

9. Parent of Many Children: The Relationship between Author and Publisher and Their Mutual Obligations

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I've always thought the relationship between writer and publisher is akin to that between parents and schoolchildren.

The writer is the parent of one Golden Book, whereas the publisher has a flock of them. The writer is programmed by the long act of creation to hope her book (increasingly it's her book rather than his) is the chief focus of the enthusiasm and endeavour of the publisher. Therefore conversations between email and telephone have this unspoken hidden tension hidden within them. We writers can't help ourselves saying Honour my book! And so we should...

The relationship can be an intense and rewarding experience, since the writer, if she's lucky, meets people within the company whose enthusiasm for her work is high. These people love books as much as the writer does...In the solitariness of writing the relationship between the author and the publishers can be one of the chief excitements of the publishing process.

Tom Keneally, Booker-prize winning author, in his foreword to *An Introduction to Australian Book Publishing*, third edition.

It is an honour to have been asked to participate in the National Workshop for Copyright Awareness and Production and Utilisation of the Mongolian Version of the *Asian Copyright Handbook*, and I thank the organizers for their kind invitation.

I have worked as an editor and publisher in the Australian publishing industry for nearly twenty years, eight of them at Pan Macmillan and twelve of them at Random House. Over those years I have worked closely with all areas of publishing, including contracts and rights, sales, marketing and publicity, but it is in the area of commissioning, editing and publishing that I have had most experience, and where my real interest lies. A publisher needs a very strong sense of what makes a book succeed; to know the difference between a passing fad and an enduring idea that will find readers over years; to be aware of market trends as well as gaps in the market. A publisher finds or commissions books that people will want to read; he or she must know how to turn ideas into books in an imaginative, sensitive, efficient and profitable way, and must be committed at all times to support and nurture the author and the book through the publishing process and out into the world of bookshops and readers. A publisher is also the

representative of the author and book in the publishing house, and must act as agent and guardian of the book to his or her publishing colleagues, 'selling' the book to them so they are inspired to sell the book outside of the company.

It is my pleasure to talk today about the relationship between authors and publishers, and the contractual and moral obligations inherent in such a relationship. I hope my experience of working as a publisher will enable me to speak about topics that will be of interest and assistance to you today and I look forward to hearing your thoughts and questions later.

As a passionate lifelong reader, I feel that books are as vital as oxygen to people and their cultures. Books and other art forms show us to ourselves and others in a way that helps us to learn, understand and grow; they can entertain us, they can teach us, they can sustain and inspire us, and they can change us and even change our world. Books are both my passion and my business, and as such I have the greatest personal and professional respect and admiration for the people who create them: the writers of fiction and non-fiction, translators, poets, journalists, historians, scientists and all those involved in the process of creating the manuscript that eventually becomes the book. I realise that not all of you here are book publishers, so please also understand that I am talking about all created work that is able to be disseminated to the wider world – as Mr. Daiki Tetsuro in last year's ACCU copyright workshop in Myanmar wrote, 'they must have one thing in common: they must be novel works of expression created through art, academic and/or cultural achievements without imitating other works'. It's a good definition and I couldn't have put it better myself.

1. Roles of Authors and Publishers

The role of authors/creators (for the purposes of this paper I will use the term 'author') is to harness their thoughts and ideas into original forms that will move, teach, entertain and inspire the world. The role of publishers is to recognise this talent and originality, propose a business proposition that will be mutually beneficial to both author and publisher, help the author of the work make it the best it can be, put it into a form that people will want to buy, and make sure as many people as possible know about it so that its author can profit from maximum sales and earn enough money to be supported in

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further creative ventures. Both the roles of author and publisher are crucial to each other; neither can thrive without the other. It's worthwhile acknowledging that a publisher could not exist without authors and books to publish, though an author could still create -- but to a very small audience!

I believe the first role of a publisher is to acknowledge the importance of the author and to recognise at all times the rights of the author as paramount in their business relationship. The agreement between author and publisher – the contract – is the cornerstone of their relationship, and its legal foundation is copyright. Authors own the copyright in what they create; the law gives them legal rights to control the use of their work.

A copyright owner is generally the only person entitled to reproduce the created work, make it public for the first time, recite or perform the work in public, communicate the work using technology or make a translation of the work. The contract between author and publisher is the legal written expression of the author's wish to 'assign' copyright rights or license them to a publisher. In return for various payments, the author licenses to the publisher, exclusively at the publisher's own expense, the right to multiply in book form copies of the author's work and the right to license to others exploitation in both book and non-book forms.

The author creates, the publisher invests, and from sales of the work they create together and from sales of rights to that work, the author earns royalties and fees, and the publisher earns its profit. As has been often observed in past, the author/publisher relationship is as simple – and as complicated! – as that.

2. Authors' Rights

Copyright is free and automatic. The author or creator of a work is guaranteed that his or her work is not used without permission from the time of its creation to 70 years after the owner's death (in Australia, the UK and the US). There are two kinds of copyright rights that are to be taken into account, economic rights and moral rights.

Economic rights

The author has the right to control the way a work's copyright is used. This means that his or her consent is necessary before the work is put to any copyright uses. Publishers need to enter into a contractual agreement with the author to obtain a

share in the copyright, in order to publish the work. If a work is used without permission, the author can file claims for financial restitution.

The most important copyright rights in the publishing industry are:

- Publication rights – the right to be the first company in a territory to publish a work
- Reproduction rights – the right to supply copies of a work to the public
- Communication rights – the right to electronically distribute the work
- Translation rights – the right to commission a translation and distribute copies of the translated work

Moral rights

Moral rights protect the honour and reputation of the author. The way in which authors' material is used may affect their standing and reputation, so moral rights provide them with a means of further controlling what happens to their work by insisting on correct attribution and faithful reproduction of their work.

There are three basic kinds of moral rights:

- The right to be attributed as the author of a work (including the right not to be falsely attributed)
- The right to the integrity of a work, which allows an author the right to object to derogatory treatment of the work (affecting his or her honour or reputation)
- The right of disclosure, which determines the way material is made public.

Further Contractual Authors' Rights

When a publisher wishes to publish any work, the copyright of which belongs to an author, the publisher must first gain the author's permission to do so. This takes the form of a written agreement outlining all the rights and obligations of each party and signed by both. It is known as a publishing agreement or contract, and includes:

Grant of rights

- whether the publisher is licensing the copyright from the author or buying the copyright outright (assignment of copyright)
- the term of the copyright granted
- the territories covered in the agreement

Payment

- the fee paid to the author (it is a once-only fee, or an advance against royalties based on sales of the work)
- the instalments of payments
- the accounting periods for calculating these payments
- the proportion of subsidiary rights income that will be shared between author and publisher

Other issues

- A contract must set out what will happen when the work is no longer in stock or out of print. In such circumstances it is usual for the publisher to revert to the author the rights previously granted and terminate the contract.
- A time frame in which the publisher must publish the work
- Other provisions for reversion should be included, such as default by the publisher or the winding up of a company.
- What will happen if legal issues arise regarding the content of a book?
- Who is responsible for obtaining permissions for use of third-party copyright material in the work?
- How an author will be consulted on issues of editorial amendments, the design of the cover and the book, or other editorial issues
- Provision of complimentary copies of the published work
- What happens if copyright is infringed by a third party
- Procedures for remaindering or clearing overstocks of the work
- The author should be offered an option on his or her next work, which means the publisher retains the right of first refusal of that work – it is up to the author to take up this offer or not (many authors refuse this option, believing it restricts their future options, but this may not be the case)

3. Publishers' Rights

A publisher obtains rights in a work by entering into a contract with the author, in which the author either transfers part or all of the copyright to the publisher. There are two ways of achieving this:

- By assignment, which means the author effectively hands over his or her copyright to the publisher who then becomes the new copyright holder and can execute use of the copyright as they see fit (even

though moral rights in this case remain with the author).

- By licence, which means the author licenses the copyright to the publisher to reproduce the work, but retains ownership of the copyright of the work. The licence granted to the publisher is usually exclusive for the term of copyright determined.

Primary right

The primary right granted to a publisher is to print, publish and sell the work in book form in a specific territory or territories. The publisher may also be granted other rights to exploit on behalf of the author, such as:

- publishing or licensing the book in electronic form as an e-book
- selling copies of its edition to various overseas countries
- licensing publishers overseas the right to print, publish and sell the book in foreign editions (whether in the English language or any other language)
- licensing audio publishers to create talking books
- licensing other subsidiary rights such as extracts to newspapers or magazines, merchandise rights etc.

Details of the work and delivery date

The contract should include a description of the work, which helps to clarify the exact nature of the work, including:

- what type of work the author and the publisher have agreed will be delivered
- what format the work will be delivered in
- when the work will be delivered
- what will happen if the creator does not deliver on time
- what will happen if the delivered work does not conform to what was agreed in the contract

Warranty and indemnity

The contract should include various warranties or guarantees made by the author to ensure the publisher that

- the work is original – the author has not copied anyone else's work
- the author has not defamed anyone within the contents of the work
- the author owns the copyright in the work
- the work has not been previously published

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4. Obligations of Authors and Publishers

It is clear to see that where there is a right on one side of the agreement, there is usually an obligation on the other. For example,

- Payment is an author's right and a publisher's obligation
- Adherence to the contracted details of the work and the delivery date is an author's obligation and a publisher's right
- Guaranteeing originality of the work and indemnifying the publisher is an author's obligation and a publisher's right
- Adherence to the responsibility of copyright and an author's moral rights are a publisher's obligation and an author's right

There are also obligations on both sides that are implicit in any relationship undertaken by an author and publisher in a publishing agreement or contract.

These obligations cannot be spelled out in a contract, nor measured in any quantitative way, but go to the heart of creating and publishing.

They are the obligations of an author to deliver a work that is to the highest standard he or she can achieve, and to not reasonably withhold willingness to further improve the work by editing or reworking.

And they are the obligations of the publisher to do their utmost to ensure the highest possible standards in editing, designing, marketing, publicising and selling the work so that both author and publisher can flourish in their work and build a successful and profitable relationship based on excellence, good will and trust.

I'd like to return to the quote by famous Australian author Tom Keneally with which I started this paper. The author is 'parent' of only one book at a time, but the publisher must become that book's replacement parent once it takes responsibility for it, in the same way a teacher must be the replacement parent when a child is at school. All publishers, therefore, have many children in the course of their work, but it is their duty and responsibility to let each author know that his or her 'child' is the most important one in the class, and that every effort will be made to help that child -- or book, or work -- reach its full and limitless potential. In that spirit, all things are possible.