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COMMENTARY

The Rights Provisions of a Book Publishing Contract

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ABSTRACT

When signing a publishing contract, an author makes decisions which directly affect the book's availability. In order to decide judiciously which rights to retain and which to transfer to a publisher, she needs an understanding of U.S. copyright law and the author-publisher partnership. In this commentary, a scholarly communications professional who has over 16 years of experience in academic publishing, and who has authored six books herself, explains the rights provisions of a book contract. First, she discusses copyright ownership and describes the ways in which copyright's components apply to scholarly books. After enumerating the benefits and drawbacks of allocating specific rights to a publisher, she highlights contract wording to watch for and suggests the rights an author may wish to retain by negotiating an addendum. She then explains how an author may reclaim rights granted to a publisher through reversion or termination of transfer. In the conclusion, she recommends that outreach programs target scholars at critical moments when they face decisions regarding publication of their work.

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INTRODUCTION

During a workshop held at the 2016 *Frankfurter Buchmesse* (Frankfurt Book Fair), leaders in the copyright industries (e.g., music, film, publishing) warned that, with the rise of digital technologies and new means of delivery and consumption, content creators must become increasingly rights savvy. They must be able to navigate contracts, determine which rights to transfer, understand how the other contract parties will capitalize on those rights, and ascertain what compensation they themselves will receive (Ambrose, 2017). A recent report, funded in part by the Arts and Humanities Research Council in the United Kingdom, confirms that academic authors also need instruction about rights and licensing options (Collins & Milloy, 2016, pp. 25, 77). Recognizing the obligation to provide such training, the Confederation of Open Access Repositories (COAR) and the North American Serials Interest Group (NASIG) included familiarity with the full range of publishing options and the rights these entail as an essential competency for scholarly communications professionals (Calarco, Shearer, Schmidt, & Tate, 2016; NASIG, 2017). Granted, college and university libraries already provide information about copyright and author's rights; but it centers on journal articles rather than scholarly books (Alvarez, Bonnet, & Kahn, 2014; Wirth & Chadwell, 2010). This emphasis is not surprising, given that serial costs originally spurred the library and information science (LIS) community to advocate for open access (OA) and that publishing guides in LIS concentrate on articles (e.g., Goetting, Miguez, Curry, & Richard, 2007; Hollister, 2013). A book, however, differs significantly from an article because of the author-publisher partnership, financial arrangements, multiple options for formats, diverse means of distribution, and greater potential for derivative works. All these factors involve a complex configuration of rights detailed in the author's contract with the publisher.

In this commentary, I explain the rights provisions of a book publishing contract.¹ It is important to note that each publisher designs its own contract template which it then adapts for each book, yet every contract must address the same key rights issues. I draw on my broad and deep professional experience, which includes more than 16 years in scholarly publishing working for three university presses, during which time I negotiated contracts for more than 250 books and evaluated the rights provisions in hundreds of other contracts. In addition, an author myself, I have published six books. As a result, I have firsthand knowledge of industry perspectives and practices, such as the preference for business-to-business agreements for translations, which isn't generally available to outsiders. Rather than relying solely on my own experience, however, I also refer to guides written by legal

¹ I cover other aspects of the book publishing contract in chapter 6 of *Writing and Publishing Your Book: A Guide for Experts in Every Field* (Herr 2017).

professionals with expertise in the publishing industry (e.g., Fishman, 2017; Levin, 2009; Murray & Crawford, 2013) as well as to industry, legal, and LIS sources.

Throughout this discussion, I follow the logic of an author's decision-making process. Before an author may negotiate with a publisher, she must own the rights to the work.² I explain how to determine ownership and how three components of copyright—reproduction, distribution, and the creation of derivatives—apply to a scholarly publication. The contract creates a business partnership whereby the author exchanges rights in the work for the publisher's services, which may include rights marketing and management as well as publication and sale of the work, and a share of the resulting profits. Urging thoughtful consideration of the trade-offs, I describe the benefits and drawbacks of allocating specific rights to a publisher. I also highlight contract wording to watch for and suggest the rights an author may wish to retain by negotiating an addendum. The contract itself should provide for reversion of rights, as I explain; and copyright law empowers an author to regain rights granted to a publisher through a termination of transfer. In the conclusion, I recommend that outreach programs target scholars at critical moments when they face decisions regarding publication of their work.

Copyright

Before the author can sign a publishing agreement, she must own copyright in the work. According to the *U.S. Copyright Act of 1976*, copyright belongs to the author of the work; co-authors own copyright jointly (§ 201(a)). However, if the author undertook the work as part of her job duties or as a work-for-hire, her employer or contractor may own copyright (§ 201(b)). The courts have provided criteria for determining who counts as an employee and if a work falls within the scope of employment (Gilbert, 2016, pp. 821–24). The extent to which these criteria apply to the full range of faculty and their scholarly products, however, remains unclear (Fishman, 2017, pp. 169–70; Smith, 2014, pp. 63–71). Notably, in “Principles and Proposals for Copyright Reform,” the Authors Alliance recommends that the law more narrowly define work-for-hire and that, in order to safeguard “academic freedom and the integrity of academic work, educators should have rights in their own research and teaching materials” (Authors Alliance, n.d.-a, p. 2). Many institutions have adopted intellectual property policies. However, because they operate as default guidelines, subject to exception or dependent upon an individual's hiring agreement, they have not definitively resolved the legal—or ethical—questions regarding faculty copyright ownership (Smith,

² Following the legal convention, I use the term *work* to refer to the subject of the contract. Whereas *book* calls to mind a codex, *work* denotes the malleable content that may appear in various manifestations.

2014, pp. 71–76; Rooksby, 2016, pp. 182–86, 271–73). Certainly, the author should read her institution’s policy; but she might also consult her dean or provost about how, precisely, it applies to her work.

Copyright bundles together six rights—reproduction, distribution, creation of derivative works, public display, public performance, and public performance by means of audio-digital transmission (§ 106). The first three, in particular, are pertinent to a scholarly work; and the author may partner with a publisher in order to use them to the best advantage. In this partnership, the author supplies the content (i.e., the work) and specific rights associated with it while the publisher supplies the capital and expertise to publish, market, and distribute it in diverse formats, by various means. The publisher also acts as a rights broker, negotiating licenses with third parties for translations, new editions, derivatives, and other uses of the work. The legal document forging the author-publisher partnership, the publishing contract enumerates the rights retained by the author, the rights transferred to the publisher, the division of revenue from sales and licenses, and the conditions under which the author may regain the transferred rights.

The author and the publisher also act as partners in safeguarding their rights. Whereas inventors must follow a highly formal, multistep application process before receiving a patent, U.S. law grants an author copyright the moment her work becomes “fixed in any tangible medium of expression” (§ 102). Yet without formal registration, enforcement is difficult. Therefore, in order to deter infringement and to take legal action against offenders if it does occur, the publisher registers the work with the Copyright Office (§ 411(a); Murray & Crawford, 2013, pp. 29–30). The scholarly publishers with whom I’m familiar clearly state in their contracts that they will register copyright in the author’s name, but a publisher whose contract calls for registration in its own name should be willing to negotiate. Regardless of whose name appears on the registration, the publisher requires particular rights in order to fulfill its contractual obligations and seeks exclusive use of these rights in order to defend its market. As I explain below, the author may want to negotiate an exception to this exclusivity allowing her to use the work for professional purposes.

Reproduction and Distribution Rights

Under U.S. law, copyright includes the right “to reproduce the copyrighted work in copies” (§ 106 (1)) and the right “to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending” (§ 106 (3)). Despite readily available digital means of reproduction and distribution, academic authors value publishers’ services: peer review, quality editing, professional design, efficient production, targeted marketing, global distribution, and especially the imprint of a reputable brand (Collins & Milloy, 2016, pp.

17–19; Jubb, 2017, pp. 35, 183). By granting the right of reproduction, the author allows the publisher to produce multiple copies of the work in diverse formats (e.g., print, e-book, audiobook). By granting the right of distribution, she allows the publisher to sell, rent, donate, or otherwise disseminate the work across the territory identified in the contract (e.g., North America, the world). In recent years, publishers have developed both new formats and new distribution methods, such as e-book packages offered to libraries (Schonfeld, 2016).

In the publishing contract, each format and means of distribution corresponds to a payment arrangement. In the author-publisher partnership, the author contributes the work and certain rights to it, while the publisher supplies labor, raw materials, and capital. Royalties are, essentially, a form of profit sharing. The majority of the publisher's costs are pre-publication costs, representing a substantial investment before the work begins to generate revenue. Once the publisher recoups this initial investment, the unit cost declines (Maron, Mulhern, Rossman, & Schmelzinger, 2016; Soloveichik, 2014). As the publisher's profit margin increases, so does the percentage of revenue shared with the author; hence the contract may provide for graduated, or tiered, royalties.

As an example, let's envision a monograph on baroque architecture. Given the high production costs, the author agrees to waive royalties on the initial hardcover sales. The contract lays out the royalty schedule: 0% net revenue on the first 1,000 copies sold, 3% net revenue for 1,001 to 3,000 copies sold, and 5% net revenue for all copies sold thereafter. Net revenue refers to the actual income from a transaction: if the hardcover has a list price of \$65.00 but a retailer receives a 30% discount, the net revenue for this sale is \$45.50. The list price and the retail discount fluctuate; but for this example, let's assume they remain stable. Note also that the contract specifies copies *sold*, not copies published. Thus, the author receives no royalties for the first 1,000 hardcovers sold, \$1.37 for each of the next 2,000, and \$2.28 for all additional hardcovers sold.

Whereas other print editions follow a similar tiered structure, royalties for digital formats are a flat percentage of the net revenue. For copies of the work distributed under specified circumstances with very low or no revenue (e.g., foreign sales, deep discounts, review or exam copies), the author may receive a flat percentage or no payment. In addition to the royalty terms, the contract states how often the publisher will issue royalty checks and statements reporting sales and earnings. The publisher may also give the author a certain number of copies of each published format and offer a discount on purchases for personal and professional purposes. If the author grants the publisher exclusive distribution rights, she may not resell books for her own profit (Murray & Crawford, 2013, pp. 165-73).

Derivative Works and Subsidiary Rights

In addition to reproduction and distribution, copyright includes the right “to prepare derivative works based upon the copyrighted work” (§ 106 (2)). Publishing professionals use the broad term *subsidiary rights* to refer to rights to all possible derivatives and manifestations of a work, ranging from foreign-language translations and magazine excerpts to young readers’ editions and film adaptations. All of these remain mere possibilities, however, unless individuals with the necessary skills, resources, and incentive take an interest in the work. But how will they discover the original and obtain a license to use it in a way that will make their investment in generating a new work feasible? In the 21st century, rights management has become more essential—and more complicated—than ever (Bide & Wise, 2010; O’Leary, 2017; Potter, 2009). Successfully marketing licenses and negotiating agreements requires expertise that authors lack (Ambrose, 2017; Collins & Milloy, 2016, p. 77). Furthermore, in my experience, publishers and other media companies prefer to negotiate directly with industry peers. If, for example, an author retains translation rights with the intention of marketing them herself, she may well find foreign publishers unresponsive. For these reasons, the publisher acts as the author’s agent, brokering deals with other publishers, media outlets, and various content providers around the world.

The publisher’s rights and permissions team actively markets subsidiary rights through international book fairs, rights catalogs, and professional networks (Anderson, 2018; Book-Expo, n.d.; Frankfurt Book Fair, n.d.; London Book Fair, n.d.). The publisher may lease translation rights to a Korean publisher, for example, or license the rights for a film adaptation to a studio. Sometimes the publisher grants an exclusive license, as when it allows the *Chronicle of Higher Education* to publish a selected passage prior to the book’s official release. Other times, the publisher grants nonexclusive permission to use the work, as when it allows several instructors to include the same chapter in their course packs simultaneously. Both exclusive and nonexclusive licenses permit the use of only the specified content for a specified purpose, for a specified time period, in a specified territory (Murray & Crawford, 2013, pp. 55–60).

Clearly, an author stands to benefit if she entrusts subsidiary rights to a publisher. First, she receives a percentage of license revenue, either a royalty or a one-time payment (Murray & Crawford, 2013, pp. 55–60). More importantly, as her work becomes available in diverse languages, formats, and media, she gains greater exposure, resulting in greater measurable impact and potentially more speaking engagements and more opportunities for collaborative research—all of which can advance her career. Not surprisingly, academic authors claim to be more interested in the professional capital resulting from a book and its multiple manifestations than in royalty income (Jubb, 2017, p. 13). Before granting subsidiary

rights, however, the author should inquire about the publisher’s licensing track record and its rights marketing plan for her work. If the publisher offering the contract cannot deliver expert rights management services, she should investigate other publishers.

Asserting and Reclaiming an Author’s Rights

Empowered with an understanding of copyright, its components, and the author-publisher partnership, the author can make astute decisions regarding the rights in her work. There are a few rights provisions which, if discovered in a contract, should make her wary.³ She may choose to eliminate them—literally striking a single line through the words and initialing the change—or temper them by negotiating an addendum.

First, a blanket clause granting the publisher “all rights to the work” should rouse suspicion. A trustworthy contract identifies, one by one, the rights granted to the publisher. The second type of clause to be wary of makes the publisher the default owner of all rights not otherwise allocated in the contract. Unforeseen circumstances and unexpected opportunities can raise questions about which partner owns unspecified rights. Technological innovation in the publishing industry serves as a case in point: today’s digital formats and means of distribution didn’t exist a few decades ago. Consequently, the author would be wise to request an addendum stipulating that she retains all rights not explicitly granted to the publisher (Levin, 2009, p. 452; Murray & Crawford, 2013, p. 156).

Third, throughout the contract, the author should make note of the word *exclusive*. In addition to assigning exclusive reproduction, distribution, and derivative rights to the publisher, the contract may prohibit the author from producing “competing works,” meaning anything that potentially threatens sales. Therefore, she may want to negotiate an addendum explicitly permitting her to use the work for her own teaching, research, and professional publications (Levin, 2009, p. 475). This addendum might also allow an open access version of the work. It is noteworthy that several university presses are exploring ways to support open access books (“University Press Forum,” 2018); and in my experience, publishers strive to accommodate requests for open access. The author addendum promoted by the Scholarly Publishing and Academic Resources Coalition (SPARC) provides model language

³ Publishers do not make their contracts publicly available, so I cannot provide actual examples of suspicious wording. The Kernochan Center for Law, Media, and the Arts at Columbia Law School offers an online collection of sample clauses from various kinds of rights agreements (Kernochan, n.d.), but it doesn’t state the sources of these clauses and, apparently, none were extracted from scholarly book contracts.

for securing the author's right to reproduce, distribute, and create derivatives of her work for noncommercial purposes (SPARC, n.d.). Designed with a journal article in mind, the SPARC addendum may need some modification to accommodate a scholarly book; but it provides a starting place for negotiating with a publisher. The Authors Alliance offers additional tips for negotiating an addendum in the introductory guide *Understanding Open Access* (Rubow, Shen, & Schofield, 2015).

Finally, a clause stating that the author grants rights to the publisher irrevocably or in perpetuity should trigger alarms because it directly contradicts copyright law. According to the *U.S. Copyright Act*, an author may terminate an agreement transferring rights to a publisher 35 years after the transfer date (i.e., date of the contract) (§ 203). The provisions differ somewhat for works that were already under copyright as of January 1, 1978, for which the author granted rights prior to that date (§ 304 (c)). A contract cannot trump this provision because the right of termination is inalienable: an author cannot surrender it, even voluntarily. However, termination of transfer affects only rights in the original work; the publisher retains rights in any derivative works completed prior to the termination date (§ 203; Gilbert, 2016). For the author who wants to regain her rights through a termination of transfer, the Authors Alliance has produced a manual with step-by-step instructions and fill-in-the-blank templates for this tightly scripted legal process (Doran et al., 2017).

Rather than declare its provisions irrevocable, the contract ought to specify the conditions under which rights revert to the author. In addition to a breach of contract by either party and termination of the contract, such conditions may include minimum annual sales figures for the work or the publisher's failure to keep it available in a particular format. If the contract does not contain such a clause regarding rights reversion—or if the clause is unsatisfactory—the author will want to negotiate an addendum (Cabrera et al., 2015, pp. 40–56; Levin, 2009, p. 476; Murray & Crawford, 2013, p. 178–79). Regardless of the terms agreed upon, however, an author may request a rights reversion at any time. *Understanding Rights Reversion*, published by the Authors Alliance, walks the author through the decision to regain rights and subsequent negotiations with the publisher (Cabrera, Ostroff, & Schofield, 2015). With the rights back in her own hands, she may approach other publishers, self-publish her work, or make it available in an open access venue.

CONCLUSION: AN OUTREACH STRATEGY

Timing matters. Effective outreach provides scholars with information about rights at key moments when they face decisions about publishing their work. I propose two separate but overlapping outreach programs: Phase One, designed for first-time authors (e.g., grad-

uate students and junior faculty) and Phase Two, designed for established authors (e.g., full professors, faculty nearing retirement).

The choices which an author makes regarding rights to her work when she signs a book publishing contract could potentially limit the options available later. Consequently, Phase One covers copyright ownership, the author-publisher partnership, the key rights provisions of a contract, the author exchanges specified rights in her work in return for the publisher's financial investment, expertise, and services. [Table 1] The central message is that, through the contract, authors exchange specified rights in their work in return for the publisher's financial investment, expertise, and services. Presenting the contract as the foundation of a business partnership introduces the possibility of negotiation. An author should not feel coerced into accepting unsatisfactory terms. Indeed, Cabrera et al. (2015) found that trade and scholarly publishers “view their authors as partners and that they want to work with their authors to do the right thing for the author and the book” (p. 74). The author is advised: “So long as you remain reasonable, flexible, creative, and persistent, you may be able to negotiate agreements with your publisher to advance your goals” (p. 100).

Table 1. Phase One Outreach

Title: Understanding Your Book Contract
Target Audience: first-time book authors
Core Message: The book contract forms the foundation of a partnership in which the author exchanges specified rights in her work in return for the publisher's financial investment, expertise, and services.
Content Outline:
Copyright ownership
Author-Publisher partnership
Key rights provisions of the contract
Reproduction (formats)
Distribution (means of distribution; author's compensation)
Derivative works (subsidiary rights; author's compensation)
Wording to watch out for
All rights granted to the publisher
All rights not specifically allocated in the contract default to the publisher
Exclusive rights granted to the publisher; prohibition of competing works
Irrevocable or perpetual grant of rights
Negotiating with the publisher
Open access addendum
Addendum allowing the author to use the work for professional purposes
Reversion of rights

Focused on late-career authors seeking new ways to keep their work vital, Phase Two delivers the message that they can revisit their initial publishing choices. This outreach introduces open access, shows authors how to read a contract and determine which rights were granted to the publisher, and explains how to negotiate a rights reversion or obtain a termination of transfer. Authors may also take inspiration from peers who have successfully reclaimed their rights and reissued their work under a new arrangement. Julia Watson offers her own experience as an example, and the Authors Alliance provides testimonials on its website (Authors Alliance, n.d.-b; Watson, 2018).

Table 2. Phase Two Outreach

Title: Reclaiming Your Rights, Revitalizing Your Publications
Target Audience: established authors
Core Message: By reclaiming rights previously granted to a publisher, an author can make her work freshly available as an open access publication or under other terms of her choosing.
Content Outline:
Open access, the basics
Rights provisions of a book contract
Determining which rights the author granted to the publisher
Reversion of rights
Termination of transfer
Negotiating with the publisher
Testimonials

By strategically timing outreach and arming authors with knowledge at the moment they most need and desire it, scholarly communications experts can empower them to make judicious choices throughout their professional lives.

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