



Before the Federal Trade Commission

Document Number 2023-00414

Comments of the Authors Guild

April 19, 2023

The Authors Guild thanks the Federal Trade Commission (the “Commission”) for the opportunity to submit the following comments in response to the Notice of Proposed Rulemaking (the “NPRM”) published in the Federal Register on January 19, 2023, regarding designating non-compete clauses in contracts between workers and employers as an unfair method of competition under the proposed Non-Compete Clause Rule (the “Rule”).

The Authors Guild is a national non-profit association of over 13,000 professional, published writers of all genres. Among our members are historians, biographers, poets, novelists, and freelance journalists of every political persuasion. The Authors Guild defends and promotes the rights of all authors to write without interference or threat and to receive fair compensation for their work. For over a century, the Authors Guild has vigorously represented writers’ concerns in Washington D.C., and advised Congress and federal agencies on laws and policies that would help—or harm—writers. One of the Guild’s biggest concerns in recent years has been authors’ lack of bargaining power in the marketplaces for their work, and the erosion of contract terms. As a general rule, authors are unable to negotiate any changes to the terms of their work beyond the edges. The Authors Guild has voiced these concerns to the Commission and the Department of

Justice’s antitrust authorities,¹ and is heartened by the present Non-Compete Clause Rule, which seeks to empower workers.

Non-compete clauses are common in publishing, journalism, and other writing services agreements and impinge authors’ ability to publish the works they want to write. In principle, these clauses are meant to protect the publisher’s investment in the work by preventing authors from selling the same or substantially similar work to another publisher. However, in attempting to restrict authors from competing against their works, publishers craft broad, harsh non-compete clauses that can unfairly impede authors from making a living. Authors are routinely asked to agree not to publish other works that might “directly compete with” the book under contract or “be likely to injure its sale or the merchandising of other rights.” Even more broadly, they may be asked not to “publish or authorize the publication of any material based on the Work or any material in the Work or any other work of such a nature such that it is likely to compete with the Work.” Such unfair, open-ended non-compete clauses can prevent an author from pursuing other writing opportunities. If a new project even arguably deals with the same “subject” as the book under contract, a door swings shut and the non-compete can be invoked to prevent an author from publishing elsewhere. For writers specializing in a particular subject, this could be career-derailing.

We strongly support the Commission’s Non-Compete Clause Rule and the designation of non-compete clauses that restrain workers from seeking other opportunities an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The Rule will give writers much-needed leverage in their negotiations with publishers and employers to strike out non-competes from their contracts. They could simply reject the non-compete clauses by saying that it is illegal. Our comments hope to illustrate the ways in which non-compete clauses and

¹ <https://authorsguild.org/news/creators-request-collective-bargaining-rights/>

similar restrictive covenants limit the ways in which writers use their works, inhibit writers from taking on new opportunities, and impact their income potential.

I. Forms of Non-Compete Clauses and Restrictive Covenants in Writing Contracts

1. Book Publishing

a. Competing or Similar Works

A common type of “non-compete” clause in book publishing contracts is a “similar work” or “competing work” clause, which restricts the author from publishing other works that might compete with or potentially impact the sales of the contracted work. These clauses typically define the scope of similarity based on the subject matter, whereby the author promises not to publish works that cover the same or closely related topics, themes, or issues as the contracted work. Some similar work clauses also prohibit authors from using the same or substantially similar characters, settings, or storylines as the contracted work. In some cases, these clauses may restrict authors from exploiting their derivative rights in the work even if those rights are otherwise reserved. Recognizing the serious restraints non-competes can place on authors’ ability to write freely, the Authors Guild advises its members to negotiate for changes so that the non-competes apply only to works that “directly injure the sale” of the book under contract, are of limited duration, and allow the author is to write a new book on the same subject upon expiry. The Authors Guild Model Trade Book Contract—a freely, publicly available resource—also contains an example of a non-compete clause that would be acceptable in most circumstances.²

Appendix A attached to these comments provides a range of examples of “similar work” clauses.

b. Next Work Clauses

² The Authors Guild Model Trade Book Contract, https://go.authorsguild.org/contract_sections/21

Another type of non-compete covenant often present in book publishing contracts is “next work” clauses, which compel authors to submit their next book to the publisher first. These clauses aren't explicitly non-compete clauses, but they can function similarly in certain situations by potentially limiting an author's ability to work with other publishers or on different projects. Broad and open-ended “next work” clauses that either do not reasonably limit the time within which the first publisher is required to accept or reject the next work can keep an author’s next book in limbo for an unduly long time. These clauses can also force authors to continue publishing with the first publisher against their will.

Appendix A attached to these comments provides a range of examples of “next work” clauses.

2. Journalism

Non-compete clauses in journalism employment and contributor contracts restrain journalists and can bar journalists from working for competing publications and writing about the same topics as those covered during the journalist’s employment. Furthermore, overbroad “non-disclosure,” “confidentiality” and “proprietary information” clauses in journalism contracts can independently or together with a non-compete clause dramatically impact the journalist’s ability to work for another publication in the same field or use their research to write about similar topics for other outlets. For instance, Journalist Stephanie Russel-Kraft, writing in the Columbia Journalism Review about how a non-compete clause in her employment contract set back her career, called them “a risk-free insurance policy against a competitive labor market” that creates “another barrier to job mobility in an increasingly precarious industry.”³ Kraft described how an attorney representing the previous publication she worked for wrote to her new employer, alleging

³ https://www.cjr.org/business_of_news/non-compete-agreement-journalism.php

that by taking the new job Kraft had violated the non-compete and confidentiality provisions of her contract with the previous employer, resulting in her termination by the new employer. Needless to say, non-compete clauses and overbroad confidentiality obligations raise serious questions about their impact on press freedom and, ultimately, the public's right to access news and ideas.

3. Services-Type Agreements

Non-competes and non-disclosure clauses in contracts are fairly common in contracts for writing services (e.g., content writing, copywriting, and marketing consulting). Like other professional non-compete obligations, these clauses can prevent writers from providing services to competing clients and clients in the same or similar industry after the termination of the writer's services. In many cases, the non-compete duration is inordinately long and can interfere with the writer's ability to work for other clients. Overbroad definitions of "proprietary information" in non-compete and non-disclosure obligations can further restrain the writer from seeking other opportunities and lower their income potential.

II. Impact of Non-Compete Clauses

Non-compete clauses in writing contracts can significantly impact creative freedom and earnings, and in the context of journalism, have a chilling effect on speech. The impact of these clauses on the writing profession is compounded by the fact the markets for books, journalism, and other types of writing services are highly precarious, with incomes from writing declining to historic lows. Preliminary results from our most recent ongoing income survey of authors found that the median income for full-time authors is \$20,530 per year in 2022; according to the Pew Research Institute, the number of newsroom employees in U.S. newspapers decreased by more

than 50% between 2008 and 2020. Non-compete clauses add to the challenges book authors, journalists, and other writers are facing in earning a sustainable living through writing.

Courts have often found non-competes in writing contracts to be illegal and unenforceable. However, most writers don't have the resources or desire to get into a legal battle and cannot risk the legal costs of being sued for breach. Even more frequently, they do not realize that the non-competes are unenforceable and so take them at face value. They also fear getting on the bad side of publishers and employers because they are constantly in need of selling the next book or piece, so they stay quiet. For instance, if a publisher so much as threatens to challenge its author's right to publish another work under a broad non-compete, the author is likely to back down. Rather than spend two years and \$150,000 fighting it out, better to just write something else. For book authors particularly, the non-compete can keep a book from the marketplace, delay the publication of a book that's already been written, jeopardize the acceptance of a book proposal made to another publisher, and have a direct effect on the author's earnings. Here are just a few examples of how Authors Guild member authors were prejudiced by non-compete clauses in their contracts:

- 1) A fiction writer who developed characters for use in multiple works was prevented from using those characters in other books.
- 2) An author specializing in true crime was prevented from developing a book about a *different* crime with a different publisher.
- 3) A non-fiction writer looking to put out a revised edition accounting for newly-discovered facts was prevented from doing so because the publisher didn't want to deal with the expense; even so, the publisher wouldn't let the author publish a revised edition anywhere else.

A survey of authors conducted by the Authors Guild in preparation for these comments further illustrates how non-compete clauses and competition-type restrictions adversely impact writers' creative freedom, publishing opportunities, and income potential. Out of the 630 respondents, 19.2% (121) reported that non-compete clauses had prevented them from publishing a similar or competing book. In addition, 38.6% (243) stated that they were forced to take a new book to the publisher of their last book before offering it to another publisher that might have been a better fit. Furthermore, 15.7% (99 authors) reported that non-compete clauses had prevented them from writing and publishing articles or stories for other outlets or media. 46.5% (293) of the respondents reported that they had not been affected by non-compete clauses in their writing contracts. As part of the survey, we asked writers to include narrative comments about the impact of non-compete clauses, and are sharing illustrative examples below (edited for clarity and anonymity):

After leaving a full-time job because my family moved, I was restricted for a year from doing the kind of branded content work I'd developed expertise in at my job. In my new work as a freelancer, this kept me from approaching familiar clients who would have certainly hired me, and it pushed me toward lower-paid work for my first year.

I was dissatisfied with my publisher, which is a major house, one of the most prestigious. What is essentially a new book was treated as a 2nd edition, and since I was contractually not permitted to bring it to a different publisher, my original publisher was able to get this new work at a very low royalty rate.

My novel was published by [Imprint] and about eighteen months later, [Publisher] shuttered [Imprint's] original fiction program and laid off all editorial employees except those overseeing paperback releases. I was never reassigned to another editor and as a result had no support, no communication, no ability to reach out to anyone with questions about my book. Sub-rights inquiries went unanswered and I lost out on multiple opportunities. They let the book fall out of print and have not responded to multiple requests for a reconciliation to print or an accounting of total sales. I have difficulty getting royalty statements. Even though I did not wish to work with this publisher again, I could not talk to another interested publisher for my next book because of the right of first refusal clause. The interested publisher

had to wait while I showed the first publisher my next book manuscript, which they eventually passed over.

I always work hard to scale down the non-compete clause from its usual vague wording which leaves it up to the publisher what is non-compete and what isn't. For example, I have a series of fantasy novels for children that are set in a castle. In a vague non-compete, I couldn't submit any other books about castles to another publisher.

Publisher pays me \$25k for a book and has a non-compete clause for any book length work of fiction for six months. This effectively limits my earning potential, ensuring I only make \$25k that year from novels—and forcing me to find outside work. Recently my agent has been able to negotiate clauses such as “no book length fiction in the mystery genre,” which opens things up a bit.

I published a research-based book in 1999. In 2012, I approached the publisher with a proposal to update the book. They weren't interested but told me that I couldn't take my book to another publisher--I actually had one that was interested--because it would be a competing book. I consulted a literary lawyer, and after reading my contract, he agreed that I was out of luck.

My debut publisher insisted on an "option" clause that was really a non-compete clause. This was confirmed when they passed on the option book and said in the past that they never intended to buy another book from me during the contract's option period. That could only happen later according to the publisher. So all the "option" clause in the contract did was stop me from shopping my next book to other publishers for months. These clauses are extremely harmful to authors and should not be allowed.

For 23 years I was affected by a non-compete clause as a professional journalist while I was writing a weekly article for a publication. To make matters even more unfair, I was doing this weekly piece as a freelancer, with a continuing 'agreement', and was very underpaid.

Since I have often written spin-off articles based on research done for a book—sometimes with the article coming first, followed by the book, followed by spin-off articles or book chapters for collections or anthologies, non-compete clauses can be impediments to moving forward with work that should be published fairly soon in order to be seen as threads in an on-going topic of exploration.

A non-compete clause stalled my writing. I didn't want to stay with my publisher, but I had to give them the option of first refusal. They weren't even looking at new work at the time. I ended up just letting my work gather dust since I couldn't shop it around. Writing is hard enough without having these limitations put on you.

A new publisher wanted to pick up our book's third edition, but they wanted not just a first-right of refusal for all subsequent editions, but the final say on if there would be future editions (meaning if they didn't want to publish a fourth edition, we would not be able to take it elsewhere).

III. Final Remarks

Designating non-competes as methods of unfair competition in violation of Section 5 of the FTC Act would give writers leverage in contract negotiations. It will allow writers to pursue a wider range of projects and work with different publications and clients, leading to increased competition in the market for their expertise and services and positively impacting writers' incomes. Non-compete clauses directly limit writers' freedom to write, publish, and realize the full potential of their talents. We are grateful to the Commission for its commitment to enhancing worker power and its efforts toward leveling the playing field between employers and workers. We look forward to continuing our dialogue with the Commission on these issues, particularly as they affect writers and other professional creators.

Appendix A

Examples of competing or similar work clauses:

During the Term of this Agreement, the Proprietor will not, without the prior written permission of the Publisher, publish or cause or authorize to be published any work (including without limitation any adaptation of the Work or any derivative work based in whole or in part thereupon) that is substantially similar to the Work or that, in the Publisher's judgment, is likely to compete with the Work or diminish the value of any rights granted to the Publisher by this Agreement.

Author is not currently working on any project which may compete with or lessen the value of an Author Product, or Related Work thereof. [This is a representation backed by an indemnity.]

The Proprietor agrees that Proprietor will not publish (or authorize the publication of) another work so substantially similar to the Work as to, in the Publisher's judgment, materially interfere with or detract from the sale of the Work.

The Author will not, without Publisher's prior written consent, (i) publish or authorize publication by anyone other than Publisher of any text-based edition, adaptation, abridgment or condensation of any Work, or of any text-based derivative work (including, but not limited to, any dramatic play, screenplay, television script, novelization, graphic novel or photonovel) based on that Work or bearing a like title; or (ii) publish or authorize publication of any work, whether print or digital, containing material similar to any Work if, in Publisher's judgment, such publication is likely to injure the sale of that Work or the merchandising of other rights granted herein.

Author will not publish or authorize a third party to publish any work on the same or similar topic during the 6 months prior to and 12 months following initial publication, except with Publisher's prior written consent and compliance with the Right of First Negotiation provision.

Translator may not, for a period of three (3) years after termination, submit any partial or complete manuscript or proposal for the Work or for a similar work to any publisher before offering it to Publisher under the same terms contained in this Agreement.

Examples of "Next Work" Clauses

Option. *The Author grants Publisher the exclusive option to acquire the same rights as have been granted in this Agreement to the next full-length work **of fiction** to be written by the Author. Publisher shall be entitled to a period of ninety (90) days after submission of a **detailed proposal and three (3) sample chapters** for such next work in which to make an offer for that work, and the Author agrees not to solicit any third party offers, directly or indirectly, during that period. If Publisher wishes to acquire such next work, the Author and Publisher will attempt to reach an agreement as to terms during a reasonable period of exclusive negotiation. If they cannot reach an agreement, the Author shall be free to submit such next work elsewhere, but the Author may not accept an offer from any other publisher on terms equal to or less favorable than those offered by Publisher. Publisher shall not be required to consider such next work before publication of the last Work that is the subject of this Agreement. Publisher's option as set forth shall also apply to*

the next full-length work by each party to this Agreement included in the term "Author," whether such manuscript is written by such individual or entity alone or together with one or more other individuals or entities.

The Publisher will have the first opportunity to read and consider for publication the Author's next work. The Author will deliver a written proposal for such Work to the Publisher and the Publisher will have sixty (60) days to give written notice to the Author as to whether the Publisher is interested in publishing it. If the Publisher and the Author are thereafter unable to agree on terms for its publication within a reasonable period, the Author will be at liberty to enter into an agreement with another publisher provided that the Author will not subsequently accept from anyone else terms equivalent to or less favorable than those offered by the Publisher.

*Publisher shall have a forty-five (45) day period (**which period shall not commence to run until three months after acceptance of the Work**) after receipt of the submission of an **outline/synopsis and sample chapter** of the next work within which to notify Author whether it will exercise such option. Publisher and Author will then enter into negotiations toward an agreement. If Publisher and Author are unable to agree upon such terms, Author shall be free to submit this "next work" elsewhere. However, Author shall not enter into an agreement for the publication of the "next work" with any other publisher with the same terms or with terms less favorable to Author than those offered by Publisher before first giving Publisher a further option to enter into a contract equally as favorable to Author.*

Examples of non-compete clauses in Contributor and Writing Services Agreements:

Non-Compete: Contributor will not, until the applicable exclusivity period herein expires, write or publish, or cooperate in the publication of, in any form, an article, broadcast, or other communication, or submit to an interview, on the same or a similar subject as the Work(s) unless Contributor has received written consent to do so by Brand.

Contractor will enter into no other commitments which will in any way conflict with or adversely affect the performance of the services under this Agreement;