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LEGAL ISSUES

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Legally Speaking — Delivery and Acceptance of a Manuscript

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You've just received a manuscript from an author who's under contract and, after reading the manuscript, your editor is disappointed by the manuscript's quality and contents. Not only is it poorly written, but also the research is incomplete and the text is not from the point-of-view you originally expected. May the publisher reject the manuscript as being unsatisfactory or must the manuscript be published despite its deficiencies?

Although the publisher under most circumstances cannot reject the manuscript out-of-hand without first trying to work with the author on overcoming the problems the publisher has with the manuscript, if the author does not subsequently correct the problems to the publisher's satisfaction, then the publisher may have the option to reject the manuscript as being unacceptable and refuse to publish the author's work.

Introduction

There are any number of reasons a publisher may be displeased with the manuscript submitted by an author. It may be poorly written, contain factual errors, not have the tone that was expected, or may not reflect the contents of the author's outline or proposal presented at the time the publisher contracted with the author for the publication of the author's work. In addition, the publisher may have concerns that the work might expose the publishing company to expensive litigation. For any of these reasons or others, the publisher may wish to reject the submitted manuscript unless the author is willing to consent to the editorial changes that are requested.

Delivery and Acceptance of the Manuscript

In the typical book-publishing contract, the author agrees to deliver a final manuscript by a specified delivery date that is complete and satisfactory in content and form to the publisher. A publisher's promise to publish an author's work and pay royalties will generally not be enforceable until the publisher has received an acceptable manuscript from the author.

"Complete" as interpreted by the publisher includes the delivery of the manuscript, and for a non-fiction work normally includes submission of all the supplementary material agreed to by the author, such as illustrations, photographs, index, charts, footnotes, permissions documents for the use of any third party copyrighted material, and if necessary photograph and/or interview releases. It is only when the publisher receives all the elements of the work that the work can be fairly judged for publication.

"Satisfactory in form and content" is a determination that is much more susceptible to subjective interpretation than the question of whether the manuscript is complete. A contract that includes a detailed description of the work or contains an attachment of the author's proposal or outline may be particularly helpful in providing guidance with regard to any questions concerning the content of the work.

The publisher may reject a manuscript as unsatisfactory if the publisher in "good faith" determines that the submitted manuscript is not what was contracted for. Courts have adhered to the policy that since the parties contracted freely, that promises requiring the delivery of an acceptable manuscript are valid. The courts have supported publishers' decisions not to publish an author's work when such rejection was made in good faith. Furthermore, the courts have consistently held that where the publisher's decision is based on personal taste or judgment that the publisher must be personally satisfied with the author's work; therefore the publisher's subjective decision requiring delivery of a satisfactory manuscript is controlling. The courts have interpreted good faith rejections to be for any number of reasons including those for

economic, legal and literary considerations.

However, despite the publisher's right to reject a manuscript in good faith, recent judicial decisions have held that a publisher cannot reject the manuscript outright. Instead, the courts have established a duty on the publisher whereby the publisher must provide the author with specific written editorial criticism and then allow the author the opportunity to make the revisions that address the publisher's concerns about the manuscript. The amount of time the publishing house must spend on revisions or on how many times the author has to revise the manuscript are fact-dependent. For example, some courts have been sensitive to the fact that an editor is more likely to be able to correct errors in a nonfiction manuscript than to be able to correct writing skills in a fiction work. But regardless of the type of work, the duty for the publisher to at least attempt to work with the author is always present. The important thing for the publisher is that she has at least

made a good faith attempt to work with the author in revising the manuscript and making it acceptable for publication.

In the event the author's revisions are not made to the satisfaction of the publisher, the courts will allow the publisher to reject the manuscript and not publish the author's work. Given the subjective standard of acceptability, the courts

will generally not rule that a publisher has wrongfully rejected a manuscript; especially since they appreciate the publisher's potential risk of financial loss if the publisher publishes what in good faith she believes to be a substandard manuscript. Even though the publisher has a right to reject a manuscript because the author's revisions have failed to assuage the publisher's concerns, most courts still have required that the rejection of an

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author's work be based on the publisher's good faith determination that the manuscript is not publishable. This means that the publisher must have an honest belief that the work is unsatisfactory. In other words, even if the publisher has attempted to work with an author to revise his/her manuscript, that attempt does not release the publisher from the duty to reject the manuscript in good faith.

If the work has potential legal problems, such as defamation, invasion of privacy or copyright infringement, the word "satisfactory" as interpreted by the publisher means that the work will only be accepted for publication once it has been cleared by appropriate legal counsel. The courts have sustained a publisher's rejection of a manuscript on their counsel's opinion that publication of the work might expose the publisher to litigation.

Therefore, the bottom line in regarding the acceptability of the manuscript if litigation should occur, is that since the standard of acceptability is a subjective one, that if the publisher can demonstrate a good reason why the manuscript is unacceptable, the likely result would be that rejection of the manuscript was justified.

The stipulated delivery date for the manuscript may have greater relevancy for the publisher depending upon the timeliness of the topic. In the event the delivery date is to be extended, it should be done in writing and be an amendment to the contract. On the other hand, if the publisher does not want to extend the delivery date this should also be done in writing.

Action: Always record in writing any and all misgivings you may have about the manuscript. These documents will help protect the publisher in the event the manuscript is rejected and not published and litigation results.

Action: The publisher may want to impress upon the author the importance of the manuscript delivery and acceptance conditions by incorporating language in the contract that the provisions as to content, form and time of receipt of the manuscript by the publisher are material terms and, in the event the author fails to comply with these provisions, that the publisher may, at her option, terminate the publishing agreement with the author.

Do Not: The acceptance clause should never permit only the delivery of a complete manuscript without also stating that the manuscript must be satisfactory to the publisher. In a recent case involving **Joan Collins** and **Random House**, Ms. Collins' agent was successful in persuading Random House to delete its normal "manuscript in form and content satisfactory to publisher" language and replace it with the phrase "complete manuscript." Although the publisher rejected Ms. Collins completed manuscript as unsatisfactory, the court allowed her to retain the \$1.2

million advance. This was because the court ruled that Ms. Collins had fulfilled her requirement of delivering the complete manuscript to Random House and because the contract failed to state that the manuscript had to be satisfactory to Random House.

Author's Failure to Deliver a Timely and Acceptable Manuscript

If an author delivers an unsatisfactory manuscript and fails to revise the work so that it is acceptable to the publisher then the publisher may have the contractual right to terminate the publishing contract and the author will usually be required to repay any royalty advance previously paid by the publisher. Courts have generally held that keeping an unearned royalty advance should not unjustly enrich an author who failed to perform his/her part of the contract by delivering a satisfactory manuscript to the publisher. Industry custom has usually limited the author's obligation to only return the previously paid advance; however, a provision in the contract could require the author to reimburse the publisher for the publisher's pre-publication production and promotional expenses. Frequently a publishing contract will have a "first proceeds" clause that permits the author to delay the repayment of the royalty advance for a stated period of time in the hope that the author during that time period will sell his/her work to another publisher and thereby be able to repay the original publisher from the monies received from the second publisher.

Courts are generally unwilling to award any damages other than royalty advances to either the publisher who received an unsatisfactory manuscript or to the author when the publisher may have wrongfully refused to publish a manuscript. The reason for not awarding damages other than royalty advances is that it is highly speculative for the court to determine the amount that should be awarded to the injured party. In contracts in other industries, courts can determine how much one party would have paid had the contract been performed, but, because of the uncertainties in publishing, even an author or publisher with a proven track record cannot prove that a book would have sold a certain number of copies.

Courts will not order specific performance of a publishing contract. This is because it would be nearly impossible for a court to supervise such an order. It is also unlikely that a court would compel an already recalcitrant publisher to publish what the publisher deems to be an unsatisfactory manuscript. In addition, some courts have implied that ordering the publication of a work that a publisher does not wish to publish would implicate free speech concerns under the First Amendment.

Conclusion

Perhaps even more than other areas of publishing law, the law surrounding the de-

livery and acceptance of a satisfactory manuscript and the remedies for a breach on either side is usually determined by the circumstances of each particular case. Evidence that one party has acted in bad faith may result in a holding for the other party regardless of the other facts present in the case. This may be especially true in the book publishing industry because book-publishing contracts contain implied covenants of good faith and fair dealing.

The publisher to protect herself should make certain that all comments regarding dissatisfaction with a manuscript be put in writing and editors should be encouraged to work with an author in attempting to turn an unsatisfactory manuscript into a satisfactory one before it is rejected. The courts recognize that publishing decisions concerning a manuscript are not cast in "black" or "white" and that they are based on the publisher's personal taste and judgment, but they also recognize that the parties must work together in good faith.

This article is not legal advice. You should consult an attorney if you have legal questions that relate to your specific publishing issues and projects. Lloyd L. Rich is an attorney practicing publishing and intellectual property law. He can be reached at 1163 Vine Street, Denver, CO 80206. Phone: (303)388-0291; Fax: (303) 388-0477; e-mail: rich@csn.net; Web Site: <http://www.publaw.com>. Jennifer L. Fountain, a recent graduate of the University of Denver School of Law, provided the research for this article.

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was in effect, and a second renewal had to be requested between 12-31-76 and 12-31-77 for it to acquire another 19 years. If this occurred, the copyright was renewed until the year 2000. This would have given the work 75 years of protection. See section 304(b) of the Copyright Act.

Today we think of older works as having no more than 75 years of total protection. But, that 75 years is calculated from the end of the calendar year. So the magic year is still 1922; it will be 1923 after 12-31-98. Only the Copyright Office records can answer whether the copyright was so renewed.

After the library has done all that it can to determine whether the work is still protected and to locate a copyright owner, then the library must do a risk assessment. What is the risk of liability for placing a 1925 article on reserve when the journal is defunct and the publisher has disappeared? While the risk in this situation surely is very low, the best solution is to consult university counsel in order to make this decision.