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Fair Contracts For Authors

Two lawyers weigh in on author contracts

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In May 2015, the Authors Guild announced its Fair Contract Initiative, and more recently the International Authors Forum presented "Ten Principles for Fair Contracts." Both highlight the same "standard" contract terms. These include length of license, fair royalties on e-books, out-of-print and termination clauses, options, and noncompete clauses. There can be no dispute that current terms favor publishers over authors. In January 2016, authors' organizations around the world launched open letters demanding that publishers treat authors equitably by offering them fairer contract terms.

The essential message is that the balance "has tilted the wrong way, and it's often not only the work that's being exploited—its creators are, too," in the words of Philip Pullman, president of the Society of Authors, a U.K. organization. Even worse, according to the society's open letter: "Without serious contract reform, the professional author will become an endangered species." The Authors Guild is equally blunt: "Unfair terms in publishing agreements negatively affect authors' incomes and even their ability to write at all." Explicit in this call to arms is that publishers have the upper hand in the current market.

This *cri de coeur* has a long history, beginning even before the enactment of the Statute of Anne, the first modern



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copyright act, in 1710. Before there was a term of copyright, authors were compelled to sell their copyrights outright to printer/publishers, who expected to own them in perpetuity. John Dryden complained in a letter to his publisher in 1695 that all publishers were "sharpers" and that he was paid "in clipped coinage and brass shillings"—a sentiment with which modern authors will no doubt concur.

Despite the clamor of the open letters, however, publishers are not yet being heard from. The demands for fairness are not excessive, but it's a matter of negotiation. The contracts authors get are what publishers believe is the monetary value of their work. Congress understood this problem perfectly when the House of Representatives, in its report on the passage of the Copyright Act of 1976, stated that the purpose of the nonwaivable right of statutory termination was to safeguard authors against "unremunerative transfers [owing to their] unequal bargaining position... resulting in part from the impossibility of determining a work's prior value until it has been exploited." It is a truism that the "house" always wins when sellers have more urgent needs to sell than buyers to buy.

Still, trying to influence publishers to be fairer in their negotiations with all authors is worth trying, if only to achieve modest gains. Certainly, authors who "don't have powerful agents or lawyers" deserve a "fair shake," according to the

Authors Guild. It is true that "when negotiating with known agents, publishers often start from previously negotiated contracts that remove many of the most draconian provisions handed to unagented authors." So, the Authors Guild asks, "Why not do the right thing by all authors and eliminate those provisions for everyone?"

Part of the answer proposed by the Authors Guild is for publishers to offer a new set of standard clauses based on contract terms successfully negotiated by sophisticated agents and attorneys for bestselling authors. However, the issue is more complex than it first appears. Most books have a limited shelf life with uncertain sales. Lack of readership is a more certain answer to the Authors Guild's complaint that "authors' income is down across all categories" because of the "unfair terms, including reduced royalty rates."

However, this conclusion is a hard argument to prove, because even a modest royalty percentage (10% of list price and 25% of net receipts on e-books) will produce significant revenues on books that the public wants; increasing royalties on books that fail to find an audience will not measurably help many authors. Successful authors either create bestsellers welcomed by the larger reading public, or treat writing as a business and produce new works to replace books that don't sell well or have become stale.

While we applaud the initiatives of the Authors Guild and International Authors Forum and hope for a positive response from publishers, it's up to authors to protect their interests and fight for them, which means understanding legal rights and negotiating rather than acquiescing to whatever contract terms publishers put in front of them. ■

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