepared, any work based upon the material in the current work, or any other work, that might injure the sale of the present work. This is an important provision for the non-fiction author who often publishes works in the same field.[155] The author should seek to exclude from the provision any works that she customarily prepares in her business or profession, and to limit the provision to substantially similar materials written within one year following publication.

Additionally, the publisher should be asked to subject any potentially troublesome manuscript to very careful review in addition to seeking the opinion of an outside expert. If the author has any question about the publisher's capacity to perform this function, the contract should require the publisher, at the author's request, to seek an outside reading from an expert in libel and privacy law.

155. A publisher does not provide the author with a similar promise not to publish competing works. Thus, the author should not be unduly restricted. *See Van Valkenburgh*, 30 N.Y.2d 34. Hayden developed its own line of books to compete with the author's work. *Id.* at 43. The court held, "[s]uch a contract does not close off the right of a publisher to issue books on the same subject . . . ." *Id.* at 45.

J. Option

To protect his investment in the book under contract, the publisher often requests an option to publish the author's next work. The provision is usually too broad to be enforceable.[156] However, if the publisher is seriously interested in an option, he will specify the option terms or enter into a multi-book contract. For example, a publisher will normally accept a revision of the clause that allows the author to submit an outline of the next work and requires the publisher to make an offer within thirty days.

K. Termination

The contract should include a clause enabling the author to terminate the contract in the event that the publisher fails to publish within the period of time allowed in the contract. Termination should also be permitted for any material breach of the contract, such as the failure to pay royalties when due. The author should also be certain that the contract provides for a reversion of all her rights in the event of termination or breach by the publisher.

Upon termination, the author should be free of any obligations to the publisher. She should be able to recover all of her property rights, as well as any tangible materials previously provided to the publisher. The author should also have the right to purchase any copies in inventory at a stated cost. This cost is normally the production cost, but excludes origination or plant costs.

L. Arbitration

Generally, the publisher will want the contract to be interpreted in accordance with the laws of the state in which the publisher is located. If the author is owed significant royalties, this provision, which puts any dispute into a courtroom, may not be to her benefit. Arbitration is the preferred means of resolution in the normal author-publisher dispute since it is faster and less expensive than litigation.

M. Assignment

The author-publisher agreement is a personal service contract, and therefore, may not be assigned by the author. However, the author should reserve the right to assign any income received under the contract. The publisher normally reserves the right to assign without the author's consent if there is a transfer of all or substantially all of the publisher's assets. In other situations, the author should only agree to assignment if she has the right of prior approval of the assignee.

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156. *See, e.g.*, Pinnacle Books v. Harlequin Enterprises, 519 F. Supp. 118, 122 (S.D.N.Y. 1981) (finding that "where the parties agreed only to negotiate and failed to state the standards by which their negotiation efforts were to be measured, it is impossible to determine whether [the publisher] or [the author] used their 'best efforts' to negotiate a new agreement"). *See also* Harcourt, Brace Jovanovich v. Farrar, Straus & Giroux, 4 Media L. Rptr. 2625, 2626 (Sup. Ct. N.Y. County 1979) (finding that option clause granting publisher option to publish author's next book "on terms to be mutually agreed upon" was merely an "agreement to agree" and was therefore unenforceable).

N. Agency

An agent who acts on behalf of the author also has a "standard" provision incorporated into the publishing contract. This agreement requires careful review by the author. Normally, the agent asks that all funds due to the author under the contract be sent directly to him and not the author. The agent then deducts his ten or fifteen percent before forwarding the balance to the author. The author should firmly resist this clearly undesirable practice. The author should not be required to wait for a bank clearance of the agent's check or risk the agent's insolvency. Upon request, publishers will agree to send the agent his commission and remit the royalties, minus the commission, to the author. The agent will also ask for the power to act on behalf of the author. This practice is similarly undesirable unless the author is presently unavailable or is likely to be so in the future.[157]

O. "Boiler Plate"

The housekeeping details of a contract rarely vary and normally should not be of concern to the author or the publisher. There will be provisions, for example, requiring that all modifications of the contract be in writing and signed by the parties, or specifying the addresses to which notices should be sent. There is rarely any need for any changes in the concluding provisions of the contract.

III. CONCLUSION

Most authors incorrectly believe that if they seek changes to a contract they will alienate their publisher. This is not true. The negotiation of the author's contract is a ritual which should be exercised in good faith and good humor. The contract is the beginning of a relationship, and it is incumbent upon the publisher, if he wishes a better-than-satisfactory manuscript to be forthcoming, to accept well-supported changes in the "standard" contract. It is in the author's best interest to allow her publisher to make a fair bargain so that the funds and enthusiasm necessary to exploit the author's work will be available. The author who wishes to avoid a significant amount of negotiation might begin discussions with the publisher by asking for all the changes that the publisher normally makes in preparing a contract for his favorite author. This may shorten the process, but it also eliminates a good deal of the fun.

It is unlikely that the publisher's "standard" contract will survive without change. It is also unlikely that the author will be able to achieve all the modifications she desires. This is as it should be. The publisher should be able to preserve only those parts of the "standard" contract that are fair and crucial to a successful outcome from his perspective. The author should be able to obtain a contract that enables her to perform her job comfortably and confidently. If this balance is achieved, all is, and will be, well.

157. *See, e.g.*, *Contemporary Mission*, 557 F.2d at 921 n.4 (citing contract provision which read in part, "[t]his agreement shall not be construed as one of partnership or joint venture, nor shall it constitute either party as the agent or legal representative of the other").