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REDEFINING THE RIGHTS AND OBLIGATIONS OF PUBLISHERS AND AUTHORS*

by Melvin Simensky**

I. INTRODUCTION

The language of the typical book publishing agreement reflects the unequal power of the contracting parties—publisher and author. Generally, the publisher is granted an exclusive and immediate right to publish, and wide discretion in the performance of its obligations. In return, the author usually receives a refundable advance and little latitude, at least on paper, in meeting his or her duties.¹ Two recent decisions, *Dell Publishing Co. v. Whedon*² and *Zilg v. Prentice-Hall, Inc.*,³ dramatically restructure the author-publisher relationship through the liberalizing construction of three of the most important contract clauses in every book publishing agreement. These clauses concern the following: (1) delivery of a satisfactory manuscript; (2) the grant of an exclusive right to publish; and (3) the duty to promote the publication.

The significance of *Dell* and *Zilg* is their finding that the covenant of “good faith and fair dealing,” implied in every publishing contract,⁴ imposes specific obligations on a publisher. In *Dell*, the court held that a publisher’s “good faith” rejection of a manuscript as unsatisfactory obligated the publisher to provide the author with criticism of the manuscript and an opportunity to revise it before rejection.⁵ Additionally,

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1. See Shapiro, *The Standard Author Contract: A Survey of Current Draftsmanship*, 18 COPYRIGHT L. SYMP. (ASCAP) 135, 167 (1970). In *J.B. Lippincott Co. v. Lasher*, 430 F. Supp. 993, 995 (S.D.N.Y. 1977), Judge Duffy noted that publishers, through superior bargaining power, “in fact, often enforce their will on unsuspecting artists.”

2. 577 F. Supp. 1459 (S.D.N.Y. 1984).

3. 717 F.2d 671 (2d Cir. 1983), *cert denied*, 104 S. Ct. 1911 (1984).

4. *Zilg v. Prentice-Hall, Inc.*, 515 F. Supp. 716 (S.D.N.Y. 1982) (motion for summary judgment); *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co.*, 30 N.Y.2d 34, 45, 281 N.E.2d 142, 144, 330 N.Y.S.2d 329, 333, *cert. denied*, 409 U.S. 875 (1972).

5. See *infra* text accompanying notes 23-31.

dictum in *Dell* suggests that the grant of an exclusive right to publish is conditioned on publication and, until that time, is really no more than an exclusive option to publish.⁶ In *Zilg*, the Second Circuit held that a publisher's "good faith" obligation to publish and promote a manuscript following acceptance implies a specific standard to be met respecting the work's first printing.⁷

The judicial construction given each of these three clauses alters the present imbalance between author and publisher by placing greater burdens upon a publisher. What this greater equalization between author and publisher portends, however, is uncertain. After *Dell* and *Zilg*, a publisher owes more concrete and specific, rather than undefined, obligations in certain key areas. Exactly how much specificity will be required, and what discretion remains to a publisher, is less clear. Ironically, the ultimate effect of these two decisions may be an unhappy one for prospective authors, because publishers may enter into fewer agreements with authors as a result of the greater obligations these agreements will involve.

II. PRESENT PUBLISHING INDUSTRY PRACTICE

Every publishing agreement contains a clause requiring the author to deliver a satisfactory manuscript to his or her publisher. According to one commentator, the acceptability of a manuscript in the literary sense "is, and probably should be, the most material factor in a publishing contract."⁸ The clause at issue in *Dell* is typical:

The Author shall deliver . . . the work to Dell in form, style and content satisfactory to Dell If the Author fails to so deliver, then the Author shall, at Dell's request, promptly return to Dell any payments made to the Author pursuant to this agreement.⁹

Dell's significance, lying in its interpretation of this clause, can only be understood in the context of prevailing industry practice, which *Dell*, if not reversed or modified on appeal, seems destined to change.

The typical book publishing agreement presently requires the author to deliver a manuscript "in form, style and content satisfactory" to the publisher, even though no definition of "satisfactory" is provided. Case

6. See *infra* text accompanying notes 32-33.

7. See *infra* text accompanying notes 54-68.

8. Healy & Alonso, *Author's Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts*, 15 NEW ENG. L. REV. 485, 494 (1980).

9. *Dell Publishing Co. v. Whedon*, 577 F. Supp. 1459, 1460 (S.D.N.Y. 1984) (quoting paragraph 2 of the contract).

law has defined "satisfaction" as being the publisher's "subjective and personal satisfaction." The satisfaction of any other party, or reasonable satisfaction, has been considered irrelevant, and review of a publisher's decision rejecting a manuscript has, therefore, been regarded as almost impossible.¹⁰

The typical book publishing agreement presently allows the publisher near total discretion in determining whether a manuscript is satisfactory.¹¹ Since no contractual limit is placed on the publisher's ability to reject, some critics have charged that a typical book publishing agreement permits a publisher to cancel the contract and recoup all advances simply by claiming that a manuscript is unsatisfactory.¹²

Under these circumstances, the publishing contract would be illusory, *i.e.*, void for lack of mutuality. To prevent this, courts have implied an obligation on the part of publishers to act in good faith in rejecting a manuscript.¹³ By this means, a publisher's inability to reject, except by reason of an honest belief that a work is not satisfactory, constitutes the requisite consideration to support the publishing agreement.¹⁴

Most cases prior to *Dell* held that an author could only prove that a publisher breached its implied obligations to act in good faith in rejecting a manuscript if the author could show that the publisher's judgment was not honestly held.¹⁵ The author was required to present proof of the bad faith reasons prompting the rejection. It is often impossible, however, for

10. Healy & Alonso, *supra* note 8, at 488-90. See *Frederick A. Praeger, Inc. v. Montagu*, 35 COPYRIGHT OFF. BULL. 562, 564 (N.Y. Civ. Ct. 1965) (since manuscript calls for exercise of judgment and sensibility, only good faith in the exercise of dissatisfaction is required. In matters of utility, marketability and fitness, reasonability is infused into the determination of satisfaction); *Safire v. William & Morrow Co.*, 136 PRACTISING LAW INSTITUTE, BOOK PUBLISHING 22 (1981) (arbitration award) (since only publisher's satisfaction is addressed, no testimony would be taken on literary worth, nor would manuscript be read).

But see *A.A. Wyn, Inc. v. Saroyan*, N.Y.L.J., Nov. 16, 1956, at 7 (N.Y. Sup. Ct. 1956) (publisher's failure to accept editor's recommendation to publish was unreasonable).

11. See *Walker v. Edward Thompson Co.*, 37 A.D. 536, 56 N.Y.S. 326 (1899) (publisher has absolute right to reject).

12. Healy & Alonso, *supra* note 8, at 489-90.

13. *Id.* at 491. See, e.g., *Random House, Inc. v. Gold*, 464 F. Supp. 1306, 1308-09 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979) ("The requirement that a manuscript be satisfactory to the publisher gives it the right to reject a work if it acts in good faith."); *Holt, Rinehart & Winston, Inc. v. Wolman*, 47 A.D.2d 872, 368 N.Y.S.2d 813 (1975); *Frederick A. Praeger, Inc. v. Montagu*, 35 COPYRIGHT OFF. BULL. 562 (N.Y. Civ. Ct. 1965).

14. Healy & Alonso, *supra* note 8, at 489-90.

15. See, e.g., *Random House, Inc. v. Gold*, 464 F. Supp. 1306 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979); *Haynes v. Ginn & Co.*, 136 PRACTISING LAW INSTITUTE, BOOK PUBLISHING 85 (1981) (N.D. Ill. 1973) (unpublished opinion), *aff'd mem.*, 511 F.2d 1405 (7th Cir. 1975) (judgment on acceptability of manuscript is for publisher and, since author admitted publisher's criticism was made in good faith, publisher's motion for summary judgment would be granted); *Frederick A. Praeger, Inc. v. Montagu*, 35 COPYRIGHT OFF. BULL. 562, 564

an author to discover, much less to prove, bad faith absent explicit documentation in a publisher's files. Furthermore, what constitutes "good faith" or "bad faith" is not always clear.

Two important decisions preceding *Dell* examined the parameters of a publisher's implied obligation to act in good faith in rejecting a manuscript as unsatisfactory. In the first, *Random House, Inc. v. Gold*,¹⁶ the author claimed that the publisher's rejection of his work was not based on the aesthetic worth of the work, which the publisher offered to publish if the author renegotiated his contract, but on financial circumstances and the work's likely commercial success. The court held that a rejection based on such economic considerations constituted a rejection in good faith.¹⁷

The second decision, *Harcourt Brace Jovanovich, Inc. v. Goldwater*,¹⁸ involved a contract for Senator Barry Goldwater's memoirs made with Goldwater and a writer named Shadegg. During the time the authors worked on the manuscript, their editor never provided editorial comment, despite repeated requests, and she never directly communicated to the authors her continuing dissatisfaction with the manuscript. In fact, the editor, refusing to apprise the authors of her constant negative view of the manuscript, indicated support and enthusiasm. All along, however, the publisher was looking for another writer for the memoirs. On these facts, the court found that there was "an intention [by the publisher] to refrain from doing editorial work with Shadegg," so that another writer might be substituted.¹⁹

On the basis of this finding, and stating that the publisher had "wilfully" failed to engage in any editorial work,²⁰ the court held that the publisher had breached its contract with Goldwater, thereby precluding the return of its advance. In so holding, the court reasoned that there is an implied obligation in a "contract of this kind for the publisher to engage in appropriate editorial work," otherwise the author would be denied a "reasonable opportunity to perform to the satisfaction of the publisher."²¹ The court cited no authority as a basis for changing the

(N.Y. Civ. Ct. 1965) (judgment on manuscript requires merely the exercise of good faith in the exercise of dissatisfaction).

Cf. *A.A. Wyn, Inc. v. Saroyan*, N.Y.L.J., Nov. 16, 1956, at 7 (N.Y. Sup. Ct. 1956).

16. 464 F. Supp. 1306 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979).

17. 464 F. Supp. at 1308-09.

18. 532 F. Supp. 619 (S.D.N.Y. 1982).

19. *Id.* at 623.

20. The court cursorily stated: "I conclude that [Harcourt Brace Jovanovich] breached its contract with Shadegg and Goldwater by wilfully failing to engage in any rudimentary editorial work or effort." *Id.* at 625.

21. *Id.* at 624.

publisher's implied obligation from one simply of "good faith" rejection to an implied obligation to edit,²² nor did it delineate the extent of the editorial work required.

Dell, following *Goldwater*, not only reaffirmed the latter decision, but went even further in defining the editorial duties owed an author by its publisher.

III. *DELL PUBLISHING CO. V. WHEDON*²³

A. *The Decision in Dell*

Dell concerned a contract for publication of a novel by one Julia Whedon. On the basis of an outline of the novel, the publisher entered into the contract and paid Whedon an advance. Although the editor had expressed enthusiasm for the novel, and despite the publisher's having paid a second advance when the first half of the manuscript was received, the publisher rejected the work as unsatisfactory in form, content and style after the entire manuscript's submission. Whedon subsequently sold the publishing rights to Doubleday & Co., whereupon Dell sued her for return of its two advances.

In response, Whedon claimed that Dell had breached its publishing contract by failing to act in good faith in the way it rejected her work. The court agreed, ruling that Dell had not fulfilled its implied obligations under the clause allowing the publisher to reject a work for being unsatisfactory.²⁴

The court, citing *Gold*, began its analysis by defining "satisfactory to Dell" as meaning "to Dell's subjective satisfaction."²⁵ Whedon had not contended, however, that the rejection of her manuscript was for any reason other than a good faith, honest belief that it was unsatisfactory. Acknowledging this, the court nevertheless reasoned that a publisher could not fulfill its obligations simply by rejecting a manuscript in the good faith belief that it was unsatisfactory. More was required. Thus, the court held that implicit in every publishing agreement is a "good faith obligation" on the part of a publisher to provide "at the very least, a detailed explication of the problems" in the manuscript and "an opportunity to revise it" in order "to bring it up to publishable standards."²⁶

22. The court gave no indication in its decision by which a breach of contract holding was not based on the already recognized good faith obligations.

23. 577 F. Supp. 1459 (S.D.N.Y. 1984).

24. *Id.* at 1462.

25. *Id.* (citing *Random House, Inc. v. Gold*, 464 F. Supp. 1306, 1308-09 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 998 (2d Cir. 1979)).

26. 577 F. Supp. at 1462-63.

In so holding, the court stated that Whedon, induced to write her manuscript in reliance on the publisher's approvals and advances, was owed more than an honest belief that her manuscript was unsatisfactory. Moreover, the court reasoned that such greater obligation was consistent with *Goldwater's* prescription requiring editorial work prior to rejection.²⁷

Dell sought to distinguish *Goldwater* in two ways. First, Dell argued that, unlike the publisher in *Goldwater*, its failure was not willful, and that it had not lacked a bona fide commitment to the contract. The court found these considerations irrelevant, stating that *Goldwater* rested solely on the publisher's failure to provide editorial assistance. The court also rejected Dell's second argument that *Goldwater's* book, unlike Whedon's, was non-fiction, so that editorial assistance in *Goldwater* was more appropriate. The court concluded that Dell's second argument was dismissible where no editorial assistance of any kind had been provided.²⁸

Dell further contended that *Gold* dictated a different result. The court, likewise, rejected this argument. Acknowledging that there was language in *Gold* supporting Dell's position, the court nonetheless stated that the publisher in *Gold* had provided the author with criticism and an opportunity to revise before rejection.²⁹

In its reply brief, Dell made the additional argument that Whedon's manuscript had not been criticized because it would have been unpublishable even with revisions.³⁰ The court responded to this argument by stating that "any suggestion" that the manuscript was unsalvageable was "undercut" by Doubleday's subsequent publication of the manuscript.³¹

Finding that Dell had breached its publishing agreement with Whedon, the court held that Whedon was under no obligation to return her advances and dismissed Dell's complaint. The court also stated that Dell's breach discharged Whedon from her grant of exclusive rights to the publisher, thereby justifying Whedon's subsequent sale of her manuscript to Doubleday with Dell's release.³²

Finally, the court suggested that even if Whedon's contract had still been in force, that fact would not have been prevented the Doubleday

27. *Id.*

28. *Id.* at 1463.

29. *Id.* at 1463-64.

30. Dell's reply brief stated: "Dell decided that the novel was unpublishable even with editorial revision, . . . it would have served absolutely no purpose to deliver to defendant a written critique."

31. 577 F. Supp. at 1463.

32. *Id.* at 1465.

sale. The court reasoned that the exclusive rights that Whedon had given Dell became operative only after acceptance of her manuscript, registration of the manuscript's copyright, and publication within eighteen months.³³

B. Critique of Dell

Dell, on two key issues—good faith rejection of a manuscript as unsatisfactory and a publisher's exclusive right to publish—departs in significant respects from prior case law.

Until *Goldwater*, an author could successfully contend that a publisher had breached its implied obligation to act in good faith in rejecting a manuscript only if the author proved that the publisher had not held an honest belief that the manuscript was unsatisfactory.³⁴ Although *Goldwater* presented an alternative method for finding a breach of a publisher's implied good faith obligation, it was obvious in that case that the publisher had not acted honestly.

The author in *Dell* did not contend that the publisher's determination as to the unsatisfactoriness of her manuscript was made in bad faith. Indeed, she offered no evidence of any bad faith reason for rejection. Moreover, despite the fact that the author had the burden of proof on the issue of bad faith, the court, emphasizing Dell's failure to provide a competent representative from its editorial staff to explain the rejection, appeared to shift the burden to the publisher to prove its good faith.

The court seemed to view Dell's failure to provide criticism, the change in Dell's attitude toward the work, and the absence of a testifying representative as indications of Dell's "bad faith" in rejecting the manuscript. Indeed, the court characterized Dell's "sudden turnabout" in feeling—initially enthusiastic approval of the first half of the manuscript followed by rejection of the whole—in conjunction with other factors, as "surely evidence of a lack of good faith."³⁵

This language directly contradicts the court's recognition, impelled by Whedon's own position, that Dell's rejection was based on an honest belief that the manuscript was unsatisfactory.³⁶ Furthermore, whether or not the publisher honestly believed that the manuscript was unsatis-

33. *Id.* In its discussion on damages, the court also added, in dictum, that Whedon, "prevented by Dell's nonperformance from fulfilling the complete terms of the agreement, was entitled to her full expectation interest . . . (i.e., \$20,000 upon acceptance of the completed manuscript)." *Id.*

34. See *supra* note 15 and accompanying text.

35. 577 F. Supp. at 1464.

36. *Id.*

factory was, pursuant to the court's explicit holding, irrelevant.³⁷ Although the court specifically held that Dell's good faith was not at issue, it apparently felt compelled to make it one.

The court's discussion of Dell's so-called "bad faith" suggests that the court may have been uncertain about its holding. The court's diffidence seems reflected in its incomplete treatment of both *Goldwater* and *Gold*. While citing *Goldwater* for finding a breach of contract based on Dell's failure to provide editorial assistance, the court could easily have decided, based on Harcourt Brace's recognized misconduct in *Goldwater*, that such contract breach was there attributable to the publisher's bad faith. For example, the court in *Dell* could have relied upon Harcourt Brace's obvious lack of commitment to the contract and could have cited the publisher's rejection for reasons other than honest dissatisfaction with the manuscript.

The only case which *Dell* cited as precedent for its finding of an implied obligation to edit was *Goldwater*. As *Goldwater* did, indeed, rely upon violation of such implied obligation in finding a breach of contract, the *Dell* court was not incorrect in its citation. The publisher's obvious bad faith in *Goldwater* could have been used, however, to distinguish the case. The disparity between the action of Harcourt Brace and those of Dell toward their respective authors likely prompted the court in *Dell* to search for some element of bad faith on Dell's part.

The manner in which *Dell* analyzed *Gold* seems deliberately disingenuous. The court in *Dell* found *Gold* to be supportive, stating that in that case the publisher had provided editorial assistance and an opportunity to revise.³⁸ In *Gold*, however, such assistance and opportunity to revise were clearly beside the point. There, the publisher was obviously unconcerned about the merits of the manuscript and was only interested in the economics of the contract. And so the court in *Gold* recognized.³⁹

The dictum in *Dell* concerning a publisher's exclusive right to publish is also questionable. The clause granting Dell the exclusive right to

37. *Id.* at 1462, 1464-65.

38. *Id.* at 1464.

39. 464 F. Supp. at 1308-09. In reciting the facts, the court stated that Fox, a fiction editor who "admitted he was not a fan of Gold's work," "criticized the manuscript as shallow and badly designed." The editor-in-chief of Random House, James Silberman, "sent some of Fox's comments to Gold . . . Gold went on to work on a revision of the manuscript." *Id.* at 1307-08. Thereafter, the manuscript was rejected as unsatisfactory. "Silberman testified that he decided to reject the book after reading a second, revised manuscript . . . He could not remember exactly why he thought that the work was not a good book, and he did not keep a written memorandum of his criticisms, but said they were the same as those in the Fox memo." *Id.* at 1308.

publish was applicable "during the full term of the copyright"⁴⁰ Commenting upon that clause, the court suggested that Dell's exclusive right to publish Whedon's manuscript would not "become operative" until acceptance of the manuscript, subsequent registration of the book's copyright, and publication.⁴¹

In making such a suggestion, the court seemed to have relied on an erroneous view of the copyright law, to the effect that the term of copyright begins upon registration and publication.⁴² Under present copyright law, however, the copyright term begins on completion of a manuscript.⁴³

The dictum in *Dell* is suspect for still other reasons. First, the court's interpretation contradicts the express language of the contract, which is a present grant of rights. Further, publishing contracts typically require notice and an opportunity to cure before termination of a publisher's rights, and some require repayment of advances before such rights revert.⁴⁴ The court's construction of the clause above dealing with a publisher's exclusive right to publish effectively nullifies the express provisions of notice, cure, and reversion.

C. *The Impact of Dell*

The practical effect of the dictum in *Dell* is to give a publisher an exclusive option, not an exclusive right, to publish until publication has actually occurred.

The implied obligation to edit in good faith that *Dell* espouses presupposes that the editorial problems a publisher articulates are ones an author can eliminate through revision. Whether other good faith reasons for rejection incapable of elimination by revision are still viable and would excuse performance of the publisher's obligations is unclear.

40. 577 F. Supp. at 1465.

41. *Id.* Cf. *Dodd Mead & Co. v. Lillienthal*, 514 F. Supp. 105 (S.D.N.Y. 1981) (after publication, right to publish does not revert to author on breach of contract but reverts only after notice and opportunity to cure).

42. Under section 24 of the Copyright Act of 1909, a copyright lasts 28 years from the date of the first publication of the work.

43. Under the Copyright Act of 1976, applicable to Whedon's manuscript as it was created but not published prior to January 1, 1978, the term of the copyright is the life of the author plus 50 years after the author's death. 17 U.S.C. § 303 (1982).

44. See Dannay, *A Guide to the Drafting and Negotiating of Book Publication Contracts*, 15 BULL. COPYRIGHT SOC'Y 295 (1968), reprinted in 64 PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN COPYRIGHT LAW 309 (1975); Shapiro, *supra* note 1, at 164. See also *Gates v. Billboard Publications, Inc.*, 81 A.D.2d 776, 439 N.Y.S.2d 17 (1981) (a condition of the relief requested—return of the manuscript to plaintiff author—may be repayment of advances).

For example, in *Gold*, rejection based on economic considerations was held to be in good faith. Such view has been criticized, however, on the ground that good faith dissatisfaction should not include dissatisfaction with the bargain.⁴⁵

It is unclear whether, after *Dell*, economic considerations will be deemed good faith reasons for a manuscript's rejection. *Dell* cited *Gold*, but did not reject it. Indeed, *Dell* found *Gold* to be supportive. Since no reasons for rejection of Whedon's manuscript other than merit were cited by the publisher in *Dell*, the court did not have to deal with the issue.

Dell clearly limits a publisher's discretion. Required to provide specific reasons for its dissatisfaction with a manuscript, a publisher cannot simply claim that a manuscript is unsatisfactory whenever it is unhappy with a contract. Even good faith dissatisfaction is no longer sufficient. Instead, the publisher is required to articulate concrete reasons for rejecting a manuscript in a manner allowing the author to meet the criticisms. The effect is similar to putting the burden on the publisher to prove good faith, since the publisher must now reveal its good faith reasons for rejection.

Dell reiterated that the standard for a manuscript's rejection in a typical author-publisher contract is based on the publisher's subjective satisfaction.⁴⁶ If true, review of a publisher's actions should be based on whether the publisher's judgment on aesthetic worth is honest, not reasonable.⁴⁷ Nevertheless, the courts in both *Goldwater* and *Dell* refused to accept the publisher's determination of aesthetic worth, *i.e.*, that the manuscripts were not only unsatisfactory, but unsalvageable. In *Goldwater*, the court reviewed the manuscript, found it had merit, and noted its successful publication by a reputable publisher.⁴⁸ In *Dell*, the court rejected the publisher's argument that the manuscript would be unacceptable with revision by pointing to the manuscript's subsequent publication by Doubleday. By looking to the satisfaction of Doubleday rather than of *Dell*, the court directly contradicted its statement that *Dell*'s subjective satisfaction was the standard.

45. Healy & Alonso, *supra* note 8, at 506. The article criticizes the decision in *Gold*, which, in the author's view, totally eliminated the good faith requirement. *Id.* at 508. Bad faith has been defined as use of discretion for reasons beyond the risk assumed by the other party. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 385-86 (1980). This definition is imperfect, as there is dispute over what risks are assumed by an author in a publishing contract. For other good faith considerations, see Healy & Alonso, *supra* note 8, at 507 n.158.

46. 577 F. Supp. at 1462.

47. Healy & Alonso, *supra* note 8, at 488-89, 509. See *supra* note 10 and accompanying text.

48. 532 F. Supp. at 625.

The opinion of a second publisher is only relevant if the issue is the reasonableness of the first publisher's judgment, not the latter's subjective aesthetic evaluation.⁴⁹ The implicit, but nonetheless controlling, issue in *Dell* was whether a reasonable publisher would have been satisfied with Whedon's manuscript. By looking to Doubleday's acceptance of Whedon's work, *Dell* focused upon the publishable quality of the work and suggested that Doubleday's acceptance was proof of such publishability.

Thus, *Dell*, in effect, shifts the dispositive question from aesthetic satisfaction to "reasonableness," the test being whether a manuscript is of publishable quality. Instead of "good faith" meaning "honest dissatisfaction," it now means reasonableness pursuant to a "reasonable publisher" standard.⁵⁰

How *Dell*, if not reversed or modified on appeal, will be applied in future cases is uncertain. Nevertheless, certain results are suggested if subsequent cases follow *Dell*'s logic. To apply a "reasonable publisher" standard, a second publisher need not have subsequently accepted a rejected manuscript. Expert testimony could provide equivalent proof of such standard.

In cases following *Dell*, publishers will presumably have fulfilled their obligations to give comments and opportunities to revise before rejecting manuscripts. Invoking a standard of reasonableness in any particular case, a tribunal could then review the comments to see whether they "reasonably" permitted the author an opportunity to make the manuscript publishable. Moreover, the revisions could be compared to the criticisms to determine whether the revisions did, or did not, "reasonably" satisfy the problems specified. Accordingly, by giving concrete criticisms, a publisher's judgment is open to review pursuant to a reasonable person standard.

If subjective satisfaction after *Dell* still remains the standard for rejecting a manuscript, once a publisher has satisfied its obligations to critique and to give an opportunity to revise, the publisher at that point should theoretically be able to reject based on good faith dissatisfaction. This outcome is problematic, however, as the "reasonableness" standard

49. See Healy & Alonso, *supra* note 8, at 509, stating that on the question of "whether the publisher found the book aesthetically worthy as a piece of literature, the issue is the honesty, and not the reasonableness of the publisher's decision; no other publisher's opinion is relevant." See also *supra* note 10 and accompanying text.

50. If the question is the reasonableness of the publisher's judgment, the test is "whether a reasonable person in the publisher's position would be satisfied with it," and the opinion of other publishers or experts would be relevant on this question. Healy & Alonso, *supra* note 8, at 509.

is arguably applicable at every step. Should a publisher's comments and an author's revisions be reviewable pursuant to such standard, little, if anything, remains of subjective satisfaction.⁵¹

Given the new regime that *Dell* proposes, publishers may seek to limit their liability by refusing to contract based on outlines, as opposed to full manuscripts, unless the author is well known. There seems to be no easy alternative, however, to a publisher's doing editorial work and giving an author a good faith opportunity to revise, once a contract for a work has been signed.⁵² Moreover, it is problematic that in the situation of a manuscript's litigated rejection a publisher will be able to avoid judicial review of its editorial criticisms, an author's revisions, and the final manuscript's form under a "reasonable publisher" standard.⁵³

IV. *ZILG V. PRENTICE-HALL, INC.*⁵⁴

Zilg construed the following clause, standard in most, if not all, pub-

51. See *William Morrow & Co. v. Davis*, 583 F. Supp. 578 (S.D.N.Y. 1984), a post-*Dell* case, in which plaintiff publisher moved for summary judgment on its action against an author for breach of contract for failure to deliver a manuscript of the author's autobiography "satisfactory to the publisher in form and content." The court defined the crux of the dispute as "what written product is a manuscript 'satisfactory to plaintiff in form and content.'" In denying the publisher's motion, the court reasoned that the meaning of what constituted a satisfactory autobiography was capable of three reasonable interpretations—those of the publisher, the subject of the autobiography, and the ghost writer. *Id.* at 579. The publisher contended that the manuscript submitted did not conform to its earlier editorial comments on a submitted draft. The ghost writer, on the other hand, contended that the manuscript did conform and was satisfactory to the publisher, and that the real dispute was the subject's refusal to authorize the book. Finally, the subject of the autobiography contended that the publisher brought about the creation and delivery of a manuscript unacceptable to the subject and, therefore, breached its duty of good faith and fair dealing. These contentions raised genuine issues of material fact, precluding summary judgment for the publisher. *Id.*

52. Cf. *Rinzler, How Much Editing? Decision in Dell-Whedon Causes Stir*, PUBLISHERS WEEKLY, Feb. 20, 1984, at 26. Besides paying less money in advances and contracting for fewer manuscripts on outlines, lawyers for publishers, the author notes, are contemplating the addition of a contract clause disclaiming the obligation to edit. It seems impossible that use of this clause would eliminate the implied good faith obligation.

53. In a post-*Dell* case involving a rejection of a manuscript as unsatisfactory, *Random House, Inc. v. Howar*, No. 07252/82 (N.Y. Sup. Ct. Mar. 14, 1984), a jury awarded Random House return of the \$50,000 advance paid to author Barbara Howar. Random House had contracted for Howar's novel based on an outline and had paid a \$50,000 advance on the signing of the contract. After signing, one year passed, during which time the publisher expressed no dissatisfaction with the author's work and offered no editorial commentary. At the end of the year, the manuscript was rejected as unsatisfactory. Although Howar had argued that the publisher had breached its obligation to edit and was, therefore, not entitled to a return of the advances, Justice Greenfield refused to charge the jury that the publisher had such a duty to edit. The jury decided that Howar must repay the advances which she received.

See *William Morrow & Co. v. Davis*, 583 F. Supp. 578 (S.D.N.Y. 1984).

54. 717 F.2d 671 (2d Cir. 1983), cert. denied, 104 S. Ct. 1911 (1984).

lishing contracts, dealing with a publisher's obligation to publish and promote a manuscript after acceptance:

The Publisher shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; . . . (3) to determine the method and means of advertising, publicizing, and selling the work, . . . and all other publishing details, including the number of copies to be printed⁵⁵

Prior to *Zilg*, this clause gave a publisher near-total discretion over the manner of a work's publication and subsequent promotion.⁵⁶ The only limitation, absent express contractual language, upon the exercise of a publisher's discretion, was the requirement, imposed by case law, that such exercise be made in "good faith."⁵⁷ Other cases defined the meaning of "good faith" as the requirement that a publisher expend "reasonable efforts" in publishing and promoting a work.⁵⁸

Zilg took the standard of "reasonable efforts" and elevated it one step further. In *Zilg*, the Second Circuit not only reaffirmed the implicit requirement that a publisher act in "good faith" consistent with the rubric of reasonableness, but, like *Dell*, added specific contours to the definitions of "good faith" and "reasonableness."

A. *The Decision in Zilg*

The plaintiff in *Zilg*, an author, brought suit against his publisher, Prentice-Hall, for contract breach in failing to promote his book in good faith. Plaintiff also sued E.I. duPont de Nemours & Co. for tortious interference with his contract with Prentice-Hall. Plaintiff charged that Prentice-Hall had, in bad faith, reduced its printing and promotion of his book because of duPont's economic coercion aimed at suppressing the book, a work critical of the duPont family.

Prentice-Hall responded by moving for summary judgment dismissing plaintiff's claim.⁵⁹ It argued that its contract with plaintiff, giv-

55. 717 F.2d at 674.

56. Shapiro, *supra* note 1, at 164.

57. "Under New York law there is implied in every contract a covenant of fair dealing and good faith." *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 923 n.8 (2d Cir. 1977) (citing *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co.*, 30 N.Y.2d 34, 45, 281 N.E.2d 142, 144, 330 N.Y.S.2d 329, 333, *cert. denied*, 409 U.S. 875 (1972)). The opinion continues "[t]hus, Famous' determination of effectiveness or profitability of promotion would have to be made in good faith."

58. *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d at 923; *Schisgall v. Fairchild Publications, Inc.*, 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955). *See also* *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

59. *Zilg v. Prentice-Hall, Inc.*, 515 F. Supp. 716 (S.D.N.Y. 1981).

ing it discretion as to how plaintiff's book was to be promoted, precluded implication of a "good faith and fair dealing" standard.⁶⁰

The trial court, by Judge Brient, rejected Prentice-Hall's argument and denied its motion. In so doing, the court reasoned that every contract, including agreements according publishers almost complete discretion over a book's "publishing details," contains an implied covenant of "good faith performance and fair dealing."⁶¹ Continuing its analysis, the court equated the standard of "good faith and fair dealing" with a standard of "reasonable efforts." Thus, the court stated, "the contract gave Prentice-Hall the right to determine the publishing details, including how the Book should be promoted. The requirement that defendant exercise this discretion in good faith could not, of course, obligate it to expend more than fair and reasonable efforts to promote the author's Book."⁶²

Finding the question whether a party to a contract has failed to act in good faith to involve issues of fact not determinable by summary disposition, the court rejected Prentice-Hall's motion for expedited judgment.

Thereafter, a bench trial was held before Judge Brient, who entered judgment for plaintiff against Prentice-Hall, while denying judgment and dismissing plaintiff's claim against duPont.⁶³ In his decision respecting plaintiff's contract claim against Prentice-Hall, Judge Brient inexplicably altered the "good faith" standard of breach from one of "reasonable efforts," invoked on the prior summary judgment motion, to a "good faith" standard now defined as "best efforts . . . to promote the Book fully."⁶⁴

On the basis of this latter standard, Judge Brient held that Prentice-Hall had breached plaintiff's contract by limiting its promotional efforts without any valid business reason. The court awarded plaintiff damages equal to the money lost in sales that it found would have been generated but for Prentice-Hall's breach.⁶⁵

On appeal, the Second Circuit reversed as against Prentice-Hall, and

60. *Id.* at 718.

61. *Id.*

62. *Id.* at 719.

63. *Zilg v. Prentice-Hall, Inc.*, 717 F.2d at 673 (unpublished district court opinion is quoted in Second Circuit decision).

64. *Id.* at 676. If Judge Brient proposed a basis for this change, the Second Circuit opinion does not mention it.

65. *Id.* at 673, 676. See McDowell, *Reversal of Ruling Troubles Authors*, N.Y. Times, Sept. 16, 1983, at C1, col. 3.

affirmed as against duPont.⁶⁶ The court rejected Judge Brient's standard of liability invoked at trial, *i.e.*, "best efforts . . . to promote . . . fully and fairly." Instead, it reverted to a standard of "reasonable efforts," but added a measure of specificity previously lacking in the case law. Thus, the court stated in the following excerpt, quoted at length because of its significance:

We think 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*

However, the clause empowering the publisher to decide in its discretion upon the number of volumes printed and the level of promotional expenditures must also be given some content. . . . We believe that once the obligation to undertake reasonable initial promotional activities has been fulfilled, the contractual language dictates that a business decision by the publisher to limit the size of a printing or advertising budget is not subject to second guessing by a trier of fact as to whether it is sound or valid.

The line we draw reconciles the legitimate conflicting interests of publisher and author as reflected in the contractual language, for it compels the publisher to make a good faith effort to promote the book initially whether or not it has had second thoughts while relying upon the profit motive thereafter to create the incentive for more elaborate promotional efforts. Once the initial obligation is fulfilled, all that is required is a good faith business judgment.⁶⁷

In reviewing the record on appeal, the court found that plaintiff had failed to sustain his burden of proof corresponding to the standard of liability excerpted above. Ruling that plaintiff had not proved that Prentice-Hall's "initial promotional activities" were unreasonable, and therefore tantamount to having been rendered in "bad faith," the Second Circuit held that Prentice-Hall had satisfied its obligation to promote plaintiff's book in "good faith."⁶⁸

66. 717 F.2d at 676.

67. *Id.* at 680 (emphasis added) (citations omitted).

68. *Id.* at 681.

B. *The Impact of Zilg*

Zilg constitutes an important advance for authors by giving explicit definition to the requirement implicit in all publishing agreements that a publisher render "reasonable efforts" in the promotion of an author's work. After *Zilg*, a publisher will, at the very least, have to provide sufficient promotional efforts at the stage of a work's first printing consistent with an advertising budget, based on the work's subject matter and anticipated audience, that is reasonably calculated to give the work a chance of achieving success. A publisher will be less able to "privish" a work, *i.e.*, mount a "wholly inadequate merchandising effort," when it wishes to avoid further financial loss on a work that fails to meet expectations.⁶⁹

Despite its making explicit the standard of "reasonableness" required at the initial stage of a work's promotion, *Zilg* did not eliminate the continued need during such stage to rely upon some sort of implicit "reasonableness" standard. For example, the question as to what constitutes an advertising budget adequate to give a book a reasonable chance of achieving success will still have to be answered pursuant to an implied "reasonable man" measurement.

Nevertheless, *Zilg* explicitly defines the parameters of a publisher's promotional activities against which to apply a "reasonableness" standard, and that is significant.⁷⁰

In holding that a publisher's promotional activities after the first printing of an author's work must evidence "good faith business judgment,"⁷¹ *Zilg* continues the implicit requirement from prior case law that such activities during this period be rendered consistent with a "reasonable efforts" standard. *Zilg* does not restrict application of the "reasonable efforts" standard to the initial stages of a work's promotion by

69. *Id.* at 679.

70. In *Fraser v. Doubleday & Co.*, 587 F. Supp. 1284 (S.D.N.Y. 1984), an author's complaint alleged that defendant publisher breached the publishing agreement by not using its best or reasonable good faith efforts to advertise, promote and exploit the author's work. In denying the publisher's motion for summary judgment on that issue, the court stated:

Plaintiffs' allegation of inadequate promotion of their book by defendant cannot be resolved on this motion. There are still substantial controversies as to certain facts relevant to the test formulated in *Zilg v. Prentice-Hall, Inc.* . . . for determining if a publisher has breached its contractual obligation to promote a certain book. These controversies include issues such as whether the size of the initial printing was sufficient in light of the subject matter and likely audience of the book . . . ; whether defendant had a marketing plan for the book; whether the amount spent on promoting the book was sufficient; and whether the book should have been initially printed in foreign languages. These issues must be resolved before it can be determined whether defendant's initial printing and promotional efforts were adequate or whether later efforts were not undertaken because of a good faith business judgment.

Id. at 1288.

71. 717 F.2d at 680.

having there given expression to what it leaves silent in subsequent stages. This follows from prior case law holding that where a contract is silent respecting a party's duty to promote, which duty must presuppose "good faith" performance, such party is obligated to render "reasonable efforts."⁷²

IV. CONCLUSION

The effect of *Dell* and *Zilg* is to give authors, by judicial fiat, what they have generally been unable to obtain by contract negotiation. Previously, the typical book publishing agreement imposed no obligation on a publisher to articulate its reasons for rejecting a manuscript as unsatisfactory, let alone obligate a publisher to inform an author of such reasons and permit revision of the manuscript to make it publishable.

Moreover, previously, the typical book publishing agreement contained only vague obligations to publish and promote a work, and only established authors were able to share in a publisher's promotional decisions.

Dell and *Zilg* alter these situations by diminishing the exercise of a publisher's discretion. To what extent, of course, remains for future determinations. Nevertheless, these decisions have a present cumulative effect, and that is to require that a publisher, once it contracts for a work, make a definite commitment to the work.⁷³

Dell translates such commitment into providing authors with actual editorial assistance to enable them to make their manuscripts publishable. This means the following: criticism and the opportunity to revise; non-refundability of advances for a publisher's rejection of a manuscript based on "reasonableness"; and, perhaps, reversion of an author's rights for a publisher's failure to publish.

Following a manuscript's acceptance for publication, *Zilg* translates such commitment into rendering "adequate" promotional efforts aimed at giving the manuscript, now a book, a reasonable chance to attain market success.

72. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

73. *Dannay*, *supra* note 44, in *CURRENT DEVELOPMENTS* at 317.

