BOOK CONTRACTS 101—An ABA Forum on Entertainment & Sports Law Webinar Transcript

Moderated by Daniel Rogna

Panelists: Evan Gregory and Jason Koransky

On April 26, 2017, The ABA Forum on Entertainment & Sports Law featured a Webinar on Book Publishing. The Webinar explored basic publishing agreement terms, drafting tips, and negotiation strategies. The presenters will examined traditional and self-publishing contracts, exploring the effect of electronic publications on the evolution of the business. Here is that transcript.

Welcome to "Book Contracts 101" cosponsored by the ABA Forum on Entertainment and Sports Industries, Young Lawyers Division, and the ABA Center for Professional Development.

Moderating the program today is Daniel Rogna. Daniel is an associate at Partridge Partners PC and is located in Chicago, Illinois. Daniel, please proceed with today's program.

Daniel Rogna: Thank you. Joining me on the program today are Jason Koransky and Evan Gregory. Jason is an associate at Pattishall, McAuliffe, Newbury, Hilliard & Geraldson in Chicago. Jason's experience includes a decade serving as an editor of "Downbeat," an international music magazine, and Jason's taken that experience into his career as an attorney. Today, Jason's practice focuses on trademark, copyright, advertising, data privacy, and internet law.

Evan is a senior agent at the Ethan Ellenberg literary agency in New York. Evan has extensive experience managing subsidiary rights in foreign deals, and Evan represents a variety of literary, fiction and nonfiction authors, with particular focus on fantasy and science fiction. If you're looking for more of Evan after the program, I suggest you follow him on Twitter @Evanjgregory.

The purpose of the program today is to review publishing contracts. And although these the standard terms of a book agreement haven't changed much over the years, the publishing industry and the technology associated with that industry has evolved substantially. We have standard terms that take on new meanings with this evolution, and those new challenges require innovative approaches. The goal today will be to review standard publishing agreement terms, present drafting tips to avoid legal risks and suggest negotiation strategies. The objectives that we expect the viewer to be able to achieve at the end of the program will be to competently discuss standard publishing contract terms, recognize the grant of rights in a publishing contract and assess whether the language, format and territory grants are advantageous to their client, identify favorable royalty terms; assess the risks associated with publishing contract representations and warranties; and advise clients on related issues, like selfpublishing alternatives, book title trademarks and literary agent agreements.

So, let's start with the description of the work. Evan's going to speak on this a little bit. But the idea is we're not just selling any book, we're selling a specific book. So, we need to describe the work, including things like the title, genre, content and length, even if the book is not fully completed at the time of contracting. Evan, what are your thoughts about the best way to draft a description of the work?

Evan Gregory: Well, typically as an agent, an author, you don't have a lot of input on it. Usually, it's what the publisher presents to you. And sometimes there are instances where you may need to renegotiate some of the wording or make sure that genre distinctions are narrowed a bit, because if you have a client, for example, I have writers, both fantasy and science fiction, and if they have a work that is solidly in one camp or the other, and the publisher publishes both, it could be a problematic to have the description be sort of vague. Like to have it be like a fiction novel. So, it's good to say it is science fiction novel or a hard science fiction novel, or it is a military science fiction novel, to differentiate from other types of novels that an author might write.

Daniel Rogna: It's fair to say what you want to do when drafting the description of a work or negotiating a contract is to make sure that the expectation of the publisher is clear

Evan Gregory: Right.

Daniel Rogna: by being as specific as possible?

Evan Gregory: Right. If your author turns in a fantasy novel when they're supposed to turn in a science fiction novel, they could get the book rejected and have to return their advance. That's no fun for anyone.

Daniel Rogna: We'll talk about that later.

Evan Gregory: Exactly. The secondary concern is usually length. So, length expectations are kind of a big deal. Everyone has a different idea of how long a novel should be, and there are different expectations in different genres. You don't want to promise a fantasy novel that is

300,000 words and only deliver 100,000 words. Because you wind up in the same situation. So that's why it is important to watch that language.

Daniel Rogna: Is that where you, as an agent, step in with a realistic approach about how long the book is actually going to be?

Evan Gregory: Yes, usually, yeah.

Daniel Rogna: Once you described the work, generally the next thing you find in the contract is the grant of rights. The grant of rights is usually a very dense clause. What it does is transfer rights in the literary property from the author to the publisher. Copyright law confers a number of rights in the author of any copyrightable work. These are considered or often referred to as the bundle of rights. And the author has the authority to grant third parties the right to exercise this bundle in whole or in part, and breaking down that bundle is a lot of what the contract negotiation for a publishing agreement is about.

Let's take a look at a typical grant of rights. This is language that you might see. It says, "the author grants to the publisher the exclusive right to print, publish, sell, distribute, and license the work in the English language, in all formats, in whole or in part, throughout the world during the full term of copyright and any renewals and extensions thereof except as provided herein." So, there are a lot of parts in there. There's exclusivity. There's the language, the format, territory and the term, all bundled together in the grant of rights. Think of those, one big takeaway is pay attention to the grant of rights, because it's perhaps the most important part of the agreement. Evan, let's just talk about exclusivity for a second. Is that something that comes up in the publishing agreement?

Evan Gregory: Not often, no. Usually, if you are granting rights to a publisher for publication rights, they want them exclusively, and same goes for conferring film rights or translation rights to other third parties. So usually they want them exclusively. There are a few instances where nonexclusivity is kind of a necessity. Usually, it's for like serial rights. There are first, second, third serial rights. Usually, first serial rights are exclusive. So, if you are publishing an excerpt of your literary novel in "The Atlantic" for example, you would be granting "The Atlantic" exclusive serial rights. But after it's already been published in "The Atlantic" obviously it's no longer exclusive. Excerpts from a novel or even the same excerpt can be republished multiple times. So, that's where sort of nonexclusive rights may be granted.

Daniel Rogna: Great. But exclusivity is something you also want to pay attention to when looking at a selfpublishing agreement, because you do not want to, under most circumstances, give the publishing platform exclusive rights to that work.

Evan Gregory: Right.

Daniel Rogna: The next topic within the grant of rights, we've got the term. How long should the term be generally?

Evan Gregory: It depends on which rights you're licensing. Obviously, most publishers will accept nothing less than the full term of copyright and all extensions and renewals, which is, if I understand it correctly, life plus 70 years, and whatever extensions by law happen during that term. Usually the publisher wants the rights for the whole duration of that. If your book is a bestseller, and it goes into reprint and it's one of those classic books that is always going to be bought and printed, there's potential for them to hang onto and be the exclusive publisher for your entire life plus 70 years, for the entire life of your children and grandchildren. So that's something to look out for. Most subsidiary rights deals, however, the term is shorter. For translation deals, for example, terms may be as little as five years or as much as ten years. For audio rights, it's usually around like ten years, with automatic renewals.

Daniel Rogna: Sure. I'll point out that there is a statutory reversion, which any copyright attorneys in the room understand, and it's complicated, and I have had to deal with it in the past. But short of the statutory reversion, you want to make sure that the contract includes a reversion right in the event the work is out of print and if it isn't one of those classics that's always being printed. We'll talk about that a little bit more later. But if it's out of print you want to make sure you get the rights back.

Moving on. Let's talk about territory. It may be a worldwide license, it may be country specific. Evan, in your experience, what's preferable for the author? What do you see most frequently? What should new attorneys looking at their first book contract think about when they're presented with the territory grant?

Evan Gregory: It's become increasingly popular for publishers to demand worldwide rights, and in several instances, it's advantageous to the author to grant them worldwide rights, especially if they have subsidiaries in the UK, for example. So, if you are limiting the grant of rights to the English language, worldwide distribution with the publisher that has publishing arms in other territories can be advantageous.

Now, it doesn't always work that way. Sometimes you want to reserve some territory. So, you might want a book to be published by a publisher in the United States and to reserve UK rights, because you have an author who is based in the UK and there's a different UK market, and you might able to sell those rights to a UK publisher for more money and have them publish it in their home territory with more fanfare and publicity. That is one

concern when it comes to limiting territory. Like I said, most common these days is to have a grant of worldwide English rights. It used to be more common to exclude the UK and a bunch of other protectorates and territories that would be included in a separate schedule.

Daniel Rogna: Would it be fair to say that an author or author's representative is going to have an easier time negotiating that if they're dealing with a smaller publishing house, as opposed one of the big five?

Evan Gregory: Well, not really, no. It depends on the book, and whether or not you have a rationale for retaining those rights, because you have to have a reason to want to publish it with a separate publisher in other territories. Otherwise, those rights can be useless to you. If I reserve, for example, UK rights for a book and I didn't have a UK publisher in mind to send it to, and it wasn't a book that was particularly popular in the UK, I would be sort of cutting off my nose to spite my face. Because I could grant those rights to the publisher, and they could distribute those books in the UK, and my client could make a few sales in the UK that they otherwise would have not made if I just sat on those rights.

Daniel Rogna: I think that's a great point. Retaining rights, any of these rights we're talking about, can allow the author to maximize control of the work. But if you don't have a plan for how to exploit the work in other territories, maybe you're doing more harm than good. Is that fair to say?

Evan Gregory: Yeah, you have to weigh the benefits and costs.

Daniel Rogna: So, in conjunction with territory, we think about language. You've pointed out that the book may be English language worldwide, but we also have to think about individual languages in different territories. Do you think about them in conjunction all the time? Is there a strategy that you advise somebody looking at an agreement?

Evan Gregory: Yeah, yeah. I would advise if you are unagented, or if your client doesn't have an agent, that it would be better to allow the publisher to retain translation rights. Unless you have a plan to sell them and someone who is going to do that for you. Usually, it's an agent. In our case, we work with subsidiary rights agents in several different territories, and we split commission with them to help us sell those rights in other languages, or sell translation rights in other languages. If you don't have someone doing that full time for you, then it could be kind of useless to retain those rights, because the publishers also have subsidiary rights departments that sell those rights on behalf of the publisher and you, and you would get usually a 50% cut of any proceeds that they would get from licensing those rights on your behalf. If you have an agent, it's advantageous to retain those rights, because you will be giving up a 20% commission. But keeping the rest of the money from the disposal of those rights in other territories. In the grant, you want to be specific about it being I mean, the grant is often as much about what it doesn't say as what it does. So, you want to be specific and say in the English language, if you mean to retain all those translation rights. Then you also want to check further in the contract in subsidiary rights provisions to make sure that splits are stricken from the agreement so there's no doubt about it.

Daniel Rogna: Great. Yeah, I think that is a good point that we'll talk about when we get to subsidiary rights, that you want to be as clear as possible. And if you are reserving rights, you don't want to leave it unstated, you want to be absolutely explicit about which rights you are reserving.

Evan Gregory: Exactly.

Daniel Rogna: So, let's talk about the format, the form of the publication. Is it typical to see all formats of the work? Do you often advise clients to retain paperback publications? What's typical for an agreement?

Evan Gregory: Typically, the publisher will try to grab as many rights as possible, and when negotiations open they will often send you a deal that has everything that they could possibly grab or they will want. And it is your duty to ask for those things back, basically. In terms of format, like for publication rights, hard covers, soft covers, etc., usually the publisher controls most of those rights. Then there's separate subsidiary rights, which you should be mindful of, especially when it comes to film, TV, merchandising, those sorts of rights are big basket rights that all go hand in hand if you want to exploit film or TV adaptation rights. Typically, if you are going with a big five publisher, they're going to want to retain all of the publication rights, unless you have specific reasons for excluding some. So if you are doing, for example, there are publishers that only publish hardcover books, and they publish sort of fancy hardcover books, and you might only want to confer rights for hardcover books to them because if you conferred soft cover rights and all those other things, they wouldn't utilize them anyway. You might be able to utilize them on your own.

Daniel Rogna: One caveat would be this future technologies clause. So now, when we think about all formats, we absolutely consider ebooks. There was a point in time when ebooks weren't a thing, and a lot of contracts still included language that spoke to it could say something like "in any format or version, by any means, and in any and all media, whether now known or hereafter developed." Well, if you're counseling a client for certain royalty rights on books, and ten years later, the book is still in publication, and now it's an electronic book, and

under the contract the publisher has rights to that, maybe you've been disadvantaged a little bit. Do you have any strategy for dealing with a future technologies clause? It's hard to think about what could come after an ebook, but it was probably hard for people to conceive of an ebook 20 years ago.

Evan Gregory: Certainly. I mean, the enforceability of future technologies clauses is, I think, always going to be a bit in doubt. I'm not an attorney, so I can't speak to this as well as perhaps you might be able to. But in my experience, when it came to reviewing contracts that didn't specifically grant ebook rights and when publishers made claims on having those rights, they often tiptoed around it a little bit and were amenable to negotiating terms after the fact. Usually, with new technologies, they don't have the royalty framework worked out about how they're going to monetize it, and so those terms will always have to be added after the fact, and you as the person granting rights, you have a lot of leverage when it comes to negotiating those terms. I don't worry too much about the future of media technology clauses for that reason from a business standpoint.

Daniel Rogna: From a business standpoint, yeah. As a lawyer, there's a lot of concern about it. But I understand –

Evan Gregory: It's problematic because you can get into a little bit of legal trouble for it.

Daniel Rogna: Sure.

Evan Gregory: Also as a practical matter, publishers are pretty loath to change those terms. I've gone round for round with them on certain future technologies provisions, making sure to limit them. I would, of course, if they concern you, always ask. It doesn't hurt to ask. The worst they can say is no. It's always a good idea to try to limit the scope of those clauses as much as possible.

Daniel Rogna: That's a great point. So, there's one case that I wanted to bring up that deals with this grant of rights clause, *Random House vs. Rosetta*. In that case, Random House sought an injunction to stop sale of electronic books by Rosetta Books. When the court reviewed the agreement, the language that they pulled out was that the grant to the publisher was to print, publish, sell the works in book format. The court decided to deny the injunction because the contract was explicit that it didn't it was not including digital publication. They relied on this in book form language. But they also relied on the fact that the author very clearly reserved rights in other portions of the agreement, so they contemplated this, and because they contemplated not including electronic formats the injunction was denied. I think you make a good point, though, from a business perspective, that both parties are going to want to come to an agreement about how they can move forward and both mutually benefit from it. From a legal perspective, if you can limit it at all, that would be the advice that we'd give.

Evan Gregory: Right. In terms of this circumstance, there are also a lot of contracts in which Random House was able to sort of squeak by, because they had provided there was language about grants of rights for books on microfiche and books on like a publication other than just book form that they tried to sort of wiggle around to confer ebook rights. So yeah, if in the future there are technologies that inscribe books on the inside of your eye lids with laser beams, you know, they would probably have a right to that.

Daniel Rogna: Sure. All right. Let's move on to subsidiary rights, which we've talked about a bit right now. Can you explain what constitutes a subsidiary right? And we've got a large list here. What should we be thinking about when we come to an agreement? What are the important subsidiary rights that we want to make sure we talk about in the agreement?

Evan Gregory: It's mostly translation and adaptation rights, and then other weird publication rights. In the book business, there are many ways to skin a cat, other than publishing a book in hardcover or softcover and sending it to bookstores. There's obviously ebooks, included in the standard grant of rights these days, but weren't always. Sometimes they were considered a subsidiary right, because it was entirely new, different thing that wasn't as popular as it is today. Then translation rights, obviously, so translations in other languages; adaptations into film; audio book adaptations; and then associated merchandising rights when it comes to sort of film and TV; theatrical rights, If they wanted to adapt a new stage play, which happens infrequently; and book rights, which are usually retained by the publisher, so special edition rights, like they are creating 10,000 of your books for a corporate retreat because you have written this business book that is very popular, things like that.

Daniel Rogna: Yeah. From a legal perspective, I think we can lump all these in as derivative works, for the copyright attorneys in the room.

Evan Gregory: Right.

Daniel Rogna: To give everybody a feeling for what kind of language this looks like in the agreement, it would sound something like "author grants to publisher sole and exclusive right throughout the world to sell, license, and otherwise exploit motion picture rights, radio rights, television rights, compact disc rights, dramatic rights, public reading and all of the nondramatic performance rights, then include information about royalties subsequent to that." So, when you're negotiating subsidiary rights, what is your strategy? I'd be interested to hear how you deal with it.

Evan Gregory: As an agent, I want to retain as many rights as possible, because I want to be able to sell those rights on behalf of my client and earn a commission for it. It's just that simple. Usually there are some non-negotiables. Film and TV rights, because they have the potential, if they ever happen, to earn your client a lot of money. That's also advantageous to them to have someone representing them who knows what they are doing, not have the publisher kind of muck it up. The publishers aren't as good at exploiting film and TV rights as agents may be. Although they're getting better, but they haven't always been great at it. Film and TV rights, you definitely want to retain. I always try to retain translation rights. Audiobook rights, because there is a huge secondary market for audiobooks. Audible in particular is hungry for rights and will buy anything I try to sell them, so I try to retain as many of those rights as possible, although the publishers have been pushing back because they notice the utility in publishing audiobooks, that it's very popular, people like to listen to them, they make a lot of money and the publishers would prefer to do everything inhouse themselves, in most instances. If you're working with a smaller publisher, if you're working with a publisher that doesn't have its own audio recording branch, it's advisable to retain those rights if you can. Translation rights, obviously. I usually ask to retain translation rights. We do a big business in translation rights, and we have partners in several different countries.

Daniel Rogna: If someone is dealing with an author who maybe doesn't have representation though, like you said before, it's probably better to leave those translation rights with the publisher.

Evan Gregory: Right. You may consider retaining film rights in the hopes that your book becomes a huge success, and then you shouldn't have problems finding an agent. In fact, they'll probably come knock on your door, seeking those rights or seeking to represent you for those rights. And publishers are usually pretty forgiving when it comes to film and TV rights, even if you are unrepresented.

Daniel Rogna: OK. What I'd like to do quickly is point out that there is risk in not considering subsidiary rights entirely. It is an older case, but I think it's pretty instructive for what we're talking about, in this case the plaintiff was Dr. Seuss. He had prepared some cartoons for a magazine. A few years later, the cartoons were turned into dolls by a third party who had been given rights to do that by the magazine. Dr. Seuss didn't believe that the merchandise was contemplated under the contract, but the court disagreed. They found that the magazine publisher had complete rights to the cartoons, and they therefore had the right to license defendant toy producer to make those threedimensional figures based on the cartoons. The point being avoid risk if at all possible. What I'm going to do is jump back and point out that the best way to avoid risk is to include reservation of rights. Anything that you don't specifically grant to the publisher you should reserve to the author. And don't just rely on the negative space of the contract, be explicit about it. And lay out what you are not granting to the publisher.

Evan, do you have anything to add to that?

Evan Gregory: Yeah, always include reservation of rights.

Daniel Rogna: So, let's turn over to financial stuff now. Advance is a big topic. I think anybody, even if they don't have any background in intellectual property or book publishing knows what a book advance is. I think no one here is expecting I don't know if it's $60 million or $65 million President Obama received. But what's the expectation for maybe a firsttime author who is lucky enough to get their book in negotiations with the publisher?

Evan Gregory: Sure. I can talk about advances. Advances are usually commensurate with the royalties you can expect to receive for the first printing. So whatever that may be. You probably won't have access to the profit and loss statements that the publisher generates, but you can be reasonably assured that when they come to you with an offer, it's going to be fairly close, the advance terms are going to be fairly close to what they can afford to pay you and publish the book at the same time. If they come to you and say "we want to give you $10,000 as an advance," you can't then turn around and be like, "I would prefer $1 million, please." You may be able to talk them up to $15,000 or $20,000, depending how well you think the book will do and whether or not you think they are getting the numbers right, but you have to get in the same general ballpark.

Daniel Rogna: That makes sense.

Evan Gregory: Yeah. The advance and royalty terms kind of go hand in hand, because you are expected, if you are going to be successful, to at some point hopefully earn out your advance or get close to earning out your advance. The advance is usually against royalties, so you are given $10,000 and you do not get additional royalties until you have earned $10,000 in royalties based on the percentages that you negotiate.

Daniel Rogna: Yeah, I think that's a great point for anybody who is new to this. The advance isn't just free money on top of it. It's an advance against royalties.

Evan Gregory: Exactly. They will give you $10,000 if you sell through your first printing of the book, you will usually earn additional royalties on the second printing.

Daniel Rogna: When should an author expect the advance to be paid? Are installments typical?

Evan Gregory: Yes, installments are typical. You know, it's usually in two parts, but it can be in three parts. If it's in three parts, it would be a third on signing. There would be a third upon delivery and acceptance of the manuscript, which means if you have a completed manuscript they've already seen, they still need to edit it, you still need to perform edits, you still need to copy edits, and after the publisher deemed it acceptable for publication, then you get the second chunk of money. Usually there's a third, or sometimes there's a third payment upon publication. And it's important when you are if there's a publication payment to have a "But no later" clause, so if they accept the book, you want to have that third part of the advance within a year to 18 months, because they could unreasonably withhold publication of the book, and then you wouldn't get that third part of the money, and your royalties would be earning against an advance you never received. You have to be clear about that.

Daniel Rogna: Yeah, when you're drafting, make sure if it's being paid in installments, you understand what the expectations for those installment payments are.

Evan Gregory: Right. Installments are also negotiable. If the publisher wants to pay in three installments, or pay in four installment, because it hasn't been written yet, so it want to pay you on delivery of a proposal, then delivery of the complete manuscript, you can also negotiate them down, and say, "No, I'd rather do it in two pieces than three."

Daniel Rogna: Like we mentioned a little bit before, and we'll talk about shortly, you can be required to pay back the advance, correct?

Evan Gregory: Mmhmm. You can be. Usually, there are provisions for that in the contract, for under what circumstances that that happens. So, it happened to me on my first deal. I had a client who submitted a proposal and was supposed to write the book and did not write the book in time, and then when he did ultimately deliver the book the publisher was like, "No, this is kind of half done." So, they rejected it, and he had to pay back the advance and I also had to explain to him that I wasn't going to be paying back my commission, because I had done my job, which was a fun conversation to have on your first publication deal. Now, it doesn't always I mean, non=delivery isn't usually the only reason that you might have to return an advance. If anyone is paying attention, like the Milo Younopolis thing, where his book was eventually canceled, he probably got to retain the entirety of his advance, because he did his job. He returned the book. It was acceptable to them. People complained about Simon and Schuster publishing it, and they decided to pull the book just because there was bad publicity and they expected it to flop and there to be boycotts, etc., etc., etc., but just because that happens, it's not his fault, and he probably retained all of his money in advance anyway. He didn't see any additional royalties, because the book was never published, but he got to keep his advance.

Daniel Rogna: Right. He bargained in good faith and got to keep the benefit of that bargain.

Evan Gregory: Right.

Daniel Rogna: Let's talk about royalties now. What we recommend is that royalties should be based on suggested retail price. That's because it allows for the author to maximize the revenue regardless of the actual sale price of the work. If the suggested retail price is $14.99 and the royalty is based on that, the author is going to be getting a higher payment than if the book is heavily discounted to $8.99, something like that. Evan, when looking at royalty rates, what did the publishers typically present as the original bargain? What do you turn around? What basis and what, I guess, percentage are you looking for?

Evan Gregory: Oh, well, first, can we talk about suggested retail price and net receipts?

Daniel Rogna: Yes.

Evan Gregory: It's not just about maximizing the money. It's also about transparency. If you are basing royalties on suggested retail price, you know dollar for dollar what you're getting. If your hardcover is selling for $25 MSRP, and you are getting a 10% royalty of that, you know exactly what you're getting. Whereas, with net receipts royalties, the publisher doesn't have to disclose to you what they are netting out. They obviously have confidential terms with their distributors about the amount of money they're giving up for distribution and you are not privy to that information. Net receipts can be sort of a black box, wherein they sell the book for X amount of money, and they give you 10% of mystery money. That's usually why you want to go with the suggested retail price royalty. It's not always financially better, but it is more transparent. Then, secondarily, it's not always feasible for a publisher to give you a royalty based on suggested retail price just because of the nature of the product they're selling. When it comes to ebooks in particular, you will expect to see a net royalty, because the pricing fluctuates and it has to be adaptable. In most publication contracts, there are also provisions for discounting that will reduce the amount of royalties that you have. For books sold at greater than 50% or 60% discount, you will receive a reduced royalty or half royalty, depending on what you negotiate with the publisher.

Typical royalties for hardcovers, these have been unchanged for decades. It's usually 10% on the first 10,000 copies, 12.5% on the next 10,000 or 5,000 copies, depending what you negotiate, then 15% at the high end. Paperback royalties can be 6%. 6% is a little low. Usually, it's escalators of 6%, 8%, 10%, and it's kind of

all over the map what the escalators should jump at, like the number of units you're selling. So, paperbacks have sort of undergone a change. It used to be you could be reasonably expected to sell 100,000 paperback copies, because they were cheap, plentiful, and people were buying them. Now, ebooks have sort of reduced the need for cheap edition paperbacks, because people prefer to buy ebooks instead, so the threshold for the escalators have gotten a bit lower. I try to negotiate for like every 50,000 copies sold there should be an escalator, up to 10% is usually the ceiling for paperback royalties. That's for mass market paperbacks. There's also a differentiation between mass market paperbacks and trade paperbacks. A lot of publishers, in lieu of publishing a hardcover edition, publish a trade paperback, which you've seen. It's a bigger, fancier, paperback that has a waxy cover. The dimensions are different than five inches by whatever it is, four inches, the little mass market paperbacks, the cheap paperbacks.

Daniel Rogna: Is it fair to say we can expect to negotiate different rates for each of those different formats?

Evan Gregory: Yes. In hardcover, there are different considerations than there are for paperbacks. Then there are usually two sorts of paperbacks, the mass market paperbacks which they're printing, they're pulp paperbacks, printed in large numbers. Then there are trade paperbacks, which are sort of in between the hardcover and your mass market paperback in terms of print sizes. For those of you who want escalators as well, they usually start around 7.5% with a ceiling of 10%.

Daniel Rogna: Great. So, you mentioned ebook royalties. It's, at least in my experience, been disputed. I've got this quote from the Author's Guild about what their position is, that it should be a 50/50 split of ebook profits. Have you seen tension over negotiating royalty rates? Is it leveling out at this point?

Evan Gregory: Yeah, I think we sort of reached a detente with the big publishers around 2008, that they weren't going to give any more than 25% of net receipts, which nobody thinks is fair, but the publishers are sort of unwilling to budge on that, because they haven't been in the business of ebooks long enough to know if it's going to be profitable. At this point, they probably have, and there are I mean, we certainly make efforts on behalf of clients who have a lot of leverage to improve terms for the ebook royalty rates. And I can't say whether we've had success with that, because it would be confidential, but yes. Certainly, ask, certainly try, certainly pressure the publishers to do better, because they, I personally think, should do better. I agree with the Authors Guild that a 50/50 split is probably equitable.

Daniel Rogna: OK. Do you see different royalty rates from a publisher who is ebook only?

Evan Gregory: Yeah, sure. In certain circumstances, there are publishers who don't offer advances, and are just offering higher than average royalties. And those deals can be great if you have a client who otherwise couldn't get his foot in the door with the bigger publisher and get an advance to get a deal like that. Usually, it's like they're onlineonly publications, they don't dabble in print at all. Their main bread and butter is on Amazon, Kobo, or the other platforms.

Daniel Rogna: Does the typical royalty structure change based on the type of the work?

Evan Gregory: Yes, certainly. Yeah, for a novel, for fiction, for popular nonfiction, they're fairly standard. For children's books, you can expect a lower royalty depending on the cost of the book itself. So there are lower royalties for children's books and for specialty markets, like gift books, where production costs are higher because they're using better paper, they're using fullcolor printing, the actual cost of the book is going to be greater than just pulp paper with words printed on it. You can expect to have lower royalties. Typically, for children's books, though, it's not too much lower. For most of our children's clients, I haven't found it's been substantially lower than other types of fiction or nonfiction.

Daniel Rogna: The takeaway I think would be try to negotiate up, by keep expectations realistic.

Evan Gregory: Right.

Daniel Rogna: Let's talk about accounting now, sort of the last point of the financial section. How often do you want the publisher to submit payments and statements? What's standard? What is the expectation that you need to produce to the client about when they're going to get paid and how they can check the math to make sure everything is right?

Evan Gregory: Semiannually is sort of the lowest threshold, and I do have publishers who pay monthly, which is lovely, and preferable. Yeah, usually, it's semiannual with statements being rendered 90 days after a certain period. So, with the year split into two halves, January to June, and June through December. Then you usually get statements rendered in April and October, and that's typical.

Daniel Rogna: Can you speak about reserve on return a little bit? I think that might be a concept that's new to some of the audience members.

Evan Gregory: Sure. Books are returnable goods. So usually the way the business works is that the publisher will warehouse 10,000 copies of the first printing, and then they will take orders from bookstores. The bookstores may usually order more than they need. And then after a period if the book isn't selling as well, they will return those copies. A reasonable reserve is kept

to cover those returns. If the publisher is expecting that your book is going to be a blockbuster and they print a zillion copies and ship them out to the bookstores and it's a flop, they like to keep a reserve so that they can cover those losses.

Daniel Rogna: Is there a reasonable percentage?

Evan Gregory: There is a reasonable percentage for the reserve for returns. It depends a lot on the book. I couldn't give you like a real figure, but yeah, usually you want to negotiate based on the size of the print run so that they're just not withholding a bunch of money that you never see, and you want them to release that reserve each statement period.

Daniel Rogna: OK. Great. Do you have any other points you want to make?

Evan Gregory: Yeah, make sure that you are very clear about when they account and how they account. You want to make sure that the accounting provisions are very precise and that they will tell you exactly how many books they are selling and how many they are returning, and which formats, and that it is all transparent.

Daniel Rogna: I think that's a good point. Transparency is key. If something seems awry, rely on that ability to account for the payments, go back and check the books

Evan Gregory: Don't be afraid to negotiate auditing clauses to your advantage. Publishers will try to limit the number of times you can audit in a certain period, and they will try to make it difficult for you to get an auditor in there to do it, because they want to restrict it to what they will allow for them to open their books. So yeah, do be mindful of those clauses in auditing clauses.

Daniel Rogna: Great. All right. Thanks, Evan. We're going to turn over to Jason now, who is going to start talking about publication. Let's lead off with delivery. Jason, is there a deadline? Are we trying to look to set up a deadline to deliver the manuscript? How do we compromise a reasonable date? Do we consider multiple deadlines?

Jason Koransky: Sure. Absolutely. It also can depend upon the status of the work. This could be a situation in which, prior to negotiating with the publisher, the work has already been substantially completed. At this point, the delivery clause will be – may be shortly after the execution of the agreement, because at that point, the publisher has probably already seen the work and they're just waiting for a format from the author that they would deem acceptable. Otherwise, certainly the delivery clause would be dependent upon the type of work, whether it's a fiction or nonfiction book, and I think it's important also to have certain clauses that do not make this a nonfixed deadline, where there's no room for extensions. There should be clauses in there for mutually agreed upon extensions for the delivery of the work.

Daniel Rogna: Good. That's a great point. So, we're looking for a little flexibility in the delivery.

Jason Koransky: Absolutely.

Daniel Rogna: You used the word "acceptable." I think that's an interesting concept in publishing law. It certainly is subjective. How can we protect the author from this subjective standard of acceptability?

Jason Koransky: Well, it's fairly difficult to provide an absolute protection to the author. This is a subjective standard and it is a standard that has traditionally been set as far as it has to be satisfactory to the publisher. Now, there could be language in there that would allow, for example, the author to get editorial input, specifically editorial input from the publisher in order to have them help define that standard. So, they just can't say, "This is not acceptable, give me another version." You give another version, "Sorry, this is not acceptable, we are not going to be publishing the work." That would probably be a very strong way to, at least, require the publisher to provide reasons. Another way would be, you can also agree to it, to provide in writing, as a lawyer, it's always something you want to have included in an agreement as often as possible, where the other party has to provide a breach clause, something like that, if there are specific reasons, here for the acceptability, provide in writing specific reasons why it is not acceptable and whether or not they have provided recommendations. That can be negotiated. At least, you want to be able to provide, the author wants to be able to know where in particular the publisher has issues with the manuscript.

Daniel Rogna: Yeah, I think that's a great point. If you can get it in writing, that's great. If we don't have a provision that requires the publisher to put in writing, does the publisher have a duty to edit the manuscript before they reject it? I'll give you guys a second to vote. While there is no absolute, a publisher does have a general duty to edit the manuscript. It's considered a good faith effort consistent with the duty that the publisher takes on in the agreement to provide feedback about it. I would never recommend relying on that duty to edit, but like Jason says, if you can get it in writing that the publisher needs to turn around and say explicitly what problems it had with the manuscript, that certainly is going to cover you better.

Jason Koransky: Right. Of course, you don't want to rely on the absence of the words "good faith" to imply that that is in there. But courts, when they have interpreted the standard, the standard has been, for the satisfactory of the publisher language, there is a good faith standard that exists on behalf of the publisher.

Daniel Rogna: In the Harcourt Brace Tranavovich Fitzgoldwater case the court found there was an implied obligation for the publisher to engage in appropriate editorial work with the author of the book.

Evan Gregory: Usually in most publication agreements, under delivery and acceptance, there's a question here as well. I see that, that pertains to this. Give a time for the publisher to respond with editorial comments, and there are usually terms about what satisfies that threshold. So, it says usually the publisher must make a reasonable effort to respond within 60 days, 90 days, or 30 days to submit a manuscript. Otherwise, the contract may be terminated.

Jason Koransky: Or, I've also seen where if they don't respond within that certain period of time it would be deemed accepted.

Evan Gregory: Right. Yeah. Or you're able to make a written request, etc., etc.

Daniel Rogna: A point that ties into this, that we raised earlier, is if the manuscript is rejected, is the author going to have to pay back the advance. And generally, yes, you're going to be required to pay back at least part of the advance. We've got some case law here. You know, the circumstance that Evan brought up earlier wasn't one in which the manuscript was rejected, it's one in which the publisher decided not to publish the work. So, it's a different situation there that won't require, most likely will not require, repayment of the advance.

Jason Koransky: Right.

Daniel Rogna: What happens to the advance if the publisher declines to accept the manuscript? How can the author protect him or herself against having to return the advance? I guess, Jason, how can we avoid the risk of repaying the advance? What strategies would you suggest?

Jason Koransky: I always see an advance not as also a risk that the publisher is taking. The publisher is taking a business risk in which they are making an investment in that author. So, it can be good to have a contractual clause in which perhaps 50% of the advance, if the work is rejected, and that can be negotiated, would not be returnable. The author would be able to retain that advance. Unless, of course, the author is then able to turn and sell the manuscript to another publisher. At that point, then that remaining portion of the advance would have to be returned to the original publisher. That's a very fair and reasonable way to both make sure that the author puts a lot of time and effort, perhaps their own money, into completing a manuscript, that does not end up with absolutely nothing. As well as the publisher should be able to agree to those sort of terms, since they understand we're taking a business risk and this is not a situation in which we're risk free. If it doesn't work out, we get all of our money back. That is not reasonable for a publisher to insist upon such a term.

Daniel Rogna: Yeah, I think you make a good point. We've been looking at most of these terms from the perspective of the author or the author's representative. The publisher has obligations and responsibilities as well. If you can try and hammer out this situation ahead of time, you can avoid some messy conflict down the road.

Jason Koransky: Exactly. The *Nance vs. Random House* case. That was a situation in which the language in FIA contract read "if the manuscript for work number two is rejected, author shall retain 50% of moneys previously advanced for work number two." Basically saying that the author would have the right to, again, retain 50% of those moneys, unless they were then sold to another publisher, which in fact they did. So, they had to return all those moneys.

Daniel Rogna: Great. Let's move over to publication date. How can you protect the author from having the manuscript fall into a black hole, i.e., after submission of the manuscript the publisher fails to act? Can I reasonably expect the publisher to accept a publication date?

Jason Koransky: Oh, absolutely. This is a standard clause in a publishing agreement. If the publisher fails to meet the deadline, two things should happen: The author should get to keep the advance that's been paid to them. If you had that clause in there, that if the author after a particular amount of time has not responded, that this should be deemed accepted. The other is that the work, any rights to the work, should revert back to the author.

Daniel Rogna: Yeah, absolutely. It keeps it out of this limbo period of they have rights to the work, but they aren't doing anything with the work, and I'm sitting here not making any money on the book.

Jason Koransky: Yeah. And the publisher may insist on some sort of, just as the delivery date, some sort of extension, some sort of acts of God type clauses, things like that. Which can create a little bit of ambiguity towards the publication date. But you should really try to have as concrete of a deadline as possible in the agreement.

Daniel Rogna: OK, great. Let's talk about the concept of clearances. What party is normally going to be responsible to obtain permissions and releases? What's the risk involved there? Do you have any strategies you can advise about?

Jason Koransky: Yeah, sure. Obviously, in a lot of agreements this responsibility is going to fall on the shoulders of the author. The author is the person doing the

research, especially in nonfiction work. Pulling together materials, finding photographs, finding old excerpts of songs, books, whatnot. Usually the author is the party on whose shoulders that falls. Oftentimes, it is helpful for the author to have legal counsel for these matters. It could be a situation where, based upon the research and the work on the book, they can have a very, very simple agreement in which they're able to provide to the source of the materials granting them all of the appropriate rights to use that photo, that excerpt in the book. But I think it's important to actually have that paper, have that in writing, and it can be very simple agreement, but should be something that the author is cognizant of and does not do based on the back of a napkin type contract. You should have a good contract in place to protect them.

Daniel Rogna: Yeah, that's a great point. I think often lay people have this concept of fair use that doesn't really fit with what the legal concept of fair use is.

Jason Koransky: Precisely.

Daniel Rogna: That's where, as the representative, you need to step in and make sure that as you say, Jason, they've got all the paper in place, that there's a good clear chain and we know that we have rights to use the song excerpt. So that when legal, at the publisher, comes to ask us about it, we can show it to them, and they can feel comfortable moving ahead with the publication.

Jason Koransky: Exactly. Especially if you get the book published maybe in electric format, maybe multimedia issues in there. I've litigated many cases that dealt with fair use. Regardless of all the case law that exists, each fair use case is determined on the facts of that case. Anytime someone calls me and asks me, "Is this a fair use?" I can't give you a brightline answer on that. I can give you what may or may not, but it's impossible for me as an attorney to say, "Yes, that is a fair use." There's just no brightline rule there.

Evan Gregory: If I can interject again. My advice to clients, when they're using material, is always to get explicit permission. Just because.

Daniel Rogna: Why not, right?

Evan Gregory: As a matter of course. Or usually my advice is if it can be left out, to leave it out. Because it can turn into a legal headache, yeah.

Daniel Rogna: Great. Let's move over to outofprint clauses. Jason, can you talk about that for a little bit?

Jason Koransky: Right. Usually, there was a concept of a clause where if there are no longer specific copies of the book available, then the rights to the book revert to the author. Obviously, this is a little more difficult these days with digital material, which is something that can always be available. That point, the clause should have some sort of minimum sales or minimum royalties, or whether the book is actually even accessible via any sort of additional media. But at that point, once the book is out of print and the terms it's out of print specific to the terms of the agreement, the rights of the work should revert back to the author.

Evan Gregory: In terms of outofprint provisions for a minimum threshold in terms of digital works, it can be percentage of royalties, but it can also be like an actual dollar amount of royalties in certain circumstances. It's like if the book is earning you less than $200 per statement period, and it falls below that threshold, it's available for reversion.

Daniel Rogna: Great. Let's talk about options a little bit. I think that's a term that most people will be familiar with, but maybe not know how they should address it in a contract.

Jason Koransky: Sure. That's obviously something where the publisher is taking a business risk on the author, and they're often going to want to have something along the lines of perhaps a right of first refusal for a second book. Perhaps even a third book. You're going to want to have terms, however, specified in there. What would the advance be for that? There should be a period of time under which the publisher can exercise those rights. You don't want an openended term to exercise those rights. It should be a very specific period of time under which they have the ability to have the option for the next book. Also, sometimes it can also be the option for the next book for the same or similar type of content, so that the author can have the right to pursue another publisher for a different type of work, but for perhaps another book in this series the publisher would have the right of first refusal for that next work.

Daniel Rogna: That's a great point. If you're working with a prolific author who has one series going, make sure that the contract isn't so broad that it's going to encapsulate every kind of work that this author is doing, and limit it more to that series, so that the business relationship is focused on that particular line of work.

Evan Gregory: Sure. An option clause, yeah, in certain circumstances, it's advisable to limit the option to only future books in that particular series. If you're writing a series of science fiction novels, let's say, it can be advantageous to keep it to that series specifically to allow your client to write another science fiction series for somebody else, if they so deem it.

Jason Koransky: This goes without saying, but I'll keep repeating this, but the option clause should be that they exercise their option in writing. It should be like if you have a phone call saying, "Yeah, we'd like to do that." It's

nebulous. Every time there's a certain clause that involves continuing rights or obtaining rights, electing to do something, it should be in writing. That should be explicitly included within that clause.

Daniel Rogna: Great. The basic point of the case is that if the clause is too vague, it's going to be unenforceable. Like we said with pretty much everything so far, specificity is key. Be very clear about what you're negotiating for. Let's turn over to the last segment here. Let's try and talk about representations and warranties and a little bit about indemnification. Jason, what are the standard representations and warranties? What's the legal implication of those to avoid risk?

Jason Koransky: Sure. I have a pretty interesting take on this one, because the representations, warranties, and indemnification revisions oftentimes can mirror each other, they can look very similar. The reps and warranties: if the work is original or it's sole author or joint author, if there's multiple authors, that it doesn't infringe a copyright or trademark or right of publicity or libel another party, and so those are the standard representations and warranties. One of the issues with it is that oftentimes there isn't a text in there that says "knowingly is original," or "knowingly is a sole author," or "knowingly infringes the right." I've had situations where you can actually negotiate to include that sort of language within the reps and warranties. Also, it's possible to actually delete these from the representations and warranties. The reason being is that you can tell the publisher, "this is how the reps and warranties work with the indemnification clause, we are already indemnifying you, the publisher, I am indemnifying you against claims based upon copyright infringement or libel. Why do I also need to include a rep and warranty?" It's something that has become a standard way of drafting these agreements, but if you really think about it, it is superfluous, and it's a rep around warranty that it can create more liability. Because, as we say here, breaching of warranty can expose the author to risk. If you are already indemnifying the publisher, consider pushing back on this. So again, as I said, the indemnification would basically say that "if these claims are brought, and also in part to include in there by a third party," because I've seen contracts where you're indemnifying a publisher against any of these claims. Arguably, based upon the contract language, you're identifying the publisher has a claim they would have against you as the author. So, that's something you want to make sure to include in the indemnification clause. Also you want to have, if possible, if you are indemnifying, the author is going to want to have control of the litigation. You're going to want to be able to control who the attorney is and perhaps how any sort of litigation or negotiations may proceed. But usually, there's going to be something in there regarding any sources that would have to be agreed upon by both parties.

Daniel Rogna: Sure. That's a really interesting argument. How is the publishing company going to encounter that argument. Is it a take it or leave it situation?

Jason Koransky: It can be. Again, we've been successful in making this argument. It has been successful. So it could be it also depends upon the author, their leverage, their bargaining, if they're negotiating say between several publishing companies. Oh, one other point on there is that indemnification clause should also be contingent upon the publisher providing notice within a certain period of time, perhaps 30 days, 45 days, 60 days, to the author of this claim by a third party. Otherwise, it's waived.
Daniel Rogna: That's a great point. How to minimize risk and keep the client in the best shape possible. Quickly, I'll point out that the author can consider obtaining insurance. I don't know if that's something that either of you recommend to your clients. The publisher may cover the author, but that coverage is probably going to be limited. Do either of you have any points you want to make about insurance?

Evan Gregory: I've never recommended a client obtain separate insurance, but in several circumstances the publisher will include them as part of their insurance. To speak to the publisher's rationale when it comes to warranties, usually they don't like to be sued for libel for something that you did, and they want you to warrant it to them, because they don't have the capacity to fact check things. If you were making untrue claims of another party, they're usually not going to check that just because their focus is on turning in a book that is editorially sound and will sell, and they don't have the same sort of journalistic duty to present facts as facts. I think a lot of people get upset about that, but the publishers usually want to keep the warranties for those reasons.

Jason Koransky: I agree wholeheartedly, absolutely. That's the reason they want to keep them, to say it is possible.

Evan Gregory: They want plausible deniability, to be like, "We didn't check the facts on it. The author warranted that they were true."

Daniel Rogna: OK. Registration of the copyright is important. Jason, do you have anything you want to speak to about that?

Jason Koransky: Well, having a registration of copyright allows a party to go to court, and it allows them to obtain statutory damages and attorneys' fees. It depends. Also depends upon the nature of the work, whether you want to obtain a file of the copyright application prior to publication. That could be important to do, simply because it's the type of work where if it can get leaked out it would be very valuable. But the timing and the nature of the copyright application would be important to consider. The

publisher should have a good system in place for filing copyright applications. It's an incredibly simple process to do, and they should have someone inhouse.

Evan Gregory: It's in their best interest to do it.

Jason Koransky: Absolutely, yeah.

Daniel Rogna: I will say, I had one experience where we were dealing with a client whose book was infringed. We went to do the early due diligence, and I could not find a copyright registration. Pulled up the agreement. It was publisher's responsibility to register that copyright, and they failed to do so. We're a few years down the line at that point, so we had to just put the claim on the side and deal with the problem other ways, because that had been overlooked. I agree, the publisher's best interest is to go through the very simple process of registering the copyright, but as the author, you want to doublecheck to make sure that doing their job.

Jason Koransky: Very good point, yeah.

Daniel Rogna: How are these term negotiations usually carried out? Red lining? Face to face? Or phone?

Evan Gregory: I will happily answer that question. Usually, negotiations begin well, in my case, via email, sometimes over the phone. Mostly via email. And mostly a request like a memo in advance of them drafting an agreement that delineates the terms, so there's no doubt about it. That usually includes everything in the grants, royalties for the primary editions that the publisher is going to be publishing, option terms. Those are all hammered out before an agreement is drafted by the contracts department or the publisher. Then, once I get the contract, there's usually a couple rounds of red lining and asking for minor things to be changed and adjusted. If that makes any sense.

Jason Koransky: Oftentimes the publisher will have a standard agreement and have standard terms in which they would like the, we hit on this previously, they'd like to have the authors agree to. Sometimes these terms don't make any sense to the work at hand. So just because you get this contract know that these terms are negotiable, and this is in the bestcase scenario what the publisher would like to see, if there's not been, as Evan said, these pre-negotiations as far as specific terms. Just be prepared. Don't worry if there's a lot of red line on there. That's not unusual. That's common.

Evan Gregory: Yeah. Usually, if you are lucky enough to have a literary agent, their contracts department has standard contracts that are adjusted for things we've already asked for, for other clients. Just because they know we'll ask for them every time. So they don't waste time, I usually get a contract for things I know I've negotiated with other clients. This is just stricken from the agreement when I get it. That's nice to have.

Daniel Rogna: That sounds very nice to have. How much of the negotiation is handled by the literary agent? Does the literary agent usually have a role? I think the easy answer is it's the biggest role, if you have an agent, right?

Evan Gregory: Yeah, exactly. Yes. I do the majority of the negotiating. I have worked with clients who also have attorneys who specialize in intellectual property. Usually I will negotiate the initial terms. Like I said, in terms of grants, royalties, etc., etc., then the attorney will step in on some of the issues once we have contracts, or we'll work in conjunction with each other and the client to get them the most advantageous terms. It can be kind of a pain in my neck to work with an attorney, because they want certain things that I know that the publisher doesn't want to negotiate or is not likely to give. So, it can complicate things for me. I'm like, "Do we have to ask for this? I know we're not going to get it."

Jason Koransky: That's our job, though, Evan, is to

Evan Gregory: That's your job and I understand it. And I tolerate it.

Daniel Rogna: I think the nice thing that we've learned here, though, is the business negotiation side of things from you. Do modern publishers have standard splits for subsidiary rights licensed to the publisher? Or is it generally a negotiation?

Evan Gregory: Some are negotiable. And it depends on the leverage you have. Like if you are publishing a book that you know will be translated and you want a larger cut, you can always ask for one. I usually ask for larger cuts for serial rights in instances where I know that those rights will be exercised, but standard splits are usually 50/50, and that's the way it goes. If you're working with a publisher that has a really good film division, like McMillan does, if they want to represent film rights on your behalf, it might be advisable to ask for a larger cut, just because even up to just asking for whatever the standard commission would be for an agent to represent those same rights, because that's basically what they're acting as. But generally, it's 50/50 for subsidiary rights, like book publishing rights, most of the rights that the publisher retains for subsidiary rights that they intend to utilize themselves or give to third parties.

Daniel Rogna: OK, great. What is a work made for hire and how do you minimize a risk to the author if they're dealing with a situation that may be construed as a work made for hire.

Jason Koransky: Sure. Well, there's a couple of things that have to be considered here. One, a work made for

hire is specifically defined in the copyright act. First, a work made hire, if the author somehow is considered an employee of the publisher, there might be a clause within the agreement saying that the author is explicitly not an employee of the publisher, or work made for hire can be agreed upon. Again, a work made for hire again is all rights in the work would be owned by the publisher, the author would not own any of the bundle of rights set forth in Section 106 of the Copyright Act. There are particular works that, by definition, within the Copyright Act, cannot be considered a work made for hire. For publishing, a work of fiction, unless it's part of a compilation, it really wouldn't be considered, like a serial in a magazine, like month after month, it could not be considered a work made for hire based upon the definition of the Copyright Act. I'm not going to read it, because that would be pretty boring, but saying you can read Section 101 of the Copyright Act to see what can be considered a work made for hire. In the publishing world, a translation can be. A supplemental work, instructional test or an atlas, a few other things in here that really would not apply to a publishing agreement. It's important, if the publisher wants your fiction book to be considered a work made for hire, technically, under the Copyright Act, that's not possible.

Evan Gregory: I've done several sort of work for hire agreements. In some circumstances for authors who are coauthors or who are ghosting for other authors. James Patterson doesn't write all of his novels, obviously, because he couldn't do three a year just by himself, so there are a lot of those agreements that will be work for hire. They're also book packages, so people who come up with the concept for a book, then they hire out authors to write it in certain circumstances, for like franchise stuff, like novelizations of "Star Trek" novels can sometimes be work for hire, or things like that, if there's a package involved.

Jason Koransky: I think it's important in an agreement such as that then that the person's writing would have to be somehow considered an employee of the

Evan Gregory: Or a contractor. Usually, they have a story Bible already planned out in advance by principles at the packaging company, and the author is required to stick to a certain script in terms of the plot of the book. But the word and content is all provided by them.

Jason Koransky: If the parties agree it's a work made for hire, usually they can proceed under those terms. But there are cases in which work has not been deemed a work made for hire because it does not fall under the statutory definition of what a work made for hire is in the Copyright Act. It is something to keep in mind when contemplating whether this issue in a contract.

Daniel Rogna: Yeah. An alternative could be to have the author assign all the rights in the work to the publisher and avoid the work made for hire distinction entirely.

Evan Gregory: Yeah. I remember there being some kerfuffle about it. Was it James Frey? He had the sort of book packaging thing where he was churning out like YA novels from authors straight out of grad school, and they were all under work for hire contracts, but producing entirely original works for him.

Daniel Rogna: Wow. Are there any reference suggestions for attorneys new in the area? I guess I'll take a quick plug for Jason and point to the book "Law for Authors" book, published by Chicago's Lawyers for the Creative Arts, which Jason edited.

Jason Koransky: I edited that. If you're in Chicago, Mary Hutchings Reed was the author with David Creasey. They did a wonderful job. I did help write this with part of the LSA Law Guide Series. I don't have any other particular suggestions. I always like, as far as forms, in entertainment publishing and the arts, if you have access, I think always has a pretty nice selection. I think also Nimmer on Copyright as well.

Daniel Rogna: Nimmeer has great forms in there, if you're looking for a basis to start off with. What should an agent agreement look like; what red flags are there that we should pay attention to, if a client comes to us with an agent agreement?

Evan Gregory: Sure. Yeah. Agency agreements should obviously include scope of representation matters; you want to be able to narrow it down as much as possible. If you have a client who writes academic works that need to be excluded from representation, just be clear about which works are going to be falling under the agent's representation. You can even do it narrowly by genre. If you have a client who might have two agents, one for the nonfiction career he has and one agent for fiction that he is writing. Agent compensation typically is 15%. If you are working with an agent who is part of the Association of Authors Representatives, it's capped I believe at 15%. That's for domestic deals. We usually do a 20% commission for translation rights, because we are splitting it in half with are a subsidiary rights agent. Termination agreement as well; usually it can be mutually terminated with the understanding that we're still the representative for rights that were negotiated under the term of the contract. So, if I have done a deal with a publisher, I would still be the agent of record for that deal in perpetuity, and I would also be able to conduct deals for subsidiary rights from that publication deal. That way, you should be in agreement. Usually, termination should be as simple as you want to fire me, you get to fire me and vice versa. There are clients that have been like, "Hey, it's been a good run, but I haven't sold anything for you. I'm letting you go, terminating our agreement, and here is a letter to that effect."

Daniel Rogna: That's a good point, it should be a mutual understanding between the parties. My takeaway would be if a client comes to you and says, "Hey, I got this agent who wants to sign me up, I just have to pay him five grand," that's a big red flag to me.

Evan Gregory: Exactly, yeah.

Daniel Rogna: Avoid that.

Evan Gregory: There should be no reading fees. There should be no fees of any sort. Be very careful about expenses that can be charged back to the client. That's generally what to look out for. You should also be mindful in terms of expenses that you can specify that expenses should be taken out of some of the money paid to them by a publisher, not just have an agent who is like, "I spent a thousand dollars printing out your manuscript to send to several different editors, and now you owe me money for that. Even though I didn't sell your book." Be specific about that, too.

Daniel Rogna: Great. Just before we wrap up here, I will point out the author's guild itself as having great resources on book contracts. That's all the time we have, unfortunately. It was a great conversation.

To our faculty for the program, Jason Koransky and Evan Gregory, thank you so much for sharing your expertise with us.

On behalf of the ABA, I'm Daniel Rogna. Thank you for joining us.

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Book Review: How to Play the Game: What Every Sports Attorney Needs to Know (2nd ed.) by Darren Heitner

By: Blake Yagman

Darren Heitner's second edition of *How to Play the Game: What Every Sports Attorney Needs to Know*, like a lead-off homerun, touches all of the bases of sports law from the very initial pages of the book. *How to Play the Game* is an essential read — not only for current or aspiring sports attorneys, but for members of the sports business at-large. Heitner breaks down all of the types of law that impact the sports industry in a way that lawyers and non-lawyers can understand.

How to Play the Game immediately tackles one of the greatest philosophical divides in the sports law world: whether "sports law" is an independent body of law (and deserving of its own name), or whether sports is merely an industry affected by the law (and deserving of the name "sports and the law"). Heitner believes the former: "... there truly is a distinction between a sports lawyer and all other types of practitioners. It requires a deep understanding of the nuances that largely affect athletes, their representatives, and companies providing products and services in the space."

Heitner's opinion on this philosophical argument is instrumental; as he demonstrates in his book through his command of the material and through his personal anecdotes, Heitner is a titan in the sports law sphere he is helping to shape.

Another key component of this book is it's highlighting of niche roles. Through Heitner's experience as a sports lawyer, he has been able to analyze the industry from a macro perspective and, as such, he has been able to identify different roles within the sports law world which could develop to into future staples of the industry. For example, Heitner believes there is plenty of room for current and future attorneys to occupy the space of "sports arbitration" and even provides strategy for how to do so. From the chapter on arbitration: "While a civil litigator by trade may be able to quickly adapt to the various players' associations' regulations and case law, a seasoned practitioner in this area should have a tactical advantage based on his or her knowledge and experience with using the applicable precedent, the general demeanor of the arbitrator, and the relaxed rules of evidence… This is