PUBLISH AND PERISH? HANDLING THE UNREASONABLE PUBLICATION AGREEMENT

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I. INTRODUCTION

A. Opening Remarks

Scholarship necessarily suffers when scholars suffer unreasonable restraints on what they may read and express. Publishers also suffer loss when they suffer unreasonable restraints on what they may publish. Both parties therefore have a common interest in opposing one especially foolish area of unreasonable restraint: the unreasonable publication agreement that potentially chills scholarly speech.

This article explores such unreasonable restraint through a hypothetical account of one author faced with a publisher’s continued use of a twenty-year-old unreasonable publication agreement. As we think in stories, I hope this story-telling approach will facilitate exploration of the real interests involved and the real room for compromise in such agreements.

B. Opening Tale

George Eliot’s Edward Casaubon has at long last completed his masterful article, “The Key To All Mythologies.” Mr. Casaubon takes his article to XYZ Publisher Press (“XYZ Press”), which is delighted with the piece. Mr. Casaubon and XYZ Press then spend the next several months editing the piece. Just before the publication deadline, XYZ Press provides Mr. Casaubon with its “standard” publication agreement.

Mr. Casaubon actually reads agreements before he signs them and is deeply troubled by what he sees. First, the agreement transfers Mr. Casaubon’s copyright to XYZ Press. Second, the agreement contains warranties and representations by Mr. Casaubon that only an omniscient being could make. (We will explore examples of such warranties and representations in more detail below.) Finally, the agreement requires Mr. Casaubon to indemnify and hold XYZ Press

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1 The pun is intended. In this sentence and in the next, I mean to use “suffer” in both its common senses: to experience loss and to permit or allow.

2 Although this hypothetical is just that, i.e., purely a piece of fiction, its relevance should be apparent to most who have had the pleasure of negotiating such agreements.

3 See ALASDAIR MACINTYRE, AFTER VIRTUE 201 (1981) (“I can only answer the question ‘What am I to do?’ if I can answer the prior question ‘Of what story or stories do I find myself a part?’”). I also use the story form here because stories of drafts are in my opinion essential to a “best practices” approach to legal education. I believe that taking students on such journeys is an essential part of teaching them both legal theory as well as practice.
harmless from any losses XYZ Press may suffer on account of any breach of such omniscient warranties and representations or any losses that XYZ Press may suffer in any way otherwise related to publication of Mr. Casaubon’s article.

Not only does Mr. Casaubon not wish to relinquish his copyright, he is naturally terrified by the potentially-endless liability he would acquire under the agreement. He therefore pushes back, XYZ Press’s lawyers ultimately dig in their heels, and suddenly three needless possibilities become quite real. Mr. Casaubon may not have his article published, XYZ Press may have an empty or much reduced volume, and the world may never see the wonderful “The Key To All Mythologies.”

II. Round One

A. The Initial Form

Mr. Casaubon and XYZ Press have just finished several months of editing Mr. Casaubon’s “The Key To All Mythologies.” At this point, just days before its press deadline, XYZ Press presents Mr. Casaubon with the following “standard” form that XYZ Press has used for at least twenty years:

Name of Contributor (please print or type): Edward Casaubon

XYZ Publisher Press (“XYZ Press”) is pleased to undertake the publication of your contribution to its journal, XYZ Journal entitled (please print or type): “The Key To All Mythologies” (the "Contribution"). We ask you to assign the copyright, thus granting us all rights for the Contribution, so that you as author and we as sponsor of the Journal may be protected from the consequences of unauthorized use. You will have the right, however, after publication in the Journal, to reprint the Contribution without charge in any book of which you are the author or editor.

Accordingly, the following terms of publication are submitted for your consideration.

Copyright Assignment: Whereas XYZ Press is undertaking to publish the Contribution in its journal, named above, and whereas you desire to have the Contribution so published, now, therefore, for good and valuable consideration, the exchange, receipt, and
adequacy of which you hereby acknowledge, you grant and assign the entire copyright in and to the Contribution to XYZ Press. The copyright consists of any and all rights of whatever kind or nature now or hereafter protected by the copyright laws of the United States and of all foreign countries, in all languages and forms of communication, and XYZ Press shall be the sole proprietor thereof. The Publisher, in turn, grants to you the right to reprint the Contribution in any book of which you are the author or editor, subject to your giving proper credit in the book to the original publication of the Contribution in the Journal. To protect the copyright in the Contribution, the original copyright notice as it appears in the Journal should be in the credit.

Warranty: You warrant that the Contribution is original with you; that it contains no matter which is defamatory or is otherwise unlawful or which invades individual privacy or infringes any proprietary right or any statutory copyright; and you agree to indemnify and hold XYZ Press and its trustees, officers, employees, and agents harmless against any claim to the contrary. Further, you warrant that you have the right to assign the copyright to XYZ Press and that no portion of the copyright to the Contribution has been assigned previously. It is understood that the copyright to the Contribution has not been registered with the Library of Congress, but that in the event such registration has taken place you will promptly transfer the copyright to XYZ Press.

Previous Publication and Permission: You warrant that the Contribution has not been published elsewhere in whole or in part (except as may be set out in a rider annexed hereto and signed by a duly authorized signatory of XYZ Press) and that no agreement to publish is outstanding. Should the Contribution contain material which requires written permission for inclusion in the Contribution, such permission shall be obtained at your own expense from the copyright proprietor and submitted for review to the editor of the Journal with the manuscript.

Proofhandling: You will be given an opportunity to read and correct the edited manuscript and/or proofs,
but if you fail to return them to the editor of the Journal by the date set by the editor, production and publication may proceed without your corrections.

Subsidiary Rights and Compensation: It is understood that you will receive no monetary compensation from XYZ Press for the assignment of copyright and publication of the Contribution in the Journal.

If the foregoing terms are satisfactory, please sign and date this Agreement. (All joint authors should sign, and every author's Social Security number and year of birth should be included. Use the other side of this page, if necessary.) Please return the Agreement to XYZ Press immediately. A duly executed copy will be returned for your files.

B. Review of the Problematic Provisions

1. Assignment of the Copyright

From the outset, Mr. Casaubon is a bit offended by the contract language stating that the requested assignment of his copyright is for his own protection. Mr. Casaubon of course understands that he is not increasing his power to prohibit “unauthorized use” of his work (to use the language of the document draft) to the extent he assigns away his ownership rights. As a practical matter, this unnecessary initial insult to Mr. Casaubon’s intelligence actually inspires him to review the document more carefully than he might otherwise have done.

In so doing, Mr. Casaubon does not understand certain other specific language in the assignment. The language permits him “to reprint the Contribution in any book of which [he is] the author or editor, subject to [his] giving proper credit in the book to the original publication of the Contribution in the Journal.” Parsing this language carefully, Mr. Casaubon finds limited comfort in the privileges it allows. Mr. Casaubon first stumbles over the phrase “to reprint the Contribution.” Does this mean he is only allowed to “reprint” the entire work and not selections from his article?

Mr. Casaubon then wonders what “reprint” means. Does this include, for example, Xerox or scanned copies of the article he might

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4 A copyright infringement claim should allege, among other things, that the plaintiff has an ownership right in the work allegedly infringed upon. See, e.g., Elektra Entertainment Group, Inc. v. Barker, 551 F. Supp. 2d 234, 238 (S.D.N.Y. 2008).
want to hand out in class or give to his friends? As he studies the language further, Mr. Casaubon concludes that “reprint” mostly likely does not include such handouts since the verb refers to “any book of which [he is] the author or editor.”

This conclusion only raises other concerns. Can he permit others to use his article in future anthologies? It would seem not unless he is the “author or editor” of the anthology. As he considers this further, he wonders how much comfort he can have even where he is clearly the “author or editor.” For example, what if he is the “author or editor” of a magazine in which he wishes to include his article? The reference to “book” in the contract language would not seem to cover inclusion of his article in such a magazine.

Mr. Casaubon also worries that his copyright might in some way cover the very ideas set forth in the article. Mr. Casaubon has included most of his life’s work in the article, work which he plans to continue refining and developing. If his copyright extends to his ideas in the article, would a copyright assignment limit his ability to create and publish future works which in any way involve or touch upon these ideas? Mr. Casaubon quickly researches this point and learns that copyright protection covers the expression of ideas but not the ideas themselves.  

This, however, does not comfort Mr. Casaubon. Instead, it merely reframes his concerns. Mr. Casaubon does not live in the world of pure ideas and fears that he may well find it difficult or even impossible to convey his ideas in ways that do not involve his prior expression of those ideas.

Faced with this Gordian knot of “what-if’s,” a frustrated Mr. Casaubon simply cuts this knotty copyright assignment language out of the contract. He replaces it instead with the license language set forth in Section III below.

2. The Warranty and Indemnity Provisions

Although he believes that he alone has found the key to all mythologies, Mr. Casaubon knows that he is not omniscient. He does not believe his article contains any defamatory material, any unlawful material, or any material that invades privacy or other rights including copyrights, but how can he ever know this? What search or searches could he possibly perform that would provide him with such absolute knowledge in all of these areas? Even in the case of copyright, how could he ever know with certainty that no grounds for alleging a

copyright violation exist? Not only might he be unaware of (and even unable to discover) the prior expression of some of his ideas, it is also always possible that someone unknown to him has previously used some of his very phrasing in another writing. While independent creation would be a defense, why should this burden fall solely on the author, when the publisher can also do its own due diligence? Why also should the burden fall solely on the author when due diligence itself has limits? Under the common law of copyrights, for example, it is possible that someone may assert a copyright that even the most diligent statutory copyright search would not uncover. How, therefore, can the publisher reasonably ask for any warranty that is not qualified by the author’s knowledge?

The indemnity provision that follows the warranty provisions only exacerbates Mr. Casaubon’s concerns. Not only would the publisher have him warrant things beyond his knowledge, the publisher would have him “indemnify and hold XYZ Press and its trustees, officers, employees, and agents harmless against any claim to the contrary [i.e., any breach of warranty claim].” Of course, careful Mr. Casaubon cannot allow himself to agree to this.

Nor can he ignore even broader problems with the indemnity. The indemnity does not simply cover valid claims. It covers any claims, which therefore means it covers frivolous claims. Why, he asks himself, should he bankroll a defense of frivolous claims against the journal such as claims, for example, that his article has defamed Hera or Zeus or invaded their privacy? He has led a scholar’s life to enlighten himself and others. He will not willingly contract himself into potential bankruptcy for such noble efforts. He therefore simply strikes the warranty and indemnity language in the manner shown in Section III below.

3. Other Provisions of Concern

Prior to submitting his article for publication, Mr. Casaubon posted a copy of his article on SSRN, an on-line research network where others have downloaded copies of the article multiple times. He

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6 Copyright law requires independent creation instead of novelty. See 17 U.S.C. §101 (2006); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (“If by some magic a man who had never known it were to compose anew Keat’s Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s [poem in the public domain].”).

7 Registration is not required to create a copyright, and registration can (with limited exceptions) occur at any time during the copyright’s term. See 17 U.S.C. §§ 102(a), 408(a) (2006).
therefore naturally has concerns with the following language:

You warrant that the Contribution has not been published elsewhere in whole or in part (except as may be set out in a rider annexed hereto and signed by a duly authorized signatory of XYZ Press) and that no agreement to publish is outstanding.

He contemplates preparing a rider disclosing the SSRN posting. However, he notes that the publisher will have to initial the rider and he is not sure how the remainder of the quoted language would apply to continued SSRN postings and downloads. Out of caution, he therefore strikes the language and inserts substitute language as shown in Section III below.

Mr. Casaubon is also concerned about the proof handling section which simply provides that he will be given “an opportunity to read and correct the edited manuscript and/or proofs.” It does not address what happens in the event the publisher and he disagree on an edit. Although he does not like such uncertainty, Mr. Casaubon decides to leave this language alone on the belief that any editing dispute should be resolvable.

Finally, Mr. Casaubon has a problem with the portion of the agreement requiring his social security number. He does not understand why the journal needs that information or why the journal needs the burden and liability of protecting the confidentiality of that information. He therefore strikes that provision and provides the publisher with the redlined draft discussed in Section III below.

III. ROUND TWO

A. Mr. Casaubon’s Responsive Redline Draft

Prior to Mr. Casaubon, the publisher has never received any markups to its “standard” publication agreement. The publisher is therefore a bit shocked to receive the following redline draft:

Name of Contributor (please print or type): Edward Casaubon

XYZ Publisher Press is pleased to undertake the publication of your contribution to its journal, XYZ Journal, entitled (please print or type): “The Key To All Mythologies” (the "Contribution"). We ask you to assign the copyright, thus granting us all rights for the Contribution, so that you as author and we as sponsor of the Journal may be protected from the consequences
of unauthorized use. You will have the right, however, after publication in the Journal, to reprint the Contribution without charge in any book of which you are the author or editor.

Accordingly, the following terms of publication are submitted for your consideration:

LicenseCopyright Assignment: Whereas XYZ Publisher Press is undertaking to publish the Contribution in its journal, named above, and whereas you desire to have the Contribution so published, now, therefore, for good and valuable consideration, the exchange, receipt, and adequacy of which you hereby acknowledge, you grant XYZ Publisher Press the non-exclusive license to print the Contribution and to retain all proceeds received on account of said printing and assign the entire copyright in and to the Contribution to XYZ Publisher Press. The copyright consists of any and all rights of whatever kind or nature now or hereafter protected by the copyright laws of the United States and of all foreign countries, in all languages and forms of communication, and XYZ Publisher Press shall be the sole proprietor thereof. XYZ Publisher Press, in turn, grants to you the right to reprint the Contribution in any book of which you are the author or editor, subject to your giving proper credit in the book to the original publication of the Contribution in the Journal. To protect the copyright in the Contribution, the original copyright notice as it appears in the Journal should be in the credit. Notwithstanding the foregoing, you retain full ownership of the copyright in the Contribution.

Warranty: You warrant that the Contribution is original with you; that it contains no matter which is defamatory or is otherwise unlawful or which invades individual privacy or infringes any proprietary right or any statutory copyright; and you agree to indemnify and hold the XYZ Publisher Press and its trustees, officers, employees, and agents harmless against any claim to the contrary. Further, you warrant that you have the right to assign the copyright to the XYZ Publisher Press and that no portion of the copyright to the Contribution has been assigned previously. It is understood that the copyright to the Contribution has
not been registered with the Library of Congress, but that in the event such registration has taken place you will promptly transfer the copyright to XYZ Publisher Press.

*Previous Publication and Permission:* The parties acknowledge that the Contribution has been posted on SSRN. You warrant that the Contribution has not been published elsewhere in whole or in part (except as may be set out in a rider annexed hereto and signed by a duly authorized signatory of XYZ Publisher Press) and that no agreement to publish is outstanding. Should the Contribution contain material which requires written permission for inclusion in the Contribution, such permission shall be obtained at your own expense from the copyright proprietor and submitted for review to the editor of the Journal with the manuscript.

*Proofhandling:* You will be given an opportunity to read and correct the edited manuscript and/or proofs, but if you fail to return them to the editor of the Journal by the date set by the editor, production and publication may proceed without your corrections.

*Subsidiary Rights and Compensation:* It is understood that you will receive no monetary compensation from XYZ Publisher Press for this non-exclusive license to publish the assignment of copyright and publication of the Contribution in the Journal.

If the foregoing terms are satisfactory, please sign and date this Agreement. (All joint authors should sign, and every author's Social Security number and year of birth should be included. Use the other side of this page, if necessary.) Please return the Agreement to XYZ Publisher Press immediately. A duly executed copy will be returned for your files.

Never having seen before such a “significant number of changes and amendments” to their “standard” agreement, the publisher forwards the proposed redraft to its legal counsel.

**B. The Journal’s Review of Mr. Casaubon’s Draft**

The journal’s legal counsel understands that the journal does not need an assignment of the copyright to publish the article. Such counsel, however, understandably wants more than a mere revocable
license to publish. Since the horse will be out of the barn once publication occurs, they want the license to be irrevocable. Also, since publication will presumably disperse their journal worldwide, they want clarification of such geographical scope as well. They also recognize that publication may take diverse forms and they wish to clarify this matter as well. As counsel for the publisher has good and reasonable insight in all these areas, these provisions of the contract should be resolvable.

Such counsel, however, is less flexible with respect to the warranty and indemnity concerns of Mr. Casaubon. Here they simply advise the publisher that Mr. Casaubon must warrant that the material submitted for publication is neither infringing, defamatory or otherwise unlawful and that he must furthermore indemnify the publisher against all liability arising out of breach of this warranty.

IV. ROUND THREE

A. The Journal’s Response To Mr. Casaubon’s Redline

In light of its counsel’s advice, the publisher prepares a new redline for Mr. Casaubon. New language in the redline reflects the more specific license advice provided by the publisher’s counsel. However, the publisher simply reinserts the deleted warranty and indemnity language. The new redline thus reads as follows:

Name of Contributor (please print or type): Edward Casaubon

XYZ Publisher Press is pleased to undertake the publication of your contribution to its journal, XYZ Journal, entitled (please print or type): “The Key To All Mythologies” (the "Contribution").

License: Whereas XYZ Publisher Press is undertaking to publish the Contribution in its journal, named above, and whereas you desire to have the Contribution so published, now, therefore, for good and valuable consideration, the exchange, receipt, and adequacy of which you hereby acknowledge, you grant XYZ Publisher Press the irrevocable worldwide, royalty-free and fully paid-up non-exclusive license in perpetuity to reproduce and publish print the Contribution in any media, whether now or hereafter known, and exclusively to retain all proceeds received on account of said printing publication(s). Notwithstanding the foregoing, you retain full ownership of the copyright in
the Contribution.

\textit{Warranty.} You warrant to XYZ Publisher that the Contribution is original to you; that it contains no matter which is defamatory or is otherwise unlawful or which invades individual privacy or infringes any proprietary right or any statutory copyright; and you agree to indemnify and hold XYZ Publisher Press and its trustees, officers, employees, and agents harmless from and against any claim to the contrary. Further, you warrant that you have the right to make the non-exclusive license grant to XYZ Publisher Press set forth above.

\textit{Previous Publication:} The parties acknowledge that the Contribution has been posted SSRN.

\textit{Proofhandling:} You will be given an opportunity to read and correct the edited manuscript and/or proofs, but if you fail to return them to the editor of the Journal by the date set by the editor, production and publication may proceed without your corrections.

\textit{Subsidiary Rights and Compensation:} It is understood that you will receive no monetary compensation from the Press for this license to publish and publication of the Contribution in the Journal.

If the foregoing terms are satisfactory, please sign and date this Agreement. (All joint authors should sign, and every author's year of birth should be included. Use the other side of this page, if necessary.) Please return the Agreement to the Press immediately. A duly executed copy will be returned for your files.

\textbf{B. Mr. Casaubon’s Review of the Publisher’s Redline}

Mr. Casaubon finds the license changes straightforward and acceptable. When he drafted his proposed license language, he did not mean to retain revocation rights, limit the geographical distribution of the publication, or limit the media in which such publication might occur. Mr. Casaubon therefore accepts such language a reasonable clarification of what he originally intended.

Mr. Casaubon is angered, however, by the intransigence on the warranty and indemnity language. His knee-jerk reaction is to return the redline with the inserted language deleted. Upon a bit of reflection, however, he realizes that such a gesture would merely
duplicate the uncreative intransigence that angered him and do little to resolve the remaining disputed issues in the draft.

Mr. Casaubon therefore tries to outline the remaining real concerns of both parties so that he might attempt to find some balance between them. Reflecting upon the matter from his point of view, he finds four matters that disturb him. First, he cannot honestly make warranties and representations about things he does not know. Second, he cannot agree to pay potentially-ruinous financial sums to the publisher. Third, as a matter of principle, he cannot agree to indemnify the publisher for frivolous claims. Finally, also as a matter of principle, he cannot agree to indemnify the purchaser for losses to the extent the publisher itself causes such losses. Once outlined, he realizes that these concerns can be addressed by a liability limitation, by adding a knowledge limitation to his warranties and representations, by limiting his indemnity to valid claims, and by excluding publisher-caused losses from the scope of the indemnity.

Reflecting upon the matter from the publisher’s point of view, Mr. Casaubon believes that there are only three issues of reasonable concern. First, the publisher wants assurance that Mr. Casaubon did not plagiarize the article. Second, the publisher wants some reasonable assurance from Mr. Casaubon that the article contains no defamatory, unlawful or infringing material. Finally, the publisher wants some reasonable degree of financial commitment from Mr. Casaubon in the event of any breach of his warranties and representations. Outlining the parties’ interests in such a way, Mr. Casaubon returns to the draft to see what might be done.

V. ROUND FOUR

A. Mr. Casaubon’s Second Redline

Attempting to balance the warranty, representation and liability concerns of the parties, Mr. Casaubon delivers the following responsive redline draft to the publisher:

Name of Contributor (please print or type): Edward Casaubon

XYZ Publisher Press is pleased to undertake the publication of your contribution to its journal, XYZ Journal, entitled (please print or type): “The Key To All Mythologies” (the "Contribution").

License: Whereas XYZ Publisher Press is undertaking to publish the Contribution in its journal, named above, and whereas you desire to have the Contribution so
published, now, therefore, for good and valuable consideration, the exchange, receipt, and adequacy of which you hereby acknowledge, you grant XYZ Publisher Press the irrevocable worldwide, royalty-free and fully paid-up non-exclusive license in perpetuity to reproduce and publish the Contribution in any media, whether now or hereafter known, and exclusively to retain all proceeds received on account of said publication(s). Notwithstanding the foregoing, you retain full ownership of the copyright in the Contribution.

_Warranty_. You warrant to XYZ Publisher that the Contribution is original to you; that, to your knowledge, it contains no matter which is defamatory or is otherwise unlawful or which invades individual privacy or infringes any proprietary right or any statutory copyright; and, except to the extent caused by any act or omission of the indemnified parties, you agree to indemnify and hold XYZ Publisher Press and its trustees, officers, employees, and agents harmless from and against any valid claim to the contrary. Further, you warrant that you have the right to make the non-exclusive license grant to XYZ Publisher Press set forth above. Notwithstanding the foregoing, however, your aggregate liability for all warranties and matters addressed in this Section 3 shall not exceed the sum of twenty-five hundred dollars ($2,500.00).

_Previous Publication:_ The parties acknowledge that the Contribution has been posted SSRN.

_Proofhandling:_ You will be given an opportunity to read and correct the edited manuscript and/or proofs, but if you fail to return them to the editor of the Journal by the date set by the editor, production and publication may proceed without your corrections.

_Subsidiary Rights and Compensation:_ It is understood that you will receive no monetary compensation from the Press for this license to publish and publication of the Contribution in the Journal.

If the foregoing terms are satisfactory, please sign and date this Agreement. (All joint authors should sign, and every author's year of birth should be included. Use the other side of this page, if necessary.) Please
return the Agreement to the Press immediately. A duly executed copy will be returned for your files.

B. Publisher’s Review of Mr. Casaubon’s Second Redline

The publisher provides its counsel with Mr. Casaubon’s responsive redline. Presumably having had enough of Mr. Casaubon, the publisher’s counsel at this stage imputes sinister motives to Mr. Casaubon. Such counsel advises the publisher that Mr. Casaubon’s insistence on limiting his liability should be a “red flag” that something is amiss. If no one else has raised such obstinate objections to the twenty-year-old form, what other conclusion, they ask, could one reasonably draw? Such counsel therefore advises the publisher in the strongest terms not to accept Mr. Casaubon’s changes to the draft.8

At this point, however, the imminent publication deadline helps the publisher exercise a little common sense and focus on its real goals.9 The publisher has difficulty applying sinister motives to Mr. Casaubon simply because no one else has questioned those liability provisions. Perhaps Mr. Casaubon is just smarter and more careful than other prior authors. Second, as a matter of simple probabilities, the publisher knows that the form is twenty years old and finds it rather predictable that over a span of twenty years at least one person would question the form. Finally, the publisher looks at the nature of the work involved. It discusses mythologies and not real people. Hera and Zeus, for example, cannot be defamed, have their privacy invaded or have standing to bring a legal action. Considering their counsel over cautious, the publisher makes the “business judgment” to accept Mr. Casaubon’s changes. At last, with some help and some failure10 from the lawyers, the parties have an agreement and “The Key to All Mythologies” will now see the light of day.

8 This is not an unrealistic scenario. I am aware of at least one situation where a publisher’s counsel gave similar advice. I include this twist to demonstrate how negotiations can falter at both the client and lawyer level.

9 Dwindling time is often the sharpest lens.

10 The lawyers’ failure to exercise more diligence at the end of negotiations of course not only risked losing the publication deal, but it may well have resulted in a final agreement less favorable to their client than it might otherwise have been. Arguably, for example, the publisher is worse off with the final liability limitation language than it would have been had the contract simply not addressed author liability. The agreed language not only limits the author’s liability to $2,500.00 for warranties but for all matters addressed in Section 3. This, of course, picks up any kind of liability the author might have in any way involving the article since the article itself is one of the matters addressed in Section 3. In the absence of such a limitation, I personally would never agree to an indemnity as an author.
VI. CONCLUSION

What can we learn from the twists and turns of this little tale? We can learn that each party to a publishing agreement has a set of clear interests which can be respected by the other.

A savvy author will generally have the following concerns. First and foremost, the author will wish to retain his copyright. Second, the author will want reasonable proofing and editing rights. Third, the author will not wish to make needless warranties and representations or warranties and representations beyond his reasonable ability to make. Finally, a careful author will want reasonable liability limitations. Both parties can do their due diligence and no careful author will want to agree to bear all liability incident to publication. This especially applies to liability for frivolous claims or claims due to the publisher’s fault.11

Turning to the publisher, first and foremost it must have the right to publish the work in reasonably available formats for the contemplated period of time (including any desired right of first publication) and contemplated geographical area. However, this does not require a copyright assignment since these goals can be accomplished by a license agreement.12 The publisher’s needs can therefore be accomplished in a manner consistent with the author’s need to retain the author’s copyright. This area of common dispute should therefore simply disappear from the world of publishing. Second, the publisher will also want reasonable proofing and editing rights. This need not be inconsistent with similar rights of the author and should present no impediment to a final agreement. Third, the publisher will want comfort from the author that nothing is amiss with the piece to be published. In seeking such comfort, however, the publisher should not request impossible or overly burdensome

11 According to the Scholarly Publishing and Academic Resources Coalition [hereafter “SPARC”], authors’ basic interests include (1) retaining whatever rights they desire in their work, (2) having the unrestricted ability to use and develop their work, (3) receiving proper attribution when others use their work, and (4) having the choice of publically archiving their work online. Author Rights: Using the SPARC Author Addendum to secure your rights as the author of a journal article, SPARC (2006), http://www.arl.org/sparc/author/addendum. For the reasons discussed above, authors’ retention of their copyrights while granting a license serves all of these goals.

12 See, e. g., Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998) (“A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement”); see also Cydney A. Tune, Copyright Licensing Fundamentals, 950 PLI/PAT 135, 141-42, 144 (2008) (describing copyright licensing generally and non-exclusive copyright licenses specifically).
warranties from the author. A knowledge limitation would seem to balance the publisher’s concerns here with author’s reluctance to make warranties and representations the author cannot reasonably know to be true. In this area, the publisher of course has the right to perform its own due diligence and can perform any extraordinary or other due diligence it wishes to perform. Finally, the publisher will want an author’s warranties and representations to have some practical value. This, of course, is part of the comfort that such warranties and representations are meant to provide. However, this does not require endless potential liability on the part of the author. Insurance\(^\text{13}\) can supplement liability limitations and may provide the publisher with any monetary assurance it needs beyond the liability limitations agreeable to the author.\(^\text{14}\)

All these basic author and publisher concerns are thus fully reconcilable. Unlike the travails of Mr. Casaubon’s “The Key to All Mythologies,” the key to simplifying the publication agreement negotiation process is therefore to begin with a draft more like the last Casaubon draft. Beginning with such a draft is also key to eliminating yet another way unreasonable publication agreements chill expression: time spent negotiating such agreements is of course time not spent on scholarship.


\(^{14}\) This is all consistent with SPARC’s summary of a publisher’s three basic interests: (1) “Obtain a non-exclusive right to publish and distribute a work and receive a financial return,” (2) “Receive proper attribution and citation as journal of first publication” and (3) Have the ability to “[m]igrate the work to future formats and include it in collections.” SPARC, supra note 11.