

3-1-1992

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### Recommended Citation

Jonathan L. Kirsch, *Vanity of Vanities: Subsidy Publishing after Stellema*, 12 Loy. L.A. Ent. L. Rev. 275 (1992).

Available at: <https://digitalcommons.lmu.edu/elr/vol12/iss2/1>

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# ARTICLES

## VANITY OF VANITIES: "SUBSIDY" PUBLISHING AFTER *STELLEMA*

Jonathan L. Kirsch\*

*Vanity publishing is to legitimate publishing as loansharking is to banking.*<sup>1</sup>

### I. INTRODUCTION

*Oh Kim! My Son! My Son!* is Frank Stellema's heartrending account of the illness and death of his son. Like thousands of other aspiring authors, Stellema was unable to find a commercial publisher. Therefore, he paid Vantage Press, a so-called "vanity publisher," to publish his book. And, like thousands of others, Stellema discovered that there is much less to "vanity publishing" than meets the eye.

"They baited me with a phony brochure and a lot of promises," Stellema testified before the jury in a Manhattan trial court in April 1990. "They took my \$6,000 and sent me 50 copies of my book, all of which I had to sell myself."<sup>2</sup> Frank Stellema is the lead plaintiff in *Stellema v. Vantage Press*,<sup>3</sup> a class-action lawsuit against Vantage Press, Inc. and two of its corporate officers, Arthur Kleinwald and Martin Littlefield. Nearly thirteen years after the case was filed, the jury returned a \$3.5-million punitive damages verdict against defendants on a claim that

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The author wishes to express his appreciation to Lisa K. Garner for her indispensable assistance in the research and preparation of this article. The author also appreciates the assistance of counsel in the *Stellema* case, including Arthur J. Jacobs and Alfred E. Smith, counsel for plaintiff, and Steven J. Ahmuty, Jr. of Bower & Gardner, counsel for defendants, for their generosity in making available various pleadings and exhibits for use in connection with this article.

1. DAN POYNTER, *THE SELF PUBLISHING MANUAL* (5th ed. 1989) (quoting Martin J. Baron).

2. Jonathan Yardley, *For Victims of the Vanity Press Scam, A Small Victory*, WASH. POST, Apr. 16, 1990, at B2.

3. *Stellema v. Vantage Press, Inc.*, No. 23585/77 (N.Y. Sup. Ct. 1990).

Vantage defrauded the authors merely by calling itself a publisher.<sup>4</sup>

The lesson of *Stellema* is that the legal definition of publisher—and the duties owed by a publisher to its authors—are moving toward ever greater clarity and specificity. A company that calls itself a publisher is now under court-mandated duties to edit and promote in good faith. And, as a practical matter, the verdict in *Stellema* may destroy the vanity publishing industry, or at least the illusions on which it has thrived for so long.

## II. TOWARD A LEGAL DEFINITION OF "PUBLISHER"

As a threshold matter, we must ask how "publisher" is defined in legal sources. According to Black's Law Dictionary, a publisher is:

One who by himself or his agent makes a thing publicly known. One whose business is the manufacture, promulgation, and sale of books, pamphlets, magazines, newspapers, or other literary productions. One who publishes, especially one who issues, or causes to be issued, from the press, and offers for sale or circulation matter printed, engraved or the like.<sup>5</sup>

Significantly, the function of a publisher as defined in Black's Law Dictionary goes far beyond the mere manufacture of books: a publisher must also "promulgat[e]" the books and offer them for "sale or circulation."<sup>6</sup>

Similarly, the legal definition of "publish" ("[t]o make public; to circulate; to make known to people in general")<sup>7</sup> carefully distinguishes between *printing* and *publishing*: "To 'publish' a newspaper ordinarily means to compose, print, issue, and distribute it to the public, and especially its subscribers, at and from a certain place. To 'print' may therefore refer only to the mechanical work of production . . . and constitutes a narrower term than publish."<sup>8</sup>

Thus, the crucial inquiry in the legal definition of publishing is whether the so-called publisher merely *produces* a book—that is, per-

4. Interrogs. to the Jury and Verdict Sheet, *Stellema v. Vantage Press, Inc.*, No. 23585/77 (N.Y. Sup. Ct. 1990). The actual amount of compensatory damages was to be the subject of a hearing after the jury decided in favor of plaintiffs on liability and punitive damages. However, the hearing on compensatory damages never occurred because the lawsuit was settled. Telephone Interview with Arthur J. Jacobs, Esq., lead counsel for plaintiffs in *Stellema* (Apr. 13, 1992).

5. BLACK'S LAW DICTIONARY 1233 (6th ed. 1990).

6. *Id.*

7. *Id.*

8. *Id.* (citing *In re Monrovia Evening Post*, at 1017, 1019 (Cal. 1926); *In re Publishing Docket in Local Newspaper*, 187 S.W. 1174, 1175 (Mo. 1913)).

forms or arranges for the typesetting, printing and binding of a work of authorship into book form—or goes further and places the book into commercial distribution to the public. The very same distinction is at the heart of *Stellema*, where plaintiffs maintained that Vantage Press, merely by calling itself a publisher, engaged in an act of fraudulent misrepresentation because it made no real efforts to distribute the books that it produced at the expense of its authors.

### III. TOWARD A “DUTY TO PUBLISH”: A SUMMARY OF PREVIOUS CASE LAW ON THE LEGAL DUTIES OF THE BOOK PUBLISHER

It is telling that, with the exception of *Stellema* and the venerable case of *Exposition Press v. Federal Trade Commission*,<sup>9</sup> virtually all reported appellate cases in the publishing industry arise from disputes between an author and a publisher engaged in “trade” or other forms of commercial publishing—that is, a publisher whose business is the production, distribution and sale of books for profit through the book trade.

It is significant, too, that recent case law in the publishing industry has established the clear and unambiguous duty of the publisher to do not only what the contract expressly provides, but to fulfill the implied covenants of good faith and fair dealing by going beyond the technical requirements of the contract.

#### A. Implied Duties of the Book Publisher

The customary publishing contract is a fairly straightforward transaction in which the author grants the right to publish his or her work of authorship—usually in the form of an assignment or exclusive license of copyright—in exchange for the payment of royalties. Virtually all such contracts permit the publisher to make unilateral and subjective decisions on the acceptability of the manuscript, the “style and manner” in which it is published, and the extent to which the book is advertised and promoted, if at all.

However, the courts have applied the familiar concept of the “implied covenant of good faith and fair dealing” in a manner that sharply limits the discretion of the publisher. An emerging line of authority—most of which comes from the Second Circuit and the appellate courts of the state of New York, the traditional locus of the book publishing industry—is increasingly protective of the contractual rights of authors, and

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9. 295 F.2d 869 (2d Cir. 1961).

imposes not only an amorphous standard of "good faith" but specific and articulable duties on the publisher.

The law has long held that a publisher must act in good faith in availing itself of the contractual right to reject a manuscript. The venerable case of *Wood v. Lucy, Lady Duff-Gordon*,<sup>10</sup> a law school classic, establishes the implied duty to an exclusive licensee in intellectual property "to use reasonable efforts to bring profits and revenues into existence."<sup>11</sup> Even the most recent cases hark back to the elegant formulations of the old case: "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."<sup>12</sup>

Thus, for example, in *Random House v. Gold*,<sup>13</sup> Random House and novelist Herbert Gold entered into a four-book contract, which Random House later sought to cancel by rejecting the manuscript of Gold's third book after reviewing the poor financial performance of the first two books under the contract.<sup>14</sup> The United States District Court held that a publisher is entitled to reject a manuscript on financial considerations "if it acts in good faith."<sup>15</sup> But the court suggested that a different result would be reached if a plaintiff-author could adduce sufficient evidence to prove that the publisher's evaluation of the manuscript as unsatisfactory was not held honestly and in good faith.<sup>16</sup>

Then, in *Harcourt Brace Jovanovich v. Goldwater*,<sup>17</sup> the district court went further by suggesting that "good faith" alone is not enough: a publisher must engage in some minimum level of review and response before rejecting a manuscript. Specifically, the court held that the publisher breached its contract with Barry Goldwater and ghostwriter Stephen Shadegg by rejecting the manuscript of Goldwater's ghostwritten memoirs without first explaining why it was dissatisfied with the manuscript or affording the authors an opportunity to rewrite.<sup>18</sup> Although the publishing contract required that the manuscript be "satisfactory to pub-

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10. 118 N.E. 214 (N.Y. 1917).

11. *Id.* at 215.

12. *Mellencamp v. Riva Music, Ltd.*, 698 F. Supp. at 1154, 1158 (S.D.N.Y. 1988) (quoting *Wood v. Lucy, Lady Duff-Gordon*, 188 N.E. 214 (N.Y. 1917) (emphasis in original). See also *Havel v. Kelsey-Hayes Co.*, 445 N.Y.S.2d 333, 335 (N.Y. App. Div. 1981).

13. 464 F. Supp. 1306 (S.D.N.Y. 1979), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979).

14. *Id.* at 1308.

15. *Id.*

16. *Id.* at 1309.

17. 532 F. Supp. 619 (S.D.N.Y. 1982).

18. *Id.* at 625.

lisher in form and content,"<sup>19</sup> the evidence convinced the court that Harcourt Brace had "breached its contract with Shadegg and Goldwater by wilfully failing to engage in any rudimentary editorial work or effort,"<sup>20</sup> apparently because the publisher wanted to replace Shadegg with another ghostwriter.<sup>21</sup>

The court in *Harcourt* found "an implied obligation . . . for the publisher to engage in appropriate editorial work,"<sup>22</sup> consisting of "some reasonable degree of communication with the authors, an interchange with the authors about the specifics of what the publisher desires . . . ."<sup>23</sup> The court pointedly observed that there was no need to "determine the full extent or the full definition of the editorial work which is required of a publisher under the contract. Here there was no editorial work. I emphasize, no editorial work."<sup>24</sup>

*B. "Good-Faith Editing" and the "Duty to Promote" Under Dell and Zilg*

More recently, the doctrine of "good faith and fair dealing" has been interpreted to impose specific and quantifiable duties upon book publishers in *Dell Publishing Co. v. Whedon*<sup>25</sup> and *Zilg v. Prentice-Hall*,<sup>26</sup> where, in the words of one authoritative commentator, the courts "[gave] authors, by judicial fiat, what they have generally been unable to obtain by contract negotiations."<sup>27</sup>

1. *Dell Publishing Co. v. Whedon*

*Dell* is an author's typical nightmare come true. Julia Whedon entered into a contract with Dell in 1974 for a novel based on a twelve-page outline. After Whedon submitted approximately half of the manuscript to her editor at Dell in 1977, the editor expressed satisfaction with the work-in-progress, and an additional \$6,000 advance was paid as required

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19. *Id.* at 619.

20. *Id.* at 625.

21. *Id.*

22. *Harcourt*, 532 F. Supp. at 624.

23. *Id.*

24. *Id.*

25. 577 F. Supp. 1459 (S.D.N.Y. 1984).

26. 717 F.2d 671 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1911 (1984).

27. Melvin Simensky, *Redefining the Rights and Obligations of Publishers and Authors*, 5 LOY. ENT. L. J. 111, 127 (1985). Simensky expertly analyzes (and rather sharply criticizes) *Dell* and *Zilg*, and concludes that the two cases "dramatically restructure the author-publisher relationship," *id.* at 111, by effectively establishing a duty to "edit in good faith," *id.* at 119, and a concomitant "duty to promote." *Id.* at 127.

by the contract on acceptance of the partial manuscript.<sup>28</sup> When Whedon delivered the completed manuscript in 1978, however, Dell informed the author that the manuscript "isn't what we expected,"<sup>29</sup> purported to cancel the contract, and demanded the return of the entire \$14,000 advance.<sup>30</sup> Whedon later sold the manuscript to Dell's parent company, Doubleday, and Dell sued her to recover the \$14,000 advance.<sup>31</sup>

The court in *Dell* summarized the dispute in simple terms:

The sole issue in dispute is whether, before rejecting the manuscript as unsatisfactory, Dell had an implied good faith obligation to offer Whedon the opportunity to revise the manuscript, with Dell's editorial assistance, to bring it up to publishable standards. The court holds that Dell had such an obligation, which it failed to fulfill.<sup>32</sup>

## 2. *Zilg v. Prentice-Hall*

*Zilg*, which also embodies an author's typical nightmare, goes considerably further than *Dell* in imposing affirmative duties on a publisher under the implied covenant of good faith and fair dealing. Gerard Colby Zilg, who wrote a book about the duPont family under contract with Prentice-Hall, claimed that his publisher failed to promote his book in good faith at the behest of the duPont family (whom he sued for tortious interference with contract).<sup>33</sup>

The Prentice-Hall contract included the standard publishing-industry clause that bestows upon the publisher virtually unfettered discretion in determining how, when, and in what quantities the book will be published, including the sole right "to determine the method and means of advertising, publicizing, and selling the work . . . ."<sup>34</sup> Zilg complained that Prentice-Hall acted wrongfully by, among other things, reducing the number of copies to be printed and failing to promote the book.<sup>35</sup>

The Second Circuit in *Zilg* applied the doctrine of "good faith and fair dealing" to Prentice-Hall's obligations under the contract, and went so far as to specify the minimum obligations of the publisher in promoting a book:

28. *Dell*, 577 F. Supp. at 1460.

29. *Id.* at 1461.

30. *Id.*

31. *Id.* at 1462.

32. *Id.*

33. *Zilg v. Prentice-Hall*, 717 F.2d 671 (2d Cir. 1983).

34. *Id.* at 674.

35. *Id.* at 676.

We think that the promise to publish must be given some content and that it implies a good faith effort to promote the book including a first printing and advertising budget adequate to give the book a reasonable chance of achieving market success in light of the subject matter and likely audience.<sup>36</sup>

According to the court in *Zilg*, once the book has actually been printed and the publisher has made "a good faith effort to promote the book initially,"<sup>37</sup> any further or "more elaborate"<sup>38</sup> efforts are left to the publisher's discretion: "Once the initial obligation is fulfilled, all that is required is a good faith business judgment."<sup>39</sup> From the evidence presented at trial, the court in *Zilg* concluded that Prentice-Hall had, in fact, discharged its obligations in good faith, and the verdict in favor of plaintiff was reversed.<sup>40</sup>

### C. Doubleday & Co. v. Curtis

The same court that established a "duty to promote"<sup>41</sup> in *Zilg*, however, declined to give its imprimatur to the "duty to edit" in *Doubleday & Co. v. Curtis*,<sup>42</sup> where the veteran actor and novice author Tony Curtis complained that his publisher had breached its duty of good faith in rejecting the manuscript of a work titled *Starstruck* as unpublishable.<sup>43</sup>

The court in *Doubleday* carefully noted that a Doubleday editor had read the "partial first draft"<sup>44</sup> of *Starstruck* and offered detailed suggestions—critical but encouraging—for its improvement, but the author later delivered a complete manuscript that "ignored"<sup>45</sup> the publisher's suggestions. Doubleday's editors concluded that the manuscript was "'junk, pure and simple' and could not be 'edited into shape or even rewritten into shape.'" <sup>46</sup> When Curtis rejected a suggestion that he consult a "novel doctor" in order to rewrite his manuscript, Doubleday rejected the manuscript and later sued in United States District Court to recover its advance.<sup>47</sup>

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36. *Id.* at 680.

37. *Id.*

38. *Zilg*, 577 F. Supp. at 680.

39. *Id.*

40. *Id.*

41. *Id.* at 681.

42. 763 F.2d 495 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 912 (1985).

43. *Id.* at 499.

44. *Id.* at 498.

45. *Id.*

46. *Id.*

47. *Doubleday*, 763 F.2d at 498-99.



Curtis counter-sued for breach of contract based on the claim that "Doubleday's failure to provide . . . editorial services—a duty derived from its implied obligation to perform in good faith—prevented him from completing a satisfactory manuscript."<sup>48</sup> Curtis condemned his editor at Doubleday as "apathetic" and "incompetent," and claimed that he was deceived by the exhortatory tone of the editor's initial letter.<sup>49</sup>

At trial, the district court observed that the appellate courts of New York had not yet resolved the issue of "a duty to edit" as proposed by the district courts in *Dell Publishing Co. v. Whedon* and *Harcourt Brace Jovanovich v. Goldwater*, but concluded that "[e]ven if a duty to provide editorial services is accepted as required under New York law, here, Doubleday performed it."<sup>50</sup>

The court of appeal agreed.<sup>51</sup> The implied covenant of good faith and fair dealing in a publishing contract imposes the duty "to appraise a writing honestly"<sup>52</sup> and "not to mislead an author deliberately regarding the work required for a given project."<sup>53</sup> What's more, "[a] publisher's duty to exercise good faith in its dealings toward an author exists at all stages of the creative process."<sup>54</sup> However, good faith alone may be sufficient:

Although we hold that publishers must perform honestly, we decline to extend that requirement to include a duty to perform skillfully. The possibility that a publisher or an editor—either through inferior editing or inadvertence—may prejudice an author's efforts is a risk attendant to the selection of a publishing house by a writer, and is properly borne by that party. To imply a duty to perform adequate editorial services in the absence of express contractual language would, in our view, represent an unwarranted intrusion into the editorial process. Moreover, we are hesitant to require triers of fact to explore the manifold intricacies of an editorial relationship. Such inquiries are appropriate only where contracts specifically allocate certain creative responsibilities to the publisher.<sup>55</sup>

The court in *Doubleday* referred to the analysis in *Zilg* on the issue of the "duty to promote," and concluded that the same principles apply

48. *Id.* at 499.

49. *Id.*

50. *Doubleday & Co., Inc. v. Curtis*, 599 F. Supp. 779, 784 (S.D.N.Y. 1984).

51. *Doubleday*, 763 F.2d at 499.

52. *Id.* at 500.

53. *Id.*

54. *Id.*

55. *Id.*

in a discussion of the "duty to edit": The "satisfactory to publisher" clause is intended—and properly so—to "foreclos[e] the possibility that a publisher's editorial decision could be later questioned by a disgruntled writer or be 'subject to second guessing . . . .'"<sup>56</sup>

#### D. *Mellencamp v. Riva Music*

Similarly, the rule in *Zilg* was noted but not broadened in *Mellencamp v. Riva Music*<sup>57</sup> where the rock 'n roll songwriter and singer John Cougar Mellencamp sued the music publishing companies<sup>58</sup> to which he had licensed the copyrights in his songs for, *inter alia*, breaching their fiduciary duties "by failing to actively promote his songs and to use their best efforts to obtain all the monies rightfully due him from third parties."<sup>59</sup>

However, the court in *Mellencamp* declined to extend the duties of the publisher toward its author into the realm of a fiduciary relationship. Specifically, the court rejected Mellencamp's argument that a publisher owes its author a fiduciary duty as a matter of law, but affirmed the rule that every publishing contract includes an implied promise by the publisher to use its best efforts to exploit the rights granted in the contract.

When the essence of a contract is the assignment or grant of an exclusive license in exchange for a share of the assignee's profits in exploiting the license, these principles imply an obligation on the part of the assignee to make reasonable efforts to exploit the license. [Citations omitted.] The critical point here is that a publisher's obligation to promote an author's work is one founded in contract rather than on trust principles.<sup>60</sup>

The *Doubleday* and *Mellencamp* cases demonstrate that the courts are not willing to broaden the duties of the publisher to its author to include fiduciary duties or an elaborate "duty to edit," but—at the same time—the contractual obligations of the publisher clearly include the

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56. *Doubleday*, 763 F.2d at 500, n.3.

57. 698 F. Supp. 1154 (S.D.N.Y. 1988).

58. Music publishing differs from book publishing in significant respects, but the court's shorthand reference to the contract at issue in *Mellencamp* applies to the typical book publishing contract as well: "In exchange for the assignment of the copyrights, Mellencamp received a percentage of the royalties earned from the exploitation of his music." *Mellencamp*, 698 F. Supp. at 1156.

59. *Id.*

60. *Id.* at 1157 (citing, *inter alia*, *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983); *Havel v. Kelsey-Hayes*, 445 N.Y.S.2d 333, 335 (N.Y. App. Div. 1981)). See also *SBK Catalogue Partnership v. Orion Pictures*, 723 F. Supp. 1053, 1070-71 (D.N.J. 1989): "[T]rust principles are implicated only in those cases where the publisher tortiously engages in infringing conduct or deliberately tolerates infringing conduct by others."

duty to edit "honestly" and, notably, the duty to promote.<sup>61</sup> As we will see, the inherent duty of a publisher to market and distribute is the central issue in *Stellema*.

#### IV. "VANITY" OR "SUBSIDY" PUBLISHING

Unlike the publishing houses whose contracts were scrutinized in the foregoing cases, the defendant in *Stellema* was a so-called "vanity" press. At the outset, therefore, it is essential to understand the peculiar function of a "vanity" publisher, and to distinguish between "vanity" publishing and other kinds of self-publication in which the author pays all or part of the cost of publication.

A self-published author is one who goes into the publishing business on personal initiative and resources by arranging for the printing and distribution of his or her own book. The tradition of self-publishing is an old and honorable one; as defendants in *Stellema* pointed out with charming precision in their brief in the third of three pre-trial appeals, Tolstoy arranged for the printing of *War and Peace* at his own expense of 4,500 rubles.<sup>62</sup> A self-publisher, as the term suggests, is an author who assumes the role of publisher. Although it is common for self-publishers to delegate the mechanics of bookmaking, the author is responsible for the product and for its marketing. In addition, the profit generated by the book will go to the author rather than the publisher. In vanity publishing, on the other hand, the author merely pays to have the vanity press print the work and deliver a finished product.<sup>63</sup>

In fact, "vanity" publishing—or "subsidy" publishing, as its practitioners prefer to call it—has been referred to as "a scam of the lowest order."<sup>64</sup> The "vanity publisher" extracts a fee from aspiring authors for producing a small edition of the author's work in book form.<sup>65</sup> As the court observed in *Exposition Press*, a "vanity" or "subsidy" publisher "differs from that of most publishing houses in that normally most or all of the expense of publishing its books is paid in advance by their authors."<sup>66</sup>

But the definition in *Exposition Press* is misleading. The "vanity"

61. *Mellencamp*, 698 F. Supp. at 1157.

62. Defendants-Appellants Brief at 10, *Stellema v. Vantage Press, Inc.*, New York Supreme Court, Appellate Division—First Dep't 547 N.Y.S.2d 59 (N.Y. App. Div. 1989) (No. 38109) [hereinafter Defendants' Brief].

63. *Id.* at 72.

64. Yardley, *supra* note 2, at B2.

65. "Vanity houses sometimes deliver unbound pages to an author because the contract did not specifically call for the book to be bound." LEONARD D. DUBOFF, GUIDE 71 (1984).

66. *Exposition Press*, 295 F.2d at 871.

publisher may arrange for the typesetting, printing and binding of a small number of books—usually a few hundred copies, and sometimes as few as fifty copies—but it does not necessarily “publish” the books in the crucial sense of distributing them for sale. The promotional efforts of a vanity publisher may include a small “tombstone” advertisement in the *New York Times* with a listing of titles by various authors and the mailing of a few “review” copies.<sup>67</sup> But even these modest efforts are strictly *pro forma*, as author and book critic Jonathan Yardley has attested to in his critique of the advertising come-on of the vanity presses:

The words vary from ad to ad, depending on the medium in which it appears, but the message—“your book can be published, promoted and marketed”—is always the same. Yet as the Manhattan jury found, and as over the years I have been told by numerous people who tried vanity publication, only the first part of it is true. Yes, the book will be published, but it will not be promoted and it will not be marketed except in the narrowest sense of both terms; from time to time Vantage lists some of its titles in uninviting ads in various publications, it sends out review copies to certain publications—which, I can testify from a quarter-century’s experience, promptly throw them away—but as to marketing, well, that is up to the customer.<sup>68</sup>

Indeed, no real effort is made to sell the books through commercial channels; most authors whose books are published by vanity publishers are responsible for their own sales.

A vanity publisher contracts to produce an author’s book for a fee, but the publisher has no financial stake in the success of the book. The author pays all direct and indirect costs of editing, typesetting, proofreading, and printing, plus an additional fee that represents pure profit for the publisher. *Usually the author must market and distribute the book.*<sup>69</sup>

Perhaps the most useful distinction between vanity publishing and self-publishing was suggested by Martin J. Baron, a former editor in a vanity publishing house, who divides the entire publishing industry into “risk” publishers, on the one hand, and vanity publishing, on the other hand.<sup>70</sup> “The economics of publishing,” Baron writes, “force the [risk]

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67. POYNTER, *supra* note 1, at 21.

68. Yardley, *supra* note 2, at B2.

69. LEONARD D. DUBOFF, *supra* note 65, at 71-72.

70. MARTIN J. BARON, ON VANITY PUBLISHING, in *The Publish-it-Yourself: Literary Tradition & How-To* (Bill Henderson ed., 1973).

publisher to ask: Will this book sell at least enough to recover costs?"<sup>71</sup> But the vanity publisher never asks the question.

The whole mystery and art of vanity publishing is a consequence of but one fact: the author pays. Once this fact is understood, the logic of vanity publishing is immediately comprehensible. Since the author pays for the publication of his work, the vanity publisher will accept *any* manuscript—libelous and obscene manuscripts excepted—no matter how worthless and no matter how remote are the chances of selling the book.<sup>72</sup>

Even if the author is content with obtaining a few hundred copies of work in book form, the fact remains that it is cheaper to deal with a commercial book manufacturer than to pay the fees demanded by a "vanity" publisher.<sup>73</sup> As Yardley advises the aspiring author who is willing to pay to see his book in print, "[L]ook in the Yellow Pages under 'Printers' . . . ."<sup>74</sup>

### B. Exposition Press v. FTC

*Exposition Press* arose from the petition for review of a cease-and-desist order issued by the Federal Trade Commission ("FTC") to a "vanity" publisher whose advertising claims were found by the FTC to be deceptive. The advertisement was directed to "writers seeking a book publisher,"<sup>75</sup> and offered "two fact-filled, illustrated brochures [that] tell how to publish your book, get 40% royalties, national advertising, publicity and promotion."<sup>76</sup>

Exposition Press, like all vanity publishers, required that its authors pay the costs of production of their books, but purported to pay "royalties" on any books that were ultimately sold. The FTC found the advertisement to be deceptive and misleading; it issued a cease-and-desist order requiring that any representation that royalties would be paid to an author be accompanied by "a disclosure . . . that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the author."<sup>77</sup>

71. *Id.*

72. *Id.*

73. POYNTER, *supra* note 1.

74. Yardley, *supra* note 2.

75. *Exposition Press*, 295 F.2d at 871.

76. *Id.*

77. *Id.* at 871-72.

The opinion sheds some light on the practices of "vanity" publishing in general: "Less than 10% of its authors recoup their investments and derive actual profit from their writing."<sup>78</sup> For example, a Dr. Cleere paid \$2,100 for publication of "Hello, Hello, Hello, Doc" and was paid only \$242 in "royalties."<sup>79</sup> A Mrs. Royall paid \$2,600 for "Andrew Johnson, Presidential Scapegoat" and was paid \$239 in "royalties."<sup>80</sup>

The court in *Exposition* emphasized the long-standing rule that, in evaluating "the tendency of language to deceive, the Commission should look not to the most sophisticated readers but rather to the least,"<sup>81</sup> and observed that "the fact that a person has produced a manuscript does not necessarily mean that he has any knowledge of publishers' prevailing rates."<sup>82</sup> Accordingly, the petition to review was denied, and the cease-and-desist order was left in force.<sup>83</sup>

Significantly, the court in *Exposition* noted that only the advertisement itself was alleged by the FTC to be deceptive, *and only as to the issues of royalties*.<sup>84</sup> Any person responding to the advertisement would receive "literature which made it clear, before any contract was made, that the author was required to subsidize the expenses of publication."<sup>85</sup> Nevertheless, the court resolved that "it was within the Commission's power to prohibit the initial deception."<sup>86</sup>

Perhaps the most illuminating passages of the opinion in *Exposition*, however, were found in the dissent of Circuit Judge Friendly, who discerned a powerful urge in the soul of the aspiring writer "to move into a flame of publication."<sup>87</sup> Although Judge Friendly would have annulled the cease-and-desist order and allowed the advertisement to stand, his dissent reflected upon the peculiar vulnerabilities of the author who would respond to a vanity publisher in the first place. "Some people think they have written books for which the world is waiting. Publishers who must back judgment with investment take a less sanguine view. Rejection slips accumulate, and frustration mounts. Petitioners are in the business of relieving it."<sup>88</sup>

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78. *Id.* at 871.

79. *Id.* at 871 n.2.

80. *Exposition Press*, 295 F.2d at 871 n.2.

81. *Id.* at 872.

82. *Id.*

83. *Id.* at 869.

84. *Id.* at 872.

85. *Exposition Press*, 295 F.2d at 873.

86. *Id.*

87. *Id.* at 875.

88. *Id.* at 874.

Judge Friendly insisted that any "trifling lack of candor"<sup>89</sup> in the vanity publisher's advertisement would be remedied when the brochure (and its presumably fuller disclosures) arrives in the mailbox of the aspiring author:

Hence the only prejudices possibly suffered even by the most wayfaring and foolish authors would be a 4 cent stamp, the depression when the brochures dissipated the temporary euphoria of thinking their books would be published without cost, and perhaps an occasional decision, taken with all the facts fully disclosed, to move into a flame of publication that otherwise would have stayed unseen.<sup>90</sup>

*Exposition Press* focused on a passing reference to "40% royalties" in the advertisement of a vanity publisher. What is entirely overlooked in Judge Friendly's dissent—and what turned out to be the crucial issue in *Stellema*—is another phrase in the same advertisement: "national advertising, publicity and promotion."<sup>91</sup>

## V. *STELLEMA V. VANTAGE PRESS*

### A. *Statement of the Case*

*Stellema* was a class-action lawsuit for common-law fraud filed in 1977 against Vantage Press and two of its officers, Arthur Kleinwald and Martin Littlefield. The lawsuit was filed on behalf of some three thousand individuals who entered into publishing agreements with Vantage Press during the six-year period prior to the filing of the lawsuit.<sup>92</sup>

The case was certified as a class action in 1978 and the certification was upheld on appeal.<sup>93</sup> A subsequent motion to decertify the class was denied and the denial was upheld on appeal.<sup>94</sup> Two motions for summary judgment by defendants, one in 1981 and another in 1988, were denied.<sup>95</sup>

A three-month trial by jury was held in the Supreme Court of the State of New York, County of New York, before Justice Carmen Beauchamp Ciparick in 1990. A verdict was returned in favor of the

89. *Id.* at 877.

90. *Exposition Press*, 295 F.2d at 875.

91. *Id.* at 871.

92. Defendants' Brief, *supra* note 62, at 4.

93. *Stellema v. Vantage Press, Inc.*, 411 N.Y.S.2d 191 (N.Y. App. Div. 1978); *appeal dismissed*, 47 N.Y.2d 882, 419 N.Y.S.2d 75 (1979).

94. *Stellema v. Vantage Press, Inc.*, 492 N.Y.S.2d 390 (N.Y. App. Div. 1985).

95. Brief for Plaintiff-Respondent at 12, *Stellema v. Vantage Press, Inc.*, 547 N.Y.S.2d 558 (N.Y. App. Div. 1989) (No. 38109) [hereinafter Plaintiff's Brief].

class on April 9, 1990.<sup>96</sup> The case was settled by the parties in a confidential agreement which apparently provides for payment of an undisclosed sum of money by defendants in exchange for a dismissal of the case.<sup>97</sup>

### B. *Statement of Facts*

#### 1. The Vantage Brochure

Prior to entering into a contract with Vantage Press, Frank Stellema received a four-color, fifty-four-page brochure titled "To the Author in Search of a Publisher," which describes what Vantage Press called "A PRACTICAL PLAN FOR THE PUBLICATION AND PROMOTION OF YOUR BOOK."<sup>98</sup> Although the brochure contains various admonitions (e.g., "Can you afford to risk the investment?")<sup>99</sup> and caveats (e.g., "By its very nature, book publishing is a hazardous business, and the author who subsidizes his work should be aware of the risks involved"),<sup>100</sup> the brochure includes fifteen consecutive pages devoted to optimistic and enthusiastic descriptions of publicity, promotion, reviews, advertising, sales, "extra income," and "financial returns."<sup>101</sup>

Indeed, even when the brochure purports to warn against the risks of "subsidy" publishing, the text holds out the promise of success by stating that "sales of the average VANTAGE title vary widely. Some books sell a few hundred copies; some sell out their entire editions; a handful even go into second and third printings."

#### 2. The Contract

In 1974, Stellema executed a publishing contract ("the Contract") which incorporated by reference a so-called "Author's Promotion and Product Report" ("the Report").<sup>102</sup> Like conventional publishing agreements, the Vantage contract includes an assignment of copyright and a royalty provision.<sup>103</sup> Unlike a traditional publishing contract, however,

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96. Interrogs., *supra* note 4.

97. Telephone Interview with Arthur J. Jacobs, Esq., lead counsel for plaintiffs (Apr. 1, 1992).

98. VANTAGE PRESS, TO THE AUTHOR IN SEARCH OF A PUBLISHER, (1974), Exhibit "D" at trial in *Stellema*. The author wishes to thank Arthur Jacobs and Alfred E. Smith of the New York City Bar for providing the original exhibit and other documents for use in the preparation of this article.

99. *Id.* at back cover.

100. *Id.* at 2.

101. *Id.* at 10-35.

102. Exhibit "D" at trial in *Stellema*.

103. *Id.* at 1.



it is the author who pays the publisher at the outset; Frank Stellema paid \$5,950 to Vantage for publication of *Oh Kim! My Son! My Son!*<sup>104</sup>

Vantage obliged itself to deliver fifty copies to the author, and offered to sell additional copies to the author at a forty-five percent discount from "the established retail price."<sup>105</sup> (Another fifty copies are offered "without extra charge" if the author forgoes the installment payment provision of the contract and pays the entire contract price on delivery of the signed contract.)<sup>106</sup> Vantage is obliged to print and bind a minimum of only four hundred copies.<sup>107</sup>

Significantly, the contract specifically and narrowly defines what efforts Vantage will undertake in promoting and distributing the work:

Sales promotion, distribution, advertising and publicity shall be at Publishers' election and discretion as to the extent, scope and character thereof and in all matters pertaining thereto . . . . It is specifically understood and agreed, however, that the promotion, publicity and advertising recommendations, as set forth by the Publishers in the *Author's Promotion and Production Report* . . . will be performed by the Publishers within a reasonable period of time . . . . It is agreed, furthermore, that the recommendations in the said *Author's Promotion and Production Report* represent the minimum promotion program allocated to the said Work and will constitute the Publishers' full and satisfactory compliance as provided for in this agreement.<sup>108</sup>

The *Author's Promotion and Production Report* sets forth "the basic steps that will be taken in behalf of your book,"<sup>109</sup> ranging from sending "review copies to selected newspapers, magazines, [and] specialized sources" and "advertising in either the N.Y. Times or other leading newspaper" to "consider[ing the] author's own ideas and utiliz[ing them], if possible" and "study[ing] additional promotional steps after publication."<sup>110</sup>

The Contract and the Report were carefully drafted to define the minimum obligations of Vantage Press in a fashion that allowed the publisher to remain in technical compliance with its own contract even if an author's work was never placed in distribution through ordinary retail

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104. Contract, ¶ 32.

105. *Id.* ¶ 10.

106. *Id.* ¶ 32.

107. *Id.* ¶ 7.

108. *Id.* ¶ 14 (emphasis added).

109. Report at 5.

110. *Id.* at 1.

channels and—like Stellema's book—achieved only a handful of sales by dint of the author's own efforts.<sup>111</sup>

### 3. The Complaint

Counsel for Stellema as the representative party audaciously and artfully sidestepped the issue of Vantage's contract boilerplate by pleading only common-law fraud and *not* breach of contract. Essentially, Stellema argued that the mere use of the terms "publisher" and "subsidy" publisher by Vantage to describe itself amounted to an act of fraudulent misrepresentation *even though Vantage may have complied with the technical requirements of its own contract*.

The complaint in *Stellema* initially consisted of four causes of action, each one based on common-law fraud. The first and third causes of action, which are discussed here, alleged that Vantage defrauded Stellema by calling itself a "publisher" and a "subsidy publisher." The second cause of action alleged that Vantage misrepresented the services that it purported to offer. The fourth cause of action alleged violations of a 1958 consent order issued by the Federal Trade Commission against Vantage Press.<sup>112</sup>

Stellema adopted a basic definition of "publisher" which generally reflects the legal definitions set forth above: "'Publisher' as commonly defined and popularly understood, is a person, corporation or other entity engaged in the business of making books or other written material generally available to the public."<sup>113</sup>

The complaint also alleged a set of specific marketing practices that, according to Stellema, are representative of how book publishers market and sell books, including sales to a substantial number of retail bookstores through sales representatives; advertising in the principal trade journal of the publishing industry, *Publishers Weekly*; and participating in the principal publishing industry convention sponsored by the American Booksellers Association.<sup>114</sup>

Stellema also adopted a definition of "subsidy publisher" which suggests that "the term 'subsidy,' as commonly understood and used, [means] a payment intended to defray or pay a part of the cost of an

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111. *Id.*

112. The second cause of action, which was dismissed at trial, is noted but not discussed here. The fourth cause of action was dismissed prior to trial. Defendants' Brief, *supra* note 62, at 5; interview with Alfred E. Smith (Feb. 6, 1991).

113. Plaintiff's Brief, *supra* note 95, at 5.

114. Defendants' Brief, *supra* note 62, at 6 (citing the Complaint, ¶¶ 14-16).

undertaking."<sup>115</sup> Thus, Stellema argued, any statement by Vantage Press that it "is a subsidy publisher is fraudulent because author-customers' 'subsidies' paid for not only the entire cost of issuing the book but also included a profit for Vantage."<sup>116</sup>

### C. The 1989 Summary Judgment

In 1989, defendants moved for summary judgment a second time on the grounds, *inter alia*,<sup>117</sup> that the mere use of the terms "publisher" and "subsidy publisher" by Vantage Press to describe itself was insufficient as a matter of law to support a claim for fraud.<sup>118</sup> By an order dated March 17, 1989 (by Judge C. Beauchamp Ciparick), the Supreme Court of New York County denied the Motion for Summary Judgment stating that "there are a plethora of issues that must be tried, among which is whether Vantage described itself as a publisher in one of its many forms and meanings . . . ."<sup>119</sup>

On appeal from the denial of the motion for summary judgment, defendants argued, *inter alia*, that "the terms 'publisher' and 'subsidy publisher' are not actionable representations of 'fact,'"<sup>120</sup> and thus the mere use of these terms by Vantage cannot support a claim for fraud.

This claim is not based on any statement of fact which is objectively verifiable as true or false, but on a subjective concept and definition of the word "publisher," obviously chosen by, or for, plaintiff for the sole purpose of prosecuting this lawsuit. Thus, plaintiff contends that Vantage, while representing itself as a publisher, is not a publisher because the services Vantage offers to its authors are not completely congruent with plaintiff's peculiar theory of the activities in which a publisher should be engaged<sup>121</sup> [including sales to a substantial number of retail bookstores through sales representatives, advertising in *Publishers Weekly*, and participation in the annual convention of the American Booksellers Association].

Defendants insisted that the terms "publisher" and "subsidy pub-

115. Plaintiff's Brief, *supra* note 95, at 11.

116. *Id.* at 12.

117. The motion for summary judgment also challenged the second cause of action for fraud, the sufficiency of evidence of intent to defraud, and the basis for extending individual liability to corporate officers of Vantage. Defendants' Brief, *supra* note 62, at 2-3. These arguments are noted but not discussed here.

118. *Id.* at 2.

119. *Id.* at 23.

120. *Id.* at 22.

121. *Id.* at 5.

lisher" are no more than "an abbreviated means of communicating the services which Vantage offers and which are loosely definable and variously interpretable."<sup>122</sup> In any event, defendants insisted, Stellema could not have been misled by the use of the terms "publisher" and "subsidy publisher" because the brochure "described the nature of Vantage's business and disclosed the particular services offered by Vantage in its publishing program," and "explicitly delineates the obligations and services Vantage was to perform . . . ."<sup>123</sup>

Defendants specifically attacked the reliance of Stellema on *any* definition of "publisher" that included an obligation to place the books of its "author-clients" into what Stellema characterized as a "genuine and commercially plausible" form of commercial distribution:

Permitting plaintiff to base his fraud claim on the loosely definable and variously interpretable terms of "publisher" and "subsidy" publisher permits him to claim that Vantage promised to perform certain services, *i.e.*, those services which plaintiff contends a "publisher" or "subsidy publisher" *ought* to perform but which it, in fact, never promised to perform either in the Brochure or the Agreement. Thus, plaintiff himself has created the very "misrepresentations" upon which he sues.<sup>124</sup>

Stellema responded that the list of particulars in the complaint was illustrative only, and seems to concede that even a true publisher may employ methods of promotion and distribution other than those specified in the complaint:

While the Complaint contains an enumeration of various promotional efforts which publishers generally engage in order to create a market for their printed works, appellants falsely and misleadingly contend that plaintiff requires every publisher to undertake every one of such enumerated promotional efforts. The Complaint, however, lists the publishing activities as illustrative examples. [Citation omitted.] *Plaintiff does not charge that Vantage fails to meet plaintiff's peculiar concept of what a publisher is, but rather that Vantage is not a publisher in any objective sense.*<sup>125</sup>

The evidence adduced in opposition to the motion for summary judgment was sufficient to establish that there were factual issues as to whether Vantage was a publisher.

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122. Defendants' Brief, *supra* note 62, at 26.

123. *Id.* at 6.

124. *Id.* at 33-34.

125. Plaintiff's Brief, *supra* note 95, at 4 (emphasis added).

[V]antage, though it calls itself a publisher and charges substantial fees to authors for "publishing" their books, is, in fact, virtually a book manufacturing service. As its profits are derived from fees received from its author-clients, Vantage has no incentive to, and plaintiff has shown that it does not, in fact, make a good faith effort to make its books generally available to the reading public—*i.e.*, to publish them.<sup>126</sup>

Indeed, *Stellema* argued that the strictly *pro forma* efforts of Vantage at promotion and distribution make it clear that Vantage Press is not a publisher at all:

Plaintiff's evidence established that: 1) the average Vantage title appears in less than an average of 5.1 book stores—less than .04% of the nation's 15,000 book stores; 2) over 8.7% of Vantage titles never see a book store; 3) Vantage as a matter of policy does not print and bind books in sufficient quantity to ever meet any kind of significant orders; 4) actual sales of Vantage books are less than nominal and are, for the most part, the result of the authors' own promotional efforts and/or personal purchases; 5) Vantage does not edit manuscripts so as to ensure quality and editorial integrity; 6) Vantage has no regular and purposeful contact with booksellers or wholesalers; 7) Vantage regularly exercises its contractual option to terminate its "publishing agreement" with its author-customers after a two to five year period without regard to the actual sales of the book and even when the book is not out of print. The evidence which plaintiff submitted shows that Vantage, in essence, does nothing more than print and bind its customers' books in exchange for very substantial "publication" fees. As Vantage's publishing efforts are nominal and intended to be nominal, *Vantage is not a publisher.*<sup>127</sup>

### 1. The Role of *Zilg* in *Stellema*

*Zilg* and the related cases on implied contractual duties of publishers were not directly at issue in *Stellema*, a case sounding in fraud. More pertinent to the summary judgment proceedings, for example, was a line of authority on the issue of whether a particular representation was, in fact, a statement of fact at all.<sup>128</sup> Defendants insisted that the terms

126. *Id.*

127. *Id.* at 10-11 (emphasis added).

128. See, e.g., *Bailey v. Diamond Int'l Corp.*, 47 A.D.2d 363, 367 N.Y.S.2d 107 (3d Dep't 1975).

"publisher" and "subsidy publisher" are not "objectively verifiable statements of fact,"<sup>129</sup> and thus the use of such terms did not, as a matter of law, constitute an actionable statement of fact under the controlling authority.<sup>130</sup>

Stellema, however, argued that "the word 'publisher' has an objective meaning which the jury may . . . derive from various standards in the publishing industry,"<sup>131</sup> and relied on *Zilg* and other publishing cases for the proposition that "[s]tandards in the publishing industry have been recognized by the courts as well."<sup>132</sup> "Obviously, the court's statement [in *Zilg*] assumes a common understanding of what it means to publish a book, and it assumes that publishing entails a certain level and quality of advertising, promotion and distribution efforts."<sup>133</sup>

Defendants rejected the applicability of *Zilg* and related cases where the duties of a publisher under a written contract were at issue. "This sharply contrasts with the matter at bar, wherein Vantage set forth, with specificity, what it would do as a 'publisher' and 'subsidy publisher.'" <sup>134</sup>

## 2. Ruling on the 1989 Summary Judgment

On November 14, 1989, the Appellate Division of the Supreme Court affirmed the denial of the summary judgment, and remanded the matter for trial. The court declared that it was not persuaded that "the various representations were not actionable as a matter of law,"<sup>135</sup> and noted that "after twelve years of litigation and numerous opportunities to challenge the sufficiency and merit of the complaint, we are not inclined to grant summary judgment on the eve of trial."<sup>136</sup>

### D. Verdict at Trial

The matter reached the jury on two causes of action only: first, the claim that defendants defrauded Stellema by characterizing Vantage Press as a "publisher"; and, second, the claim that defendants defrauded Stellema by characterizing Vantage as a "subsidy publisher."<sup>137</sup>

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129. Defendants' Brief, *supra* note 62, at 27.

130. *Id.*

131. Plaintiff's Brief, *supra* note 95, at 29.

132. *Id.* at 29-30.

133. *Id.* at 30 (citing *Zilg v. Prentice Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983), *cert. denied* 466 U.S. 938 (1984); *Fraser v. Doubleday & Co.*, 587 F. Supp. 1284 (S.D.N.Y. 1984); *Schisgall v. Fairchild Publications*, 207 Misc. 224, 137 N.Y.S.2d 312 (N.Y. Sup. Ct. 1955)).

134. Defendants' Brief, *supra* note 62, at 8.

135. Order dated Nov. 14, 1989.

136. *Id.*

137. Jury Sheet.

The jury found that Vantage Press and the other defendants engaged in fraudulent conduct merely by calling itself a "publisher," and awarded punitive damages of \$1,500,000 against Vantage Press, \$1,000,000 against Arthur Kleinwald, and \$1,000,000 against Martin Littlefield.<sup>138</sup>

The following interrogatories, among others, were answered "Yes" by the jury:

1. Has plaintiff proven, by clear and convincing evidence, that [defendants'] statement that VANTAGE was a "publisher" was false?
2. Has plaintiff proven by clear and convincing evidence that when [defendants] stated VANTAGE was a "publisher" it knew it to be false and the statement was intended (or made) to deceive plaintiff?
3. Has plaintiff proven by clear and convincing evidence that plaintiff reasonably relied on the statement that VANTAGE was a "publisher" and that the statement was a substantial factor in plaintiff's decision to enter into the agreement with VANTAGE?
- ...
6. Did [defendants] in stating that VANTAGE was a "publisher" act in a manner which was aimed at the public generally and was gross and involved high moral culpability?<sup>139</sup>

The same set of interrogatories relating to the use of the term "subsidiary publisher" were answered in the negative.<sup>140</sup>

### *E. Current Status of the Litigation*

The parties in *Stellema* engaged in settlement discussions after the verdict was rendered in April 1990. A formal settlement, including a confidentiality clause, was approved by the court on June 5, 1991. The first of seven annual settlement distributions has now been made to approximately 700 class members. As a result, no further appeals were taken, and the case was denied any specific precedential authority. Under the terms of the settlement, the defendants in *Stellema* are not under any legal obligation to change the practices that the jury found so

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138. *Id.*

139. Interrogs. to the Jury and Verdict Sheet, filed April 9, 1990. The second cause of action was withdrawn after plaintiffs rested. Telephone Interview with Arthur J. Jacobs, Esq., lead counsel for plaintiffs in *Stellema* (Apr. 13, 1992).

140. *Id.*

objectionable. Thus ended the final chapter of a lawsuit of Dickensian proportions.

## VI. CONCLUSION

Because the parties entered into a settlement that resulted in the dismissal of the case with no further appeals, *Stellema* adds nothing of direct precedential value to the law of publishing. What's more, the fact that *Stellema* was pleaded and decided on principles of common-law fraud sharply limits the applicability of the case on the ordinary practices of commercial publishing.

Nevertheless, *Stellema* is a case of intense interest within the publishing industry, and the verdict is likely to have some practical implications in the publishing industry in general and the business of vanity publishing in particular. Even without a final judgment, the three-and-a-half million dollar punitive damages verdict in *Stellema* will encourage all vanity publishers to tone down their advertising, promotional brochures and contract documents. Any vanity publisher that continues to hold itself out as an equivalent of a conventional trade publisher is at risk of a similar claim for fraud. And once the vanity publisher makes it clear that it is not much more than a "book manufacturing service," then the author in search of a publisher may turn elsewhere.

Of course, it is also true that the *Stellema* settlement may actually deter further litigation by authors who fall under the spell of vanity publishing. The fact that the case rattled around the courts for so many years—and ended on such an ambiguous note—is hardly encouraging to attorneys who may be approached by potential plaintiffs in a new lawsuit against a vanity press. Further, although *Stellema* is readily distinguishable from *Zilg* and the related line of contract cases, the *Stellema* verdict only reinforces the fundamental notion that a publisher, regardless of the express language of its contracts, owes certain specific duties to its authors. In that sense, the verdict in *Stellema* goes even further than *Zilg* in establishing that the very term "publisher" implies a minimum effort toward commercial exploitation of a book, and amounts to a warning shot across the bow of any publisher that fails to act in good faith in acquiring, editing, and marketing the work of an author.

Above all, the *Stellema* case underscores the distinction between vanity publishing and self-publishing, and thereby enhances the stature of the self-published author and the independent publishing industry. Indeed, the publicity that surrounded *Stellema*—and the effects of *Stellema* on the advertising claims of vanity publishers—will only encourage the aspiring author to forego the vanity press and undertake the ancient and



honorable enterprise of self-publication, an enterprise that will place him in the company of not only Tolstoy but also Walt Whitman, Mark Twain, Rudyard Kipling, James Joyce, D.H. Lawrence, and even Richard Nixon.<sup>141</sup>

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141. POYNTER, *supra* note 1, at 24.