Publishing contract

The regulation of the relationship between authors and publishers is as old as copyright law itself. Indeed, the founding moment is often identified in the Republic of Venice granting a printing privilege to Johannes von Speyer in 1469 (Witcombe 2004). While privileges are intrinsically different to rights, and despite the lack of a statutory basis, it can be said that current copyright law to this day exhibits the marks of the printing privileges (de Sanctis 1953, 35). One such mark is the fact that copyright law – even in the *droit d'auteur* systems purporting to frame copyright as a personality right – ends up favouring those able to commercially exploit the works, rather than the authors. It is no accident that the first time the *droit d'auteur* was couched in terms of property was in the context of the defence of the privileges of the Parisian booksellers in 1725 (Rideau 2010).

Given its historical and continuing relevance, this entry will focus on the contract parties agree to before publishing a book, which may differ from other publishing contracts (e.g. journal articles). Given the diversity in book publishing practices ('bibliodiversity'), it can be useful clarify what we mean by publishing contract. A traditional definition refers to it as a contract whereby the holder of the right to print a copyright work grants its exercise to the publisher against the payment of a sum, while the publisher agrees to publish and distribute the work through the printing of its exemplars (de Sanctis 1965, 377). Adaptations to the definition are necessary to take account of a model that normally relies on yearly royalties, as well as of the rise of the e-book. Another methodological caveat is that the law of copyright transactions has not been the specific subject of harmonisation interventions; therefore, when analysing statutory provisions this entry will refer to English Law unless otherwise stated. Dogmatically, it is contested whether copyright contracts are subsumed under contract law or under copyright law. When asked whether the breach of a software licence agreement constituted copyright infringement, or might a contractual liability regime apply, the Court of Justice of the EU held that the breach would fall within the concept of 'infringement of intellectual property rights' under the Enforcement Directive (C-666/18 *IT Development SAS v Free Mobile SAS*). The ruling should not be interpreted as determining the special nature of liability in copyright infringement cases, let alone a tortious one. Indeed, the Court noted that Member States remain 'free (…) to define, (…) the nature, whether contractual or tortious' [44] of the copyright infringement action. What matters is that whenever an infringement occurs – which may well arise from a breach of a contract – the measures, procedures, and remedies necessary to enforce IPRs are available on a fair, equitable, timely, straightforward, and cost-effective way, regardless of the nature of the underlying liability. Additionally, while it will be up to the national lawmakers to determine the nature of the liability ensuing from the breach of a publishing contract, general legal principles (normally contract law) will most likely apply to the negotiation, conclusion, interpretation, and enforcement of the contract. For example, under English law, a transfer of copyright that lacks the relevant formal requirements may nonetheless result in the creation of an equitable title in the transferee (Copinger and Skone James 2022, [5-76]).

Since the early days of the internet, it became clear that the new medium could be used by authors to publish their works without intermediation of traditional publishers. In 2000, Stephen King published *The Plant* on his website making history as the world's first mass market e-book (Ziman 2000). While self-publication is on the rise (Spedicato 2017), it holds to a large extent true that it is a rare occurrence that authors have the means to commercially

exploit literary works (especially books) without the support of a publisher providing editing, printing, and marketing services (Bently et al. 2022, 323). The main mechanisms to exploit copyright commercially are assignments and licences. These constitute the core sections in a publishing contract.

An assignment is the main way copyright is transmitted, other ways including testamentary dispositions and 'by operation of the law' (Copyright, Designs and Patents Act 1988 or CDPA, s 90(1)) e.g. in the event of bankruptcy. An assignment can be complete or partial; for example, it could be limited to certain restricted acts (e.g. the right to translate the work) or to a specified time period. It must be in writing and signed by the assignor, but as said above an assignment not meeting the formal requirements can still be at least partly effective as an equitable title. The assignment – and the publishing contract by extension – does not need to be registered as copyright arises automatically under the Berne Convention for the Protection of Literary and Artistic Works. However, registration can be useful for evidentiary purposes, and in some jurisdictions such as the US it is a prerequisite to bring an action for copyright infringement (*Fourth Estate Public Benefit Corp. v. Wall-Street.com*, LLC, 139 S. Ct. 881, 892 (2019)). Under the Universal Copyright Convention, the contract will have to be marked with the copyright symbol (©), the name of the rightsholder, and the year of first publication. This is particularly important to identify the rightsholder and to create a rebuttable presumption of ownership.

While it is standard industry practice that the author of a book retains the copyright over it, it is common for authors to authorise the publishers to exercise some or all of their copyrights, often on an exclusive basis. Less common in the context of book publishing – due to the necessity to compensate for the costs of editing, production, publication, and marketing – an author may grant voluntary or non-exclusive licences covering some or all the restricted acts, and without required formalities. However, a written licence signed by the rightsholder is a prerequisite to bring an action, if the latter expressly granted the right of action (CDPA, s 101A). More common is the scenario where the author will grant the publisher an exclusive licence covering all of the restricted acts. This will vary in practice as these contracts can in principle be negotiated , but in light of the power imbalance affecting the creative industries (Travis 2018), negotiation is unlikely to radically change the content of standard publishing contracts. If in writing and signed by or on behalf of the rightsholder, an exclusive licence will give the licensor i.e. the publisher the same rights against a successor in title as the licensor (CDPA, s 92(2)). Crucially, if beneficiary of an exclusive licence, the publisher will be able to sue for infringement without the owner's permission; however, the publisher will not be allowed, without the leave of the court, to proceed with the action unless the author is either joined as a plaintiff or added as a defendant (CDPA, ss 101-102).

Another section one is increasingly expected to find in a publishing contract is a morality clause, whereby the publisher has the right to terminate the contract, or take action against the author should the latter engage 'in reprehensible behaviour or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company' (Pinguelo & Cedrone 2009). In some instances, a morality clause can be implied (e.g. *Yiannopoulos v. Simon & Schuster*).

A morality clause should not be confused with the provisions dealing with the so-called moral rights, with protect the non-economic interests of the author by preventing uses of the work

that may be prejudicial to the author's 'spiritual' interests e.g. the right to integrity. Also due to the non-actionability before the WTO Dispute Settlement Body of Article 6-bis of the Berne Convention, moral rights vary from country to country and tend to be more strongly protected in civil law jurisdictions, compared to common law jurisdictions (Loewenheim 1995; Hoekman and Mavroidis 2007). For example, only in civil law jurisdictions the author can withdraw the work from circulation; for example, in Italy this right can be exercised 'if serious moral reasons apply' (*legge* 633/1941, art 142) e.g. if the book no longer reflects the views of the author. The civil law approach – regarded as strongly influenced by Hegel and Kant (Fisher 2001; *contra* Liemer 2011) – is not ontologically different to the common law one, where there has always been the recognition that copyright is 'a blend of economic and personal rights' (Dworkin 1999 citing *Millar v Taylor* (1769) 4 Burr. 2303, 98 ER 201 per Lord Mansfield). Some major differences do remain. For example, in the UK the paternity right is infringed only if the author expressly asserted said right either through a statement to be included in the assignment or by instrument in writing signed by the author. The typical wording of the assertion, normally found both in the contract and in the book, is 'The right of [name of the author] to be identified as author of this work has been asserted in accordance with sections 77 and 78' of the CDPA. Similarly unthinkable in civil law jurisdictions is the moral rights waiver. The author can waive all moral rights – whose violation will therefore not constitute infringement – by signing an ad-hoc written instrument, and such waiver may relate also to future works and be unconditional. Additionally, publishers will be able to argue for the existence of an informal waiver under general contract or estoppel law (CDPA, s 87). Publishers can impose such waivers because the publishing industry tends 'to oblige authors […] to enter standard-form contracts that require them to waive the integrity rights' (Bently et al. 2022, 321). The existence of these waivers 'erode[s] significantly, indeed drive[s] a coach and horses through, the moral rights provisions' (Dworkin 1995, 257; *contra* Ricketson 1987). This divergence creates complex private international law issues; for example, the Cour de Cassation stated that moral rights are a matter of public policy and, accordingly, waivers that are lawful under US copyright law are not enforceable in France (*Huston v TV5*, Cour de Cassation, Chambre civile 1, 28 May 1991, 89–19.522 89–19.725 [1991] RIDA 149, 197).

Finally, a more recent addition to publishing contracts, and one that is increasingly common– also due to the COVID-accelerated rise of the e-book – is the section dealing with open access matters. There are three types of open access clauses: gold, green, and diamond (Dulong de Rosnay 2021). Gold open access allows immediate open access to the final edited version of the work and it is the most contentious one as it involves an author processing charge and therefore, by definition, it is not in fact open. Green open access is typically not accompanied by a fee but it only allows the publication of the preprint (submitted or accepted version, prior to the editing). The diamond model allows for open access to the final version of the work without an author processing charge and it promises to usher in an alternative approach to publishing, one that is community-driven, academic-led, and academic-owned (cOAlition S 2022).Open access has been often debated with regard to journal articles, also in light of the ease of publication of the preprints in online open repositories (Caso 2020). In this sector, a clear steer was given by cOAlition S, an international consortium of research funding and performing organisations that in 2018 launched Plan S, requiring scientists and researchers who benefit from state-funded research organisations and institutions to publish their work in open repositories or in journals that are available to all. Building on the principles for open access to academic books (Science Europe 2019), funders have been recognising the importance that

books that are the output of publicly funded research should be available in open access. For example, under Horizon Europe, books should be available under Creative Commons licences (namely CC-BY, CC-BY-ND and CC-BY-NC or similar) and no embargo is allowed i.e. no temporary period where traditional copyright will apply (European Commission 2022). There has been a shift from authors or readers being expected to pay for access to research, to funders and universities to do so. When a book is the outcome of funded research, then the relevant costs will be included as an eligible expense. When it is not, then it is an increasingly common practice is for universities to set aside a pot in their budgets for their staff to fund the open access to their research. As Global South universities have limited financial resources, it is clear that a just transition to open access will not be without obstacles (Powell et al. 2020).

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