A NEW GUIDE TO NEGOTIATING THE AUTHOR-PUBLISHER CONTRACT

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I. INTRODUCTION

After the euphoria of hearing that the publisher is enthusiastic about the book she plans to write has subsided, the author 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 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 must protect himself against the potential hazards involved in the creative process. This protection is necessary since the author's book will probably require the publisher to invest several hundred thousand dollars. The publisher hopes that the manuscript is received on time, is satisfactory and original, and will not embroil him in a suit for libel and 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. In some instances, a lawyer and an agent will assist them.

This Guide will frame the issues in the author-publisher contract. It will suggest modifications to the publisher's "standard" contract[1] which will assist the parties in realizing their paramount

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[1] *See, e.g.*, L. FRIEDMAN, ENTERTAINMENT INDUSTRY CONTRACTS NEGOTIATING AND DRAFTING GUIDE Form 41-1 (1986). *See also infra* note 16.

goal of creating a book that is both the best they can publish and one that will earn both of them a profit for their labor.

Since the author bears the burden of suggesting any changes, this Guide is written with a bias towards 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 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.

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."[2] Any exclusive rights in such "property" must be transferred by a written document that is executed by the owner of these rights.[3] This grant may cover the entire scope of the copyright, or it may be limited to a particular time period, territory or medium.[4] The owner[5] of the copyright reserves any rights not expressly granted in the contract.[6]

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[2] *See* The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended 17 U.S.C. §§ 101-914 (1982 & Supp IV 1986)).

[3] *Id.* § 204(a), which reads:

> 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 Library Publications Inc. v. Medical Economics Co., 548 F. Supp. 1231 (E.D. Pa. 1982), *aff'd*, 714 F.2d 123 (3d Cir. 1983) (agreement granting to trade book publisher and distributor certain exclusive rights held unenforceable because it was oral rather than written agreement).

[4] 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.

[5] "Owner" may be an employer of an author if the work was (1) 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 a work for hire. *See* 17 U.S.C. §§ 101, 201(a), (b).

[6] *Id.* § 201(d)(2).

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 such imprints as *Villard Books*, *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 towards the major venturer (the "deep pocket") in the event the contracting entity does not perform. The author, if 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.

a. *The author who is an employee of a corporation.*

In some instances, an author has established a corporation which 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 undertaking 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.

b. *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.[7] This issue most often arises in the context of record-

[7] *See generally* 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 223, 235, 238 (3d. ed. 1959); *see also* Matter of Prinze (Jonas), 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (1976) (holding arbitration clause valid when clause was standard, reason-

ing and theatrical contracts. In New York, the applicable statute is silent on the transfer of intellectual property rights of infants[8] (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.[9] 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[10] and perhaps court approval as well. Prior court approval defeats any subsequent attempt to disaffirm.

c. *The author who is a "criminal."*

Victim compensation laws have been enacted in about thirty states.[11] In general, these statutes require publishers to pay a state agency any money owed to a person convicted or accused of a crime if the author-criminal writes a reenactment of the crime or if he writes of his thoughts or feelings concerning the crime.[12] The state agency must hold the funds to satisfy any judgments entered in civil actions by victims against the alleged perpetrator.[13] The book may be published, but until this matter is resolved by the United States Supreme Court, the author-criminal may not receive any income from the work so long as the book concerns the crime.[14]

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able 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).

[8] *See* N.Y. ARTS & CULT. AFF. LAW § 35.03 (McKinney 1984).

[9] *See* CAL. CIV. CODE § 35 (West 1982).

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

[11] *See, e.g.*, ALA. CODE § 15-23-1 to 23 (1987); ALASKA STAT. § 12.61.010, 18.67.162 (1985); ARIZ. REV. STAT. ANN. § 13-4202 (1978); CONN. GEN. STAT. ANN. § 54-201 to -218 (West 1985); GA. CODE ANN. §§ 17-14-1 to 16, 17-17-30 to -32 (Supp. 1987); IDAHO CODE § 19-5301 to -5306 (Supp. 1987); ILL. ANN. STAT. ch. 70, para. 401 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 16-7-3.6.5 to .6.8 (Burns 1983); KY. REV. STAT. ANN. § 346.010-.185 (Michie Supp. 1986); LA. REV. STAT. ANN. § 46.1831-9 (West 1982); MASS. GEN. LAWS ANN. ch. 258A, §§ 1-8 (Supp. 1986); MINN. STAT. ANN. § 611A (West Supp. 1988); NEB. REV. STAT. §§ 81-1814 - 1832 (1981); NEV. REV. STAT. § 217.260 (1985); N.J. STAT. ANN. 52:4B-25 to -38 (West 1986); N.Y. EXEC. LAW § 632-a (McKinney 1982); OHIO REV. CODE ANN. § 2969.01 to .06 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1987-88); S.C. CODE ANN. § 15-59-40 to -59-80 (Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 23A-28 (1979 & Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 56.02 (Vernon Supp. 1988); WASH. REV. CODE ANN. § 7.68.200-.280 (West Supp. 1987).

[12] 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 statute. *See* N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

[13] *Id.*

[14] However, these statutes do not extend to the authors or publishers of a reenact-

d. *The co-author.*

The practice of having two authors create a work is increasingly popular, especially when the 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.[15]

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.

e. *In conclusion.*

So long as the author is only one natural person over the age of eighteen, not writing about a crime in which she has been involved, and is otherwise competent, or if there are two authors and this 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. There are however, too many caveats to treat the identity of the parties routinely.

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*.[16] Grant provisions in these contracts vary widely. Therefore, authors should exercise special care in reviewing these provisions.[17]

The 1976 Copyright Act contains the first explicit statutory

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ment of a crime to which they were not a party. *See* Fasching v. Kallinger, 211 N.J. Super. 26, 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986).

[15] 17 U.S.C. §§ 302(d), (e). *See infra* note 27.

[16] 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.

[17] For a comprehensive discussion of these provisions as well as a survey of various publisher's standard contracts, see *id.*

recognition of the divisibility of copyright.[18] Presently, the owner of a copyright possesses a "bundle of exclusive rights" which can be transferred wholly or separately.[19] In the absence of a written transfer of a particular right, the copyright owner retains the right.[20] Nevertheless, the author should request that a reservation of rights clause be included in the contract so as 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.

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 publisher's "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 books. Since the development of the computer as an alternative means of delivering information, publishers have sought to include phrases in the contract such as "the right to publish and sell the work in volume and other tech-

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18 17 U.S.C. § 201(d)(1).

19 *See* N. BOORSTYN, COPYRIGHT LAW 97 (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:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (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;
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> (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; and
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> (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.

20 *See supra* note 4 and accompanying text. The district court, in Library Publications Inc. v. Medical Economics Co. ruled that, "[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." 548 F. Supp. 1231, 1234 (E.D. Pa. 1982), *aff'd*, 714 F.2d 123 (3d Cir. 1983).

nological forms."[21] The author might agree to grant these rights if the publisher is able to convert the book into "other technological forms" and is willing to pay for these rights. These technological forms may be already in existence or only foreseeable. The author, however, should require a precise definition, a timely exercise of the rights to the "other technological forms" and a clearly stated form of compensation. This, however, can be difficult, especially when the publisher is seeking to acquire rights to technologies not yet conceived.

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."[22] Most publishers know that authors rarely grant film or dramatic rights to their works. A grant of rights by the author to publish works that may derive from the film or play would be inappropriate when the author has not yet made any arrangements to dispose of the underlying rights to a dramatic interpretation of her book. Conveying these rights too early might create complications in a subsequent conveyance of the rights.[23] Additionally, if the book and/or dramatic interpretation is successful, the derivative rights would warrant a separate and significant payment.

Additional valuable rights include book club editions, condensations or abridgements. Normally these "subsidiary rights," that flow from the basic grant of rights, are covered in a separate section of the contract.[24]

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 trans-

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[21] This phrase, and others 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.

[22] *See supra* note 21.

[23] 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. 17 U.S.C. § 103(a). The author of the original book may not convey rights in a derivative work to the publisher which will be owned by the new works' creator since she is not a party to the author-publisher agreement.

[24] *See infra* notes 48-54 and accompanying text.

late, 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.

3. *Market or Territory*

The grant may be for English language publication throughout the world or it may be limited to the United States, Canada and the "open market."[25] 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 a 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 receives only ten to fifteen percent of the net receipts. This is effectively an "agent's commission."[26] If the United States publisher is granted the right to sell the work in the United Kingdom, a time limit, 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 for less than the life of the copyright.[27] Since copyright protection may last for fifty years or

25 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. Then the Philippines, and the remainder of the world would be "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 thus, in the "open market."

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

27 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 50 years after the author's death. *Id.* § 302(a). If a work has joint authorship, then the

more, there are two ameliorating factors. First, the 1976 Copyright Act provides the author with an inalienable termination right which can be exercised prior to the expiration of the copyright.[28] However, a more meaningful factor, and one which is regularly included in publishing contracts, is the provision which provides that if the publisher fails to keep the work in print,[29] the author, with notice, may recover the rights to her work.

C. Advance

As consideration for the grant of rights, 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 royalties are retained along with other income from sales of subsidiary rights until the amount of the advance is recovered. If there are insufficient royalties and other income to cover an 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 from the income retained by the publisher certain earnings, such as "first serial rights,"[30] and 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.[31]

1. *Failure to Deliver*

When the author fails to deliver a manuscript, and the pub-

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copyright endures for 50 years after the last author dies. *Id.* § 302(b). If the work is a "work for hire," the statute designates the employer as the "author." The term of copyright is 75 years after publication or 100 years after creation, whichever is shorter. *Id.* § 302(c).

[28] The provision permits termination within a five-year period beginning 35 years from the date of publication or 40 years from the date of the grant, whichever comes first. Thereafter, if the author follows the specified procedure, the copyright reverts to the owner. 17 U.S.C. § 203.

[29] 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.

[30] 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 21. *See also infra* text accompanying note 48.

[31] *See infra* notes 32-37, 55-104 and accompanying texts.

lisher 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.[32] 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.

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.[33] In some cases, courts have awarded damages to the author in the amount of anticipated hardcover and paperback royalties.[34] 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.[35]

3. *Contractual Provisions for Breach*

In light of the case law,[36] publishers have inserted provisions in their "standard" contracts to handle breaches. Many publisher's 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 which 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 90 to 120 days), the publisher forfeits all advances paid to the author. The publisher's obligations will thereby be dis-

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[32] *See* J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993, 996 (S.D.N.Y. 1977) (publisher acted in good faith at all times, while author acted in "complete breach and disregard" of this contract and would be unjustly enriched if allowed to keep his advance).

[33] *See* A.A. Wyn, Inc. v. Saroyan, N.Y.L.J. Nov. 16, 1956, at 7 (Sup. Ct., N.Y. Co.) (publisher's failure to accept author's manuscript was in response to failure of proposed series rather than quality of delivered manuscript).

[34] *See infra* notes 121-28 and accompanying text.

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

[36] *See* Doubleday & Company, Inc. v. Curtis, 763 F.2d 495 (2d Cir.), *cert. dismissed*, 474 U.S. 912 (1985).

charged. However, recent 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. The Second Circuit has held that damages arising out of a publisher's breach are *not* speculative and that the forfeiture of the advance is not sufficient to be considered an adequate remedy.[37]

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 that 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.

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 large printing, major promotion and extensive advertising in an effort to recoup his investment. A large advance 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. Only a few authors command mega-buck advances, but a respectable advance ($50,000 or more) is an important step to successful publication. The Authors Guild provides a guide of advances received by its authors.[38]

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.

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[37] *See* Bloor v. Falstaff Brewing Corp., 601 F.2d 609 (2d Cir. 1979), *aff'g*, 454 F. Supp. 258 (S.D.N.Y. 1978). *See also* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918 (2d Cir. 1977); Demaris v. G.P. Putnam's Sons, 379 F. Supp. 294 (C.D. Cal. 1973).

[38] Authors Guild Inc., *Guide to the Authors Guild Trade Book Contract* 18 (1987).

1. *The Base for Computing the Royalties*

The author's primary goal in this negotiation is to have the royalty based upon 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 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. *Freight Pass-Through*

A current practice, and one that trade book authors have generally accepted, is to allow the publisher to base the royalty on the invoice price to the book seller rather than on the retail price.[39] The publisher sets an invoice price forty to sixty cents lower than the jacket price and the retailer charges the higher jacket price to cover his increased freight charges. Thus, the retailer receives a "freight pass through."[40] This variation developed as a result of the significant increases in freight costs.

3. *Steps in the Royalty Scale*

The author should seek, and will normally receive, a graduated royalty scale. Typical royalties for hardcover trade books are:

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[39] *Id.* at 18-19.

[40] An illustration of the freight pass through system, which is generally accepted now, is shown below. The purpose is to allow the retailer to recoup some of the cost of freight, which of course varies, depending on location, without disrupting the traditional book industry practice of billing its customers at an invoice price less a discount. Prior to freight pass through, the invoice price and the jacket price printed in the book (i.e., suggested retail) were the same. Under freight pass through, part of the cost of the freight is "passed through" to the consumer without affecting the booksellers' wholesale cost.

Suggested Retail	$10.40
Invoice Price	$10.00
Jacket Price printed in book	$10.40
Publishers' discount to bookseller	45%
Amount invoiced to store (45% of $10.00)	$ 5.50
Freight allowance passed through	.40
Amount retained by bookstore	$ 4.90
Author's 10% Royalty (based on $10.00)	$ 1.00

(1) ten percent of the list price on the first 5,000 copies sold;

(2) twelve and one-half percent on the next 5,000; and

(3) fifteen percent on all copies thereafter.[41]

Trade paperback[42] 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.

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

4. *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.

5. *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 of forty-eight percent or more of the retail price, he may reduce the agreed royalty by one-half the difference between forty-eight percent and the amount of the discount. At the outset, the author should require the publisher to change the forty-eight percent discount to fifty-four percent, because most major retailers and many wholesalers now buy books at very high discounts.

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41 *See supra* note 38.

42 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 the mass market paperback. The quality of the paper and the binding is superior to the mass market paperback. It is often described as a *quality* paperback book.

This issue received extensive publicity in 1986. In that year, three authors brought an action to prevent a publisher, Addison-Wesley, from reducing their royalties on sales made by the publisher in excess of the normal discounts.[43] Addison-Wesley denied the charges and counterclaimed.[44] The suit was settled with the parties agreeing to keep the terms of the settlement confidential.[45] However, the litigation received sufficient notice in the trade press[46] and, as a result, many 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.

6. *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 usual for the publisher to pay a royalty of ten percent on the amount received by the publisher.

7. *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.[47] These traditional cut-off dates came into practice well before computers made it possible to use cut-off dates closer to the statement date.

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. The author should, therefore, negotiate to have large payments accelerated as described in part 9 *infra*.

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[43] Levering v. Addison-Wesley, 12 Med. L. Rptr. (BNA) 1807 (N.D. Cal. 1986).

[44] *Id.*

[45] 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. *Id.* at 1811. The court granted plaintiff's leave to amend their complaint. *Id.*

[46] *Judge Sustains Lawsuit by Authors Aqainst Addison-Wesley*, PUB. WEEKLY, Feb. 7, 1986, at 18.

[47] 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.

8. *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 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 30 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.

9. *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 of these amounts more rapidly than semiannually. Although most publishers resist changing from semiannual 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.

10. *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. Publishers will not pay interest on the amount deferred and the new tax law has reduced the benefits of moving income into the future.[48] 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 income is usually divided equally between publisher and author. The publisher may agree to give the author a share larger 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.[49] 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 ninety percent and the publisher receives ten percent of this income. Income from sales to magazines after publication, or second serial rights, are usually divided equally.

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

[49] *See supra* note 30.

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.

5. *Rights Retained*

It is a standard practice for the author to retain dramatic, film and television, and merchandising rights.[50] The sale of these rights falls outside the area of the publisher's competence. Reserving these rights is standard even where publishers are part of an entertainment conglomerate.[51]

6. *New Technologies*

As discussed earlier,[52] rights for works involving new technologies may become a major source of income in the future. Most authors reserve these rights because the "state of the art" is always developing and the prospects that lie ahead are presently unknown. Again, the author should reserve rights with respect to new technologies indicating that the parties addressed and resolved the issue.

7. *Audio or Video Cassette Rights*

Several major publishers have developed their own audio cassette programs and ask for these rights when the book is suitable for an audio cassette. In a few cases, publishers have sought video cassette 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 cassette rights to the publisher,[53] despite the objections of agents.[54] Presently, audio and video cassette rights are important only to a few publishers. Here, too, the author should

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50 *See supra* text accompanying note 21.

51 Simon & Schuster is owned by Gulf & Western. Paramount is also owned by Gulf & Western. The Putnam Publishing Group is owned by MCA. Universal, a major factor in motion picture production, is also owned by MCA.

52 *See supra* text accompanying note 21.

53 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 21.

54 *Best Seller: Simon & Schuster is Setting a Fast Pace*, Wall St. J., Sept. 26, 1984, at 24, col. 2.

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 warrant a separate advance and royalty payment.

8. *Hardcover-Softcover Deals*

Several 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 rights to the publisher that are retransferable, she should include a provision in the contract which requires her written approval of the retransfer. It is customary for the publisher to allow author approval, as long as such approval is not unreasonably withheld. Often, it is also 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 of the book and the advertising 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 long-standing usage, several pivotal court decisions[55] and scholarly review of the problem,[56] 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 which 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.[57] In *Walker v. Edward Thompson Co.*,[58] the plaintiff was a writer employed by a law publisher to write, without accreditation, an article in a law treatise.[59] The publisher rejected the article and the court held in favor of the publisher.[60] The court summarized its position in the last two sentences of its opinion:

> 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 em-

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55 *See* Doubleday & Co. v. Curtis, 763 F.2d 495 (2d Cir. 1985), *rev'g*, 599 F. Supp. 779 (S.D.N.Y. 1984), *cert. dismissed*, 474 U.S. 912 (1985); Dell Publishing 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 Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y.), 607 F.2d 998 (2d Cir. 1979); Stein & Day v. Morgan, 5 Media L. Rep. (BNA) 1831 (N.Y. Sup. Ct. 1979); Freund v. Washington Sq. Press, Inc., 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974); Walker v. Thompson Co., 37 A.D. 536, 56 N.Y.S. 326 (1st Dep't 1899).

56 For in-depth discussion of the issues, see Fowler, *The "Satisfactory Manuscript" Clause in Book Publishing Contracts*, 10 COLUM. J.L. & ARTS 119 (1985); *see also* Healy and Alonso, *Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts*, 15 NEW ENG. L. REV. 485 (1980); Pilpel, Wechsler, Rockett, *Contract Clauses, The Publishing Contract: Only an Option to Publish?*, 2 COM. L. 85 (Fall 1980); Simensky, *Redefining the Rights and Obligations of Publishers and Authors*, 5 LOYOLA ENT. L.J. 111 (1985).

57 *See* Walker v. Edward Thompson Co., 37 A.D. 536, 56 N.Y.S. 326 (1st Dep't 1899). 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 names, 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 538, 56 N.Y.S. at 327.

58 37 A.D. 536, 56 N.Y.S. 326 (1st Dep't 1899).

59 *Id.* at 536-37, 56 N.Y.S. at 326.

60 *Id.* at 539, 56 N.Y.S. at 328. The court held that:

> [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 . . . [it] might arbitrarily reject the same.

ployer, he might arbitrarily reject the same.[61]

Sixty-six years later, in *Frederick A. Praeger v. Montagu*,[62] a creative work was elevated above the three-piece suit. The *Montagu* court refused to accept subjective style and caprice as appropriate standards and held that "the applicable test is merely the existence of *good faith* in the exercise of dissatisfaction."[63] In *Montagu*, the author, had refused to make requested modifications in his manuscript.[64] The publisher rejected the manuscript and when the $1,000 advance was not returned, he brought suit against the author.[65] The court held that the publisher, in the exercise of "judgment" and "sensibility,"[66] had rejected the manuscript in "good faith,"[67] and ordered the author to repay the $1,000.[68]

Although the courts have failed to define the "good faith" standard with consistency or clarity, it has become the operative standard for subsequent decisions.[69] Since determination of "good faith" requires an investigation of state of mind, it is a difficult test at best, and even more so when dealing with a literary work.[70]

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*,[71] the publisher entered into a contract with Herbert Gold, a best-selling author, to write four novels. Gold was advanced $150,000.[72] The first two novels did not meet the publisher's financial expectations.[73] 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.[74] While Gold was revising his work, the editor-in-chief offered to

61 *Id.*, 56 N.Y.S. at 328 (citation omitted).
62 35 COPYRIGHT OFF. BULL. 562 (N.Y. Civ. Ct. 1965).
63 *Id.* at 564 (emphasis added).
64 *Id.* at 563.
65 *Id.*
66 *Id.* at 564.
67 *Id.* at 563.
68 *Id.* at 564.
69 "There is implicit in all contracts—for book publishing or house building—an implied covenant of fair dealing and good faith." Van Valkenburg, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 281 N.E.2d 142, 144, 330 N.Y.S.2d 329, 333, *cert. denied*, 409 U.S. 875 (1972).
70 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.
71 464 F. Supp. 1306 (S.D.N.Y.), *aff'd*, 607 F.2d 998 (2d Cir. 1979).
72 *Id.* at 1307.
73 *Id.*
74 *Id.* at 1307-08.

publish the novel if Gold would take less money for the third book.[75] The editor-in-chief learned that if he rejected the novel, Gold would be required to pay $50,000 under the contract.[76] 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.[77]

Despite the editor-in-chief's failure to remember the basis for his rejection, the court held for the publisher.[78] The court ruled that Random House, in rejecting the manuscript, had acted in "good faith."[79] Furthermore, it held that "the publisher is not bound to incur the significant costs of publication if it declines to accept the risk of financial loss."[80]

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.[81] Since Gold had only received $60,000, he was entitled to receive an additional $15,000. However, he was denied any compensation for the third or fourth book in the contract.[82] The court stated:

> 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.[83]

Gold infused the concept of "good faith" with a factor that had not been present before. In *Gold*, it was permissible for the publisher to reject a manuscript in "good faith" if the prospect of a financial loss was present. The *Gold* decision also puts 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.

Gold may be regarded as a setback for authors. The holding adds an additional subjective aspect to the "satisfactory manuscript"

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75 *Id.* at 1308.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* at 1311.
80 *Id.* at 1308 (footnote omitted).
81 *Id.* at 1309-10.
82 *Id.* at 1310-11.
83 *Id.* at 1308-09 n.1.

determination, i.e., the publisher's own evaluation of the financial prospect for success irrespective of whether the publisher's view is reasonable.[84]

3. *A "Good Faith" Duty to Edit*

Is it "good faith" when the publisher has provided no editorial assistance and then rejects the manuscript when it is submitted by the author? Senator Barry Goldwater joined with a co-author to write his memoirs.[85] A publisher, Harcourt Brace Jovanovich ("HBJ"), entered into a contract with Senator Goldwater.[86] 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.[87] When the book was completed and submitted, HBJ rejected the manuscript and asked for a return of the advance.[88] When Senator Goldwater refused to return the money, HBJ sued.[89]

The court held for Senator Goldwater saying:

> 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.[90]

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. The court's ruling was a clear message to publishers that failure to edit is likely to be costly.[91]

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

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84 *See* Healy & Alonso, *Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts*, 15 NEW ENG. L. REV. 485, 502-10 (1980) (additional in-depth analysis of *Gold*).

85 Harcourt Brace Jovanovich, Inc. v. Goldwater, 532 F. Supp. 619, 620 (S.D.N.Y. 1982). The book, *Conscience of a Conservative*, by Senator Barry Goldwater, was edited by an experienced editor and became a major best-selling book for William Morrow & Company.

86 *Id.* at 619.

87 *Id.* at 620-22.

88 *Id.* at 623.

89 *Id.* at 619-20.

90 *Id.* at 624.

91 *Id.*

publisher's subjective standard for a "satisfactory manuscript."[92]

Goldwater was followed by *Dell Publishing Co. v. Whedon.*[93] In this case, Whedon submitted a twelve-page outline to allow the publisher to determine the nature of her novel, *Over The Limit.*[94] The author received an advance upon signing the agreement and an additional advance after she delivered half of the novel.[95] Dell's editor was enthusiastic about the material and made no suggestions for revision. 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.[96] There was no further explanation. About one month later, Dell formally rejected the book and sought return of the money paid.[97] The district court held for Whedon.

> 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.
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> That conclusion accords with industry practice. . . . [98]

The *Whedon* court followed *Goldwater*, especially in the murky area of "good faith." 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.[99]

A publisher's duty to edit was limited by the parameters set forth by the Second Circuit in *Doubleday & Co. v. Curtis.*[100] Though he had had an earlier novel published by Doubleday, actor Tony Curtis' second novel for the publisher was characterized as "truly

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92 *Id.* at 624-25.

93 577 F. Supp. 1459 (S.D.N.Y. 1984).

94 *Id.* at 1460.

95 *Id.* at 1461.

96 *Id.*

97 *Id.*

98 *Id.* at 1462-63.

99 *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 56, at 137-39.

100 763 F.2d 495 (2d Cir. 1985), *rev'g*, 599 F. Supp. 779 (S.D.N.Y. 1984), *cert. dismissed*, 474 U.S. 912 (1985). The book, *Starstruck*, is a novel by Tony Curtis. A previous book had been published by Doubleday and became a best-selling paperback book.

. . . terrible" by the executive editor.[101] 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 to bad faith.[102] In contrast to *Goldwater* and *Whedon*, however, the *Curtis* court refused to inquire into the adequacy of the publisher's editorial efforts. "To 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."[103]

Thus, due to the Second Circuit's refusal to inquire into the adequacy of the editorial services provided, the duty to edit, set forth as an absolute obligation in *Goldwater* and *Whedon*, was diminished by the *Curtis* decision.[104]

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 work proposed prior to closing the contract. Additionally, the contract should include a clause stating that the publisher has seen and approved of these 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.[105]

The author should also seek an affirmative statement in the contract that the publisher will provide editorial assistance and, if possible, should have the editor identified 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 pub-

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[101] Doubleday & Co. v. Curtis, 599 F. Supp. 779, 783 (S.D.N.Y. 1984), *rev'd* 763 F.2d 495 (2d Cir.), *cert. dismissed*, 474 U.S. 912 (1985).
[102] *Curtis*, 763 F.2d at 500.
[103] *Id.* (emphasis added).
[104] *Id. See* Fowler, *supra* note 56, at 135-40.
[105] 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 references into the contract.

lisher 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. Additionally, because the litigation process is expensive and time-consuming, the author should seek to have any dispute concerning a satisfactory manuscript determination submitted to arbitration.[106]

In summary, a publisher should not be forced to publish a book which he reasonably believes, in his good faith judgment, is editorially deficient. Likewise, an author should not be subjected to the publisher's caprice nor 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.

G. The 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.[107]

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

By analogy, the 1917 case, *Wood v. Lady Duff-Gordon*[108] sets forth an obligation requiring the publishing house to use its best efforts to print, promote and sell an author's book. In *Wood*, the defendant was a "creator of fashions" who entered into an agreement with the plaintiff.[109] The defendant was given the exclusive right for one year to license Lady Duff-Gordon's indorsements to other manufacturers.[110] During that year, the defendant licensed

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106 *See infra* Section L in Part II of this Article.

107 An example of such a clause appears in the The Authors Guild Recommended Tradebook Contract which states that the "[p]ublisher agrees to expend a minimum of $—— in the initial hardcover printing of the Work for the advertising and promotion of the Work in connection with U.S. hardcover publication thereof." THE AUTHORS GUILD, INC., THE AUTHORS GUILD RECOMMENDED TRADEBOOK CONTRACT 6 (1987).

108 222 N.Y. 88, 118 N.E. 214 (1917).

109 *Id.*

110 *Id.*

her own indorsements without the plaintiff's knowledge.[111] Lady Duff-Gordon claimed that no contract existed between her and the plaintiff because the plaintiff did not bind himself in any way. In *Wood*, the New York Court of Appeals held that there was an implied obligation to use "reasonable efforts to bring profits and revenues into existence."[112]

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

It was not until 1983, in *Zilg v. Prentice Hall*,[113] that a court addressed the problem of "best efforts" in publishing. In *Zilg*, the author wrote a book that was critical of the DuPont family. Prentice Hall, initially, was enthusiastic when the book was chosen to be a book club selection. Indeed, Prentice Hall sales department believed it could sell 15,000 copies.[114] However, the DuPont family citing a number of errors in the book, complained to the publisher. When the publisher advised the book club of the errors, the book club cancelled its order.[115] Nevertheless, the publisher corrected the errors and printed the book. However, it cut its first printing from $15,000 to $10,000 and slashed the advertising budget from $15,000 to $5,500.[116]

In *Zilg*, the Second Circuit, in holding for the publisher 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.[117]

The *Zilg* decision strongly impacted on subsequent cases. For example, soon after *Zilg*, Deborah Davis, an author, 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*, an unauthorized biography of Katharine Graham, owner of The Washington Post Company.[118]

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111 *Id.*
112 *Id.* at 92, 118 N.E. at 215.
113 717 F.2d 671 (2d. Cir. 1983), *cert. denied*, 466 U.S. 938 (1984).
114 *Id.* at 674.
115 *Id.* at 675.
116 *Id.* at 676.
117 *Id.* at 680.
118 *HBJ Pays Author $100,000 Settlement*, PUB. WEEKLY, Nov. 18, 1983, at 16.

The publisher paid Davis $100,000 in an out-of-court settlement in addition to her $35,000 advance.[119] In explaining the settlement, Davis' attorney stated that " '[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.' "[120]

Following *Zilg*, publishers are on notice that they must make certain "minimum" efforts to satisfy their obligations to publish in "good faith." Additionally, *Zilg* has added a broader dimension to the publisher's simple promise to publish. Although authors have objected to the narrow view taken in *Zilg*, the case represents the court's recognition of the implied provision requiring best efforts.

3. *Damages*

Courts award damages when publishers fail to use their "best efforts." In *Contemporary Mission Inc. v. Famous Music*,[121] cited in *Zilg*, the contract between the author and publisher specified the amount of promotional expenses to be spent by the publisher, Famous Music.[122] Famous Music assigned the contract to another publisher in connection with Famous Music's sale of its entire business.[123] The assignee failed to promote the record, and as a result, the Contemporary Mission 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 had the original amount of promotional money been spent.[124] The Second Circuit employed a statistical analysis 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.[125] 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,"[126] and

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119 *Id.*

120 *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.")

121 557 F.2d 918 (2d Cir. 1977).

122 *Id.* at 920-21.

123 *Id.* at 925.

124 *Id.* at 926.

125 *Id.* at 927.

126 *Id.* at 926 (quoting Freund v. Washington Sq. Press, Inc., 34 N.Y.2d 379, 383, 314 N.E.2d 419, 421, 357 N.Y.S.2d 857 (1974). It is interesting that 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; *see* Demaris v. G.P. Putnam's Sons, 379 F. Supp. 294 (D.C. Cal. 1973) (holding that if a publisher breaches by failing to publish a "satisfactory" manuscript, future hardcover and paperback royalties may be extended and recovered).

awarded damages based upon this projection of sales.[127] *Contemporary Mission* thus removes the danger that the "speculative" nature of certain injuries might bar recovery.[128]

4. *Contract Alternatives*

Given the current 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 is incorporated by reference in the contract.

H. Warranty and Indemnity

1. *Nature of the Warranty*

Every contract contains, *inter alia*, 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.[129] 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.[130]

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

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127 *Contemporary Mission*, 557 F.2d at 928.

128 For further discussion on damages, see Healy & Alonso, *supra* note 84 at 510-12.

129 Shapiro, *supra* note 17, at 171.

130 *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. Additionally, the publisher should be asked to submit any potentially troublesome manuscripts to very careful review in addition to seeking the opinion of an outside expert. If the author has any question of 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.

should include a provision in the contract specifying that no settlement will be made without her approval. When necessary, the author and the publisher should, ideally, select counsel jointly. However, at a minimum, the publisher should consult with the author on her selection.

In principle, the risk and responsibility for libel and privacy suits should be shared by both the author and publisher. The author should also therefore attempt to limit her liability for indemnity to: (1) fifty percent of damages awarded in a final judgment not the result of 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. The publisher, meanwhile, 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.[131] 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.

J. Option

The publisher, to protect his investment in the book under

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[131] 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 v. Hayden Publishing Co., 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329 (1972). Hayden developed its own line of books to compete with the author's work. The court held that "[s]uch a contract does not close off the right of a publisher to issue books on the same subject." *Id.* at 45, 281 N.E.2d at 144, 330 N.Y.S.2d at 333.

contract, often requests an option to publish the author's next work. The provision is usually too broad to be enforceable.[132] 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 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 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. How-

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132 *See* Harcourt Brace Jovanovich, Inc. v. Farrar, Straus & Giroux, Inc., 4 Media L. Rep. (BNA) 2625, 2626 (Sup. Ct. N.Y. County 1979) (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 therefore unenforceable).

ever, 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.

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, in the future, to be so.

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 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 save 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.