Spring 2023

The Satisfaction Clause in Publishing Agreements: A Case Study of Its Purpose, Controversy, and Future

Maliea Ruby
Portland State University

The Satisfaction Clause in Publishing Agreements: A Case Study of Its Purpose, Controversy, and Future

By Maliea Ruby

Master of Science in Book Publishing

Spring 2023

Research Question: What is the purpose of the satisfaction clause in publishing, how has it been controversial since the 1970s, and what is (or should be) the future of this clause in U.S. publishing contracts for publishers?

Abstract

This research paper examines the satisfaction clause included in publishing contracts, the reason for controversy surrounding it, and what the future may look like for it. This is accomplished by looking at the history of the clause, how it functions in publishing contracts, and three major court cases centered around it. The satisfaction clause allows a client seeking a job done to determine whether the work is satisfactory to them. Much of the time these contracts are written to favor the client, part of the reason for its controversial status. In the context of publishing, the satisfaction clause is important to publishers because it can protect them from things like lawsuits. However, for authors who don't have much legal knowledge or an agent to do negotiation for them, they are left with very little power over their work or whether they're going to be rejected. Thankfully many scholars and courts have determined that publishers are required to perform in good faith, preventing them from rejecting a manuscript for arbitrary reasons and giving authors some protection. One development that determined what is included in good faith is the obligation to provide editorial services, but to what extent hasn't been determined. After analyzing the precedent three major cases established and after, the current precedent is that publishers are required to communicate with the author and provide editorial services. But the reasons a publisher gives for rejecting a manuscript only have to follow reasonable commercial standards. It's clear that the satisfaction clause will remain in contracts, but some proposed changes could help to even the balance of power between authors and publishers.

Introduction

In the publishing industry, authors enter into contracts with a publisher for the publication of their manuscript. These contracts contain details about the title, when it will be published, payment details, and rules of the agreement. One of the most controversial provisions in these contracts is the satisfaction clause, which allows the publisher to determine whether the manuscript is acceptable. In publishing, it's also considered the most material and important to both parties' financial well-being. Authors who don't have any legal knowledge or literary agent to help them negotiate the contract are often left to do their own research and negotiation or accept what is offered to them. It's incredibly important for them and industry workers to understand the reason this clause exists and how it works in order to negotiate it.

Methodology

This paper employs the method of case study focused on three major court cases that defined how courts generally interpret the satisfaction clause in publishing contracts. The benefits of case study for this research are that it provides real-world context for an often hypothetical situation and analysis of what happens when this hypothetical becomes reality. What it does not provide, however, is a sweeping generalization of what an author should do in this situation as court cases are very individual. An analysis of these cases in addition to an establishment of how the clause functions in the publishing industry will reveal the reason for its controversial status and what the future holds for it. Research regarding the satisfaction clause's purpose in contracts will also aid in the cases' analysis. The three court cases are *Random House v. Gold*, *Harcourt Brace Jovanovich v. Goldwater*, and *Dell Publishing v. Whedon*. These cases were chosen because they largely set the current precedent for this aspect of modern publishing law. Documents related to

these cases that'll be used in their analysis will include the judge's opinion, news articles, and scholarly analysis.

Information surrounding these cases will establish something of a literary review that allows enough legal understanding to conduct an analysis. This information will be obtained from law review articles, law firms' websites, research articles, and publishing industry research regarding contracts. Some information will also come from other cases that involved the satisfaction clause but were not major enough to warrant additional case study. Based on the information gathered from the three cases and subsequent analysis, conclusions about the purpose of the clause, reasons for controversy, and what the future may hold for it in U.S. publishing contracts will be drawn.

Background of the Satisfaction Clause

In contract law, when two parties enter into a contract one is often expected to perform a task or provide a product for the other. A major component of the contract's success hinges on the performance of this party being satisfactory to the other. This provision of contract law is commonly referred to as the satisfaction or acceptability clause. Industries such as construction, most freelance positions, and publishing commonly include a satisfaction clause. The clause allows the party seeking a job being done to use their own standards to determine whether the job they are paying someone to do meets their requirements. These contracts are often stacked in the client's favor as they typically write the contract and want to protect their financial investment. In publishing, the power dynamic is even more apparent because the author is often left with little power over what may be their life's work. This clause has gained a controversial

status in publishing and other industries for this and similar reasons. However, what the future holds for the satisfaction clause in the publishing industry is unclear.

Of course, as with most things in contract law, there's more to what looks like a simple statement than meets the eye. At the start of the twentieth century the idea that contracts had to be performed in 'good faith' came about in New York, a predecessor to the satisfaction clause, which would come a few decades later. It wouldn't be until the latter half of the century, however, that much legal review would be developed on the subject. Around this time, a few courts in New York determined that a buyer could not give a "capricious or arbitrary" reason for using the satisfaction clause[1]. This was the beginning of the courts building a precedent for how to interpret the meaning of good faith. Use of the good faith doctrine spread even further with its inclusion in the Uniform Commercial Code, or UCC[2], that was put into effect in 1951 and adopted by 49 states. It became widely regarded as the counterpart to unconscionability[3].

The first law review articles that had influence over good faith began appearing in the 1960s. The most relevant determinations made since that time decided how parties entering into a contract shall abide by this doctrine. First, its entry into the UCC provides the parties the power to determine the standards the performance will be judged by "if those standards are not manifestly unreasonable"[4]. In the context of publishing, the publisher tends to decide the factors of acceptability. Second, good faith in a contract occurs when the party that passes judgment of the performance "exercises its discretion for any reason within the justifiable expectations of the parties arising from their agreement"[4]. The key word here is 'reason', meaning it is less about the actions the party (i.e. the publisher) will take, but why they may determine the performance of the other is unsatisfactory. These reasons must come from the contract rather than separate, independent ideas. Finally, bad faith occurs when a party judges a performance "for reasons

outside the justified expectations . . . arising from their agreement"[5]. What these reasons and expectations are exactly will vary contract to contract based on how certain clauses are worded, whether they are justified is for a court to decide. In book publishing, this is detailed in the satisfaction clause.

The Satisfaction Clause in Publishing

In publishing contracts, the satisfaction clause is one that is always included because of its importance to the publisher. When a publisher acquires a manuscript they will draw up a contract and present it to the author for negotiation. The contract will contain a description of the work being published and will inform what an acceptable delivery of the work looks like. One reason it is important for the publisher to have the power to determine what's satisfactory is because should the manuscript contain content that will expose them to lawsuits, they will only accept it once it's cleared by legal counsel[6]. However, as it's the publisher that writes the initial contract, it is always stacked in their favor. Many times authors don't have the knowledge or negotiating strength required to gain them a more equal amount of power in the contract. This leaves the author with very little power over the development of their work, resulting in a generally unfavorable opinion of the clause[7]. What the author does start with tends to be a "refundable advance and little latitude" on paper[8]. As the satisfaction clause is considered one of the most difficult to negotiate, the final contract typically allows the publisher to have "near total discretion in determining whether a manuscript is satisfactory"[9]. The obligation to perform in good faith, however, is used to even the power balance out a little. The law will protect the author by requiring the publisher to "display a commitment . . . by making explicit efforts to assist the author"[10]. This usually appears as providing editorial assistance. Should the two parties

go to court over the contract, the court may appreciate the "potential risk of financial loss if the publisher publishes what in good faith he/she believes to be a substandard manuscript"[6]. They will also focus on what the publisher was thinking at the time of rejection and require the plaintiff to provide hard proof of their claims. Unfortunately, there's typically little evidence that can be used as proof[11].

There have been developments in what is considered part of the obligation to perform in good faith that support authors. One is that publishers are required to provide editorial services to authors so that their manuscript is more likely to be accepted as satisfactory. What hasn't been quantified is what exactly this editorial support should look like so a judge will deem it enough to fulfill the publisher's obligation. It's determined on a case-by-case basis due to the uniqueness of each manuscript. Other questioned aspects include the amount of time a publisher should spend on revisions and how many times an author will revise the manuscript, which are also dependent on specific circumstances and the state a manuscript is in at the time the satisfaction clause is invoked[6]. For example, the amount of time it will take an editor to fact-check a nonfiction manuscript is very different from reviewing and improving upon the creative, more abstract ideas in a fiction work. The presence of this obligation can range in a contract as for some "this may not be an option for the publisher, but may be a general condition of the agreement," or "such phrasing may be absent entirely" and is part of the good faith obligation[12].

The Importance of Wording

In 1985, publishing house Doubleday Co. filed a complaint against Tony Curtis for breach of contract when he allegedly failed to submit a satisfactory manuscript and sought the recovery of the advance payment they gave him. Curtis in turn counterclaimed for the same earnings,

claiming that Doubleday rejected the manuscript in bad faith and used the defense that the publisher didn't provide editorial assistance, "a duty derived from its implied obligation to perform in good faith"[13]. The judge in this case dismissed both claims, saying that Doubleday rejected in good faith, fulfilled its obligation to provide editorial assistance, and "waived its right to demand return of its advance" because they accepted the manuscript eighteen months after the original deadline and lead Curtis to believe the manuscript would eventually be published. This decision was appealed up to the appellate court—though the court opinion does not state who filed the appeal—who reversed the decision regarding Doubleday's original complaint. This court found that the publisher did provide editorial assistance, but "decline[d] to extend that requirement to include a duty to perform skillfully," meaning the court wouldn't comment on the skill of the editorial work[13]. Regarding Doubleday waiving their right to the advance, they found that because this question "was not properly before the court," the dismissal decision was improper[13]. With this reversal, Doubleday received $50,000 of the advance plus interest. This example shows how a trial may go when the topic of the duty to provide editorial assistance can determine the outcome of a case. One legal scholar, Mark Fowler, was of the opinion that the outcome of this case didn't establish enough protection for authors because if they were to have reasonable opportunity to fix a manuscript, the publisher must identify the issues "with reasonable definiteness and deliver his editorial comments promptly so that the author can . . . make the recommended changes before the contractual deadline"[14]. An author may need this protection because if they build a reputation of rejection, their work can become stigmatized and be offered a lower advance because of it.

The specific wording of the satisfaction clause is also an important factor that can determine whether these implicit obligations will be interpreted as present in a contract by a judge. Many

clauses can be similar to this one from Simon & Schuster, "The Publisher shall not be obligated to accept or publish the Literary Work if, in its sole editorial judgment, such work is not satisfactory to it . . . (Simon & Schuster, Inc., 11)"[15].

Compare this to the case of *Collins v. Random House* in 1996 when Joan Collins's agent got the publisher to change the satisfaction clause to state "complete manuscript" instead of the typical "manuscript in form and content satisfactory to publisher"[6]. It was because of this word change that allowed her to keep her $1.2 million advance when Random House took her to court for her unsatisfactory manuscript. The court determined Collins fulfilled her obligation and that Random House should have had language in the contract specifying the manuscript had to be satisfactory to them for their case to be successful. The Simon & Schuster clause states exactly this, resulting in vastly different legal implications than Collins's clause. These are some main concepts that will be considered in the following major cases.

Burden of Proof and Finance-Based Rejection

The first major case took place in November 1978 and the judge's opinion was dated February 15, 1979 in the District Court of the Southern District of New York. All of these cases took place in this district and only in front of the judge. The plaintiff is Random House seeking to recover advance payments given to the defendant, Herbert Gold, an author that has published with Random House previously. In response, Gold counterclaimed alleging breach of contract in bad faith. The contract was first signed in 1970 for the publication of four works. The total advance payment to Gold was $150,000, paid in ten installments. The manuscripts also had to be "in content and form satisfactory to the publisher" for Gold to follow the contract[16].

The first two manuscripts were published by Random House. In January 1973, Gold received his fourth installment of the advance, totaling $60,000. At the end of July 1973, Gold's literary agent, James Brown, submitted the third novel to Random House. The editor-in-chief, James Silberman, read the manuscript and gave it to another fiction editor, Joe Fox, to read it as well. Upon request, Silberman learned the current payments amounted to $60,000 and royalties $11,579 as of the end of March. On August 23, Fox reported to Silberman with an overall negative critique and asked whether Random House was "behind financially" on Gold's contract.

In September, Silberman passed some of Fox's comments on to Gold for revisions. On December 20, Silberman wrote to Brown stating that the manuscript was "unsatisfactory in form and content" and the contract was to be terminated per the satisfaction clause of the contract[9]. In his testimony, Silberman did read the revised manuscript before deciding to reject it and was conscious of the "financial circumstances" of the contract[16]. However, he didn't give the manuscript to another editor to read. At the start of 1974, Silberman offered to renegotiate the contract for what would likely be a lower advance payment. After the rejection Brown offered the manuscript to McGraw-Hill and they paid Gold a $10,000 advance payment, the action that brought the lawsuit.

The money Random House sought to recover was $50,000, stating the amount "represent[ed] an "unearned" advance which Gold agreed to pay" should the contract be terminated[16]. Gold denied this and said he was entitled to the agreed upon advance because Random House broke the contract in bad faith, as well as an additional $15,000 for the two accepted works. The questions the judge had to determine included: whether Random House breached the contract, whether Gold had to repay the advance payments, and whether Random House is liable for the remaining balance. Gold's argument—that Random House gave "improper weight" to the financial

considerations when they chose to reject his manuscript—was found to be unestablished by the judge because he couldn't provide evidence as to why[16]. The judge also found that Random House wasn't liable for breach of contract in regard to Gold's third and fourth works but couldn't recover any payment for the first two. This was determined by a lack of language in the contract that supported their claim. Overall, the judge found in favor of Random House. The judge stated six findings in the opinion, most of which determined whether each party was entitled to recover a certain amount of money from the other, coming down to Random House paying Gold $15,000.

An analysis of this case must start with the language of the contract's satisfaction clause. In addition to being satisfactory in form and content, the author must "deliver any manuscript within ninety days" after the agreed upon date or the "Publisher may terminate . . . by giving written notice" according to the second paragraph of the agreement[16]. The questions stated above that the judge answered in their findings established a precedent that similar court cases would rely upon for decades afterward. Which party has the burden of proof and that financial reasons are acceptable factors in the decision to reject a manuscript are the two major pieces of precedent established. Both of these decisions make winning this type of case more difficult for authors. Typically, in a civil case the plaintiff has the burden of proof by providing dominating evidence that their allegations are true. Random House was able to do this with most of their claims, but the court found that Gold's claims weren't "established by a preponderance of the credible evidence"[16]. In regard to a publisher rejecting a manuscript for financial reasons, Fowler states it best that this case "conflicts with this basic tenet [of contract law], it is heretical and thoroughly unpersuasive"[17]. The tenet being referred to is that a buyer cannot break a contract and escape liability just because they become unhappy with the bargain and not the seller's performance.

Barring a clause stating otherwise, financial reasons for rejection were only valid if the contract in question would keep the company from going bankrupt at the time. Overall, the result of this case seemed to have removed most any protection an author had from publishers suing in bad faith.

Obligation to Edit

The next case took place a few years later in February 1982 and the plaintiff is once again the publisher, Harcourt Brace Jovanovich, which will from now on be referred to as HBJ. They sued for breach of contract and sought the recovery of advance payments made to the defendants, Barry Goldwater and Stephen Shadegg. The manuscript was Goldwater's memoirs that were to be written by Shadegg, an author that had previously written for HBJ. The contract was signed on January 26, 1977 after a proposal was submitted earlier that month. Shadegg received help from Oscar Collier, a literary agent, to create the proposal. The advance payment amounted to $200,000 with $65,000 to be paid at the time of signing.

Some correspondence between the editor, Hill, and Goldwater that February showed that Goldwater welcomed any editing. That June, Shadegg sent Hill and Collier a seven-chapter draft. What follows is a several-month-long period in which Hill did not communicate with Shadegg or Goldwater at all. Shadegg testified that he placed a phone call to Hill during this time that went unreturned. In September, Hill gave negative feedback to Collier, and she testified that "she was requested [by Collier] to refrain from direct contact with the authors" due to her opinions, which Collier denied[18]. Evidence showed that Hill didn't perform any editorial work on those chapters, indicating she was considering replacing Shadegg with another author, going as far as contacting an author's agent. In fact, her only direct contact with the authors showed nothing but support for

the project. A letter dated November 14 that was sent by Hill to Oscar Collier's daughter, Lisa, implied her comments had been passed on and work was moving forward.

During this time, the authors continued to write but with the lack of editorial comments, Shadegg requested comments from Collier, who made suggestions. However, the court determined them not to be the substitute of editorial work from the publisher. In July 1978, another 24 chapters were sent to Hill by Goldwater. Once again, Hill made no effort to communicate with either author. In her testimony, Hill was concerned with how the book could be successfully marketed and sought the counsel of two other editors at HBJ; they also had negative comments. This back-and-forth continues, but ends with the manuscript being bought by another publisher, edited as normal, and became a bestseller in the fall of 1979. The outcome of the case was the judge finding that HBJ breached its contract with the two authors by "wilfully failing to engage in any rudimentary editorial work or effort"[18]. They also found that HBJ couldn't simply rely on the opinion that the manuscript was unsatisfactory.

The relevant piece of the satisfaction clause states the manuscript as needing to be, "satisfactory to the publisher in form and content"[18]. As the judge determined HBJ couldn't rely on this piece alone, they decided there was another implied obligation within it. The judge found that there exists "an implied obligation . . . for the publisher to engage in appropriate editorial work with the author," which must consist of a "reasonable degree of communication" with the writers[18]. Reasonable communication is stated to include specifics of what the publisher is looking for. However, if editorial assistance isn't provided by the publisher, the author is "virtually prevented from performing under the contract" by writing a satisfactory manuscript[18]. The judge determined this based on witness testimony during the trial and the customs of the publishing industry. What's left out is the full extent or definition of the editorial work required due to the

lack of work done in this case. This establishment of the obligation to provide editorial services gave authors the potential for more bargaining power, should other state courts adopt the concept[19]. It was also a large step in further defining what constitutes a publisher acting in good faith in these sorts of cases. Every similar case that took place after this opinion was handed out included the publisher's obligation to provide editorial support.

Concrete and Specific Explication

The final case took place November 2, 1983 and the judge's opinion was dated January 11, 1984. The pattern continues with the publisher, Dell Publishing, as the plaintiff and the author, Julia Whedon, as the defendant. Dell sued Whedon for breach of contract and requested the recovery of the advance payments made to her, totaling $14,000. The beginning of this was in early 1974 when Whedon and her agent, Sterling Lord, submitted a proposal for a manuscript to Dell, and on May 23, the contract was signed. The advance Whedon was to receive totaled $20,000 split into three payments. Whedon later met with the editor, Ellis Amburn, and worked on the manuscript until 1977 with limited contact from Amburn. At this time, Whedon submitted the first half of the manuscript for which Amburn expressed enthusiasm, "indicated no problems, and made no suggestions for revisions"[20]. Whedon received her second payment and continued to work until February 1978 when she submitted the rest of the work. Afterward, Whedon had one phone call with Amburn, who expressed hesitation but never gave any suggested revisions, nor had anyone else at Dell. On March 7, 1978, Amburn told Whedon they wouldn't be completing the manuscript, canceled the contract, and the manuscript was returned. Just the following month, Doubleday (Dell's parent company) accepted the book and signed a contract

with Whedon. Once the book was published in 1981, Dell filed the suit claiming Whedon failed to deliver a satisfactory manuscript in "form, style, and content"[20].

There was a one-day bench trial in 1983 that used expert testimony to establish the facts. The disagreements were centered around what the exact legal obligations both parties had according to the contract. One main point established was that the manuscript was subject to Dell's subjective satisfaction, "not to . . . this court, a jury, or a reasonable person"[20]. The primary issue in dispute was whether Dell had the good faith obligation to allow Whedon to revise the manuscript with editorial help in order to bring it to their standards. Based on the various testimonies, the court determined that Dell owed Whedon "a detailed explication of the problems it saw . . . and an opportunity to revise," and that it was Dell who was in breach of contract for failing to provide editorial services[20]. In the end, Whedon retained her advances and the complaint against her was dismissed.

Dell's argument regarding their subjective satisfaction follows the logic of *Gold*, but the judge concluded that since Dell had an obligation to edit, the case would follow *Harcourt's* rationale. To answer the question of whether Dell was obligated to allow Whedon to revise, the judge found that there was "never any suggestion that a change…was necessary or even desirable" because they had Whedon complete the novel before rejection[20]. As a result, the court established the precedent that authors are owed "more concrete and specific…obligations in certain key areas" of the satisfaction clause[21]. Overall, this case changed the standard industry practice of the time. This was also obvious to the public because it showed that publishing companies "within the same corporate structure act independently"[22].

Modern Day

After these cases established the modern precedent that is still largely used today, few major changes have occurred since then. The law is incredibly slow to adapt to societal changes, so while this precedent was established forty years ago, courts still abide by it. A case that shows this was in 2002 when John Nance claimed Random House, Inc. breached their contract, alleging a bad faith rejection and fraud. However, the court found he failed to provide proof. After revisions, Random House still rejected the manuscript and—due to a section of the acceptance clause—didn't break the contract. This section was, "should Publisher find the revised Work . . . unacceptable for any reason, Publisher may reject it"[23]. Random House then recovered the $335,000 advance. Even though the author is the plaintiff in this case, the burden of proof still typically falls to the author. In 2003, the good faith definition changed to include "the observance of reasonable commercial standards of fair dealing" in addition to honesty in fact[24]. This shifted many scholars' focus to the idea of a party's reasonable expectations.

Feinman explains that to protect reasonable expectations a court will start with what each party has stated in a contract, put those statements into the context of how the contract came to be, and apply industry standards to determine liability[25]. Essentially, the context is looked at through a lens of norms to determine what is reasonable. Feinman also states that reasonable expectations are "made up of 'an agreed common purpose' and . . . 'justified expectations,' which . . . must come from a source broader than the . . . purpose," that being standards of decency and fairness[26]. These standards are relevant because contracts are not made in a vacuum, there is always the presence of ideas of decency, fairness, or reasonableness that were previously established as part of the good faith obligation. Ultimately, Feinman concluded that at the core of the good faith standard is keeping "consistency with the justified expectations of the other party," that each party should be aware of what the other is expecting out of the contract and

maintain those expectations. He also concluded that observing "reasonable commercial standards of fair dealing" requires a full contextual understanding of the contract[27]. All of this shows that the courts continue to struggle to define good faith but make slow progress that can be used to further protect authors. If a publisher can't reasonably say they kept within an author's reasonable expectation of being published, they are less likely to bring a satisfaction clause–related case to court.

The Future

This brings us to the current state and future of the satisfaction clause in publishing contracts. Given the controversy surrounding the clause, there have been several theorized solutions proposed over the years by legal scholars and literary agents alike. Over the course of my research and learning about this topic, there are four solutions I feel have potential for giving authors more power in contracts and ensuring they receive payment should the satisfaction clause be invoked by the publisher.

The first was mentioned in a discussion in 1990 by Arnold Goodman, a literary agent. He brings up a strategy he uses in negotiations that "the most publishers agree to, is simply to limit rejection to reasons of editorial insufficiency. And . . . to rule out the loss of an editor, competing book, or change of business conditions . . . stop publishing, and so on"[28]. This would prevent an author from being rejected for reasons not related to them or their writing. If a case with this clause went to court and it's discovered the publisher rejected it for one of these reasons, the author would not likely be found liable.

The second was proposed by House, which includes the idea of something similar to a kill fee[29]. This sort of provision is often used with freelancers for one-time publication. In publishing

contracts it might say that if the manuscript is rejected for other than dissatisfaction "the publisher will pay the author an amount agreed upon at the time the contract is signed"[30]. However, as most agreements are standardized, it would be difficult for an author to negotiate a similar provision being added.

The third solution found was brought by Fowler, which doesn't actually change the clause but adds to it. He suggests that adding the proposal submitted by the author and/or a sample chapter to the clause would set the publisher's expectations of the final product[31]. If the author's writing is in conformity with the proposal, then the publisher can't reject it for not being what they expected. This will help courts determine what the publisher had in mind when the contract was signed as well.

The final solution I think has potential was proposed by the Author's Guild in 1980, which is a complete rewrite to replace the typical boilerplate clause. The pertinent piece of the revision, provided by Sluss, is as follows:

> The Author shall deliver a manuscript which, in style and content, is professionally competent and fit for publication. The publisher shall be deemed to have agreed that the manuscript complies with the conditions . . . unless . . . the publisher sends the author a written statement of the respects in which the publisher maintains the manuscript is not, in style and content, professionally competent and fit for publication. If the contract is terminated . . ., the author shall be entitled to retain __% of the total advance and shall receive any portion of that amount not yet paid; and if the author has received more than __% of the total advance, the author shall repay to the publisher any portion that exceeds

> % of the total advance, but only from those proceeds, if any, received by the author under a subsequent contract for publication of the work by another publisher. ("New" 1981, 1)[32]

The issue with this proposal is it does not let publishers protect themselves from what they professionally believe to be an unsatisfactory manuscript. While another expert in litigation might believe it to be competent and publishable, a publisher that is financially invested should be able to prioritize their own opinion. However, an author retaining a certain percentage of the total advance should the contract be terminated has merit in that it could be used to fairly compensate the author. Many legal scholars have expressed similar opinions. Robert Stein, a lawyer that specializes in publishing legal matters has stated that he believes "most publishers would insist on adding 'given the size of the advance to which publisher is committed hereunder'. . . Because it is entirely possible that the manuscript may be fit for publication as a $15,000 book, but if the publisher is committed to pay a half-million-dollar advance, then to that extent, it is not fit for publication"[33]. While the whole revision is not feasible, authors and their agents could take inspiration from it in their negotiations.

I find the second two solutions to have the most promise overall. It's clear that the satisfaction clause won't be leaving contracts soon, but perhaps a middle ground can be found that appeases all parties involved in these contracts. Although the clause serves a necessary purpose for publishers, they also have an ethical duty to be fair and transparent to writers who can spend years on their craft. Publishers need to remain aware of the fact that they are in a major position of power over people who don't always have the same knowledge and resources they do. Provisions in contracts like the satisfaction clause need to be universally amended in order to create a more equal balance of power.

Recommendations

To summarize the information without legalese, the satisfaction clause states that a publisher can end a contract and refuse to publish a manuscript if they feel the submitted work is not up to their standards or is what they were expecting at the time of signing. This would require the author to pay back the advance they had already been paid. From the perspective of the publisher, it is a necessary clause to keep in because it provides them protection. It's incredibly difficult to get a publisher to change the clause and nigh impossible to remove it, but it is possible to get some small changes made in negotiations. Should the publisher use the clause to end the contract, the law protects authors from publishers canceling without good reason. An author can take the issue to court if they feel their contract was wrongfully canceled as there are a few ways for a lawyer to defend depending on the circumstances. It's important for authors to know what the many clauses in a publishing contract mean for both them and the publisher. Having that knowledge allows an author to enter into the contract on a similar level as the publisher with clarity of what they're agreeing to.

Based on all the information compiled, there are three recommendations I have for authors that are looking to be published. Firstly, if at all possible, get an agent to represent you. They will do the contract negotiations for you with your best interests in mind. Second, if you are entering negotiations yourself, do your research about contracts. This might include what get included aside from the satisfaction clause, definitions of legal jargon, and how to negotiate contracts. Take inspiration from the proposed changes mentioned above and use sources in the bibliography for further reading. Finally, you could hire a lawyer that specializes in contracts to temporarily represent you or look over the contract if possible. They could help you understand

the contract and give advice going forward. Overall, the satisfaction clause is a controversial yet necessary one for publishers to hold onto the power to decide whether to publish. So, give yourself as much knowledge as you can. Afterall, knowledge is power.

Notes

1. Burton, “History,” 3.
2. See “UCC” in Glossary.
3. See “unconscionability” in Glossary.
4. Burton, “History,” 7.
5. Burton, “History,” 10.
6. FindLaw, “Delivery.”
7. Sluss, “Interpreting,” 35.
8. Simensky, “Redefining,” 111.
9. Simensky, “Redefining,” 113.
10. House, “Good Faith Rejection,” 107.
11. House, “Good Faith Rejection,” 113.
12. Sluss, “Interpreting,” 30-31.
13. Doubleday.
14. Fowler, “Satisfactory Manuscript,” 139-140.
15. Sluss, “Interpreting,” 30.
16. Random House.
17. Fowler, “Satisfactory Manuscript,” 146.
18. Harcourt Brace Jovanovich.
19. Fowler, “Satisfactory Manuscript,” 127.
20. Dell.
21. Simensky, “Redefining,” 112.
22. McDowell, “Publishing.”

23. Nance.

24. Imwinkelried, “Implied,” 2-3.

25. Feinman, “Reasonable Expectation,” 549.

26. Feinman, “Reasonable Expectation,” 552.

27. Feinman, “Reasonable Expectation,” 569.

28. Karp, “Roundtable,” 309.

29. See “kill fee” in Glossary.

30. House, “Good Faith Rejection,” 143.

31. Fowler, “Satisfactory Manuscript,” 150.

32. Sluss, “Interpreting,” 35.

33. Karp, “Roundtable,” 311.

Glossary of Terms

good faith. Honesty in a person's conduct during the agreement. The obligation to perform in good faith exists even in contracts that expressly allow either party to terminate the contract for any reason.

kill fee. A clause commonly included in contracts between free-lance writers and publishers when the writer is providing an article for one-time publication. If the publisher declines to publish the article, the author is paid the kill fee in lieu of the total fee[6].

satisfaction clause. A provision in a contract that makes one party's performance conditional on the satisfaction of the other party. Also called the acceptability clause.

UCC. The Uniform Commercial Code, a set of laws governing all commercial transactions in the U.S.

unconscionability. A doctrine that determines whether the terms of a contract are extremely one-sided, past the point of a person's conscience. If a contract is found to be unconscionable, it is unenforceable.

Bibliography

Burton, Steven. "History and Theory of Good Faith Performance in the United States." *U Iowa Legal Studies Research Paper*, (1995): 1–13. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742354.

Dell Pub. Co., Inc. v. Whedon, No. 81 Civ. 2884(JEL), 577 F.Supp. 1459(1984), https://law.justia.com/cases/federal/district-courts/FSupp/577/1459/1497458/.

Doubleday Co. Inc. v. Curtis, No. 85-7023, 85-7043, 763 F.2d 495 (2d Cir. 1985), https://casetext.com/case/doubleday-co-inc-v-curtis.

Feinman, Jay M. "Good Faith and Reasonable Expectations," *Arkansas Law Review 67*, no. 3 (2014): 525–570.

FindLaw. "Delivery and Acceptance of a Manuscript." Last modified June 13, 2017. https://corporate.findlaw.com/intellectual-property/delivery-and-acceptance-of-a-manuscript.html.

Fowler, Mark. "The "Satisfactory Manuscript" Clause in Book Publishing Contracts." *Columbia-VLA Journal of Law & the Arts*, no. 1 (1985-1986): 119–152.

Harcourt Brace Jovanovich, No. 79 Civ. 4863, 532 F.Supp. 619 (1982), https://scholar.google.com/scholar_case?case=18295704577854627744&q=Harcourt+Brace+Jovanovich+v.+Goldwater&hl=en&as_sdt=6,38&as_vis=1.

House, Calvin R. “Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author’s Reasonable Expectations.” *Brooklyn Law Review*, no. 1 (1984): 95–146.

Imwinkelried, Edward. “The Implied Obligation of Good Faith in Contract Law: Is It Time to Write Its Obituary?” *Texas Tech Law Review*, no. 1 (2009): 1–22.

Karp, Irwin. “The “Satisfactory Manuscript” Clause in Book Publishing Contracts: A Roundtable Discussion.” *Columbia-VLA Journal of Law & the Arts*, no. 3 (1992): 285-326.

Kelly, Catherine Pastrikos. “What You Should Know About the Implied Duty of Good Faith and Fair Dealing.” American Bar Association. Last modified July 26, 2016. https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/duty-of-good-faith-fair-dealing/.

McDowell, Edwin. “Publishing: Courts Backing Authors.” *New York Times*, January 20, 1984. https://www.nytimes.com/1984/01/20/books/publishing-courts-backing-authors.html.

Nakase Wade. “Breach of Contract Containing Satisfaction Clause Law Elements Defense Lawyer.” Accessed November 30, 2022. https://california-business-lawyer-corporate-lawyer.com/breach-of-contract-lawyer-california-los-angeles-san-diego-orange-county/breach-of-contract-containing-satisfaction-clause-law-elements-defense-lawyer/.

Random House, Inc. v. Gold, No. 77 Civ. 4642(MP), 464 F.Supp. 1306 (1979), https://scholar.google.com/scholar_case?case=3421599341481362101&q=Random+house+v.+gold&hl=en&as_sdt=6,38&as_vis=1.

Simensky, Melvin. “Redefining the Right and Obligations of Publishers and Authors.” *Loyola of L.A. Entertainment Law Review*, no. 1 (1985): 111–127. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1068&context=elr.

Sluss, Sara. “Interpreting and Applying the Acceptability Clause in Book Publishing Contracts.” *Book Research Quarterly*, (1990): 29–36. https://link.springer.com/content/pdf/10.1007/BF02683809.pdf.

Uniform Law Commission. “Uniform Commercial Code.” https://www.uniformlaws.org/acts/ucc#:~:text=The%20Uniform%20Commercial%20Code%20(UCC,the%20interstate%20transaction%20of%20business.

Wex. “Unconscionable.” Legal Information Institute at Cornell Law School. Accessed April 26, 2023. https://www.law.cornell.edu/wex/unconscionable#:~:text=Unconscionable%20is%20an%20adjective%20that,contract%20unconscionable%2C%20it%20is%20unenforceable.