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Bright Ideas

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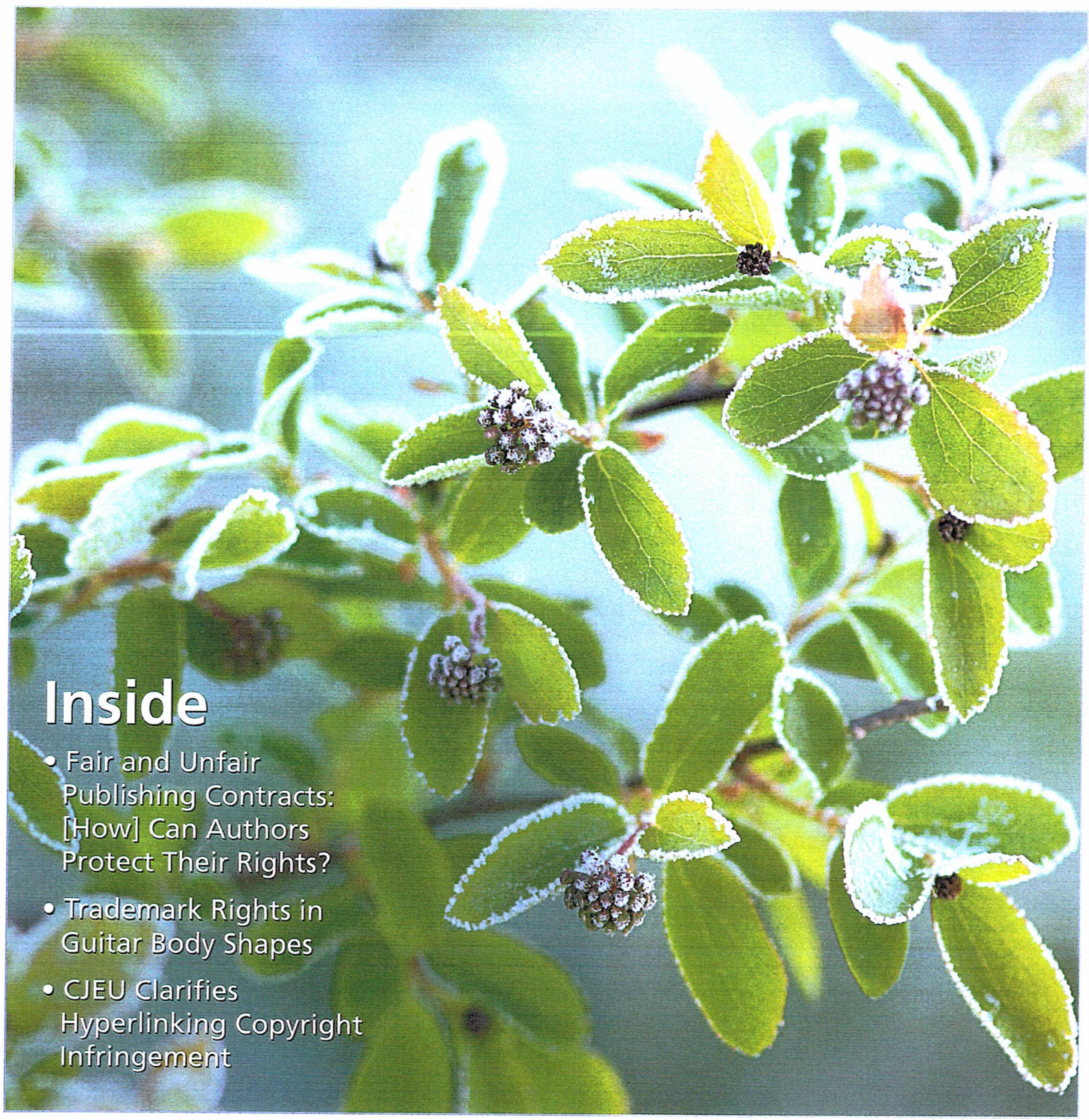

Inside

- Fair and Unfair Publishing Contracts: [How] Can Authors Protect Their Rights?
- Trademark Rights in Guitar Body Shapes
- CJEU Clarifies Hyperlinking Copyright Infringement

Fair and Unfair Publishing Contracts: [How] Can Authors Protect Their Rights?

By Gerald M. Levine and Sheila J. Levine

I. Introduction

In the United States authors' rights to enjoy the fruits of their labor are protected by the Constitution: "The Congress shall have power. . .to promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings."[1] This Constitutional grant of legislative authority is author-friendly in affirming that authors are entitled to the potential rewards made possible by a time-limited monopoly.

However, while the benefits of copyright initially belong to authors, once they assign their rights to publishers and other content distributors, the copyright baton passes, and authors cede control to their transferees. What authors get in exchange for this ceding of control depends on the contractual terms to which they have agreed. This generally means accepting terms that in light of a work's reception may be considered unfair when viewed in retrospect.

While the intended ultimate beneficiary of the fruits of creation is the public,[2] before the monopoly expires and a work enters the public domain, the primary beneficiaries, the parties who propose the terms and will control the rights, are publishers and producers who edit, print, package, market, and distribute works to readers and audiences.

The current duration of copyright is the life of the author plus 70 years.[3] While long copyright duration may create an illusion of value in the marketplace for authors, very few books enjoy shelf lives of more than a few years (and most substantially less) before they go out of print. The result is that most authors enjoy only short-term financial rewards unless their books remain on a publisher's active backlist, but the backlist is often a book's graveyard. The point has received substantial attention from one of the most astute commentators in the publishing industry, Mike Shatzkin. He notes in one of his Internet essays that authors "are right to leave and take matters into their own hands when [the backlist is inactive]." "Leaving," of course, depends on the terms and language of the "out of print" clause in the publishing contract.[4]

The conundrum is that while authors are the source of wealth, they are unlikely to receive a fair share of the profits from their works. The uneven distribution of profits between publishers and authors is not a modern phenomenon. It is explained by the economic law that in the commercial world the risk-taker receives the reward. A publisher's offer largely depends on its initial valuation of a work. As a result, while authors make a significant economic contribution, they come as sellers to markets controlled by buyers whose goals center on return on investment. Authors get what they can negotiate in exchange for giving up their rights. The irrefutable truth is that books have to be bought by readers before anyone can earn a living or profit from them.

II. Framing the Issue of Fair Publishing Contracts

Unquestionably, the advantage of duration is with transferees. Standard publishing contracts provide for assignment of exclusive rights for the "full term of copyright." This provision does not completely reflect the Copyright Act (as we discuss further below), but unless authors have negotiated to retain some of the "basket of rights" (e.g., derivative, motion picture, television, dramatic) granted in section 106 of the Copyright Act, all of those rights are effectively owned and exploited by publishers and producers even if the copyright is registered in the author's name. The Copyright Act makes clear in the definition of "transfer of copyright ownership" that authors are conveying and alienating their rights unless and until they are reverted.[5]

In May 2015 the Authors Guild (AG), the oldest and largest professional organization for authors in the United States, announced its "Fair Contract Initiative: Eight Principles for Fair Contracts" to take a "fresh look at the standard book contract," which the Guild criticizes as outdated and skewed in favor of publishers. More recently the Society of Authors (SOA) in England[6] supported, and the International Authors Forum (IAF) presented, its own Ten Principles for Fair Contracts.[7] The issue of fairness to authors and performers has even reached the political level in the European Union with the publication on September 14, 2016, of a Proposal for a Directive of the European Parliament and of the Counsel on Copyright in the Single Digital Market.[8]

The IAF explained:

> A contract is what governs *the relationship between authors and their business partners*, such as publishers or producers, and as such is vital in determining the working conditions of both parties. Too often it is imbalanced, favouring the preferences of the publisher. However, IAF wants to change this, and considers it vital that contracts enable authors to make a liv-

> ing from their work and ultimately, of course, to continue to create (emphasis added).

The IAF also includes a Principle addressing moral rights, which is not a feature of U.S. copyright law except as it applies to certain works of visual art.[9]

The Proposed EU Directive acknowledges the plight of authors. It calls on Member States to "ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."[10] In the SOA's newsletter its chief executive "urged the UK government 'to implement these clauses without delay,' and for the provisions to be adopted in UK law, given that the directive is unlikely to have effect until after Britain has left the EU."[11] The International Federation of Journalists (IFJ) also welcomed the proposed EU directive strengthening authors' contractual position.[12]

In their Principles, both the AG and IAF highlight and criticize the same "standard" contract provisions. Each core Principle from both organizations is connected to a clause generally found in current author/publisher agreements, including those addressing division of e-book profits, contract duration, ownership of copyright, non-compete and option clauses, reporting and payment of royalties, warranty and indemnification,[13] and manuscript delivery and acceptance.[14]

In January 2016 authors' organizations around the world followed up the Fair Contract initiatives with open letters to publishers demanding that they treat authors equitably by offering fairer contract terms. The international advocacy campaign is intended to "restore contractual balance to the author-publisher relationship and help authors achieve a fair return for the efforts they contribute to the *joint venture* of book publication." However, to talk about authors and publishers as "business partners" and "joint venturers" fundamentally misrepresents the relationship. Even if they are not adversaries in the conventional sense, authors certainly need advocates.[15]

Despite the clamor created by the open letters, one year and counting into the Fair Contract campaigns, if publishers are listening there has been little if any public evidence of their taking any action to offer more equitable contracts. For instance, the chief executive of the British Publishers Association responded as follows to the open letter from the SOA:[16]

> Publishers share the frustration of the author community that it is increasingly difficult for authors to make a decent living from their writing. However, we locate the principal source of this problem not in the contractual relations between publisher and author but in deeper market factors.

While the calls to action are timely and address important concerns, they nevertheless resemble Glendower's boast in *Henry IV, Part 1* that he "can call spirits from the vasty deep" to which Hotspur replies "Why, so can I, or so can any man; But will they come when you do call for them?"[17]

"There is no reason to believe publishers as investors think of the relationship with authors as anything other than an arm's-length agreement for exclusive rights to exploit the monetary value of a work."

III. Relative Negotiating Positions of Authors and Publishers

The first Principle of the AG Fair Contract Initiative is "The author-publisher partnership should be reflected in the author's share of profits." This fundamental Principle of the AG's Initiative is an ideal: there is no "partnership" in the sense of sharing profits, only the contractual obligation to pay advances, bestseller and prize bonuses, and royalties.

Whatever may have been true in the past, the publishing universe is now dominated by the "Big 5,"[18] which are themselves subsidiaries of global media empires. There is no reason to believe publishers as investors think of the relationship with authors as anything other than an arm's-length agreement for exclusive rights to exploit the monetary value of a work. When their veneer as servants of culture is stripped away, publishers are investors in literary properties who are interested in return on investment. This is made abundantly clear by provisions in publishing agreements that implicitly (and in some agreements, explicitly) disclaim partnership or other joint venture arrangements with authors.

While the author advocacy initiatives are directed to all publishers, there is a wide range of contractual terms and attitudes toward negotiation and accepting changes. Many of the worst publishing contracts, which are offered to authors on a "take it or leave it" basis, come from self-publishing and print-on-demand businesses. Traditional

and university press publishers begin with boilerplate contracts but generally are more willing to negotiate terms for books they want to acquire.

IV. Agented and Unagented Authors

In their letter to publishers dated January 5, 2016,[19] the AG identified two classes of authors and agents, claiming publishers do not treat them equally:

> When negotiating with known agents, publishers often start from previously negotiated contracts that remove many of the most draconian provisions handed to unagented authors. Why not do the right thing by all authors and eliminate those provisions for everyone?

According to this view, authors represented by literary agents are in a better negotiating position than unrepresented authors or authors with less well known agents. In fact, many publishers will not even consider unagented manuscripts, although if a potentially "hot" unagented manuscript reaches an editor's desk it will be acquired on the best terms that can be negotiated. In general, authors without literary agents or attorneys will be presented with boilerplate agreements which, although they naturally favor publishers, authors too often sign without reading.

While the author/publisher relationship is arm's-length, insofar as the contract terms are concerned it is also personal. The parties have to be on good terms, since they need to work together after the contract is signed. However, there is no law that requires authors to sign form agreements. It is up to authors and their literary agents and lawyers to try through negotiation to correct "unfair" contract provisions, to reserve as many rights as possible for authors, or even to consider withdrawing from negotiations if a publisher refuses to change contract terms.

V. Specific Fair and Unfair Contract Terms

Publishing agreements contain two kinds of provisions: those that publishers believe are necessary to protect and enhance their investment, which are sacrosanct, and others that they are willing to modify. The AG Eight Principles for Fair Contracts are a mix of both. Regardless of whether an author is represented, the contract terms that impact the publisher's return are essentially non-negotiable.

The AG's Eight Principles for Fair Contracts are set out on a chart with three unnumbered columns headed "Principle," "Fair Contract Terms," and "Unfair Contract Terms." As mentioned above, the first and fundamental Principle is "The author-publisher partnership should be reflected in the author's share of profits." The Fair Contract Term proposed by the AG for this Principle is "Authors should receive 50% of the publisher's net profits from e-book sales," while the Unfair Term is "The 25% of e-royalties that is the industry standard today."

The debate about the division of net profits from e-book sales between publishers and authors is at the heart of the Fair Contract Initiatives and has been debated within the industry since e-book sales became a significant part of the market. However, the Big 5 and most other publishers have been adamant in holding the line at 25 percent. Authors view this Unfair Contract Term as a draconian memorialization of the inherent financial imbalance between themselves as creators and publishers as exploiters. For productive authors with large sales, this unfairness is mitigated by receiving larger advances, which can be viewed as an unacknowledged increase in the royalty percentage for e-book sales.

The second AG Principle is "A publishing contract should be limited in duration." The accompanying Fair Contract Term is "Time limits—or 'use it or lose it' limits—on the publisher's right to exploit individual rights; time limits on the contract term as a whole." The Unfair Contract Term is "Unlimited time for publishers to exploit rights and no or limited obligation for publishers to revert unexploited rights." The duration of the contract clearly affects the publisher's revenues and profits. Consequently, it is difficult to modify for any author or agent. It may be possible for authors to obtain a reversion of unsold subsidiary rights or terminate licenses if a book is out of print (which is possible if carefully defined in the contract), but the concept of a "use it or lose it" provision or a limited license for the contract as a whole has been unacceptable to print publishers. E-book publishers typically insist on rights for a stipulated but limited term of five to seven years.

The insistence on the "full term of copyright" as the standard term of license also reflects the importance of backlist books to publishers' profitability, as already noted. It is well-known that the backlist is the financial backbone of the book industry, accounting for 25 to 30 percent of the average publisher's sales. Current titles, known as the front list, are often a gamble: they can become bestsellers, but they are much more likely to disappear in a flood of returns from bookstores. By contrast, backlist books usually have more predictable sales and revenues.[20]

The remaining six Principles in the AG Initiative in the order in which they appear are:

- Authors should be able to retain ownership of their copyrights;
- Authors must be able to publish subsequent books freely;
- Publishers' accounting practices need to be more timely and transparent;
- Authors should not be unfairly deprived of royalties;

- Warranties and indemnification clauses shouldn't place all financial risk for violation of third-party rights on the author; and
- Delivery and acceptance provisions shouldn't give publishers a way out of publishing a book.

There are other clauses not mentioned by either AG or the other associations that authors should pay attention to, including derivative rights; preparing revised editions; ownership of character rights in ongoing book series;[21] non-compete clauses that do not permit authors to use stipulated portions of their book for marketing or other purposes; dictating unfair reversion provisions that define "in print" as including print on demand and e-books; and an option that provides for the next book contract on the same terms. Without negotiation these terms unfairly favor publishers.

Other than unsatisfactory manuscript and warranty and indemnification claims, there has been virtually no litigation over any of the contract provisions addressed in the Fair Contract Initiatives. A number of actions against companies offering self-publishing services alleging fraudulent practices have been dismissed for failure to state claims.

VI. Statutory Termination Right Granted to Authors

The one area in which duration of copyright can make a significant difference to authors is for books that have a prolonged shelf life and ongoing economic value. Although publishers typically demand transfer of rights for the term of copyright (subject to out-of-print and reversion provisions), this grant is not enforceable under all circumstances and can be terminated well short of 70 years postmortem. The 1976 Copyright Act intervenes by granting authors a statutory reversion right to terminate exclusive licenses 35 or 40 years after the initial contract or publication of the work.[22]

Congress recognized the imbalance of power between authors and transferees when it included in the 1976 Copyright Act a reversion right that if exercised can terminate an exclusive license.[23] The potential termination encourages (or compels) transferees to negotiate new contracts that reflect the current value of a property. While the statutory termination is not a new concept, it significantly improves upon the 1909 Act by making the termination right nonwaivable.

The House of Representatives stated in its Report 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."[24] The statutory rules are complicated, and the benefits conferred can be lost by failure to follow them.

VII. Conclusion

The value of copyright rests on the ability of authors and their advocates to modify the terms of publishers' standard contracts. The Principles of the Unfair Contract Initiatives laid out by AG and other author associations establish important standards of fairness but are aspirations that will not be fulfilled by wishing. Fairer contracts can only be achieved through negotiation and compromise by publishers, authors, literary agents, and lawyers.

Endnotes

1. U.S. Constitution, Article I Sec. 8, Cl. 8.
2. *The Authors Guild v. Google Books*, 804 F.3d 202 (2d Cir. 2015) ("while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship").
3. 17 U.S.C. § 302(c). Works of corporate authorship, including works made for hire, have a copyright duration of 95 years from publication or 120 years from creation, whichever expires first.
4. "Publishers need to rethink their marketing deployments and tactics in the digital age to take advantage of their backlists." http://www.idealog.com/blog/ publishers-need-rethink-marketing-deployments-and-tactics-digital-age-take-advantage-backlists/ (July 28, 2014).
5. 17 U.S.C. § 101: "A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright."
6. The SOA noted that "[s]tudies across the world have shown that authors' earnings are falling fast. Authors remain the only essential part of the creation of a book and it is in everyone's interests to ensure they can make a living. While there are many factors behind the decline, unfair contract terms, including reduced royalty rates, are a major part of the problem. So we want to address the issue before it is too late, and we're asking for your co-operation." http://www.societyofauthors.org/News/News/2016/Jan/International-call-for-action-on-contracts.
7. The 10 principles are contained in a covering letter dated August 10, 2016.
8. A copy of the Proposal can be found at https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market.
9. 17 U.S.C. § 106A.
10. Proposal, Art.15.
11. Nicola Solomon. The newsletter can be found at https://www.theguardian.com/books/2016/sep/21/philip-pullman-calls-for-uk-to-adopt-eu-plans-to-protect-authors-royalties.
12. http://www.ifj.org/nc/news-single-view/backpid/1/article/ifjefj-welcome-proposed-eu-directive-strengthening-authors-contractual-position/.
13. A typical contract term that an author can now expect to find requires the author to represent that "all factual statements in the Work are either true, if they purport to be based on Author's personal knowledge, or, if they are not based on Author's personal knowledge, are based on Author's reasonable and adequate research and are believed by Author to be true." *See In re A Little Million Pieces*, a class action composed of readers from at least five states who claimed to have been defrauded by Random House, Inc. and the author, James Frey, for misrepresenting the work as a memoir. The case was settled. Other typical warranties are (1) Author is the sole author of the Work; (2) the Work is original; (3) the Work has never been published in whole or in part in any form, and (4) the Work is not in the public domain in

any country in the Territory. Hachette recently filed a complaint in the Southern District of New York for breaches of these warranties, alleging that "[t]hat the manuscript delivered in 2016 is not ... original to [the author], but instead is in large part an appropriation of a 120-year-old public-domain work." *Hachette Book Group v. Seth Grahame-Smith and Baby Gorilla, Inc.*, No. 16-cv-06752 (S.D.N.Y. filed Aug. 26, 2016).

14. New York courts have weighed in on the issue of the unsatisfactory manuscript clause. *See Random House, Inc. v. Gold*, 464 F. Supp. 1306 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979) ("allowing unfettered license to publishers to reject a manuscript submitted under contract would permit 'overreaching by publishers attempting to extricate themselves from bad deals'"); *Harcourt Brace Jovanovich, Inc. v. Goldwater*, 532 F. Supp. 619, 624 (S.D.N.Y. 1982) ("[P]ublisher could simply make a contract and arbitrarily change its mind and that would be an illusory contract"; *Doubleday & Co. v. Curtis*, 763 F.2d 495, 501 (2d Cir. 1985) ([termination must be] "made in good faith, and that the failure of the author to submit a satisfactory manuscript was not caused by the publisher's bad faith"). In an unpublished decision, *HarperCollins Publishers, L.L.C. v. Arnell*, 600507/08 (S. Ct. N.Y. Cty. 2009), the court noted that "generally, a publisher may not terminate a book contract on the basis that a manuscript is unsatisfactory, if it has provided no editorial assistance to the author prior to submission of the manuscript."

15. Nicola Solomon also stated that publishers "too often fail to give their authors full information on sales and exploitation of their work. Many more gain an unfair windfall when a work is an unexpected success but do not share any of that gain with authors. This unfairness leads to many authors no longer being able to make a living from writing and, if unchecked, threatens the creative excellence of our publishing industries." http://www.societyofauthors.org/News/News/2016/September/New-Safeguards-for-Authors-Proposed-in-EU-Draft-Di.

16. Publishers Association chief executive, Richard Mollett, commented January 7, 2016, http://www.publishers.org.uk/policy-and-news/news-releases/2016/the-pa-responds-to-soa-open-letter-on-author-contracts/.

17. Act 3, Scene 1.

18. Hachette, HarperCollins, Macmillan, Penguin Random House, and Simon & Schuster.

19. AG's January 5, 2016 letter can be read online at https://www.authorsguild.org/wp-content/ uploads/2016/01/AAP-Open-Letter_Final-UPDATED-With-Logos1.pdf.

20. *See supra* note 4 and other essays by Shatzkin as well as regular articles in Publishers Weekly.

21. To take a prominent example: Tom Clancy accepted an offer from the Naval Institute Press as a first time author and signed its standard contract, which included an assignment of the copyright to the publisher. No one could have foreseen the extraordinary reception of *The Hunt for Red October*, but by signing the contract with that term he contracted away rights to the characters in the book. The matter was settled in arbitration.

22. 17 U.S.C. §§ 203 & 304.

23. The formulaic phrase "all continuations, extensions, and renewals thereof" typically found in publishing agreement does not override an author's or heirs' statutory rights provided in sections 203 (grant of right or publication after January 1, 1978) and 304(c) (grant of right or publication prior to January 1, 1978).

24. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 124.

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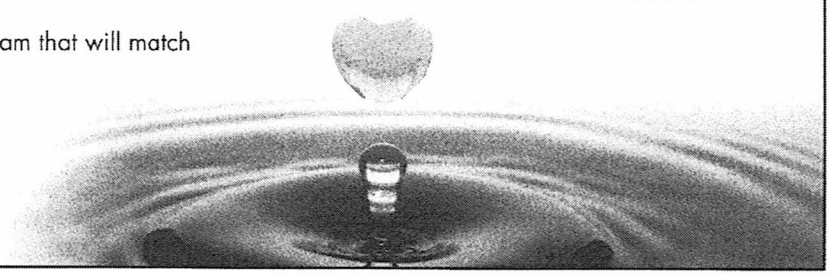

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