



Whose Morals?

The rise of morality clauses— and what to do about them

BY PAUL COCCIA

“The Publisher, in its sole discretion, may terminate this Agreement... if at any time the Contributor’s past or future conduct or allegation against evidences a lack of due regard for public convention or morals... or may shock, insult or offend the general community...”

The above is sample phrasing from morality clauses, (aka morals, conduct, or respectability clauses). You may not have encountered them in your contracts. Or maybe you signed one thinking, “Well, I haven’t done anything wrong.”

In the past, these clauses were reserved for situations where large sums of money were at stake. Celebrities and athletes come to mind, not authors trying to scrape by. However, morality clauses have been working their way into other industries. And the rise of their use in publishing contracts has many authors concerned.

Business and intellectual property lawyer Warren Sheffer, of the firm Hebb & Sheffer, explains what these clauses mean in plain language: “Authors are asked to give the publisher a contractual escape hatch through which

the publisher can exit, if it comes to light publicly that the author has done or said something that could damage the publisher’s brand or that threatens sales of the author’s work.”

There is no upside for authors. “Such clauses are a form of insurance for the sole benefit of the publisher,” Sheffer says.

My day job is in insurance, so I’m well acquainted with liability, risk, and minimizing damages. Businesses are designed to make money, and morality clauses are one way of protecting against loss. They make sense from a corporate perspective. Publishers may say they are designed for use in extreme circumstances, such as sexual assault or murder but, nowadays, may be enacted in other instances of scandal such as a contributor using hate speech. However, in insurance as in manuscript

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acquisitions, there is assumed risk—and due diligence falls on the part of the company. For example: An insurance policy can't force someone to be a safe driver. So, businesses weigh the potential fallout and decide whether or not to jump in with hopes for the best outcome.

In using morality clauses, publishers and other corporations are trying to restrict behaviour through legally binding contracts without identifying what constitutes a transgression. As we can see from the sample above, the language is vague, lacks specificity, and is based on opinion—thereby rendering judgments purely subjective. The clauses are broad, so authors can be in breach for anything at any time or even for a simple allegation. Contracts can be terminated at the publisher's discretion, with some clauses even stipulating repayment of advances or the equally vague “any sums paid to date.”

Several sources I spoke to for this story linked the current rise of morality clauses to the #MeToo movement, but the clauses' language does not limit them in scope. And if U.S. publishers are using them, international firms are likely to see them as standard protocol and follow suit.

Morality or protection of profit?

“We refer to them as morality clauses, but they're not actually concerned with any one type of morality,” says literary agent Amy Tompkins, of the Transatlantic Agency. “The morality is, ‘Can we still sell this type of book or not?’ This is the moral touchstone at the heart of it.”

Tompkins says morality clauses made their first publishing appearance in contracts issued by independent Christian publishers. As they've spread, she says their wording has gone from “draconian” to having “softened somewhat” over time.

While they are relatively new to Canada, Mary Rasenberger, CEO of the New York-based Authors Guild, says that in the United States “they've been in book contracts quite a while within the termination provisions.” While the Guild hasn't been successful in getting rid of the clauses, she says they have succeeded in clarifying their wording. “The point is to limit use to the most extreme situations or in cases of big advances (i.e., millions of dollars.)”

Meanwhile, in the U.K., Society of Authors Chief Executive Nicola Solomon says morality clauses are “not quite as widespread,” and that “we always push back against them.” She adds, “If you're going to have a clause, it should be specific.”

Where agents and authors have resisted the clauses, or mitigated their potential for abuse, it has largely been accomplished through rewording that limits a publisher's unilateral decision-making. Another concern is ensuring an author receives payment and reversion of their rights if such a clause is enacted.

However, morality and public convention can and do change, depending on factors as simple as the prevalent values of the time or geographical location, leaving morality clauses ripe for abuse. They do not afford room for contributors to refute allegations, defend themselves, or make amends. The power in this situation is one-sided, and the all-important bottom line is protecting a healthy profit margin.

MORALITY CLAUSES

THE ORIGIN OF THE STORY

Morality clauses originated in Hollywood in 1921 when silent film star Fatty Arbuckle was accused of sexual assault and charged with first-degree murder. He was tried on the lesser charge of manslaughter, but despite being acquitted, the scandal destroyed Arbuckle's career. The day after charges were laid, Universal Studios (not Paramount Pictures, who predominantly cast Arbuckle) responded by adding a clause in performers' contracts stipulating nonpayment for actors who “forfeit the respect of the public.” Over 100 years later, the language is still just as ambiguous.

Publishers are trying to restrict behaviour through legally binding contracts without identifying what constitutes a transgression.

Some publishers do not include morality clauses in their contracts. Marc Côté of Cormorant Books is one of them. “If you’re a publishing house and something blows up, what can you do about it?” he says. “Especially if the book is already out there. It’s too late.” Besides, Côté points out, if the book hasn’t been published yet, publishers have other tools at their disposal to terminate a contract any time they wish. Solomon agrees: “A publisher can always terminate a contract. What they are trying to get out of is paying you.” The recourse for an author is to sue, although most are unlikely to have the means to pursue legal action.

Côté adds that publishers themselves can also be hurt by these clauses. For some time, he has seen versions of morality clauses in funding agreements, requiring the return of funds if they are breached.

Morality and marginalized communities

Côté also believes those from certain communities will feel the implications of these clauses more strongly than others: “Morality clauses are unnecessary and disrespectful of writers who need to express unique voices untethered by restraint... When crowds push against something, it is dangerous because individual voices are so important. Morality clauses shut down dissenting thoughts—thoughts which, if disagreed with, can always be discussed and debated.”

Asked about these clauses, Ken Setterington, author of *Branded by the Pink Triangle* and *The LGBT Purge*, says, “Morality, what a loaded term! Who gets to define it? Having written about the LGBT purge and the pink triangle, I can only say the definition of morality has been used to discriminate and punish gays for decades.”

Queer identity largely still exists on the wrong side of good behaviour. Events in the not-so-distant past, such as those Setterington documents and the AIDS pandemic, demonstrate how queer identity has been systematically constructed as immoral, deviant, and worse.

“There are always concerns with morality clauses, especially when parts of your identity have been considered historically immoral or subject to someone else’s interpretation of what makes you good,” says author Natasha Deen.

About one-third of the world’s countries can prosecute queer individuals with penalties including death. Recent book bans drive the point home. To ask a queer person to promise to adhere to public convention with respect to morals may be forcing them to break that promise before the ink is even on the page.

Author, journalist, educator and documentary filmmaker Wanda Taylor also has concerns about imposed morality, from the perspective of other marginalized communities.

“I think about me as a Black woman, based on the very history of Blacks in general but particularly Blacks in Canada—we’re natural advocates for our community, because we’ve had nothing, and we know we’ve had to fight to occupy the basic levels of spaces in education and employment,” she says. Causing change often requires challenging a status quo that relies on upholding public convention. “If you’re out there advocating for your community, publishers may get squeamish and uncomfortable. An unspecified clause feels like [an author] is giving [a publisher] all their power without any parameters around what is inappropriate or controversial. Sometimes advocacy gets messy. Do I need to stop and worry that I’m violating a contract clause whenever I speak or act?”

Rasenberger brings up the rise of extremist ideologies within the U.S., and Tompkins speaks of fears about the rise of a “*Handmaid’s Tale*-style society.” In this context, signing with even a seemingly progressive publisher is no guarantee marginalized writers won’t have morality clauses used against them, as businesses can be sold, and new owners have no obligation to uphold their predecessors’ values.

If you have to sign, at least negotiate

Tompkins warns that as morality clauses become more widespread and publishers refuse to budge, authors should be prepared for the possibility of signing contracts that include them. However, her agency, Transatlantic, has yet to see a morality clause enacted. She says a greater concern for authors might be more probable scenarios, such as a publisher going bankrupt “or failing to make payments or issue royalty statements.”

So, if you are presented with a contract that includes a morality clause, what can you do?

First, know what you’re signing. Engage in conversations on the terms of contracts with your publishers and agents. Seek legal advice if needed. TWUC and the Authors Guild’s websites provide ideal sample contracts, which do not include morality clauses, but they, along with the Society of Authors, offer resources and advice. Ask for clearly defined circumstances under which morality clauses can be invoked to be written into contracts, and specify full payment and reversion of rights in the event the clause is enacted.

“Perhaps it would be reasonable in the circumstances that the clause only lasts pre-publication and for a period of three years post-publication,” Sheffer suggests. At a minimum, he urges that such clauses not apply for the full copyright term. “Public morals can and do shift over time, and the life of the publication contract is usually very long (i.e., typically the term of copyright: life of the author plus 70 years),” he says. “If the publisher insists on the inclusion of a morality clause, attention should be paid to how long it will last. It does not seem reasonable for such a clause to last for the full term of copyright.”

Solomon and Rasenberger both say past conduct may play a role in a publisher’s decision on whether to include a morality clause. Or, as Sheffer puts it, “Unless the author is a public figure with a history of obvious amoral public conduct or statements... if the publisher has no objective basis upon which to be reasonably concerned that the author’s future conduct could harm the publisher’s interests, a morality clause is not necessary, in my view.”

In short, know your rights, open a dialogue, and negotiate on unreasonable terms.

Art and convention

In thinking about and writing this story, I keep circling back to a question I asked those I interviewed: Doesn’t creating art sometimes mean going against public convention? Rasenberger’s reply: “You can’t make change without ruffling feathers. True art should be this way. True art needs to make change.”

And as artists, don’t we hope to effect change and create art without being hobbled by the shifting moralities of public convention?

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