

Copyright Implications in Book Publishing:
Variations on Rights and Contracts in France and the United States

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Introduction

Hardcover books are slowly, but surely on their way to extinction, and with them the traditional world of book publishing. Inasmuch as worldwide publishing giants are consolidating and purchasing new media instruments such as e-books and music television, the proof of a changing industry could not be more overtly put in perspective than by these recent trends. Bertelsmann, a German media company, has owned the foremost American publisher, Random House, for seven years now. American media conglomerate Viacom has been pulling the strings at Simon & Schuster since 2002. One of the oldest traditional French publishers, Gallimard—publisher of André Gide’s early works—is now principally owned by two large European companies: Madrigall and Vivendi. If any traditionally intellectual domain has become increasingly corporate, it is that of book publishing. This movement can with little doubt be attributed to the advent and now lasting popularity of the Internet and other new electronic communication methods. As paper-based, tangible media gives way to digitally transferred information, book sales have experienced a consistent downhill slide. Thus, the major publishing houses continue to downsize because business is business, and the hopes of promising young authors do not seem able to supplant the push for profits.

Fortunately, not all of the traditional care and intellectual interest in publishing a good book by a good author has been forgotten. While the administrative orders may now

be given by corporate decision-makers, the editorial elements remain in the hands of fairly large editorial staffs—groups of people trained in literature, journalism, and linguistics. Editorial staffs have dwindled and transformed, but the process has more or less endured the test of time, and remains the same as when publishing houses came into being at the turn of the 20th Century. The process is characterized by numerous stages of editing, addition, and evolution during which the manuscript is picked apart, cut, added to, and often substantially modified.

From a copyright perspective, in the world of trade book publishing in the United States, the author of the original manuscript retains the copyright to the finished book, even though editors, copyeditors, and artists have made great contributions and transformations to the work.¹ American authors, publishers, and readers generally accept this convention. However, in examining the strict legal characterization of the publishing process and the resulting work, it can be shown that U.S. conventions in this domain do not square entirely with strict legal definitions.

By way of comparison, the French convention in the trade book business is that the publishing house appears to hold the copyright in the finished book: The copyright notice (©) in the front matter of the book bears the name of the publisher, not the author. However, the French code of copyright law seems to be fundamentally opposed with the implications of this practice—French law protects authorship in similar fashion American law does.

An analysis of the two countries' laws and how they differ from custom, therefore, leads one to pose three interrelated questions: How do American and French

¹ Trade books will be the focus of this paper because in the United States, textbooks are generally copyrighted to the publishing houses that sell them. *Telephone interview with Kay Murray*, General Counsel, The Authors' Guild (3/25/2005).

book publishing conventions balance with the copyright laws of these two countries?

Why are the conventions of two countries with basically analogous laws so different?

And finally, is one of the countries right and the other wrong?

To answer these questions, this paper will, in Part I, explore the mechanism of the publishing system in general (the means by and extent to which it transforms an author's manuscript), and then analyze how copyright law in both France and the United States define these transformative elements. In Part II, this paper will compare and contrast the French and American laws and apply them to the reality of the publishing process. This application will shed light on areas where conventions and contractual arrangements have been established notwithstanding the law in order to serve the needs of authors and publishers. Finally, Part III will conclude with a discussion of the relative practical effectiveness of the conventions and contracts; how they do or do not achieve the goals of copyright law; and what, if anything, may be done to better harmonize law with convention in both countries.

I. The Publishing Process and its Many Stages of Creation

The signing of a contract begins the publishing process. When a publishing house “signs on” an author, the author transfers to the publisher certain limited rights to print, publish, and sell the finished book; the contract reflects an agreement as to these rights as well as, of course, payment. Such general transfers comprise the substantive bulk of boilerplate contracts in the U.S. and in France.²

A. The Stages of Publishing—A Conveyor Belt

After signing, the author delivers her raw manuscript to an editor at the publishing house. This is the beginning of a process best characterized as a conveyor belt in which the manuscript is passed from department to department and altered at each turn.³ The editor, first in the line, frequently makes substantial initial changes to the manuscript. This is called line editing. At this stage, editors feel free to make utter plot modifications, character changes, and suggestions to the author about her style.⁴ Frequently, the editor will meet with the author at this stage in order to show her these changes.

The manuscript then goes to a copyeditor. The copyeditor edits for grammar, punctuation, and style (these changes are considered merely technical and not substantive, although a copyeditor will often “catch” substantive discrepancies, in which

² *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613, 615 (S.D.N.Y. 2001). While licensing agreements at Random House differ in their specific terms per author, “each uses the phrase ‘print, publish or sell the work in book form’ to convey rights from the author to the publisher. For European conventions, see *International Confederation of Societies of Authors and Composers* (CISAC) Web site, www.cisac.org/web/content.

³ *Telephone Interview with Gypsy da Silva*, Associate Director of Copyediting, Adult Tradebook Division, Simon & Schuster, Inc. (April 20, 2005).

⁴ *The Chicago Manual of Style* 65, (John Grossman managing ed., 14th ed., The University of Chicago Press 1993).

case he must discuss the need to make a change with the editor before making it).⁵ Once the copyeditor is finished, he sends the marked-up manuscript to an artist, who makes decisions about page layout, font, captions, and the like. The artist also meets with the editor and author to discuss ideas for cover art; while the editor and author must give their final approval of the cover, it is normally the artist who creates the design according to his interpretations and decisions.⁶

The next leg is typesetting, the process by which the marked-up manuscript is sent to a printer and turned into a rough set of book pages. This stage involves little more than entering the changes that have been indicated on the manuscript and producing a stylized version with page numbers, chapters, and appropriate layout.⁷ These rough pages are then sent back to the author, who incorporates more changes, then to a proofreader, back to the editor for another review, and then again to the artist.⁸ From the rough pages, a second pass is set and printed. The second pass of rough pages (much less rough than the first pass) will nonetheless be scrutinized by a third editing party, called a cold reader, who may suggest additional changes to the author and editor.⁹

In the meantime, the artist has been completing his design of a cover, which involves creating and/or licensing art, and designing any interior artistic aspects of the book such as symbols on chapter heading pages and captions for photo inserts.¹⁰ The editor generally writes the text for the cover jacket, which is reviewed and modified by

⁵ Amy Einsohn, *The Copyeditor's Handbook* 18, (University of California Press 2000).

⁶ Grossman ed., *supra* n. 4, at 64, 83. Meanwhile, it must be noted that certain contractual arrangements, discussed in detail later in this study, can give the publisher the right to supersede the author's authority in circumstances when the author fails to respond (i.e., fails to give approval to cover art and illustrations) to the publisher's queries within a set time frame.

⁷ *Id* at 88.

⁸ *Id* at 107, 108.

⁹ Einsohn, *supra* n. 5 at 39-45.

¹⁰ Grossman ed., *supra* n. 4 at 81-82.

the copyeditor, editor, and author multiple times until it can be deemed ready for print.¹¹ An index may also be created, and even this must be reviewed by all participants in the conveyor-belt process.¹² Finally, a set of book blueprints are made and reviewed by artist, editor, and copyeditor before going to the printer.¹³

B. Copyright Implications in the Publishing Process (a Legal Analysis)

The editorial process, despite its almost innumerable stages, is a relatively streamlined process that has over the course of many years benefited from the scrutiny of many literary minds and become able to handle even the tightest publishing schedule and the least foreseeable extenuating circumstance. The proliferation of different hands in the pot, though, does pose questions about rights. To examine and discuss these questions, they must be viewed through the lens of modern, Berne Convention–spurned copyright law. Such law is based on the premise that authors have undisputed rights to their creations from the time the pen touches the page. Further, requirements for copyright protection generally include the elements of fixation and originality.¹⁴ These rights can

¹¹ *Id* at 94.

¹² *Id* at 82.

¹³ *Id* at 123.

¹⁴ By American copyright law, as enumerated in the Copyright Act of 1976 (codified as U.S. Code Title 17), the requirements for a valid copyrightable work are that it be an original work of authorship, and that it be fixed in a tangible medium of expression. *17 U.S.C. §102(a) (1976)*. By the U.S. code, the author is the creator of the work, and creation is defined as “fixed in a copy or phonorecord.” §101. Works of authorship are listed in §102(a), and §102(b) specifies what is *not* a work of authorship—ideas, processes, theories, and the like—thereby making clear that *expression* is the essential element the copyright shield seeks to protect.

In France, the *Code de la propriété intellectuelle* governs copyright law, and defines authorship in a similar vein: A work has been created when it has been realized (realized is employed in the sense of accomplished, not merely conceived). This author’s translation of original text: “L’Oeuvre est réputée créée, indépendamment de toute divulgation publique, du seul fait de la réalisation, même inachevée de la conception de l’auteur.” *Code de la propriété intellectuelle, Art. L.111-2*. The French code also provides a list similar to *17 U.S.C. §102(a)*, which enumerates the various works protected under French copyright law.

Most important, the French code has an originality requirement similar to the American one—that the code protects the rights of authors in all works of the spirit (spirit is defined here as any product of intellect). This author’s translation of original text: “...dispositions du présent code protègent les droits des auteurs sur toutes les oeuvres de l’esprit...” *Art. L. 112-1*.

be bolstered by registration of the copyright, and are of course subject to whatever contract is drawn up between author and publisher.

But the rights inherent in the author and publisher, and the rights exercised in the editing process and at time of sale of the finished book often become more nebulous. As is made obvious by the description of the publishing process above, there are stages in which a participant, other than the author, appears to make a substantially creative and/or transformative addition to the book, and fixes it in a tangible medium, thereby fulfilling the requirements for a valid copyright. These additions generally never get copyrighted although some of them likely deserve a copyright, based on the strict letter of the law in both the United States and France.

When an editor line edits, he changes sentences, adds or removes characters, and sometimes considerably alters the plot; in so doing, he pens his own original expression, fixing it on the page. Furthermore, other employees of the publishing house—copyeditor, proofreader, and artist—have made substantial modifications, incorporating their own creative expression in the form of editorial “fixes,” stylistic changes, and new art and graphics. It cannot be denied that the finished book is frequently a broad departure from the manuscript that first arrived on the desk of the editor. According to French and American law, editorial revisions would technically make the revised manuscript a derivative work, and both legal bodies provide that the author of the original work holds all rights to derivative works.¹⁵ So, because a published book is a derivative of a raw

¹⁵ In the U.S., “A ‘derivative work’ is a work based on one or more preexisting works, such as a translation ... or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’” *17 U.S.C. §101*.

manuscript, when a publishing house sells and distributes the book, it is technically infringing on the rights of the author. Furthermore, the editor has written the book summary and sales pitch on the book jacket. This addition, again, comports the necessary elements for copyright: an original work or authorship, fixed in a sufficiently permanent medium. And again, it falls under the rubric of a derivative work because it is “based on” the preexisting work (the manuscript) and in effect “recasts” it.¹⁶ And what about the book jacket, and the bound book itself? The artist has designed cover art, decided on page layout, font, and spacing. Arguably, these are creative additions sufficient to fulfill the copyright requirements—not for a derivative work, but for an original one. If the book requires an index, an indexer has broad creative license to index by theme, key word, or other criteria, depending on how he perceives the manuscript’s structure and targeted audience. This index is by result a creative work of authorship, fixed in a tangible medium, and based on the author’s original manuscript: a derivative work.¹⁷

In France, “Authors of translations, adaptations, transformations, or arrangements of intellectual works enjoy the protection afforded by the current code, subject to the rights of the author of the original work.” (This author’s translation of original text: “Les auteurs de traductions, d’adaptations, transformations ou arrangements des oeuvres de l’esprit jouissent de la protection instituée par le présent code sans préjudice des droits de l’auteur de l’oeuvre originale.”) *Code de la propriété intellectuelle, Art. L.112-3.*

¹⁶ *Id.*, 17 U.S.C. §101.

¹⁷ We can assume, for the purposes of this study, that these “derivative” works are truly derivative and not parts of a “collective work” as defined by U.S. and French law. Collective works are different from the contributions of publishing actors discussed here because collective works are defined in the U.S. as “separate and independent works in themselves ... assembled into a collective whole.” (The “whole” is subject to copyright by the compiler, but the contributors cannot assert ownership rights in their contributions.) Examples include periodical and encyclopedia entries. *Id.*

In French law, a collective work is defined similarly: It is not possible to separate the contributing works once they are part of the collective work (This author’s summary and translation of the original text: “Est dite collective l’oeuvre créée sur l’initiative d’une personne physique ou morale qui l’édite, la publie et la divulgue sous sa direction et son nom et dans laquelle la contribution personnelle des divers auteurs participant à son élaboration se fond dans l’ensemble en vue duquel elle est conçue, sans qu’il soit possible d’attribuer à chacun d’eux un droit distinct sur l’ensemble réalisé.”) *Id.*, Art. L. 113-2.

Therefore, in light of both countries’ laws, a published book is not a collective work if it is authored by one person because it is undeniably possible to separate and attribute the individual functional

II. Resolving the Contradictions: Conventions of Practice and Contracts

In both France and the United States, the publishing industry has dealt with these technicalities in two primary ways. The first is the adoption of conventions of practice that, while being in opposition (in certain respects) with the dictates of copyright law, are generally accepted by all actors in the business as means by which to effectively publish and sell an author's book. These conventions have been alluded to above and will be discussed at greater length below. The second way of resolving the law-reality paradox, which will also be discussed and examined in more detail, is the contract. In both cases, it is essential to keep in mind the industry here concerned and the implications thereof.

The incentives provided by copyright law play a crucial role in publishing.... Authors and publishers are ... interdependent—authors provide the talent, knowledge, labor and time essential to creation of the work, and publishers provide the means and expertise to print, ship and sell the work. Publishing agreements reflect this interdependence.¹⁸

It is also essential to view these book publishing conventions and contracts as they fit with the underlying purpose of copyright law and, in this case, how they have been employed and adapted to best serve the needs of this specific industry.

contributions: the story (author and editor), the cover (artist), the layout and design (artist), and the index (indexer).

It is pertinent to note that *New York Times Company v. Tasini* is inapplicable to the characterization of rights and rights transfers in book publishing, because *Tasini* underlines the fact that the U.S. Copyright Act “adjusts a publisher’s copyright in its collective work to accommodate a freelancer’s copyright in her contribution.” As such, the holdings in *Tasini* apply to collective works made up of the individual works of more than one contributing author: The law affords rights to newspapers and magazines in the form of copyrights for the “collective work as a whole,” while the author of the contributing work also retains separate copyright ownership in the piece he created. 533 U.S. 483, 497 (2001). Trade books are characterized by the contribution of only one author (or in the least, in the case of joint authorship, one manuscript).

¹⁸ Amicus Curiae Brief submitted by The Authors’ Guild, pp. 19-20, *Random House v. Rosetta Books*, 150 F. Supp. 2d 613, 615 (S.D.N.Y. 2001). The brief goes on to state: “Authors license some of their exclusive rights to a publisher in exchange for payment and the publishers’ provision of editorial assistance, production, distribution and publicity. This ability to license certain rights constitutes the incentive for authors to produce valuable works. These incentives are the cornerstone of the publishing industry.”

A. Copyright Law in France and the United States – Similar in Purpose and Effect, but with Nuanced Differences

It comes as no surprise that France and the United States, two highly developed signatory nations of the Berne Convention, share fundamental theoretical underpinnings for their respective laws of copyright. The Berne Convention has provided its member states with general guidelines and criteria regarding copyright law and the definitions engendered by it (the fixed medium requirement, for example). Meanwhile, the treaty provides that the legislations of member states should be individually responsible for determining registration requirements and the rights and protections afforded to authors.¹⁹

i. The United States Code, Title 17

The Copyright Clause of the United States Constitution prescribes to authors in the U.S. broad rights in their works.²⁰ These rights, along with notions of authorship and creative works, are enumerated in U.S. federal law, Title 17, which is the codification of the 1976 Copyright Act. Title 17 defines terms of art necessary to understand what types of creative works are worthy of copyright protection, as well as lists the rights protected under U.S. law. Literary works are the first category of works falling under the chapeau of Section 102 of Title 17.²¹ The exclusive rights afforded authors of literary works, as with authors of all works defined by Section 102, are those of reproduction, preparation of derivative works, distribution (by sale or other transfer), performance, display, and

¹⁹ *Convention de Berne pour la protection des oeuvres littéraires et artistiques* (Acte de Paris du 24 juillet 1971, modifié le 28 septembre 1979). And see *World Intellectual Property Organization Web site*, WIPO, www.wipo.int/copyright.

Attorney Laurence Dreyfuss-Bechmann of Fidal Strasbourg notes that it is important to remember that American copyright law was well established prior to the Berne Convention. *E-mail from Laurence Dreyfuss-Bechmann, Assoc., Fidal Strasbourg, to Gabriel Weiss, Student, U. Maine School of Law*, (April 5, 2005).

²⁰ *U.S. Const. Art. 1, §8.*

²¹ *17 U.S.C. §102(a)(1).*

audio transmission.²²

ii. The French Code de la propriété intellectuelle

The Code de la propriété intellectuelle dictates French federal copyright law. In terms exceedingly similar to those found in U.S. Title 17 does the Livre 1e, Le Droit d’Auteur (the first of three chapters), couch its definitions of copyrightable works, authorship, and protected rights. Indeed, the French Code mirrors American copyright law in most fundamental respects, the paramount being that “[t]he author of an intellectual work enjoys, simply by reason of its creation, an exclusive incorporeal property right over the work, enforceable against all.”²³

Meanwhile, French law seems to express a more pronounced view (or at least a more perspicuous one) on the manner in which work-for-hire agreements affect exclusive rights of authorship: Article L. 111-1 goes on to say that “[t]he existence or conclusion of a work-for-hire contract by the author of an intellectual work carries with it no derogation from the enjoyment of the right recognized by paragraph 1.”²⁴ This precision, particularly when viewed in opposition with the U.S. Title 17, in which the explanation of works made for hire comes much later, in Chapter 2,²⁵ becomes all the more confusing. If French copyright law, as it appears through this statute, counts among its primary concerns that of preserving original authors’ rights in the face of (and perhaps in preference to) work-for-hire agreements, the fact that novels published in France are copyrighted to the publishing houses instead of the authors becomes increasingly

²² *Id.* at §106.

²³ (This author’s translation of original text: “L’auteur d’une oeuvre de l’esprit jouit sur cette oeuvre, du seul fait de sa création, d’un droit de propriété incorporelle exclusif et opposable à tous.” *Code de la propriété intellectuelle, Livre 1e, Titre 1e, Chapitre 1e, Art. L. 111-1.*

²⁴ (This author’s translation of original text: “L’existence ou la conclusion d’un contrat de louage d’ouvrage ou de service par l’auteur d’une oeuvre de l’esprit n’emporte aucune dérogation à la jouissance du droit reconnu par l’alinéa 1er.”) *Id.*

²⁵ *17 U.S.C. §201(b).*

contrary to the logic one would follow from a “to-the-letter” reading of the French law.²⁶

Further, the French code diverges sharply from U.S. copyright law in a section where it specifically addresses the rights of authors and editors in the context of publishing agreements. The Code de la propriété intellectuelle actually contains a set of provisions specifically addressed to book publishing contracts: Chapter II, Section 2 is indeed entirely *devoted* to the governance of publishing contracts. Article L. 132-1 asserts that in such agreements, “the author of an intellectual work or her assigns agree to certain pre-determined conditions and transfer to an editor the right to produce or have produced, in quantity, copies of the work, in order to assure the work’s publication and distribution.”²⁷ Articles L. 132-2 through 132-17 proceed to provide relatively specific guidelines for the formation of publishing contracts.²⁸

This particularity of the French code, especially when viewed alongside U.S. Title 17, which contains no such publishing-devoted sections, increases the paradoxical nature of the reality of French publishing. Chapter II, Section 2 of the French code is meant to add a layer of protection to authors by providing statutory constraints to the contracts whereby these authors may encounter the dangers of transferring too many rights to publisher; in essence, Art. L. 132-1 – 132.17 proscribes that rights transferred from an author to an editor are to be limited to those necessary for the publication and sale of the book. Not all rights are transferred by the contracts, and by no means is the ownership of copyright ceded by the author. Meanwhile, the copyright page on French books does not

²⁶ This author’s interpretation of the third sentence of *Article 111-1* is that it provides that original authorship, being indicative of copyright ownership, should supersede the transfer of rights engendered by a work-for-hire agreement when any dispute arises. (See *supra*, n. 23, 24)

²⁷ *Art. L. 132-1*. (This author’s translation of original text: “Le contrat d’édition est le contrat par lequel l’auteur d’une oeuvre de l’esprit ou ses ayants droit cèdent à des conditions déterminées à une personne appelée éditeur le droit de fabriquer ou de faire fabriquer en nombre des exemplaires de l’oeuvre, à charge pour elle d’en assurer la publication et la diffusion.”)

²⁸ See *Art. L. 132-2 – 132-17*.

reflect this apparent desire to limit the transfer of rights. If nothing else, the French convention of attributing the © to the publisher instead of the author seems either to overlook these legal provisions or to directly controvert them.

The question then becomes, in France as well as the United States, how and why has the practice of an industry undeniably regulated by a specific and relatively up-to-date body of law come to proceed on its own terms—terms that in certain respects either circumvent or stand in opposition to the law. To answer this question, it is first necessary to understand the publishing conventions of both countries.

B. General Copyright Conventions – Facilitating Publishing while Protecting Authors’ Rights

i. American Practice

The reality of the book publishing mechanism in the United States is that publishers do not retain any rights, as protected by Title 17, in whatever additions they make to a book.²⁹ While their artists and editors have added creatively to an already-existing work, and have fixed these new “works” in a tangible medium of expression, they nevertheless register the book with the U.S. Copyright Office under the name of the author.³⁰

²⁹ Although the artist of a book cover does in fact retain the copyright to his or her creation, the editor who has made substantial additions in the way of line editing and rewriting receives none of the same treatment. According to Kay Murray, General Counsel of the Author’s Guild, even if the copyright page of a book does not specifically indicate that the artist retains copyright ownership of his work, such remains the case. Most copyright pages on currently published books offer clear attribution of the cover art to its designer. However, “an editor has never been able to claim any copyright interest” in his or her contribution. Telephone interview, *supra* n. 1.

³⁰ While a more in-depth look at contracts is to follow in Section II(C), it is helpful here to note that generally, U.S. contracts reflect convention with regard to copyright notice: A boilerplate contract for book publication from Warner Books, a subsidiary of Time Warner Trade Publishing, Inc., includes the

It can also be tempting to see the author-publisher arrangement as a work-for-hire agreement in the sense that the publishing house, the large conglomerate, merely hires authors as contractors who provide the manuscript, which the publishing house incorporates it into the larger work, which is the finished book. This image is not accurate, however. The court in *Marvel Characters v. Simon* made clear that work-for-hire clauses normally will never apply to the situation in which a publisher “acquires” and publishes an author’s book: A copyright cannot vest directly with a publisher because Section 304(c) effectively trumps any work-for-hire agreement between the two parties, thereby going an extra step to ensure the original author’s copyright ownership.³¹ The applicable law in *Simon*, §304(c) of the Copyright Act, is the “Termination of Transfers and Licenses” provision. It states that “[t]ermination of [a] grant may be effected notwithstanding any agreement to the contrary....” Although the termination provision had previously been considered *inapplicable* to work-for-hire agreements, the *Simon* court’s holding—that §304(c) *did* encompass work-for-hire agreements—made clear an

following provision: “The Publisher agrees to register the copyright in the Work in the name of the Author in the United States of America.... The Author hereby appoints the Publisher to be the Author’s attorney-in-fact to execute and to file any and all documents necessary to record in the Copyright Office the assignment of exclusive rights made to the Publisher hereunder.” *Generic book contract*, Warner Books (2005).

³¹ *Marvel Characters v. Simon*, 310 F.3d 280, 290-91 (2002). The court reasoned thus: “When examining the legislative intent and purpose of § 304(c), it becomes clear that an agreement made after a work’s creation stipulating that the work was created as a work for hire constitutes an “agreement to the contrary” which can be disavowed pursuant to the statute. Any other construction of § 304(c) would thwart the clear legislative purpose and intent of the statute. If an agreement between an author and publisher that a work was created for hire were outside the purview of § 304(c)(5), the termination provision would be rendered a nullity; litigation-savvy publishers would be able to utilize their superior bargaining position to compel authors to agree that a work was created for hire in order to get their works published.

“This reading of § 304(c) is also consistent with the way in which courts have interpreted the 1909 Act’s “work for hire” provision. Courts engaging in such an analysis have focused on the actual relationship between the parties, rather than the language of their agreements, in determining authorship of the work. See, e.g., *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 640-42 (2d Cir. 1967) (holding that a composer’s work was not created as a work for hire for defendant even though his contract with defendant provided him with a drawing account during his “employment”); see also *Murray v. Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978) (holding that a writer was not the “author” of a book produced by the defendant even though she expressly contracted for “exclusive control” of its contents).”

intent to protect authors by judicially refusing to define the author-publisher relationship as a work-for-hire arrangement.

A second possible characterization of the implicit agreement between author and publisher by current American legal convention is as a type of work-for-hire agreement in which the *author* is the hiring party, and the publishing house is the outside contractor. By this theory, the author basically requires the services of the publisher to print and sell the work, and any creative, expressive investment (new, original work) by an editor or artist as the manuscript goes through the editing stages automatically vests in the original author the moment it is created.³²

However accurate this “reverse” work-for-hire theory may be in terms of strict U.S. copyright law, it holds neither logical nor practical water. This is largely because customary practice does away with any such label or characterization. It is implicitly agreed that, when the author signs a contract to have her book published, she forfeits any rights she does not expressly retain which will be necessary for the publishing house to effectively transform her manuscript into a publishable and (hopefully) profitable book.

ii. French Practice – A Different Story

On any trade book published in France, the copyright page testifies to a very different convention: The copyright is registered to the publishing house. There is no mention of the author, nor any rights reserved by her. To the contrary, many French publishers specifically proclaim their exclusive rights in the work on the copyright page. Many, however, simply list the copyright and an ISBN number. The implications of this

³² 17 U.S.C. §201(b) (Except, as mentioned *supra* n. 29, the contribution of the cover artist, in whom copyright vests at the time of creation).

fact necessarily raise the question: Are contracts between authors and publishers in France considered works-for-hire in the traditional sense—that is, where the author’s rights in her manuscript are automatically transferred to the publisher at the time of creation?

From the perspective of elementary copyright law goals, at first blush, this French convention offends the legal conscience. It does not seem that a system of laws based upon the goal of upholding and protecting authors’ rights would tolerate publishers reaping full copyright ownership by way of a work-for-hire agreement, even if authors have made certain valid transfers of rights in order that the publisher effectively edit and print the book. An author is still an author, and despite the creative additions editors and artists have made (which, we have seen, are not considered copyrightable by book publishing customs), the author’s work should, as it does in the United States, be bestowed with the full force of a copyright. So again, the question must be posed: Why is the force of the copyright apparently so blunted in France?

The answer seems to lie, as in many copyright areas, in the ubiquitous contract. To fully understand how book contracts have the power to bolster and abridge the copyrights of authors in their works, an analysis of French and American contracts is necessary.

C. American Contracts Explicitly Preserve Authors’ Copyright Ownership

When an editor in the United States initially agrees to publish an author’s book, publisher and author enter into contract negotiations. The overwhelming majority of these contracts are boilerplate, with the exception of situations with certain extenuating circumstances (such as professional baseball player Johnny Damon’s recent book

contract with Crown Publishing, which contains a stipulation that the athlete not cut his trademark long hair until the publicity tour accompanying publication ends³³). But the norm in publishing contracts is that their primary function is to grant the publishing house the right to print and sell the book.³⁴ The grant of rights, therefore, is the crux of the contract because its language and implications are what allow the publisher to exercise the degree of control over the manuscript necessary to transform it into a finished book and facilitate the author's and their own profit from it. The three essential rights granted are to print, publish, and sell the book.³⁵

However, it is precisely this grant of rights clause that may pose problems for authors in the United States and elsewhere. In transferring the right to print and publish the book in a binding contract, authors in the U.S. must make certain not to hand over rights that will have the effect of being perpetually retained by the publishing house, and thereby prevent the author from capitalizing fully from his or her creation. This becomes a question of how far the publisher's right to publish and sell extends, in terms of both geography and type of media. It is relatively easy for a reasonably alert author to retain the right to sell his or her book in certain parts of the world and the right to translate it into certain foreign languages; meanwhile, formats can be more difficult to negotiate because of their ambiguity. Particularly in this computerized age, the possibility of new media by which to transmit the printed work may be so wide that an author will make the

³³ Beggy, Carol and Shanahan, Mark, "*Zorn Sounds Off; Damon Shares a Hairy Publicity Tale*," www.boston.com (January 31, 2005).

³⁴ A typical "Grant of Rights" clause states, "The Author hereby grants and assigns to the Publisher exclusive print, audio and electronic rights in the Work (and any revisions thereof), in whole or in part for the full term of copyright (including any renewals and extensions), in any language, including the right to reproduce, publish, distribute, transmit, deliver, transfer, market and/or sell the Work..." Warner Books contract, *supra* n. 30.

³⁵ **Random House v. Rosetta Books**, *supra* n. 2 at 615.

mistake of signing a contract containing overly broad and “inclusive language such as ‘in any format now known or hereafter developed.’”³⁶

Nevertheless, current American case law does protect authors from such broadly inclusive language regardless of whether or not a publisher manages to slip it into the contract. The U.S. Supreme Court addressed the matter of format directly in *Random House, Inc. v. Rosetta Books LLC* where it reasoned that “to print, publish and sell [a] work in book form is understood in the publishing industry to be a ‘limited’ grant.”³⁷ The court interpreted a “limited” grant as one encompassing book publishing formats that could be reasonably anticipated at the time of publication, and applied this interpretation in its holding that e-books could not have been reasonably anticipated as a medium at the time the contract was signed; therefore, the specific grant of the right to publish the work in electronic format could not be read into the broad language of the contract, and remained, by consequence, with the original authors (in this case, the rights were held by Rosetta Books, the exclusive licensee) regardless of the overly inclusive language of the contract.³⁸ The court also pointed to the fact that the contracts at issue made specific reference to subsidiary rights to special editions, Braille versions, and abridgements, reasoning that, had Random House truly intended “book form” to be interpreted broadly, it would not have felt the need to include such contractual precisions.³⁹

Meanwhile, this notion of a limited grant of rights should not be understood as a

³⁶ The Authors’ Guild, *The Author’s Guild Web site*, authorsguild.org.

³⁷ *Random House v. Rosetta Books*, *supra* n. 2 at 621; see also *Field v. True Comics*, 89 F. Supp. 611, 613-14 (S.D.N.Y. 1950).

³⁸ *Id* at 621-20; see also *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 486 (2d Cir.1998) and *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir.1968).

³⁹ *Id.*

barrier to effective publication. The discussion above merely sheds light on certain financial and contractual conflicts that arise in the book publishing world and have seen a good degree of litigation. With regard to the actual process—the physical and intellectual mechanism that transforms manuscript into book—a point made by the Random House court is essential to note: “The publisher agreed in the contract to ‘publish the work at its own expense and in such style and manner and at such a price as it deems suitable.’”⁴⁰ It may be said, then, that the real crux of the author-publisher contract is the grant of certain limited *creative* rights. Speaking from a contractual standpoint, although subsidiary rights to translations, reprints, audio books, and collections might be transferred to the publisher, it is inescapable that in the United States an author retains copyright interest and ownership in the finished book.⁴¹

ii. French Book Contracts Fail to Address Copyright Ownership

Such is not the case in France. At most, French book publishing contracts iterate a transfer of the exclusive right to exercise and enjoy the financial rights associated with the publication of the book.⁴² To the same degree that U.S. contracts are specific, French contracts are vague in the terms they set forth and the rights they ascribe. Apart from this opening provision, which has the effect of transferring the author’s “patrimonial rights,” issues of copyright ownership and retention of rights not explicitly transferred do not appear anywhere in the contract.

⁴⁰ *Id.* at 616.

⁴¹ The vast majority of American book contracts contain a “Reservation of Rights” clause, such as, “All rights not granted to the Publisher hereunder are reserved to the Author.” Warner Books contract, *supra* n. 30.

⁴² *Book publishing contract between Jonathan Weiss and Les Editions Albin Michel.* (November 15, 2004). (This author’s translation of the original text: “L’Auteur cède à l’Editeur qui accepte pour lui et ses ayants droits, dans les termes et conditions ci-après énoncés, la faculté exclusive d’exploiter ses droits patrimoniaux sur son prochain ouvrage....”)

Nevertheless, the French contract is not entirely bereft of precise terms. General usage of trade in these contracts is similar to that in the United States: to provide publishers with the means necessary to create a pressworthy finished book from a bare manuscript. For this reason, the grant of essential rights is also the same. All French book contracts bind the signing author to transfer to the publishing house the right to print, publish, and sell; and with this, they also necessarily transfer all rights necessary to effectuate said printing, publishing, and selling.⁴³

Conspicuously absent from French book contracts is the reservation of rights clause. While these contracts do enter into the same degree of detail as do American ones with regard to the transfer of rights to various formats (translations, adaptations, etc.) and remuneration, they leave out any mention of who retains the copyright. They also neglect to specify where the rights not explicitly transferred reside. The obvious result of this failure to specify terms is ambiguity. It leaves open the possibility that publishers might seek to deprive authors of otherwise inherent rights to their work, simply because the contract might be construed to encompass them.⁴⁴ In sum, when authors “sign on” with publishing houses in France, they transfer a larger bundle of rights to the publisher than do authors in the U.S., and the rights they do retain are more vague and ambiguous.

⁴³ Variations in the transfer of the rights to print, publish, and sell are common. But invariably, these grants appear on the first page of French contracts. Following are two different examples, both of which essentially serve the same purpose:

1. “The author transfers to the Editor the exclusive right to edit, reproduce in number, publish, and publicize the Work...”
2. “The author transfers to the Editor the exclusive right to reproduce and represent the Work...”

It is clear that while wording differs between the two examples, their purpose and effect is the same. In both, there is a clear transfer of the rights inherent in the book publishing process. However, there is no reservation of rights clause in either of these clauses. *Id.*; see also *Book publishing contract between Jonathan Weiss and Editions du félin*, (December 10, 2004).

⁴⁴ The French legal system has, at this point in time, yet to be confronted with a case such as *Random House v. Rosetta Books*, *supra* n. 2. It is quite possible that if this sort of litigation were to darken the doorstep of a French court, a consequence would be that book contracts would soon become increasingly fortified by specific language referring to grants, transfers, and retention of copyright-based rights.

Compound this fact with the custom of attributing the copyright on the finished book to the publisher, and the impression given by the French system is that authors more-or-less forfeit their copyright interest in their work when they agree to having it published.

III. Conclusions

Regardless of the fact that these conventions appear acceptable and accepted in France, it is not clear to this author why this is so. It seems grossly unfair that merely by her endeavor to have her work disseminated to the public, an author in France must forfeit all rights to her original work. The French law, which affords the same or more protection to authors than does U.S. law, underpins this unfairness and underlines the legal paradox it creates.

The initial question this paper posed was why—why does a copyright law system similar to the American one allow a copyright in a book to be attributed to the publisher and not the author? The most straightforward answer comes not from any discovery of chinks in the French code de la propriété intellectuelle. Neither is it unearthed through an analysis of French book contracts. The most straightforward answer comes from the conventions of the French publishing industry and how intellectual property law applies to it. Quite simply, the reality is that copyright notice—the ©—has no effect in France.⁴⁵ It is merely a marking on the book which is customary but has no legal import. Whether this copyright notice be attributed to author, publisher, agent, or assign does not change the fact that in France, despite appearances to the contrary, copyright ownership does in fact remain with the author.

But to say that the copyright notice has no actual meaning seems to defeat certain

⁴⁵ E-mail from Laurence Dreyfuss-Bechmann, *supra* n. 15. (This author’s translation of original text: “ Le copyright est sans effet en France.”)

essential purposes of copyright law. Without being clearly apprised of the ownership of certain property which is made readily available to the public, readers can easily be confused when they encounter the copyright page of a French book. Title page and public notoriety aside, the rights of authors cannot be protected enough in this age of technology. Easy as it is to write a book, just as simple is it to unjustly appropriate it by new digital means—moreover, to redistribute illegally by electronic means.

Mere socio-governmental policy and general empathy for authors are not sufficient arguments against this French convention. Fortunately, neither are they the only arguments. As noted above in the discussion of French copyright law in Section I (A)(ii) of this paper, Chapter I, there is a statutory safeguard in French copyright law that seems to go a step further than U.S. law does.⁴⁶ That guidelines for publishing contracts are laid out in black and white in the code de la propriété intellectuelle is a decided advantage for authors in France, especially in the face of the customary notion that the copyright notice is of no import. So while the conventions may hold that the copyright notice is attributed to the publisher, and while the contracts might not adequately protect the authors' inherent rights, at least the French code provides a backstop to any potential abuse by publishers of their position vis-à-vis authors.

The wide gap between French and American convention can in large part be attributed to cultural differences. Traditions in contractual agreements in the respective countries have evolved according to how their laws treat the book publishing business—or more precisely, how their lawyers treat it. It appears that in France, the legal practice hasn't caught up with the modern industry and the modern wording and construction of contracts. American book publishing contracts have become increasingly precise because

⁴⁶ *Supra* n. 25, 26.

we are a litigious society and suits have come between authors and their publishers. Therefore, we draft contracts in an exceedingly precise manner that does not allow for misinterpretation. We draft into the instrument specific grants of the rights to print, publish, and sell, but we also make sure to include the fact that the author retains the original copyright in the work. As demonstrated by the French contracts analyzed above, that country's convention is to neglect to mention who retains original copyright ownership of this work. This can lead to confusion; however, as of yet, this potential confusion does not seem to have bothered many people. It is no newsflash that the French do not bring such issues to light in the litigation arena as frequently as we do in the United States. As mentioned above, if the French courts were to be faced with such a case as *Random House v. Rosetta Books*, conventions of trade and contract would conceivably garner much reexamination and retooling. Contracts, at the very least, would become increasingly precise so as to eliminate the potential for varied interpretation as to grants of rights.

The most important question that must be asked, though, is whether or not these different conventions and laws of copyright are really important in the book publishing industry today. The answer to this question is no, they really are not. In both countries here concerned, and most other developed nations, the truth is that rights come second to money. Once the work is created, the modern author wants to cash in. In this sense, therefore, fairness abounds in both the United States and in France. Authors, in signing contracts with American publishers, can negotiate a broad scope of rights (provided that they are not bereft of all common sense or, if they are, that they are represented by a seasoned literary agent or an organization such as the Authors' Guild). The large

American publishers often will award the signing author a substantial six- or seven-figure cash advance for the manuscript. Most modern authors, therefore—save the few still preoccupied by intellectual and literary integrity—gladly transfer the bulk of their rights to the work. In France, while the cash advance sums are normally much less inflated, authors negotiate contracts that ensure them a larger cut of royalties from sales. They, too, seems less concerned with contractual obligations as they are with how well their books sell. Creativity is protected in some sense, but creativity has become less of a focal point. Book publishing has become a globalized business in the 21st Century, and authors seem to have come to accept this fact—and to capitalize on it.