

# Publishing Contracts Panel: Three Perspectives—Publisher, Author, IP Lawyer

**Panelists: Chris Schoebinger, Annette Lyon, David Vandagriff**

*This is a transcript of a presentation given on September 24–26, 2020, at the annual conference of the Latter-day Saint Publishing and Media Association (LDSPMA). You may not reproduce or publish this material without prior written consent from LDSPMA.*

**Annette Lyon:** Alright, we should be recording now. And so I'm Annette Lyon, and we'll see. I don't know what order you guys are on your screens, but Chris and then Dave, you identify yourself so everyone knows who you are.

**Chris Schoebinger:** Yeah, I'm Chris Schoebinger, I work for Shadow Mountain Publishing as the publishing director, and I'm happy to be here.

**David Vandagriff:** I David Vandagriff. I am an attorney, and presently I represent both authors and publishers, quite often with respect to publishing contracts and publishing agreements, and I also have a blog where I discuss publishing issues, called [thepassivevoice.com](http://thepassivevoice.com).

**Annette Lyon:** Yeah, and The Passive Voice is a one—if I remember correctly—is one where you aggregate a lot of sources and links.

**David Vandagriff:** Right.

**Annette Lyon:** It's like, here's the beginning of an article and read the rest over here. So it's a good resource for a lot of things. Yeah. So did you come out of retirement? I was thinking that you were retired, but you're practicing again.

**David Vandagriff:** I am practicing—and I probably qualify as semi-retired because I turn down matters that I don't think I can handle with any competence anymore, but I still represent authors and have done so for several years; authors from all around the world—one in Turkey, as a matter of fact.

**Annette Lyon:** For those who may not know, this type of law is IP or intellectual property.

**David Vandagriff:** Correct.

**Annette Lyon:** And then, of course, I'm the author on the panel here and I'm a hybrid, meaning I've done both independent as well as traditional self publishing, and I could name drop all day long, of the friends and agents I've been in contact with. So I've seen a lot of careers and experienced my own. So, that's the kind of the perspective that were coming in with all this. I wanted to start out with Chris as someone who has, you know, essentially kind of shepherded a lot of books to publication and success and all of that, if a brand new author gets their book accepted with Shadow Mountain, what do you hope that they will come to the table with as far as—what do you wish, ideally, an author would know going into negotiating? Right.

**Chris Schoebinger:** Good question. I'll start with, I actually think I have a pretty unique perspective, too, only because, although I'm a publisher for Shadow Mountain, I'm also an author with Simon and Schuster, as well as a ghostwriter, and so I've worked with numerous literary agents and other editors in New York houses and literally hundreds of other authors in the 32 years I've been in the book industry.

If there's one thing I've seen with publishing agreements, it's that almost everyone wants something different and that negotiating the contract is very standard process.

That would be the first thing I would tell a debut author is that's just part of the industry, part of business.

And really, my bread and butter is the authors. I need you. I need authors who are good at what they do and who are passionate about what they've written. And we want to partner with you, so the best book possible—the one that has every advantage of selling the most copies—is published and marketed well.

That's where the publishing contract comes in. Publishing contract is necessary so the publisher can fully invest in you and build your brand, knowing that we have an agreement, giving us rights to represent your intellectual property.

And a publishing contract is necessary, so a royalty structure is set and there's no surprises about who's getting paid and much and when.

**Annette Lyon:** Just to clarify, that's one of those things that, generally speaking, is kind of already set.

In my experience, oftentimes it's a tiered structure. So it'll start at a certain percentage of retail, and then once you've sold a certain amount of books it might bump up and then it might bump up again. If you have a hard back over a paperback, that number might start in a different place.

**Chris Schoebinger:** Yeah.

**Annette Lyon:** That's not something that's usually negotiable, from what I've seen.

**Chris Schoebinger:** Yeah, it actually is negotiable, believe it or not.

I mean, the publisher will offer, you know—now, again, for debut authors, it's a little harder to negotiate. I'll be completely honest. A little more seasoned author who has that success...

**Annette Lyon:** And a track record of sales.

**Chris Schoebinger:** ... right, you know, has a little bit easier time negotiating because the publisher's going to bend a little bit in that aspect.

**Annette Lyon:** I would also think that an author who has some experience or understanding of why the contract was written why it was, and then approach it with, well, not asking crazy things that are not realistic in the first place. So understanding how the contract works in the first place might be a good place to start.

**Chris Schoebinger:** Yeah, and that's why I think, if you're an author and you've decided to tune in, then you're a very serious author, because a contract is such a serious and important part of the business. I would say one of the most important items in a publishing contract for publishers is that first right of refusal, and it's in every standard contract. I'll tell you why it's important for me as a publisher.

Even before we sign a contract, a publisher is spending overhead dollars having meetings with our editorial, sales, and marketing teams, and trying to determine if your work is not only a good fit for us, but also that it's marketable, that there's a large audience out there to make this profitable.

Once a publishing agreement is signed, the publisher continues to dump money into your bucket to begin establishing and building your brand.

Note that I said brand and author, because a publisher isn't necessarily looking for a one-hit wonder.

**Annette Lyon:** You're looking for investment in a career.

**Chris Schoebinger:** Yeah, a publisher wants an author that has multiple ideas or stories that will lead to multiple books. That's the need for a brand. And that takes time and resources, and I always think how I would feel if a publisher dumped money into my brand bucket and there was no secure chance of the publisher getting my next book.

So, first right of refusal gives your publisher—remember, the one who just dumped all that money to build your brand—the opportunity to be the first one to at least read and consider publishing your next book.

**Annette Lyon:** I've seen cases where—this is usually with established writers—but, they'll have right of first refusal on this genre or that kind of thing.

It's not necessarily on everything you've ever written. And my first contract, I was doing a lot of magazine work, and the original contract was written that it was, you know, first right over anything that you would write next. I said, "I can promise you that you don't want to have my scrapbooking article," So we worked through that one.

**Chris Schoebinger:** I'm so glad you brought that up, because again, that's negotiable. I think the publisher just wants to know that we're a partner. In some sense, in some area.

**Annette Lyon:** As an author, on my end of things, the more I've understood contracts, the better I can go into talking with a publisher and saying, "Here's a concern I have, and here's a solution that I think will benefit both of us." If you walk in the door wearing boxing gloves, then all you're doing is starting a fight and nobody's going to be happy at the end of this.

**David Vandagriff:** Let me jump in for a moment, if I can. This is, this is 2020. The year 2020, not the year 1990. And I think that any discussion of authors and publishers that ignores Amazon, is very narrow and probably not fair to authors.

Amazon has completely upended the world of books and publishing and self-publishing by authors, for authors control their own books and they publish their own books.

Yeah. Before Amazon, self-publishing was kind of a nasty little vanity thing, where it cost you a lot of money and you gave all your friends books and you tried to sell it. If you were good friends with somebody who owned a bookstore, they might put a few copies in their bookstore. Your loss if it was unsold.

Amazon came along, and I won't bore you with the background, but basically the largest publishers in the United States got together and tried to freeze out Amazon, with Apple's help, basically to force Amazon to increase its prices.

For books, as well as everything else, Amazon likes to sell at the lowest price or one of the lowest prices and, as a result of that, Amazon really put a lot of muscle behind their self-publishing capabilities. And their contract, their Terms of Service is vastly different than the contract of any traditional publisher that I've seen of any size. I've worked for a couple of small publishers, what I call New Model Publishers, that want to feel like it's best and they can attract authors by breaking away from the standard format, but Amazon is a completely different animal.

Let me just toss out a couple of things. Number one, you can quit Amazon at any time.

There are terms and conditions, but you know what, if you decide Amazon's the personification of evil, you can pull your book down and quit selling it through that. You can pull your book down and make a deal with a publisher.

Number two—

**Annette Lyon:** I've seen that happen. The one caveat is, like I said, the Terms of Service, if your book is enrolled in the KDP, um...

**David Vandagriff:** Program.

**Annette Lyon:** Thank you. If it's in the KDP Program, then it is like a three-month thing. So you have to wait till the end of that.

**David Vandagriff:** Right. You've got it, in order to be in KDP, you have to pledge to keep your book at it for 90 days.

**Annette Lyon:** For those who don't know, that that means it's exclusive to Amazon.

**David Vandagriff:** Exclusive to Amazon during that 90-day period.

**Annette Lyon:** I think you can still publish on Amazon and not be part of KDP.

**David Vandagriff:** Absolutely, you can. Amazon does make it very attractive for many authors to participate in KDP because they add a lot of things in there.

Second big difference is in royalties. There are two parts to this. Number one, particularly for eBooks, Amazon pays much much higher royalties than any traditional publisher does.

**Annette Lyon:** Honestly, the traditional publisher is putting so much money into the book and they have a small profit margin, whereas Amazon isn't putting any money into your book.

**David Vandagriff:** Right, right. You are—

**Annette Lyon:** You're 70% or whatever.

**David Vandagriff:** You as the author are in complete control of your book, and you have to do all of the things that the publisher does, which includes prepare your book for publication, publish it, promote it, and that sort of thing. And you have to do that, but in return, for eBooks Amazon pays the author 70% of the sales price, or the list price, excuse me, that the author sets. This is orders of magnitude more than traditional publishers do.

The other thing with Amazon on the royalties is they pay royalties once a month.

Traditional publisher is twice a year.

In connection with royalties, an author typically has no idea, maybe if she talks to an editor or something she can get an idea of how the sales are going and get a rough idea of what the royalty check is going to be at the end of six months. With Amazon, she gets an online Dashboard, and she can see exactly how many books she's sold and where she sold them and exactly how much she'll receive in royalties. And Amazon pays each month.

**Annette Lyon:** There is two or three months of a lag because they have to do all the accounting and such.

**David Vandagriff:** Yeah, there's a little bit of a lag that they have.

**Annette Lyon:** But it is every month. That is nice.

**David Vandagriff:** Once you get through that then you're going to get a payment every six months, and so this is, the relevance of this to authors is that some authors are geniuses at self-promoting and are very good at promoting themselves and really enjoy that process. Other authors don't.

But, one of the things that I do most often for authors who are traditionally published is to help them get out of their traditional publishing contracts so that they can self-publish on Amazon. Their reasons are that they can earn more money. I can't go into any details because of client confidentiality, but I've worked with at least three Top 10 New York Times bestsellers to help them get out of their traditional publishing contracts, so that they can self-publish with Amazon.

It was a big fight, but they eventually made it, and they are all, as they've reported back to me, all making more money from Amazon than they did with traditional publishing contracts.

**Annette Lyon:** One thing to point out—

**David Vandagriff:** That included six figure advances in some cases.

**Annette Lyon:** One note on that one is your average self-publisher won't have that experience and I know one very successful national romance author who makes far more money publishing on her own—and she's a hybrid, so she still does the New York thing as well—but she's very open about saying, "I make as much money as I do because I can put 'New York Times bestseller' after my name." People look at the indie publisher, the book, and go, "oh, that still must be good."

**David Vandagriff:** Yeah, yeah. And so the indie publisher has to work harder at that.

Definitely. But my wife is an author, and has been an author for quite a number of years, and she was traditionally published first and then, when Amazon opened up self-publishing, she decided to switch over to self-publishing and her income has gone up a bunch from self-publishing. Now, she was not a New York Times bestseller. But she's been an Amazon number one bestseller in fiction. And she's earning more money, but she's willing to promote herself and advertise and send out a newsletter on a regular basis to a whole bunch of her readers.

**Chris Schoebinger:** I would say self-publishing for some authors is exactly the way to go. I mean, if you have the time and energy to do that to your book, and especially if you have had some success.

**David Vandagriff:** Yeah yeah

**Chris Schoebinger:** But the majority of authors don't see that kind of success.

And I know some self-published authors that are happy doing it, and good to them. They just found their niche and again, we have very successful traditional authors who were doing traditional publishing.

And they are just very happy because of the structure we provide for that author. And they're able to write full time because of this. But again, that's not the majority.

**David Vandagriff:** It's not a "one size fits all" kind of a situation that's, that's my main point.

**Chris Schoebinger:** I think—

**David Vandagriff:** You have to decide and as an author; the other has to decide what she or he really wants to do and what she or he is probably good at.

And if they have an introverted personality and they hate going out and talking to people, or they hate the idea of spending time on social media talking about their books, or something like that, then they may not be right for self-publishing.

But they have to be very good, and they have to be extremely good writers in order to be traditionally published, too.

**Chris Schoebinger:** One thing that Amazon doesn't do, in my understanding, is they don't have a reach into the school library market.

Traditional publishing has spent years and years and years, creating relationships with the school library market. And we spend a lot of time there catering to that audience. And so again, a little bit different clientele. But, it just depends on what you write, what your genre is, who you're trying to reach.



**Annette Lyon:** What do you want to be doing? If you want to just be writing and never, ever marketing, then don't do indie, because that's not going to be your happy place.

One thing I would also mention, as a writer myself, and just to other writers: before you jump into an indie platform, and with a traditional publisher, either one, is to be sure you know what you're getting into, as far as what the contracts actually mean.

Because, like with Amazon, if you have your book published on other platforms as well as Amazon—and this could be an accident on your part, like you did a sale and you forgot to change the price everywhere—but if they find your book up for sale cheaper elsewhere, you could get in big trouble, and then Amazon can yank your accounts. So you have to be very careful.

I had a case where I had one of my traditionally published books that I got the rights reverted back to me, so I was able to self-publish it. But then Amazon flagged it saying, "oh, this looks like it's been published before; it's plagiarized." And I was able to then pull out the documentation that said, well, I'm not plagiarizing myself, for one; but two, I do have the rights to publish this. So you just need to know what you're doing. ACX, I can't remember what it stands for, but it's the partner the Amazon and audible use for audiobooks.

If you're trying to be exclusive with ACX, there's like a six or seven year period where you are stuck with ACX. And that can be a great option, but you just, again, you just need to know what it is you're signing up for, what restrictions there are, what the pros and cons are. Read the fine print.

**David Vandagriff:** Read, regardless of whether you're thinking about self-publishing or going with a traditional publisher, read the contracts! Read the contract. I know it is not the most exciting thing you will ever read. I know it's been written by lawyers who are among the most boring authors you will ever find, but read it so you have some idea what's in it.

And if you really don't understand everything—and read it carefully, I mean, read it like you just started studying biology in college and you're reading a biology textbook. You're not going to understand everything but read it carefully, read it more than once. And that goes for Amazon Terms of Service and the separate terms that govern KDP participation. Those are all linked online, but read them so you don't make a dumb mistake. And if push comes to shove, and you read them and you say, "it is impossible for me to understand this," then you need to find somebody who does understand it and get some help before you sign up with them, before you sign on the dotted line.

**Annette Lyon:** There's lots of things you can find out online, you know like ROFR. That's what Chris was talking about: right of first refusal.

All these acronyms and that kind of thing, there are a lot of resources out there. But again read it, understand it, and if you don't understand it: ask.

**David Vandagriff:** Exactly. You can even take a sentence from a contract and drop it into Google and see what shows up.

There may be some lawyer like me online that says, "Okay, well, this is the contract language, this is what it means, this is how it works with other provisions in the contract, and these are the things you may want to watch out for."

**Annette Lyon:** I think we probably are out of time as far as just our own discussion. Chris, any final words before we go?

**David Vandagriff:** Oh, I'm sorry. Okay. Go ahead.

**Annette Lyon:** We'll have Chris do any final words and then you, David. And then we'll just open up to questions after that.

**Chris Schoebinger:** Yeah, I would say, whether you have an agent or you don't have an agent—it's not required to have an agency to solicit to Shadow Mountain. Some publishers require having an agent and others don't. So if you're looking for an agent, that's a whole other conversation to have. One bit of advice is you can go to publishers marketplace and that's a great tool for authors to kind of start to poke around and see what agents are out there and what they're looking for. But, whatever you do, make sure that either you have someone that understands "legalese", and can read the contract, and then help you make that educated decision.

**Annette Lyon:** Any other thoughts, David, before we open it up for questions?

**David Vandagriff:** Yeah, read the contract. An agent should give you an agency agreement. Read it, ask them questions about it. If there's anything that you don't like, tell them what you want and see if they're willing to work with you to change things to something that you feel is better. And the same goes for a traditional publisher.

It is very common for them to say, “This is the contract, this is our standard contract.” That’s the oldest—not only in publishing but everywhere else—that’s the oldest game in the book. It says, “this is our standard contract” and it implies all reasonable people have signed this contract, and you’re a weirdo if you don’t sign the contract, or if you want some changes in it. So just read it, understand it because these contracts with a traditional publisher will last for the rest of your life, plus 70 years in almost all cases.

**Chris Schoebinger:** So, you know, I’ve never called anybody weirdo. Just want to make sure that’s clear.

**Annette Lyon:** Well, we writers kind of can be, though, right?

**David Vandagriff:** Okay, yeah, end of wind-ups for me.

**Annette Lyon:** Alright, well thanks, gentlemen. we’ll stop our recording here and then we’ll hopefully have a lot of awesome questions to answer.

**David Vandagriff:** Okay, great. Thanks so much. Thank you.