## Neglected author's lament: 'Please release me'

It is an all too familiar scene.

An author, wined, dined and dazzled with stories of a publisher's successes signs on the dotted line, giddy with the conviction that a cherished manuscript will finally roll off the high-speed presses by the thousands to long awaited critical acclaim and, not incidentally, financial reward.

There is a flurry of editorial planning activity and then months pass, with an occasional overnight bundle from the publisher and an urgent request for the author to expedite revisions lest a critical market window be missed.

Finally, the manuscript's completed, and the long wait begins.

"Soon...," the publisher promises.

"Just a few last minute improvements...," the publisher asks.

And then, at some point, the process starts to sour: change in editors, a merger, an acquisition, a list sale, disappointing results with other similar titles.

The explanations are many and varied, but the results are predictable.

A hopeful author's high expectations are gradually eroded by a parade of disappointing delays or slips as the publisher fails to follow through on unwritten targets.

Or perhaps the book has already been published in one or more editions, but plans for the revision are dragging as the publisher's confidence flags and market share erodes.

Ultimately, an exasperated author looks back to the publishing contract, searching for the publisher's obligations and the disappointed author's recourse. Alas, there seems to be little comfort there.

But it is there, between the lines, where courts concerned about a publisher's ability to use its leverage to unreasonable advantage have found an implied obligation to deal in good faith and where they might be convinced to find an unreasonable restraint of trade.

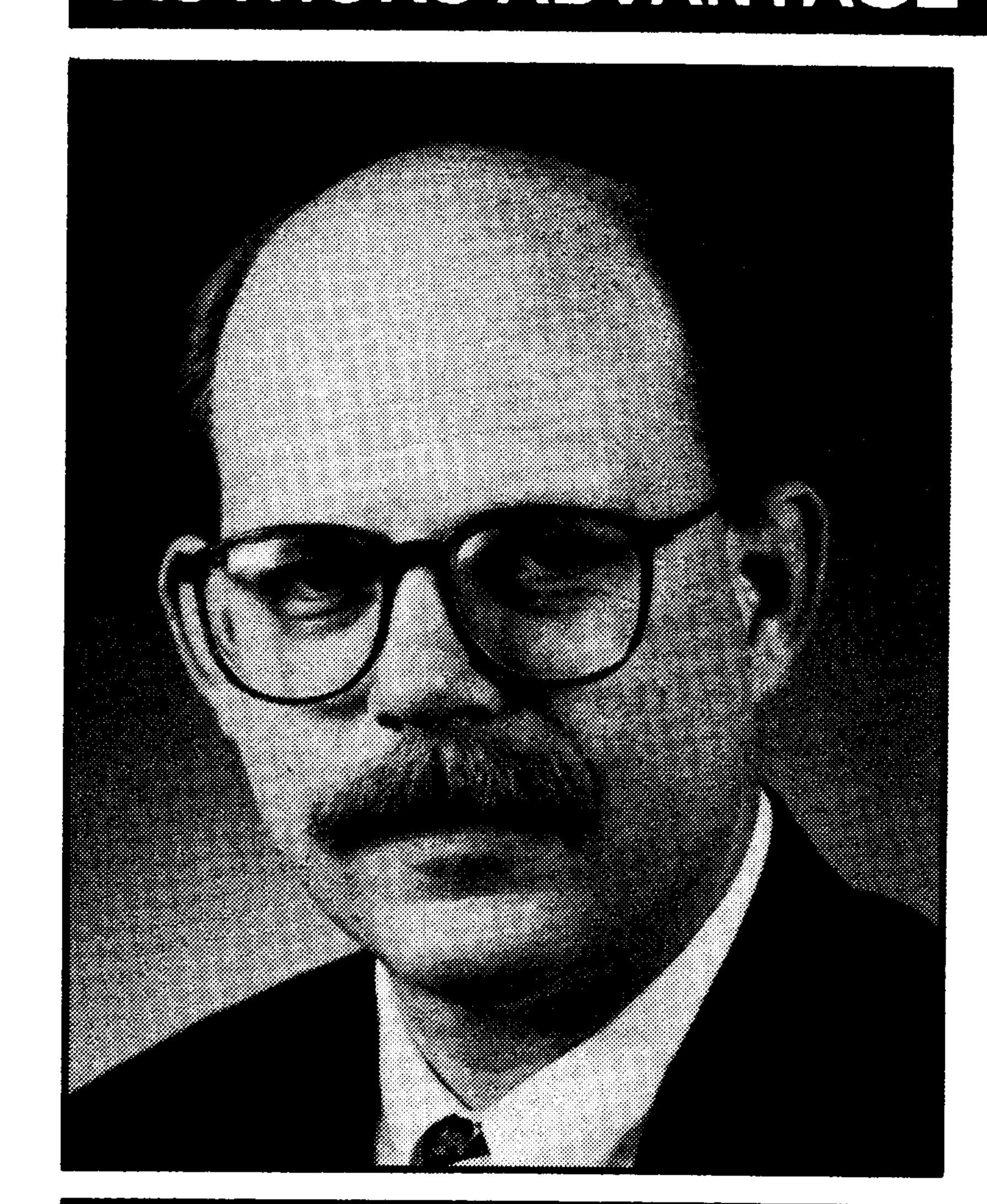
Let's take a look at the relevant terms in a typical book deal and see if we can find that elusive recourse.

By entering a publishing agreement, the author effectively agrees to entrust the publisher with the exclusive right to fully exploit the commercial potential of the work and agrees to take him/herself out of the market for any other similar book deal.

There are these two typical clauses.

- ➤ Grant of Rights. The Author hereby grants and assigns this Work to the Publisher with the exclusive right to publish and sell the work under its own name and under other imprints or trade names and with the exclusive right to exploit or otherwise dispose of all subsidiary rights in all countries and in all languages.
- Competing Publications. The Author agrees that during the term of this Agreement the Author will not, without the written consent of the Publisher, publish or furnish to any other publisher any work that is of a

## AUTHORS ADVANTAGE



Between the lines the courts might be convinced to find an unreasonable restraint of trade.

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## BY STEVE GILLEN

similar character on the same subject matter or that is likely to interfere with or injure the sale of the Work.

In as much as most book deals are signed on the strength of an expectation and without a complete and final manuscript, the publisher generally reserves to itself broad discretion to determine publishability of that final manuscript. And this is more or less reasonable – after all, the publisher's good name and a significant financial investment are at stake.

Then there is the "satisfactory form" clause:

➤ Delivery. The Author will deliver to the Publisher a complete and legible typewritten manuscript (and word-processed text-file) of the Work on or before [date], all to be satisfactory in form and content to the Publisher in its sole and absolute discretion.

This means the publisher agrees to promptly put the manuscript into type and to timely publish the resulting work once its acceptance standard has been met, although editorial control, the details of printing and binding, pricing, and marketing are typically reserved to the publisher – all areas where it brings special expertise and valuable resources to the relationship.

Now let's consider another section of most book contracts.

➤ Publishing Details. When the manuscript is complete and accepted by the Publisher and is in proper form for use as copy by a printer, the Publisher will proceed to publish the same in such style and manner of paper, printing, and binding, and at such prices and under such titles as it considers most appropriate. From time to time during the life of this Agreement, the Publisher will print and publish the Work and the revisions thereof as long as there is, in its opinion, a reasonable demand for the same. The

Publisher will keep the market supplied and make the Work and revisions thereof known by advertising and by giving copies to instructors for their examination and consideration. The Publisher reserves the right to publish or cause to be published other works even though such other works may compete with the Work.

In contemplation of success, the publisher generally further agrees to give the author what amounts to a first option to prepare a revision on substantially the same terms, though the publisher also typically reserves the right to determine when and if the work will be revised for subsequent editions.

This is the revision section:

➤ Revisions. The Author will revise the Work when and if called upon by the Publisher to do so. The provisions of this Agreement (except where expressly stated otherwise) shall apply to each revision of the Work by the Author as though that revision were the Work being published for the first time under this Agreement. Should the Author decline or neglect or be unable by reason of death or otherwise to revise the Work, the Publisher may have the revision prepared and charge the cost of so doing (whether fee or royalty) against the Author's royalties.

What does all this mean?

From an author's perspective the typical contract may seems not only daunting but depressing. It's really not as bad as it seems if you understand that the courts have recognized profound distinction between the "letter" and "spirit" of contracts.

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