Stop Forcing Authors to Take Unlimited Financial Risks

Warranty and indemnity clauses in standard publishing agreements tend to make authors' eyes glaze over. But these clauses have the greatest potential to damage authors' financial health. While other unfair terms give authors a raw deal when it comes to how much money they can receive for a book or how much control they can exert over it, far-reaching warranty and indemnity clauses are even more insidious. They can put an author's entire net worth—or more—at risk.

When authors question these clauses, editors often contend that they've been admonished not to change so much as a word without clearance from the legal department. An editor may simply insist that such terms are "non-negotiable due to corporate policy"—an unhappy way to begin what's supposed to be an amiable relationship.

Let's look past the jargon to see what that editor is asking the author to sign. A warranty is a promise that something is true. Publishers ask authors to promise that the book under contract does not infringe anyone else's copyright, does not invade another's privacy, is not libelous, and, sometimes, does not contain "matter otherwise contrary to law." If any of those statements turns out to be untrue, the author has breached the agreement.

The indemnity clause kicks in to give the warranties bite by making restitution a clear contractual obligation: if any claim is made for breach of the authors' warranties, the author has to cover *all* related costs and liability—whether or not the claim is valid, and whether or not the author knew or should have known of the infringement, defamation, or invasion of privacy.

Sounds fair enough at first glance. But is the author really in a position to promise that her work doesn't violate the law anywhere in the world? Why should an author absorb the entire monetary hit for all claims, no matter how unfounded, made against the book? And why doesn't coverage for authors under media liability insurance policies protect authors from these problems?

Truth or Consequences

Publishers defend their standard warranty clauses on grounds that may initially not seem specious: It's the author's work, after all, so who better to know what the risks are than the author, right? While this may sound reasonable, it essentially makes the author an insurer against any claim that may happen to arise, whether well-founded or frivolous. It also unfairly asks the author to be an expert regarding all sorts of laws around the world; publishers would have to pay authors a lot more than they currently do for authors to be able to afford the legal fees for that sort of review. But publishing houses often have legal expertise at their disposal internally, and they do review books when they believe there is a risk of liability. So why should the author be asked to assume intimate knowledge of the laws of infringement, libel, invasion of privacy, and "matter otherwise contrary to law" in every jurisdiction where the book appears?

An easy way to solve this is available: warranties should carry clear limits. For instance, the author might merely warrant that the book isn't violating any laws to "the best of [an author's] knowledge." And because editorial insertions may lead to their own violations, the publisher should offer a warranty

regarding any changes it makes to the work. Why don't publishers offer these very reasonable limits up front?

Jeopardy

Indemnity claims often let publishers make the author pay if even the slightest aspect of the warranty turns out not to be true, even if neither the author nor the publisher had any inkling of the error. Broad indemnities can also hold authors liable for any legal claims levied against the book, however unfounded they may be, and give publishers an incentive to settle frivolous claims, since the author will pick up the tab.

Most publishers refuse attempts by authors or agents to change this language and often impose their own language allowing the publisher to withhold author payments indefinitely to make sure money is available *just in case* any expenses are incurred from an asserted claim. But withholding royalties for an indeterminable period can unfairly jeopardize an author's livelihood, especially when a claim is asserted but never pursued. Limiting the withholding period to six months (absent litigation) as well as keeping withheld funds in an interest bearing account would be a reasonable compromise.

And indemnification clauses are no longer the sole province of contracts for full-length works. A new and disturbing development is the recent proliferation of broad indemnification clauses in freelance agreements. Randy Dotinga, President of the American Society of Journalists and Authors (ASJA), which represents over 1,000 freelance journalists and writers, admonishes his constituents: "Other than making sure you get paid, [indemnification] clauses are the biggest danger for freelancers. The risk that something could go wrong is small, but the damage could be very high."

This fall, ASJA surveyed its members, and preliminary findings show that these clauses are popping up in freelance agreements everywhere, and that these clauses have a chilling effect on the kind of work journalists are willing to do. ASJA plans to release the survey results in the spring of 2016.

What makes this so disturbing for writers, many of whom turn to freelancing after having been laid off by traditional media organizations, is that while they are expected to produce original, groundbreaking stories, their publishers deny them protection, financial or otherwise, in the event of a lawsuit. Will authors and freelancers stop writing and reporting on controversial subjects because they fear the aggravation of time-consuming lawsuits and the potential for unlimited financial liability?

According to the ASJA, that is already happening.

The Price Is Right

We believe that no author should bear unlimited financial liability for claims relating to his or her work. At most, an author's responsibility should be limited to the amount earned for that particular project.

Publishers' media liability insurance used to solve most of this problem. Roughly three decades ago, the major publishers began paying extra to extend their own coverage to cover their authors, quelling authors' fears of financial ruin. (Though they did this as a matter of practice, not out of any contractual obligation.) In exchange for coverage, authors were asked to share the cost of the deductible, originally about $10,000 to $15,000. That could be viewed as fair: as we've said before, publishing is a partnership,

financially and otherwise. Now, with deductibles often running upwards of $250,000, most authors are again placed in the dire position of facing financial ruin. And many publishers don't include authors in their liability insurance coverage at all.

Individual media insurance policies are available to authors if they qualify for coverage. (In fact, the Authors Guild facilitates discounted rates for its members.) Premiums tend to range from $450 to $2,500 per book, depending on the perceived risk of litigation. But when it comes to high-risk topics, insurers often simply refuse to cover the book.

Deal or No Deal

Authors should have to warrant and indemnify only what they actually know. An author might be asked to represent and warrant that she knows of no untruths or inaccuracies in the manuscript and did not knowingly copy from another. These are reasonable things to demand, and if they are proven to be untrue, it's fair to make the author pay for the costs of these falsehoods. But to expose authors to unlimited liability for frivolous claims, facts they could not have known, or even minor inaccuracies in content, is patently unfair. Publishers should cap liability for any claim—frivolous or not—and work jointly with their authors to resolve any litigation that might arise, and both author and publisher should have the right to approve any settlement that is reached. Further, publishers should forgo withholding royalty payments to offset liability claims. These changes would go a long way to minimize authors' sleepless nights.

And more importantly for society as a whole, they would prevent authors from excessive self-censoring out of fear of liability under laws they cannot be expected to master. Publishers are much better situated than authors to assess risk and to bear it.

Editors and lawyers in the publishing business need to clean up their act so that authors are not presented with unconscionable, non-negotiable warranty and indemnity clauses that can subject them to unlimited financial liability. It's just one more aspect of the publishing contract that needs fixing now.