

Next Book Option In Publishing Contracts: Benign to Toxic

In May 2015 the Authors Guild announced its “Fair Contract Initiative.” So far it has addressed royalty rates on e-books (should be 50% of net receipts not 25% as it presently is), term of license (should be less than term of copyright which is the default term for print books), name of copyright owner (should always be author not publisher), and next book option (should be strictly limited).

These white papers from the Authors Guild are available on its website at <authorsguild.org>, are extremely valuable, and should be mandatory reading for all authors. The Fair Contract Initiative is necessary because so many publishing contracts contain unfair terms the consequences of which may not always be understood and simply pass unnoticed. The contract an author ultimately signs depends on the acuity of his or her agent’s or counsel’s negotiating skills. Happy though authors may be to receive a contract they should nevertheless be alert to their interests, be prepared to question provisions, and not merely accept the terms offered.

While not all publishers are amenable to negotiation the next book option should receive authors' attention because it represents a contingent but unknowable benefit that can only be valued after the fact of the original contract. First look provisions run the gamut from benign to toxic. Although they are one time provisions satisfied when the publisher declines a proposal---even if the proposal does not find a publisher and the book never written---they can nevertheless be a stranglehold on the author.

Let’s look at a benign clause first and point out the features that make it acceptable:

The Author will submit to the Publisher proposal for her next book. The Publisher has the first right of refusal for a term of [stipulated days] from receipt. If the Publisher desires to publish the Work and the Publisher and Author are unable to arrive at a mutually agreeable fee for the optioned Work within an additional [stipulated number of] days, then the Author shall be free to sell the Work elsewhere.

The provision is benign because 1) the Author is obligated to submit “a proposal” not a complete manuscript; and 2) Publisher is limited to two time periods within which to exercise its “first right of refusal” and then negotiate a “mutually agreeable fee for the optioned Work.” Only if the Publisher exercises its option right is 2) triggered and only if a mutually agreeable fee is negotiated will the Publisher obtain rights to the book. The author is not obligated under this provision to accept any fee Publisher proposes. Without the kind of topping privilege typical in toxic provisions the provision is mutual and therefore harmless.

Less benign is the addition of “outline” to “proposal for [author’s] next book.” An outline is usually two sample chapters. It requires the author to undertake additional work but it is not unacceptable if the terms of the contract are otherwise fair. A provision which moves to the unacceptable changes “an outline and proposal” to a “complete manuscript.” As the Authors Guild properly points out “[t]his means that the author is writing the entire book without an advance—defeating

the very purpose of an advance, which is to provide an author with money to write the book in the first place.”

There are four restrictions that may appear in a toxic net work provision:

- Author shall not enter into a contract for publication of the work proposed upon terms less favorable than those offered by Publisher;

[Comment: In all toxic provisions the author is required to disclose the terms of any offer for the next book by any other publisher.]

- Author shall provide Publisher with the details of any offers prior to entering into an agreement with another publisher;

[Comment: In addition to the limitation noted above this can discourage offers from other publishers and may limit interest in the book.]

- Publisher shall have the right to acquire rights in the work proposed by matching all the material terms of the best bona fide offer for the work the Author receives from another Publisher, and

[Comment: This requirement prevents the author from making a strategic move to a new publisher]

- If Publisher exercises the option it obtains the next book on the “same terms” as in the first publishing contract.

[Comment: Author is stuck with provisions negotiated on an earlier work for a new work with potentially greater economic value].

It is obvious that each additional requirement limits the author’s opportunities. While that may be optimal for publisher it is unacceptably intrusive for the author who effectively cedes control of the project.

Rather, an author’s goal in bargaining for a mutual next book offer is a mutual option on the benign terms suggested above. Although a next book option may be flattering in that it signifies Publisher’s approval of an author’s work it can be dangerous if the language is not properly limited. Toxic additions tip the contract too far in the publisher’s favor at the author’s expense and should be negotiated out if at all possible. The optimal provision should require a quick decision on a proposal. If the publisher is not interested in the proposal it eliminates the option provision and allows the author to move forward unimpeded.