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Back to the Future: Opportunities to Reset the Terms of Your Book Contract

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In case you have a question that I'm unable to get to during the session or you think of something after the session.



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There are 5 events that can open the door

- Your publisher calls for work to begin on a new edition and sends an amendment to your contract to memorialize this . . . with a few additional “updates”
- Your publisher says that it is replacing older contracts with a new form that reflects changes in its business practices dictated by changing markets
- You’re ready to scale back your participation and begin the transition to a new co-author
- You’ve completed an audit of your royalty account and are in the process of negotiating settlement of your underpayment claims
- Your termination right under US copyright law matures



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Revision for a new edition

You have a contract already – it's binding on both parties

That contract anticipates that your book will need to be periodically revised

- Gives you the first option to do it
- Pursuant to the terms of your agreement
- Provides for the possibility you will be unable or unwilling

Publishers memorialize the call for a new edition in different ways

- Some do this by letter
- Some do it by amendment
- Some do it with an entirely new contract



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Revision for a new edition

You have a contract already – it's binding on both parties

All of the terms in that contract apply to the new edition as if it were the work being published for the first time, except:

- The manuscript due date will obviously be different
- There may be a description, in more or less detail, about what's expected in the revised manuscript
- Grants, advances, and publisher commitments to cover third party permissions fees are often expressly excluded from carrying over to the new edition

The permitted updates should be reduced to writing

Any other changes require your written consent, which you are not obliged to provide



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The “updated” contract

You have a contract already – it’s binding on both parties

It does not matter if the market has changed

It does not matter if the publisher’s business practices have changed

It does not matter if your current publisher acquired your contracts/copyrights in an acquisition from another publisher and now wants to move you to its own form of contract

It does not matter if your book is no longer “profitable” on the current terms.

Unless you consent to something else, the publisher has only two options:

- Publish the new edition on your existing terms
- Decline to publish a new edition

The only reason your publisher might choose the second option is if in fact a new edition would lose money for them (in which case you probably won’t care because it’s also not making much for you)



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What to watch out for

- *Everything* -- you would be naïve to believe that your publisher would propose amendments to your contract that favor you



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What to watch out for

The Trojan Horse re-grant

An attempt to re-set the 35-year clock on your termination rights

Language may be hidden in the recitals . . .

“This Xth edition revision letter/amendment shall constitute a re-grant of rights.”

Or buried in the revision clause . . .

“The undertaking of preparation of a revision shall constitute a re-grant of rights.”



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What to watch out for

The Trojan Horse amendment

- a “welcome” letter from the publisher who just acquired the rights to your work . . .

“Dear [Author]: It is my pleasure to welcome you to our community of authors . . . I am pleased to inform you that we will be paying your royalties based on [something less favorable than your existing contract provides] . . . I am sending you two copies of this letter, one for your files and one to be signed by you and returned to me.” [Below the letter writer’s signature was a line for the author’s signature, right under the word “AGREED”]



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What to watch out for

An offer to “simplify” your royalty structure by going to a single rate (lower than the current print rate for domestic sales) alleged to be the historical average

- Your publisher will probably not show you its calculation
- There probably won’t actually be a “single” rate
- There will probably be a provision giving the publisher broader discretion in making allocations



What to watch out for

- A provision broadening the publisher's ability to allocate package/bundle proceeds across the components . . . in its absolute discretion.
- What might be reasonable:
 - No allocation to platforms or other typically free ancillaries
 - Based on objectively measurable metrics (not the publisher's judgment as to relative value)
 - With reporting transparency
 - And an auditable record



Settlement of an audit

- Some of the proposed findings in an audit are likely to involve disputes over the proper interpretation and application of royalty provisions in the publishing contract. These are not simple counting or calculation errors and so are ripe for compromise.
- One of the things you might compromise on, apart from the settlement payment, are clearer royalty calculation terms going forward.
- But watch out for re-grant language in the settlement agreement . . . or an offer to terminate the existing contract and replace it with a “new” publishing agreement.



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Transition as a leverage point

- The publisher has an interest in effecting an orderly succession of the authorship of your work from you to someone younger who can carry on after you step down
- But the publisher cannot force a co-author on you as long as you are ready, willing, and able to continue to revise your work
- As you get older and closer to retirement, the publisher will get nervous about its ability to make a smooth transition of market recognition from your name to the name of a new co-author
- Agreeing to cooperate in a transition has value to your publisher that you might use to improve certain terms in your contract, particularly those concerning the number of editions (or years) over which your step down will take place and the rate at which that will happen



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Section 203/304 Terminations

What can be terminated?

Any grant under copyright

- Assignment of all or any subset of copyrights
- Exclusive license
- Non-exclusive license (may not be written)

But not Work-for-hire



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Two types of termination rights

§ 203 Terminations

- Any grant executed on or after 1/1/1978
 - grant can be terminated 35 years from the date of the grant
 - if the grant covers right of publication, period begins on earlier of 35 years from date of publication or 40 years from date of grant
 - 1/1/1986 grant – 5-year window opened 1/1/2021



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Two types of termination rights

§ 304 Terminations

- Any copyright in its first or renewal term on 1/1/1978
 - grant can be terminated 56 years after the copyright was originally secured
 - for a work copyrighted in 1965, the 5-year window would open in 2021

* Calculation of the timing under 304 can be exceedingly complex. For help, see <https://www.copyright.gov/recordation/termination.html>



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Additional eligibility issues

- For jointly authored works, a majority of the authors must join the notice
- Work-for-hire is not eligible, and educational texts can be WFH by agreement
- For works created prior to 1978, the WFH question was determined differently



Termination rights cannot be waived

- “Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”
 - §203(a)(5)
 - §304(c)(5)
 - (until after notice is served)
 - You have a termination right even if you long ago stopped participating in or receiving royalties on revisions (and maybe even if you accepted a buy-out if your publisher was not on top of its game)



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Effect of termination

- Copyrights revert to the authors (all of them) on the effective date of termination
- Derivative works created prior to termination may continue to be exploited but no new derivative works can be created



How to effect termination

- Determine notice window – not less than 2 nor more than 10 years before effective date (which itself may be within a 5-year window)
- Determine who can effect –
 - Author or majority of co-authors
 - Surviving spouse (unless there are surviving children or grandchildren)
 - Surviving children (and surviving grandchildren of any deceased child) if spouse is deceased
 - Author's personal representative if spouse, children, and grandchildren deceased



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Requirements of the notice

- Statement that termination is made under §_____
- Name of each grantee/successor whose rights are being terminated and the address at which service is being made
- Date of execution of the grant being terminated
- If the grant covers the right of publication, the date of publication
- Title of the work and name of the author(s) who executed the grant
- If possible, the original copyright registration number
- A brief statement reasonably identifying the grant to which the notice of termination applies
- Specifying the effective date of termination
- If the author is deceased, information on the heirs
- Signed in writing by the number and proportion of owners of termination interests (with full name and address for each) or by their duly authorized agents
- Served on grantee or grantee's successor
- Served within the notice window by first class mail or personal service
- Recorded in the Copyright Office before the effective date of termination (CO has a special address and process for receiving them)



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Questions as yet unanswered

- Impact of non-competes
- Impact of contractual obligation to revise
- Impact of reps and warranties
- Impact of associated (non-copyright) rights
- Impact of *Kirtsaeng* (since non-US copyrights not terminated)
- Will you get DJ'ed



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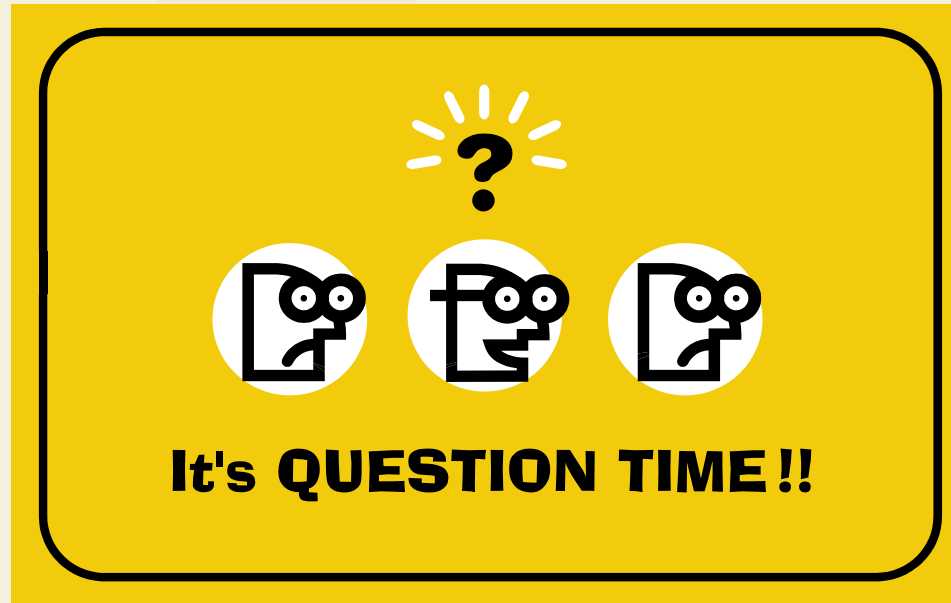
What is the value of a termination right?

- Starting point -- FMV of strategic asset purchase (in book publishing, probably between 1X and 2X annual sales)



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Questions for me



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