The Seven Provisions in a Typical Publishing Contract That I Would Change if I Were King

David P. Vandagriff

Introduction

As a preface, the author is an attorney. However, with respect, he is *not* your attorney.

I have been a member of The State Bar of California for over forty years, but I am *not* a member of the Utah State Bar. Among other things, since I currently reside in Utah, I am not able to provide legal advice to clients who live in Utah. Those clients must obtain their legal advice from an attorney who is a member of the Utah State Bar or an attorney who lives outside of Utah.

I have represented clients from all across the United States and in several foreign countries in their dealings with US-based publishers. Most major US publishers are headquartered in New York City and their publishing contracts specify that New York law will apply. That does not prevent me from representing people who don't live in Utah with confidence because New York law as it relates to the sorts of provisions that appear publishing contracts is not different in any material respect from the laws governing contracts in all the other states as well.

Large companies and many small companies often do business across state lines and, while the laws of various states may differ in some areas, such the process of adopting a child or ending a marriage, state laws relating to common commercial contracts, such as most publishing contracts, are very similar because it makes doing business across the country much easier.

Nothing in this article should be treated as legal advice. You obtain legal advice about a publishing contract or any other important contract in your life by retaining a qualified attorney to represent you, not by reading a short paper that briefly discusses some parts of some publishing contracts in general written by an attorney.

I do understand that attorneys cost money and many authors, particularly authors facing their first publishing contract or the first publishing contract from a publisher with which they have not worked before, may not have a lot of excess money to pay an attorney. However,

authors spend a great deal of time and do a lot of hard work to write a book and may often have an emotional connection to what they have created. Selling a book often feels different than selling a sack full of peaches from a tree in your back yard.

At a minimum, read your publishing contract all the way through. Carefully.

If you are not familiar with contracts, this will not be easy. Reading it once will probably not be enough. I've reviewed a great many contracts. My practice is to make a copy of a contract and go through it with a red pen, annotating it completely. When I finish, words or paragraphs are underlined or circled, my hand-written notes litter the margins, etc., etc., etc.

I don't read a contract the same way I read a chapter in a novel. Think of what you did when you were in school and reading something about which you would have to write a paper or take a test.

Although many publishing contracts are similar in some respects, each one that I have examined has some differences. Focusing on a single paragraph and working to get that paragraph changed and ignoring the rest isn't a good approach. You have to read the whole thing.

Pay particular attention to what attorneys call "defined terms". These are words which may have a common meaning when used in ordinary speech or writing, but have a particular meaning in this particular contract.

An example I see frequently is a definition of the basis upon which an author's royalties will be calculated. The publishing contract may require the publisher to pay the author 10% of the net amount received by a publisher for the sale of a book which has a suggested retail price of $10 is not $1.

The publisher sells the author's book to a bookstore or, more commonly, a book wholesaler for a discount from the retail price. Assuming the publisher is selling a copy of a book with a list price of $10, the publisher may only charge $6 so the bookstore can sell the book for $10 (or less) and still make a profit.

Then, there is the longstanding practice (at least in the US) of allowing bookstores to return unsold copies of books to the publisher for credit. So, if a publisher ships ten books with a list price of $10 to a bookstore for $60, but the bookstore returns five unsold copies to the publisher, the "net amount received" by the publisher for those ten books less returns will be $30 and the author's 10% royalty due for the ten books originally shipped to the bookstore will be $3.00.

Depending upon how "net amount received" is defined in the contract, the publisher may also deduct shipping costs for sending the ten books to the bookstore plus shipping costs for the bookstore returning five of those book back to the publisher, fees charged by a book wholesaler for its services, etc.

So, pay close attention to any terms that may not mean the same thing in the contract as you might expect them to mean if you were selling something to a friend or neighbor.

With that overlong introduction, let's start looking at my royal decrees concerning publishing agreements in general.

1. **Contracts last forever—life of copyright**

Problem: When contracts give a publisher the rights to a work for the length of the author's copyright, this means they own the work for the remainder of an author's life plus 70 years in the US (and similar lengths of time in other countries). For example, if a 35-year-old author signs a contract and lives to be 82, the contract would last 117 years from the date the author signed the contract.

Decree: Contracts should be limited to three to seven years, renewable with the consent of both parties.

2. **No minimum performance standards—out of print clauses**

Problem: Under most traditional publishing contracts, an author may regain rights to her book if the book is "out of print" at some time in the future. "Out of print" originally meant that the publisher wasn't willing to pay the cost of printing more books and there were no copies left in the publisher's warehouse. Today, out-of-print clauses should really be called "never out of print" clauses because they are vague and seldom have a minimum standard detailing what the publisher should be doing to sell a book.

Decree: Minimum performance standards give the author the right to get his or her book back if conditions are not met. Establish a "minimum wage for authors" that should increase every year and be adjusted for inflation. The author should also have the right to buy out a contract for the amount of the last three years' royalties they received.

3. **Non-compete clause**

Problem: This concept is based on the false idea that if the author writes and publishes another book other than through the original publisher, the sales of this other book will cannibalize sales of the author's book offered for sale by the publisher. Boiled down, the non-compete clause is based upon the idea that a purchaser might only buy one of an author's books, then stop buying any other book written by the author.

In fact the opposite is true. A more common response of a reader who buys a book by an author and enjoys it is to look for other books the author has written.

If you combine a non-compete clause with a contract that lasts for the rest of the author's life, depending upon the wording of the contract, the publisher could theoretically prevent the author from publishing a "competing" book (as defined by the publisher or a judge) ever again.

Decree: A non-compete period should not last more than 30 days before and 45 days after a book's release. This gives the publisher the assurance that during the time period in which the publisher is most likely to sell most copies of an author's book as a "new book" that there won't be another "new book" released by the author.

4. Rights grab

Problem: A typical publishing contract grants the publisher a wide range of primary, subsidiary and derivative rights anywhere in the universe (including foreign rights in English or in translation, television, videogame and movie rights plus rights to publish and sell the book no Mars). However, the publisher can't exploit those rights itself, but rather would have to sub-contract those activities to other entities to do anything with them. The publisher is in the book business (not the translation, movie, or game business).

Decree: Rights granted in the contract should be limited to books, and if receives any other rights under the contract—there should be a "use it or lose it" clause so any right not exercised by the publisher within five years reverts to the author.

5. Assignability of contract without consent

Problem: Given the current length of copyright, and the decades of consolidation in the publishing industry, the right a publisher has to assign a contract that controls an author's book to literally any other individual or organization anywhere in the world can cause serious problems.

Under typical contract language, an author has no idea whether or not this new entity will or even can live up to the contract, yet whoever receives an assignment of the publishing contract will have sole control of what happens to the author's book. If the publisher files for bankruptcy, the bankruptcy court can order the sale of all rights under the author's publishing contract and control of the author's book(s) to whoever submits the highest bid.

Decree: Get rid of this clause and replace with one by which the author (or her heirs) must give their consent if a contract is assigned or transferred (and if they do not consent, rights to the book revert back to the author or heirs).

There is still a danger of a bankruptcy, since contract clauses allowing a party to terminate a contract of a counter-party files for relief under the bankruptcy laws are unenforceable. All the more reason to limit a publishing contract to a shorter and specific period of time.

6. All money goes to the agency first clause

Problem: Typically, if an author works with a literary agent, a provision in the Agency Contract provides that the agent receives all royalty payments the publisher owes to the author. After receiving all the royalties, the agent is supposed to keep her commission (typically 15%) and send the rest to the author.

Most literary agencies are small businesses with not a lot of staff. They are not sophisticated in terms of business management. Most agency agreements run for the length of any publishing contract the agent helps the author to negotiate (the full term of the copyright - life of author plus 70 years). At a minimum, this means that, at some point the original agent or agents will be gone. Who knows who will buy or inherit the business assets of the agent or agency?

When the agent or whoever steps into the agent's shoes is dishonest, the opportunity for the agent to steal some or all of the author's royalties are very, very tempting.

In most, if not all states, there is no law requiring that someone who wants to be a literary agent have any sort of training, credentials or license. Someone can get out of prison one day and open up shop as a literary agent the next.

Decree: Instead of the agent getting an author's money and then sending it to the author, the contract should say the publisher splits the check so the publisher sends the agent 15% of the royalties and sends the rest of the royalties directly to the author.

7. Unlimited liability

Problem: Part of the boring and nearly unintelligible legal provisions that are typically inserted toward the end of a publishing agreement is a provision that says if anyone sues the publisher, the author has to pay all of the publisher's legal and other expenses. If the plaintiff is successful and the court grants a judgment for millions of dollars against the author and publisher or the publisher alone, the author is supposed to pay all of those damages. Contracts may refer to this obligation as a warranty by the author.

Worldwide contracts mean worldwide warranties. Typically warranties in publishing contracts usually include a provision whereby the author guarantees that her book or any part of it "will violate no law or regulation anywhere in the world," again today and continuing for the life of the book's copyright.

This is an impossible warranty for any author (or any author's attorney) to be able to make without the possibility of the warranty obligation being triggered somewhere in the world during the next hundred years or so. Yet typical publishing contracts invariably say that if an author is found to have violated that warranty (with or without knowledge or fauld) that the author will have to pay all indemnities.

Decree: These sorts of risks are what liability insurance policies are for. The publishing contract should provide that the publisher must have liability insurance with limits not less than $XX million and that such policies include the author as an additional insured. This means that the publisher and author are both covered against these sorts of claims by an insurance company.

Bonus Provision Change from the King

8. Payment every six months with reserve for returns

Problem: Most traditional publishing contracts require (and have required for decades) that the publisher pay the author royalties every six months. Some pay only once per year.

Additionally, most traditional publishing contracts allow the publisher to calculate a reserve against returns which the publisher can deduct from the author's royalties. Initially, reserves agains returns were created because bookstores could order more hardcopy books than they could sell and return unsold copies for a refund from the publisher.

Reserves are subject to abuse by publishers because the publisher can calculate reserves in any way it decides to. And change how it calculates reserves at any time. Reserves make it easy to keep money that belongs to the author.

Holding royalties for six to nine months or longer after the publisher is paid means the authors are providing interest-free financing for the publisher. It's also easy for a publisher to "forget" to pay the author for reserves that are held back, but not needed.

Amazon pays self-published authors royalties every month. If there are returns, they're deducted from the following royalty payments.

Decree: Publishers of any size should update their technology so they can pay authors every month and handle returns like Amazon does.

Conclusion

These are very quick hits on some "standard" publishing contract provisions that I think should be changed both for general equity purposes and for the benefit of authors. There are other such "standard" provisions I haven't discussed.

Many of these unfair provisions came into being at a time when traditional publishers were the only game in town if an author wanted to turn her manuscript into a book that could be sold to both friends and strangers.

That is no longer the case.

Amazon's Kindle Direct Publishing program together with similar programs provided by Kobo and other companies have brought massive changes to the publishing world during the past several years.

As mentioned, Amazon is the largest bookstore in the world. Estimates vary, but most would agree that Amazon sells about half of the books sold in the United States. Many in the publishing world believe that Amazon's share of the market will continue to grow.

Barnes & Noble is the largest physical bookstore chain in the United States. A recent ownership and management change coupled with the impacts on retail businesses due to Covid-related shutdowns means that Barnes & Noble's retail future is likely to look different, perhaps much different, than it has in the past.

Ebooks are another major technology that has shaken up the publishing world. Amazon sells a huge percentage of all ebooks sold (or more appropriately "licensed") in the United States (and perhaps, elsewhere).

Because nothing physical is printed, shipped to warehouses, shipped to bookstores and shipped back to warehouses, generally speaking, ebooks are much more profitable for traditional publishers than print is. The same can be said for self-published authors, although print-on-demand hardcopy books mean that the self-published author doesn't need to pay for printing, warehousing, etc. The POD book isn't created until after it is ordered and paid for.

Essentially, with ebooks, after a manuscript is edited and prepared for publication, a publisher simply uploads a computer file for the text and another file for the cover along with an electronic copy of the sales blurb for the book to Amazon, Kobo, BN.com, etc., and receives monthly payments for each ebook sold.

As mentioned, Kindle Direct Publishing and other online publishing venues are also open for authors to self-publish their own books as ebooks and print-on-demand trade paperbacks. Amazon presents self-published books in its online bookstore in exactly the same way as it offers books from commercial publishers, large and small.

When ebooks were first introduced, unless you wanted to read an ebook on your desktop or laptop computer screen, you also had to purchase an ebook reader, often costing several hundred dollars. With the proliferation of Apple iPads and tablets running the Android operating system, a very large and growing number of people have the hardware necessary to purchase and read ebooks.

That said, I and other intellectual property and contracts attorneys also help intelligent and business-savvy authors who feel the benefits of working with a traditional publisher outweigh the potential benefits of self-publishing. For some authors, this is still a sound business decision.