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# UNDERSTANDING AND NEGOTIATING **BOOK PUBLICATION CONTRACTS**

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# UNDERSTANDING AND NEGOTIATING BOOK PUBLICATION CONTRACTS

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Finally, thank you to all *Authors Alliance* members: Your support makes all our projects possible.

## A NOTE TO OUR READERS:

Please visit *Authors Alliance* on the web at <http://authorsalliance.org> for resources related to publication contracts, fair use, rights reversion, termination of transfer, and more. Please consider supporting our work by joining us as a member or making a donation.

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# SECTION I: INTRODUCTION



WE ALL REGULARLY SIGN, CLICK, SAY “OK,” or otherwise agree to a variety of contracts in our daily lives. For most of us, having the time to review them in detail is out of the question. But if you are an author, a book publication contract (also called a publishing agreement) is one that deserves careful attention. Its terms can affect your control of your book and dictate your rights and obligations for many years to come. A bad contract can even limit your ability to get your work into the hands of readers. Helping authors avoid negative outcomes and increase the impact of their contributions to knowledge and culture is a key part of the Authors Alliance mission, and our motivation for bringing you this guide.

Authors are sometimes so grateful to receive a publication offer that they may be tempted to sign the




first version of a publication contract that they receive, especially if negotiating seems complicated, intimidating, or risky. But there is a lot at stake for authors in a book deal, and it is well worth the effort to read the contract, understand its contents, and negotiate for favorable terms.

Happily, copyright laws give authors something very valuable to bring to the negotiating table.

Copyright confers on the author<sup>1</sup> of a work certain exclusive rights—such as the right to reproduce the work and to distribute copies of it to the public—for the life of copyright. Under copyright law in the United States today, copyright protection for original, creative works is automatic from the moment the work is “fixed in a tangible medium” (e.g., as soon as the author puts pen to paper, paintbrush to canvas, or saves a computer file). Currently, copyright protection for works by an individual author lasts for the life of the author plus seventy years.

A publication contract outlines what rights you as an author are granting to your publisher and on what terms. If you sign away all of the rights in your book to the publisher for the life of copyright, this will preclude you from certain future uses of your work. For example,






you won't be able to make derivative works like translations, audio editions, or revised editions, because your publisher now has all the exclusive rights as the work's new copyright owner. Even if you don't have any future plans for your work, you may still regret transferring all rights if your publisher does not make full use of them, your book falls out of print, or sales drop. In these circumstances, your publication contract will constrain you from making your book more widely available. At a minimum, you should carefully consider whether your publisher needs all the rights its standard contract asks for.

The grant of rights clause is only one part of the contract that deserves your careful attention. The terms of the contract can also dictate, for example, your commitments relating to the manuscript and future works, who is responsible for legal claims stemming from your book's content, how much input you have in the appearance of your book, how your book will be promoted, the specifics of how you will be paid for your book, whether and how you can regain control over the rights to your book, and much more.

This section provides an overview of the guide in **Chapter 1: About This Guide**, an introduction to



contracts in **Chapter 2: Contract Basics**, and a primer on negotiations in **Chapter 3: Negotiation Fundamentals**.






# CHAPTER 1: ABOUT THIS GUIDE



THIS GUIDE IS DESIGNED TO MAKE IT EASIER for authors to understand and negotiate their book publication contracts. Specifically, this guide will help authors:

- Understand common clauses that appear in book publication contracts;
- Recognize how a contract's terms might affect their goals for their books;
- Formulate author-friendly variations of contract terms;
- Negotiate for terms that advance their interests; and
- Avoid terms that hinder their goals.

This guide is part of a collection of resources for authors released by *Authors Alliance*, a nonprofit organization




that promotes authorship for the public good by supporting authors who write to be read.<sup>2</sup> *Authors Alliance* created this guide as a part of our mission to help authors understand and manage the rights necessary to make their works broadly available now and in the future.

## WHO SHOULD USE THIS GUIDE?

This guide was written for all authors who want more information about book publication contracts. It is relevant not only to authors who are signing their first book deals and know little about the publishing industry, but also to veteran authors who want to better understand the contracts they previously signed or who want tips about how to negotiate for better terms for their latest books.

The contract terms this guide covers are relevant to authors of both fiction and nonfiction and are applicable to agreements with academic presses as well as with trade (commercial) publishers. This guide identifies some common differences between terms found in contracts with academic versus trade publishers that reflect their different business needs. A publisher's willingness to accept any particular clause will vary,




and is often largely dependent on business concerns. Although many clauses in book publication contracts also appear in contracts for short-form works (such as scholarly or magazine articles), this guide does not specifically address these formats.

While this guide may be particularly useful to authors who do not have agents to help them interpret and negotiate their contracts, authors with agents may find that this guide will help them better communicate with their agents and ultimately end up with better results in negotiations. Authors with agents should be aware, however, that they may be restricted by the terms of their agency agreements from approaching their publishers directly on matters related to their contracts, or they may prefer to have their agents speak with publishers on their behalf.

## HOW WAS THIS GUIDE CREATED?

This guide is the product of extensive interviews with dozens of authors, publishers, literary agents, and copyright experts who shared their knowledge about publication contracts and the book business. In addition, we received more than fifty survey responses from authors who shared stories of negoti-




ation successes and contract regrets. Throughout this guide, these real-life stories are set out in text boxes labeled “Success Story” and “A Cautionary Tale.” Fictitious examples to reinforce key concepts are labelled “Literary Lesson.”

In addition, we analyzed nearly one hundred real publication contracts that authors shared with us for this project. Edited clauses from these contracts appear throughout this guide, including those you might want to avoid and author-friendly alternatives.

## WHAT THIS GUIDE IS NOT

This guide provides general information about common terms in book publication contracts and presents strategies for authors who wish to negotiate for more author-friendly variations. It does not apply this information to any individual author’s specific situation. This guide is not legal advice, nor does using this guide create an attorney-client relationship. Please consult an attorney experienced in handling publication contracts if you are unsure how the information in this guide applies to your particular facts or if you would like legal advice about your rights and obligations.





Publication contracts vary by country, as do contract and copyright law. This guide has been prepared and vetted with U.S. laws, standards, and practices in mind. As such, the information in this guide is most applicable to publication contracts originating in the United States.

While this guide explains many common clauses found in publication contracts, it does not cover all possible terms you may encounter or all potential options for negotiating these terms. Likewise, because authors have different priorities when it comes to what is important to them in a book deal, this guide does not provide a one-size-fits-all model contract. Instead, the information in this guide is intended to help authors understand a range of possible options for negotiation, which they can implement based on their personal goals.

## HOW TO USE THIS GUIDE

If you want a broad overview of book publication contracts, you can read this guide from front to back. But if you just want to understand (and negotiate) a few specific clauses, feel free to navigate straight to the relevant section. (If you are reading this guide in print,



the thumb index on the back cover will quickly direct you.)


If you don't know where to start, consider this: All authors share a desire to make and keep their books available to readers. For this reason, we encourage authors to devote extra attention to clauses in their contracts that affect the long-term availability of their books. For example, the rights that you grant your publisher can affect your ability to use, share, or adapt your book in the future (see **Chapter 5: The Grant of Rights Clause** and **Chapter 6: Subsidiary Rights**). And your contract may even define what you can do with future works (see **Chapter 8: Future Works**). Finally, your contract can identify the conditions under which you may be able to regain your rights to your book, such as if your work falls out of print (see **Chapter 15: Rights Reversion**).

Authors and their representatives are encouraged to use this guide as a catalyst for creative thinking about what terms need to be included in a contract to meet their publishing goals and how they might improve upon terms that their publishers have

proposed. If you come up with a solution that works for you and might be useful to other authors, let us know—it might appear as a Success Story in a future edition of this guide.



# CHAPTER 2: CONTRACT BASICS



AT ITS CORE, A CONTRACT IS SIMPLY AN agreement between parties to determine the legal rights and obligations they have to each other. Often this is in exchange for money, but it could also be in exchange for a promise to do (or not do) something in the future. Contracts can be as simple as a casual promise between friends (“If you drive me to the movies, I’ll buy your ticket”) or as complex as a multi-national treaty.

Contracts can be created in a variety of ways: orally (“Yes, let’s go to the movies”); in writing (“Here’s a cocktail napkin with an IOU for one movie ticket”); or through your conduct (driving your friend to the theatre). Contracts can even be implied in certain circumstances. Contracts can also be formed through a series of interactions. For example, a contract could be

formed through a thread of emails. But for the purposes of this guide, the terms “contract” or “agreement” refer to a formal written publication contract. The parts of a written contract are its “terms,” “clauses,” or “provisions,” which all mean the same thing.

Certain kinds of contracts, such as those that transfer exclusive copyright rights, must be in writing and signed by the book’s author (or her representative) to be valid and enforceable. (See **Chapter 5: The Grant of Rights Clause** for more information on assignments and exclusive licenses). For example, if Alyssa Author wants to give Polly Publisher the exclusive right to reproduce and distribute her work, she needs to do so explicitly in a signed, written document.

Likewise, contracts that cannot be performed within one year must be in writing and signed. For example, if Polly Publisher agrees to publish Alyssa Author’s book eighteen months after delivery of an accepted manuscript, their agreement has to be in writing and signed to be binding.




A best practice in negotiating book contracts is to make sure everything the parties agree to is written down, and that everyone signs the document reflecting this agreement. This provides a record of the agreed-upon terms and helps ensure that everyone understands the substance of the agreement.

## AREN'T ALL PUBLICATION CONTRACTS THE SAME?

There is no such thing as a “standard” contract that is applicable to all types of publishers and all books. A publisher’s willingness and ability to accommodate your preferred terms will be influenced by its business model. And while there are certainly core terms you’re likely to find in most publication contracts, how these provisions are organized and the language used to describe them will differ, sometimes significantly.


If you haven’t done so already, it is a good idea to set aside time to research potential publishers for your project before you (or your agent) start shopping your book so you can determine if your publishing needs are aligned with a particular publisher’s business goals. For example, it is uncommon for university presses to offer sizeable advances to authors—most don’t



offer advances at all—whereas advances are generally expected in trade publishing. Similarly, university presses may be more amenable to allowing books to be distributed under open access terms (like a Creative Commons license) than a trade publisher, since they are usually less concerned with maximizing profits and open access may align with their academic mission. On the other hand, trade publishers may offer advantages for certain authors. For example, they often have larger distribution networks (though online bookselling has diminished this advantage somewhat), and they may offer better marketing and advertising support. Not all publishers within a category operate in exactly the same way, however, or for the same reasons. And many publishers have imprints that publish different genres of books and follow different business models (and some university presses have substantial trade programs). The bottom line: It pays to do your research so that you can select a publisher with a business model that aligns with your interests. This increases the likelihood that you'll successfully negotiate a publication contract that meets your needs.


Notwithstanding the importance of selecting a publisher that has a business model that is compat-





ible with your goals, know that each publisher has its own preferred terms, some of which can be quite idiosyncratic. Many contracts contain terms that have been added piecemeal over time in response to specific negotiations. For example, once upon a time, a publisher decided it would be a good idea to protect itself in case it was sued for copyright infringement caused by one of its authors. Poof! An intellectual property indemnity clause was added to the publisher's contract. Another time, an author wasn't happy with the cover art her publisher picked for her last book and wanted to have a say over what art was used in the future. Tada! Approval rights were born. Because terms evolve over time, contracts often seem like the legal equivalent of Dr. Frankenstein's monster, with parts drawn from different sources and grafted together in an unruly whole. Or, in slightly less ghoulish terms, many contracts are like the Chartres Cathedral—the spires were built at different times in completely different styles, but the building still stands up.

This is important because you may encounter terms in your publisher's standard contract that are relics of past deals and that are inappropriate for your particular project. Not all provisions in a publication




contract work equally well for every author—one size does not fit all—and ideally a contract should reflect an individual author’s goals and priorities.





# CHAPTER 3: NEGOTIATION FUNDAMENTALS




THERE IS A LOT AT STAKE IN A PUBLICATION contract, so after you read the agreement and understand its contents, you should consider negotiating for terms that are most consistent with your goals. Authors may be tempted to sign a contract right away due to the excitement of receiving a publication offer. This is a mistake. The book deal is the start of a relationship between you and your publisher that will last for years, and the negotiation is your opportunity to establish the terms of that relationship so that it works for you as well as for your publisher.

## NEGOTIATION IS A CONVERSATION, NOT A CONFRONTATION

For many people, the prospect of negotiating is intimidating, conjuring images of tense situations or even hostile confrontations. This kind of “hard” negotiating scenario is common in movies and TV, but it bears little resemblance to the way most negotiations actually play out. Rather than viewing it as a competition between rivals, think of negotiating as a conversation in pursuit of a shared goal: a successful book. Thought of in this way, negotiation is a tool to help you build trust and understanding with your publisher, which can result in a mutually beneficial outcome. It is also important to remember that just as you bring something of value to the table (your book and your copyrights), the publisher does too (expertise in editing, designing, creating ebooks, distributing, marketing, and sublicensing your rights).


Nevertheless, for many authors, negotiation is understandably a daunting prospect. *If I try to negotiate, won't this offend my publisher and cause it to revoke its offer?* In all likelihood, no, especially if you negotiate in a respectful and reasonable way. In fact, being a polite, realistic advocate for yourself and your book may



engender more respect from your publisher. In most cases, the worst that can happen is that your publisher says “no” to your requests, which doesn’t leave you any worse off than you were to begin with. You can then decide whether to try to reach a compromise with an alternative version of your request, work with a different publisher, or seek additional assistance with the negotiation. Or you may choose to accept the terms and sign the contract, knowing that at least you tried to craft it to fit your goals. But if you are successful, you’ll thank yourself in the future for making the effort to negotiate for terms that work for you and your book.

## SHOULD I HAVE AN AGENT OR AN ATTORNEY NEGOTIATE FOR ME?

For many genres (such as fiction and trade nonfiction), literary agents function as gatekeepers to publishing houses. It is therefore common for authors of these types of books to be represented by agents rather than to negotiate directly. Conversely, many academic presses accept submissions directly from authors, making it less common for academic or technical authors to have agents—though it’s not unheard of, and some agents specialize in working with academic



authors. However, even if you don't *need* a literary agent, you may still want one. Literary agents typically work on commission—i.e., a percentage of your royalties. (Working with an agent may involve its own contract and terms; these types of agreements are not covered in this guide.)

Literary attorneys are lawyers who specialize in legal matters related to the business of publishing, including contractual negotiations. By law, only attorneys can give legal advice, so if you have specific questions about the legal effects of your agreement, you might need to engage with both an agent and an attorney. Typically, literary attorneys negotiate publication contracts for authors, but they do not get involved in book editing. Literary attorneys will often charge a per-hour fee, though some may work on commission like an agent.

Although it may be difficult or costly to hire an agent or an attorney, such a representative can provide expertise about how best to conduct negotiations and offer distance between you and your publisher if the negotiation gets sticky. Regardless of whether or not you have representation, understanding your own



agreements is essential to getting what you want out of the publishing relationship.

## WHAT ARE YOUR GOALS FOR YOUR BOOK?

The key to any successful negotiation is preparation.

Before you begin to negotiate, consider what you hope to gain from the relationship with your publisher.

While authors, in general, share a common goal of wanting their book to be widely read, what they hope to get out of a publishing deal may vary significantly. For example, it may be important for you to have language in your contract that allows you to:

- Retain your copyright;
- Give permission for others to freely use your book by making it openly accessible;
- Use your own work in the future;
- Protect yourself from frivolous claims that may arise from the publication of your book;
- Publish additional works on a similar topic;
- Make your book available at an affordable price;
- Provide input on design choices, like the book's cover art and title;


- Be paid fairly for your work; or
- Easily get your rights back if your publisher is no longer making your book available or your book is no longer selling well.

Whether it is retaining certain rights to your book, providing input in design choices, or making your work openly accessible or available at an affordable price, your publishing goals are personal and not necessarily reflected in a template contract.

### Literary Lesson

As an example of how authors' goals may differ, consider two archetypes: Annie Academic and Eddie Entertainer.

Annie Academic, a research scientist, is writing a scholarly monograph called *Better Living Through Biochemistry*. Annie wants her book to be taught widely in college classrooms, so she hopes to sell hard copies at a low price and to make the book available online for free. Annie also wants to make sure her contract doesn't preclude her from republishing parts of her book in scholarly anthologies and that it doesn't prevent her from publishing on a




similar topic in the future. Because Annie is paid for the time she spends writing through her academic salary, she is less concerned about royalties or advances.

Eddie Entertainer is a stand-up comedian who is writing a satiric novel called *A Coalition of Imbeciles*. Eddie is hoping that this book will propel him to fame and fortune, so he wants to be able to commercially exploit his book in as many ways as possible. Eddie hopes that his book will someday be made into a movie or a comic book, for which Eddie would like to write the script. Like many struggling comics, Eddie doesn't have stable income, so he needs a sizeable advance to be able to finish the book. Eddie also wants to have final say over the book's cover art and title.


## HOW DO I PREPARE FOR A NEGOTIATION?

First things first: You need to read the proposed contract and make sure that you understand what it means. This guide will help you decipher common legal clauses used in publication contracts, but if you still don't understand the terms you may want



to ask for clarification from your agent, attorney, or publisher. Publishers welcome the chance to explain contract terms—they want you to understand what you’re signing—and it gives you the opportunity to start the conversation. Don’t understand what “second serial rights” are? Not sure of the difference between “foreign rights” and “translation rights”? Go ahead and ask. Remember: The purpose of a written contract is to clearly identify what the parties are agreeing to in order to avoid misunderstandings in the future. There’s nothing wrong with asking for clarification or an explanation—the contract is for your benefit just as much as it is for the publisher’s.


After you’ve read and understood your contract, it is time to negotiate. The key to getting the terms you want is to ask for them. If a particular clause is important to you, be upfront about it and be ready to explain why it is important. Your publisher is more likely to give you what you ask for—or perhaps come up with an even better solution—if it knows why you want something included in your contract and how this provision relates to your goals for the book. Also, think through what concessions you’re willing to make to get the things you want, and be prepared to



compromise when you can achieve a similar outcome through a different method. For example, if you want your work to be available at a low price, you might reconsider whether your book really needs full-color images instead of black-and-white. Remember that the contract needs to be agreeable to both parties, so if you're asking for specific things from your publisher, be prepared to offer something in return.

Economics weighs heavily on the terms of any book deal, so consider both genre and the publisher's business model as you prepare to negotiate. The more you tailor your "asks" to fit within a publisher's business needs, the more likely they are to accept your changes.

Consider the popularity of books in your particular genre in terms of sales. For example, literary fiction, poetry, and academic works generally do not sell as well as crime thrillers, romance, or fantasy books, so don't be surprised if a publisher makes a less lucrative financial offer or agrees to fewer marketing or promotional commitments for works in less-popular genres. This doesn't mean the publisher doesn't believe your work is valuable or will be successful; it simply reflects the economic realities of the book trade.



Also, consider what type of publisher you are working with, what its overall business objectives might be, and whether these objectives align with your own goals. For instance, are you negotiating with a nonprofit university press that has a specific scholarly mission, a commercial publisher that is more profit-focused, or something in between? Does the publisher operate in the same way as its main competitors, or has it taken a different tack? It is crucial that you learn as much as you can about a publisher's specific business practices so that you recognize that certain contract terms might not fit a publisher's particular business model, even if the same term is commonly used by others.


Lastly, a word of warning: Make sure that the publisher you are negotiating with is a legitimate business that is able to make good on its promises. Unfortunately, there are scam artists who prey upon would-be authors. For example, a classic publishing scam is to charge authors a fee to have their book read by an editor or agent, which is simply not done by reputable publishing houses. It is a good idea to spend some time investigating the reputation of any publisher

you're considering working with before you start negotiating.

## WHAT SHOULD I EXPECT THE NEGOTIATION PROCESS TO BE LIKE?

Every negotiation follows its own trajectory, but it is not uncommon for a contract to go through multiple drafts before it is signed by the parties. Usually, this process begins with the publisher sending you its template contract with the terms it generally seeks from authors; other times, a publisher may first send an offer letter with basic terms listed. Often, it will be up to you to initiate negotiations, either by marking up the contract or corresponding with the publisher about changes you'd like to implement in the contract. You may go back and forth, each making suggestions and accepting or rejecting counter-proposals, and the contract may go through multiple drafts before the agreement is finalized.

Contract negotiations often proceed in fits and starts. Don't be surprised if it takes longer than you expect, or if the publisher initially resists making some of the changes you propose. Here, as elsewhere, persistence pays off, as does a willingness to compromise.



During this process, remember to be patient, particularly while you're waiting for the publisher to respond to proposed changes or to answer questions. Trying to rush the process rarely works to your advantage. This is particularly true if contract changes have to be reviewed by different people and departments before they can be approved. It can also be helpful to ask who has signing authority on your deal. This might be your editor, but it could also be someone higher up the ladder whom you don't regularly deal with, such as the president, director, or someone in the legal department. If this is the case, it's likely that the contract negotiation process will take longer to complete simply because more people are involved.

Don't be surprised if you are put under some pressure to sign the contract while negotiation is still underway. In fact, some publishers now have automated systems that send regular reminders to authors to sign their publication contracts, regardless of whether negotiations are ongoing. You should not feel rushed to sign a contract that has terms you are unsure of or disagree with. Try to remain calm and patient as the negotiation process unfolds.




## WHEN SHOULD I CONSIDER WALKING AWAY?

As the negotiation proceeds, it may become clear that you and the publisher just don't see eye to eye. If that happens and you've clearly reached an impasse, it's okay to walk away. Though it will undoubtedly be disappointing in the moment, it is better in the long run that you find the right publisher for your book. Remember, not all publishers are the same, and just because one wasn't a good fit doesn't mean that you can't find another that will fulfill your needs. In fact, there are more publishing companies pursuing innovative business models now than ever before. For example, some publishers specialize in publishing digital-only books, and some university presses now offer open access publishing programs for monographs. Some authors may also want to consider self-publishing, which has become a much more viable option since the advent of ebooks and "a la carte" publishing services.<sup>3</sup>

## A FEW NEGOTIATING TECHNIQUES


This guide offers a variety of author-friendly changes that you may want to try to make to your publication contract. Most of these changes fall into one of four



general types: *clarifiers*, *sweeteners*, *softeners*, and *things left unsaid*. The examples in this guide are not exhaustive, so it is a good idea to keep these four negotiating techniques in mind—and to employ them creatively as you negotiate.


*Clarifiers* are changes in particular terms that make the contract easier to understand—and follow—and that eliminate vagueness and ambiguity. For example, say your contract reads: “Author shall receive 50 percent of the amount received from translations of the Work.” Does this mean that the Author gets half of the publisher’s *gross* revenues from the book, or half of the *net* profits once the publisher has deducted its expenses? Better to say “Author shall receive 50 percent of the net amount received from translations of the Work” so there’s no confusion.

*Sweeteners* are terms added to an agreement that provide one party with an incentive to work harder. Sweeteners are often phrased as conditional statements—i.e., “if Artie does X, then Paige will do Y.” If, for instance, your publisher is anxious to get your book to market quickly, it may be willing to offer you a bonus if you complete your manuscript ahead of schedule. Or, maybe you want your publisher to aggressively market



your book to particular audiences, in which case you could offer to take a lower royalty rate in exchange for the publisher making specific marketing commitments. In addition to providing extra motivation, sweeteners also help ensure that the parties' interests remain aligned over the life of the contract. Sometimes a sweetener can be added to recognize and reward success, such as by increasing royalties when a certain number of copies of the book are sold.

**Softeners** are words and phrases that are added to existing contract language to provide a range of options other than “Yes-You-Can-Do-This” or “No-You-Can’t.” Some common softening phrases you’re likely to encounter are “material,” “good faith,” “diligent effort,” and “reasonable.” Sometimes softeners come in the form of qualifying statements, such as “to the best of the Author’s knowledge.” These phrases can be incredibly powerful. For instance, a publisher might be unwilling to give you unfettered control over your book’s jacket design, but it would be willing to grant you a “right to approve, not to be unreasonably withheld.” This is a subtle difference, but a significant one. As you analyze and negotiate your contract, think about places where you could modify the contract with



softening or qualifying language to give yourself either more control or more “wiggle room,” and also places where you might be willing to soften your requests if your publisher initially says no. *Don’t want to give me approval rights? Okay, how about a right to be consulted instead?*


Lastly, think about what isn’t included in your contract: ***the things left unsaid***. Many agreements contain a provision that states that the written contract is the final agreement between the parties. (This is often called an “integration,” “merger,” or “parol evidence clause.”) This clause means that any promises made during the negotiation process are, in most cases, unenforceable if they aren’t included in the final written document. This can be either a good or bad thing for an author, depending on what has been left unsaid. For example, if your contract is silent on your publisher’s marketing obligations, then you could end up having to plan (and fund) your own promotional events. If something is important to you, get it in writing. Conversely, there might be certain terms that you don’t want included. For example, multi-book options are generally written to favor publishers over authors (see **Chapter 8: Future Works** to learn why),

so if your contract doesn't include an option clause you might want to leave this unsaid.

Many contract provisions can be made better by clarifying, sweetening, softening, or keeping mum (or inserting missing terms, as the case may be). The only limits to what's possible are your own creative instincts and your publisher's appetite for innovation. Every term you see in a publication contract—good or bad—is based on a pattern that has emerged from negotiations in the past, and there's no reason you can't be the one to create a new template if that's what your project needs.

## ONE MORE STEP: SAVE YOUR AGREEMENT

Once you've finished negotiating your agreement, it is important to save a copy of the final publication contract—signed by both you and the publisher—as you'll likely need to refer to it in the future. For example, if you need to check the deadline for submitting your manuscript, verify how you divvied up your rights with your publisher, or check whether you are eligible to get your copyrights back, you'll need to check the contract.




Finally, keep in mind this simple mnemonic: The contract RUNS the relationship, so make sure you:

- Read everything,
- Understand what it means,
- Negotiate for what you want, and
- Save a copy of your signed agreement.




# SECTION II: THE GRANT OF RIGHTS





THE GRANT OF RIGHTS IS THE HEART AND soul of your publication contract. This provision specifies exactly which rights in your work you are giving your publisher and what it can do with these rights. The rights you give to your publisher can be broad (e.g., the right to print and sell copies of your work anywhere in the world, forever) or they can be narrow (e.g., the right to sell a limited edition in a specific market for a set period of time).

But what exactly are your rights? **Chapter 4: What Rights?** introduces what copyright is, how you get it, and how having co-authors can change that equation. Next, **Chapter 5: The Grant of Rights Clause** explains the different ways you can give your copyrights to your publisher and presents options for



limiting that grant of rights. Finally, **Chapter 6: Subsidiary Rights** discusses how your contract is likely to divide up your copyrights into different industry-specific “slices,” why these slices matter, and your options for retaining some control over them.






# CHAPTER 4: WHAT RIGHTS?



## COPYRIGHT

The U.S. Copyright Act gives authors “exclusive rights” in their works.<sup>4</sup> From the moment an original work is first fixed in a tangible form, the author becomes a copyright owner and has exclusive rights to:


1. make copies of the work;
2. sell, lend, or otherwise distribute copies of the work;
3. prepare derivative works (e.g., audio editions, revised editions, dramatic adaptations, sequels, prequels);
4. perform the work publicly; and
5. display the work publicly.



As the owner of these rights, authors may also authorize or license someone else to do these things with their works while still retaining copyright ownership. Alternatively, authors may transfer their entire copyright (sometimes referred to in publication contracts as “all rights under copyright”) or specific exclusive rights (such as the right to publicly perform the work) to someone else. When an author signs a publication contract, she licenses or transfers some or all of her rights to her publisher.

The exclusive rights of copyright are “severable,” meaning that an author can pick which ones she wants to keep and which she wants to give away. For example, Anna Author could give Becca the right to distribute copies of her manuscript, give Carl the right to publicly perform her work, and retain all other rights (such as the right to prepare derivative works like a screenplay based on her work).

It’s unlikely these five rights will be mentioned explicitly in your contract. Instead, you’ll probably come across terms like “audiobook rights,” or “serial rights,” which refer to what publishers can do with



your copyrights. Imagine your copyrights as a pie. The five different fillings baked into this pie are the exclusive right to reproduce, distribute, make derivative works, publicly perform, and publicly display the work. Each industry-specific right requires a “slice” of the copyright pie that contains different fillings. For example, the “paperback rights” to your book include the right to reproduce and distribute your work in a specific format, whereas the “audiobook rights” include those two rights—to reproduce and to distribute—as well as the right to create a derivative work (i.e., the audio recording of your book).

The copyright pie can be cut in a variety of different ways, creating different slices to precisely satisfy a publisher’s appetites, such as for a specific format, a particular geographic area, or a particular length of time. For example, the right to publish paperbacks only in France during a particular month on the full moon would be a very thin slice indeed, but entirely possible to do!

Keep in mind that having copyrights in a work is not the same as physically owning a copy of the work. When someone buys a copy of a book, they don’t automatically get the right to reproduce it. But they do

have the right to distribute that particular copy by, for example, selling that copy to a used bookstore or giving it to a friend.<sup>5</sup>

### Literary Lesson

Rhonda Rhyme is an aspiring poet known for writing her poems on napkins at local coffee shops. One day, after she writes a poem, she gives the napkin to her favorite barista. The barista then owns that copy of the poem—which she could sell or give away to someone else—but Rhonda still has the copyright. It wouldn't make a difference if the barista paid Rhonda for the napkin: The barista would still just have a physical copy and Rhonda would have the copyright.

## JOINT WORKS

When more than one author contributes to the creation of a new work and each author intends their contributions to be merged together as a whole, the copyright in that work will be shared (that is, co-owned) by the authors. In this case, the work is known as a **joint work** in copyright lingo. Sometimes it is easy to determine what is a joint work; other times, less so. Ultimately, if




each person makes valuable contributions to the work and everyone intends their contributions to end up as a “unitary whole,” they’ll likely qualify as authors of a joint work.

By law, each author of a joint work can authorize a wide range of uses of the copyright in the work without the permission of fellow co-authors. Each author can transfer her ownership interest in the work, or she can grant other people a non-exclusive license to make specific uses of the work. (This terminology is covered in **Chapter 5: The Grant of Rights Clause.**)

### Literary Lesson

John and Gregg Jamster, members of the Pistachio Brothers Band, co-wrote a hit song. John, a renowned barbecue chef in his spare time, licenses the song for use in an advertisement for his favorite brand of brisket. Gregg, a staunch vegan, is furious. But because John can grant non-exclusive licenses to whomever he wants, Gregg can’t block the use of the song in the commercial. However, as a co-owner of the song, Gregg is entitled to a share of the earnings from the commercial.




Unless they made an agreement to the contrary, each author of a joint work has a duty to give any other author a *per capita* share of revenues made from exploitations of the work, regardless of whether the co-author knew about, objected to, or supported the deal. This means that if a book has two authors, they are each entitled to 50% of the profits, even if one of the authors only did 10% of the writing.<sup>6</sup>





# CHAPTER 5: THE GRANT OF RIGHTS CLAUSE



YOUR PUBLISHER WILL NEED TO USE SOME OF your copyrights to publish your book, and it will need your permission to do so. This permission is spelled out in the *grant of rights* clause, which specifies how the copyright interests are divvied up. This chapter covers three types of grants of rights:

1. an assignment (a transfer of ownership of your copyright to your publisher);
2. an exclusive license (giving your publisher permission to do certain things with your copyright on an exclusive basis); and
3. a non-exclusive license (giving your publisher permission to do certain things with your copyright on a non-exclusive basis).

## ASSIGNMENTS

In a grant of rights clause, the word *assignment* means the transfer of ownership of one or more of your copyrights to a new owner. Following an assignment, the author of the work no longer owns the parts of the copyright that were assigned and cannot exercise those rights or license them to someone else. For instance, if you assign the reproduction and distribution rights in your book to your publisher, you no longer have the right to make or sell copies of your manuscript without its permission. This means that you cannot, for example, make and distribute copies for your reading group or class unless you have the publisher's permission or the use falls within an exception or limitation to copyright (such as fair use).<sup>7</sup>

Here's an example of a provision that assigns all copyrights:

The Author hereby assigns to the Publisher the copyright and all the exclusive rights comprised in the copyright in the Work and all revisions thereof....

The key word here is “assign”—this means you're handing over ownership to your copyrights, not just

giving permission to use them. Make no mistake: This is a big deal. You should think twice (or more) before you assign all of your copyright interests to your publisher, as your publisher may not need the whole of your copyright to make good on its obligations under the publication contract.

## EXCLUSIVE LICENSES

Like an assignment, an *exclusive license* gives a publisher the sole right to exercise the licensed rights. For example, with an exclusive license, the publisher has the right to stop a third party from issuing competing editions (including you). However, an exclusive license does not transfer ownership of copyrights. For this reason, some authors feel strongly about keeping their copyrights and prefer to grant an exclusive license rather than an assignment, even if the end result is largely the same.<sup>8</sup>

Here's an example of an exclusive license:

The Author hereby grants to the Publisher for the legal term of the copyright and any extensions thereof the sole and exclusive right to produce and publish ... the Work or any adaptation or

abridgement in all forms and media and in all languages throughout the world....

An exclusive license does not have to be for all of an author's copyright interests. An author can, for instance, grant an exclusive license to reproduce and distribute copies of her work in print form, but retain the right to control the making of derivative works (such as a film), or grant a license for derivatives to someone else.

## NON-EXCLUSIVE LICENSES

Though not common in book publication contracts, it is also possible to license your copyrights on a *non-exclusive* basis. If you do this, you will still be able to use these rights, and you can grant these rights to an endless number of different non-exclusive licensees. For example, you can grant non-exclusive licenses to both Peter Publisher and Professor Paula to reproduce and sell your book. Because the license is non-exclusive, you can still do whatever you want with your book, including making and distributing copies yourself.

(By the way, this is where our pie metaphor falls apart: Since an infinite number of people could share




a non-exclusive license, that would mean an infinitely renewing slice of pie!)

Negotiating a non-exclusive license to publish your book with a traditional publisher will likely be quite difficult, for reasons explained below, but it's not impossible. If you want to pitch your publisher on a non-exclusive license, it may help to make the case that your proposed non-exclusive arrangement is potentially just as lucrative for your publisher as an exclusive grant would be and to add sweeteners to the contract that make your proposal more enticing.

### Success Story

Eric von Hippel, an economist at MIT and a member of the *Authors Alliance* advisory board, studies the economics of distributed and open innovation. Professor von Hippel wanted to “walk the walk” and make his previously published book, *Sources of Innovation*, freely available to the public online. So, he struck a deal with his publisher: If hard copy sales declined after he made his book freely available online, he would pay the publisher \$1,000 as compensation for lost sales. If sales went up, the publisher would keep the profits and allow him



to keep posting the free version. Happily, sales of printed copies went up, so he was able to keep the free version available online. Based on the success of this experiment, von Hippel was able to negotiate a non-exclusive license with his publisher for his next two books, *Democratizing Innovation* and *Free Innovation*.


Some authors may be interested in non-exclusive licensing so that they can make their books openly available to the public. For instance, some authors have made their works available online free of charge under a Creative Commons license.<sup>9</sup> Some authors may also want to explore working with a dedicated open access publisher, which may share with the author the cost of releasing the book on open terms. (For more information on open access options, see *Authors Alliance's* guide to *Understanding Open Access: When, Why & How to Make Your Work Openly Accessible*.<sup>10</sup>) Alternatively, authors who are set on releasing their works under an open license may want to consider self-publishing their works.<sup>11</sup>

## Success Story

*Authors Alliance* founding members James Boyle and Jennifer Jenkins wanted their casebook, *Intellectual Property: Law & The Information Society*, to be available to as many law students as possible. For this reason, they decided to forgo traditional publishing and self-publish their book under a Creative Commons license, which allows students to download the book online for free. The decision has yielded unexpected benefits. For example, visually impaired students have told Professors Boyle and Jenkins that they appreciate using the open electronic text to produce a machine-generated audiobook in whatever format they choose.

## OPTIONS FOR LIMITING THE GRANT OF RIGHTS

In general, book publishing business models strongly favor assignments or exclusive licenses. Publishing a book involves a lot of upfront costs, such as developing and editing the manuscript; creating internal and cover designs; distributing multiple print and ebook formats (and the metadata that accompanies them); and



preparing marketing materials. Unfortunately, many books fail to sell enough copies to recoup these costs in addition to any advances on royalties that might have been paid to the author. (For more on advances, see **Chapter 12: Advances**.) Publishers keep the lights on by betting that some titles in the catalog will generate enough profit to offset their losses on other titles. And since no one can always accurately predict which books are going to be hits, publishers often negotiate to get as many exclusive rights as they can so that they don't miss out on future market opportunities. From a publisher's perspective, if it is going to take a financial risk on publishing your book, then it wants to share in the rewards if you turn out to be the next J.K. Rowling or Malcolm Gladwell.

But even if your publisher insists on an assignment or exclusive license of your copyrights, you can still try to negotiate author-friendly changes to the grant of rights. This is vital if holding on to certain rights is important to you for personal or professional reasons, if your publisher is unlikely to be able to exploit certain rights, or if you (or your agent) have another opportunity lined up to use certain rights. This section covers ways to shape the grant of rights to make

it more author-friendly in a way that will hopefully be mutually agreeable to you and your publisher.

### **Limit the Scope of the Rights Granted**

Grants of rights can be limited in scope, regardless of whether they are assignments, exclusive licenses, or non-exclusive licenses. A grant can narrowly define what medium (e.g., print book or audiobook) the grant covers, what the publisher can do within that medium, and in which geographic area the rights apply. For example, a publisher's grant of rights could be limited to certain languages or geographical areas, like so:

Author hereby grants to Publisher ... the exclusive right to publish the Work ... in the English language throughout the United States, its territories and possessions and the Philippine Republic, and Canada, and non-exclusively throughout the rest of the world....

With these limitations, the publisher's exclusive rights are limited to English editions in specified geographical areas, and its license to publish English language editions beyond those specified is non-exclusive.

(Check your contract carefully, since it's possible that your publisher will ask for so-called foreign rights in another part of your contract. To learn more about foreign rights, see **Chapter 6: Subsidiary Rights**.)

Here's another example, this time limiting the scope of the formats covered:

Author grants worldwide English-language rights to the Publisher to produce, publish, and sell the Work in trade paperback and electronic formats ... with the exception of audio....

Rather than providing all rights to the publisher, here the exclusive license is limited solely to the right “to produce, publish, and sell the Work in trade paperback and electronic formats... with the exception of audio.” This means that the publisher does not have rights beyond these specific uses. For example, the publisher could not produce a hardcover or audiobook version of the work.

At a minimum, take care that you aren't assigning or exclusively licensing rights that your publisher will not be able to exploit. For example, if your publisher is not in the business of producing or licensing audio-

books in foreign languages, you probably don't want to license it the rights to digital audio editions in all languages. Instead, it might be better for you or your agent to find a foreign publisher to handle these rights. If in doubt, ask your publisher about its specific experience using or licensing the full set of rights it is asking for.

### **Limit the Duration of the Grant**

Many agreements will grant rights to the publisher “for the whole term of the copyright and any extensions.” This is a very long time! In the United States, for works created by individuals after 1978, copyright lasts for the life of the author plus 70 years.<sup>12</sup> So, if your contract gives your publisher rights for the life of the copyright, this means it will retain these rights for 70 years after your death.<sup>13</sup>

For many projects, granting a publisher rights for the full term of the copyright is neither necessary nor desirable. Many books have a very short commercial life, after which a publisher has little incentive to continue marketing or commercially developing the work. If the author assigned all rights to the publisher or granted the publisher an exclusive license for the full

term of the copyright, then the author is barred from doing anything that assignment or grant covers without the publisher's permission. In some circumstances it may be easy to obtain a publisher's permission, but not always. If a publisher goes out of business, for example, it may prove impossible for an author to obtain permission to use her own work.

Therefore, an author might want to grant an exclusive license that lasts only for a specified amount of time rather than the full life of the copyright. For example:

Effective five years from the date of publication of the Work: (i) the exclusive license granted to the Publisher shall become non-exclusive; and (ii) all rights (including all copyrights) in the Work shall revert to the Author (subject to the Publisher's non-exclusive license)....


By modifying the length of the grant, authors can get more control over how their works are used in the future because they regain their copyrights after the grant has expired. If you do negotiate a limited term



grant, it is a good idea to have a plan in place for what you will do with your book when the grant ends.

### Success Story

When she published her book *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property*, Authors Alliance founding member Jessica Silbey negotiated for an innovative grant of rights to her publisher. Under the terms, her publisher obtained the exclusive right to publish the book for five years. After five years, Professor Silbey will automatically regain her copyrights and her publisher will keep a non-exclusive right to continue selling the book (under the same royalty terms). Although Silbey initially asked for the publisher's exclusive rights to be limited to three years, she was persuaded by its legitimate business interest in having exclusive rights for the first five years. This arrangement enabled her publisher to fulfill its sales objectives, while also allowing Silbey to realize her goal of making *The Eureka Myth* widely available to readers in a Creative Commons-licensed online version after five years.



Don't be surprised if you get strong resistance from your publisher if you try to negotiate for a limited-term grant. As discussed above, publishers have an incentive to want long-term rights, and many publishers will be reluctant to modify the copyright grant's duration.

That said, the more fully your publisher understands why a time limitation makes sense for your project, the more open it may be to accepting modifications—particularly if you are willing to make concessions or provide sweeteners in other parts of the contract. And if you can't get your publisher to accept a time limitation, another option is to negotiate for a strong rights reversion clause, which can protect you if your publisher stops exploiting the rights to your works. For more information on this option, see **Chapter 15: Rights Reversion**.

### **Ask for a License-Back**

If your publisher will not agree to limit the scope or the duration of the grant of rights, don't lose heart. Even if you must assign or exclusively license all or large parts of your exclusive rights to your publisher, your

publisher may be amenable to licensing specific rights back to you on either an exclusive or non-exclusive basis for certain purposes. This type of provision is known as a *license-back*. For example, you might ask for a license-back to make copies of some parts of the book for nonprofit educational uses.

Be warned, though, that some license-back terms will be easier to negotiate than others. If your publisher's business model is based upon holding exclusive rights, it is far more likely that you'll be able to get a license-back for a non-exclusive, limited use, rather than broad, exclusive rights. But, either way, your case will be more compelling if you have a convincing business reason why you want a license-back of a specific right and are able to explain how this license-back might affect your publisher's sales projections and marketing strategy for your book.

### **Insert a Revert-Back Clause**

Another tweak you might make to soften the grant of rights language in your contract is to insert a "use it or lose it" clause, also called a *revert-back* clause.

Essentially, if your publisher doesn't use or license a specific right within a set period of time, the right reverts back to you.

Here is an example of a revert-back clause in a foreign rights provision (to learn more about foreign rights, see **Chapter 6: Subsidiary Rights**):

Publisher is hereby granted the right to license foreign-language publication by other publishers not affiliated with Publisher, revocable by the Author upon written notice with respect to any language or country if no license of such rights in such language or country is entered into by Publisher within four years of initial publication.

If you ask for a revert-back clause, make sure that you allow a reasonable amount of time for your publisher to actually attempt to use or license your rights. Forcing rights to revert too soon could cause both you and your publisher to miss out on valuable opportunities.

## Success Story

Howard Zaharoff, a literary attorney interviewed for this guide, worked with an author who wrote a book that had great potential to be turned into a movie. The author was therefore hesitant to sign over motion picture rights for fear the publisher would not exploit them. But the publisher also saw the potential for a Hollywood hit and was keen to try to sell movie rights. To resolve this tension, Zaharoff helped the author secure a “use-it-or-lose-it” provision that satisfied both parties: The publisher was given three years to place the movie rights, but if the publisher did not do so in this timeframe, the author could reclaim the rights.

Don't confuse a revert-back clause with a more general rights reversion clause, which is covered in **Chapter 15: Rights Reversion**.

### Reserve Rights Not Granted

Sometimes, the phrasing of the grant of rights makes it very clear that the scope of the grant is limited to the rights specified in the contract, but not always. Therefore, to be on the safe side, you may want to insert

*rights reservation* language that clarifies that all rights not granted to the publisher are kept by the author. For example:


All rights not specifically granted to the Publisher are reserved by the Author.






# CHAPTER 6: SUBSIDIARY RIGHTS





THIS CHAPTER ADDRESSES SOME OF THE INDUSTRY-SPECIFIC RIGHTS you might see in your book publishing agreement. These rights are not listed in the Copyright Act, but they all arise from your copyrights. Think of them as really thin and precise slices that publishers cut from the copyright pie.

In general, publishers have two ways to generate revenue. The obvious and familiar way is by selling copies of books in various formats, such as hardcover (also called cloth or hardback), paperback, and ebook. But another important way publishers make money is by licensing others to use a work. For example, your publisher might want to license the right to translate your book into another language or to develop a screenplay based on your book. The rights that your publisher



can license to third parties are sometimes called “subsidiary,” “ancillary,” “secondary,” or “derivative” rights, and will often appear in a separate section of your contract from the general grant of rights. Even though they are called secondary, these rights are very important sources of revenue. In some cases, these rights generate far more money than primary print sales.

It’s important that you carefully consider which subsidiary rights you want to retain and which you want to give to your publisher to control. It is a good idea to discuss with your publisher the types of derivative uses it plans for your book and what it intends to license to third parties, and then tailor the language in your contract accordingly. In general, it’s preferable to give your publisher only the rights that it can reasonably expect to use to your mutual benefit. For instance, if your publisher has never licensed a work to be made into a movie, you may want to retain these rights and negotiate with a firm more experienced in handling these rights.

Likewise, it is important to consider how you will exploit the rights you retain. If you have an agent, your agent may serve this role, as agents typically have

experience placing subsidiary rights. If you do not have an agent, placing individual subsidiary rights can be a laborious process, so it is best to consider what business connections you have to facilitate this process or have a plan in place to exploit these rights yourself. For example, you might be able to place translation rights yourself if you've previously worked with a publisher that specializes in Spanish language editions. In this case, you may wish to retain the Spanish language rights so that you can work with that publisher again.

This chapter covers the subsidiary rights that are likely to appear in your contract and offers some ways that you can get input into how your subsidiary copyright interests are licensed.

## COMMON SUBSIDIARY RIGHTS

Publication contracts vary widely in how they refer to different rights and how these rights are organized. And not every publishing agreement will contain every possible “slice” that a publisher could possibly license. It is important, then, that you closely read your publication contract in its entirety and ask your publisher to clarify any terms or phrases that are unclear.

## Electronic Rights

While your contract may discuss *electronic rights* in the primary grant of rights provision, it may also include a separate electronic rights provision elsewhere. For example, your contract may contain a clause that deals with the right to sell versions of your work through a digital subscription service. Pay careful attention to the definition and scope of “electronic rights.” Sometimes, electronic rights will be limited to ebooks (i.e., a full-length digital version of your work). Other times, “enhanced ebooks” and “multimedia” versions of your book (i.e., electronic versions with added video and interactive features) may be included. And some publishing agreements contain broad catch-all phrases like “new technologies and other new uses.” For example:

Author grants to Publisher for the full term of copyright in the Work ... the exclusive license to publish, reproduce, distribute, display, and store the Work in all forms, formats, and media whether now known or hereafter developed....


Authors may want to be wary of broad grants like this because it’s impossible to know all the future applica-

tions of their works. Consequently, giving publishers exclusive rights to all electronic forms “now known or hereafter developed” could put authors in a situation where their publishers have rights that they are unable to exploit.

### Literary Lesson

Author Nellie Newtech signed a publishing agreement with Old Timey Books Inc. that granted Old Timey exclusive rights covering “all electronic forms now known or later invented.” Twenty years later, the most popular way to read involves a holographic rendering of the book text projected on a flat surface. Old Timey, however, refuses to make holographic copies (or license others to do so), because the company considers them a useless fad. Nellie will now miss out on a chance to reach holographic readers.

If you find your contract contains broad “now known or later invented” language, you may want to try to soften it by saying that electronic rights are limited to an “electronic form now existing” or “any electronic medium that exists as of the date on the agreement.”



That said, changing this clause is not without potential consequences. Consider this: Some contracts that were signed decades ago only anticipated print as a medium and did not give the publisher electronic rights. Some publishers are now finding that these terms prevent them from creating ebook versions of titles on their backlists. Some academic presses, for example, would like to make books on their backlists openly available online, but the contracts for these books may not have granted electronic rights. In these cases, if the publisher cannot locate the author or the author's heirs to get permission for this use, the authors of these books could miss out on opportunities to reach new audiences.

### **Paperback Rights**


*Paperback rights* allow your publisher to print and sell your book in paperback form or to license this right to another company. In the past, books were commonly published first in hardcover and later re-issued in paperback. When this happened, a different publisher sometimes would produce and market the paperback version. Today, the general practice is for one publisher

to produce both hardcover and trade paperback, or for a book to be produced only in a single print format.

Your contract might make a distinction between *trade paperbacks* and *mass-market paperbacks*. Trade paperbacks are higher quality in terms of binding, paper, and color reproduction, and they are often sold at prices closer to those for hardcover books. Mass-market paperbacks, on the other hand, are lower-quality versions, typically sold at a reduced price through alternative distribution channels, such as supermarkets and airport bookstands. As you might expect, certain genres like romance and horror lend themselves better to mass-market editions than others.

### **Audiobook Rights**

*Audiobook rights* typically cover all audible retail versions of a book. Audiobooks are produced in a variety of formats (e.g., unabridged, abridged, author-narrated) and media (e.g., CDs, digital downloads, streaming through subscription services). Audiobooks can be a major source of revenue—for some authors, they're the biggest source—and they allow you to reach a broad audience, including many people who never buy



print books. Because audiobook rights are so important, you might want to consider whether your publisher is best suited to exploit these rights, or whether you or your agent should try to license them to another company. For example, a large publishing house may have pre-existing business relationships with major audiobook platforms, whereas a smaller company may not.

### **Foreign Rights**

*Foreign rights* cover international uses of your book in its original language, either by your publisher or by a licensed third party. Typically, the geographic area that a publisher controls is tied to the language of the book. For example, U.S.-based publishers generally expect to receive exclusive rights to publish in English in the United States, its territories, and Canada. But what about English language copies sold elsewhere? These are covered by foreign rights, which are different from translation rights (discussed below).


There may be good reasons for authors with agents or authors with publishers inexperienced in foreign markets to hold onto these rights. In such cases, it could make sense to grant your U.S. publisher



an exclusive right to publish in English in the U.S. (plus its territories and Canada), and withhold the rights (or grant a non-exclusive right) to publish elsewhere. Or, alternatively, you could restrict the number of years that your U.S. publisher can exclusively publish your book outside the United States. Either approach would allow you to engage with a non-U.S. publisher (either immediately or in the future), which could be a better overall distribution strategy than relying on one company to market your book worldwide.

### **Translation Rights**

Closely related to foreign rights are *translation rights*. These are the rights to translate your work into another language. It's not uncommon for foreign and translation rights to be lumped together in the same section of a contract, but you should think about (and negotiate) them as separate sets of rights. For example, the market for foreign language books in the U.S. is quite different from the market for English language books—different stores, different distribution channels, and different marketing. For this reason, if your publisher is not active in this market, you might want to consider giving your translation rights to a company that is, even



if you otherwise decide to give your English-language publisher worldwide foreign rights (i.e., the right to sell English language versions of your book in other countries). If your contract includes translation rights, you might also want to ask for the right to approve any translations (for more information, see **Other Ways to Have a Say** below).

### **Dramatization Rights**

*Dramatization rights* permit your work to be adapted for other entertainment markets such as movies, TV shows, live theater, and radio programs.


For some authors, these rights are important, but for many they aren't worth haggling over. For instance, while undoubtedly some rheologists will be thrilled by your manifesto *Watching Paint Dry, Vol. 2 (the Second Coat)*, it's unlikely that Hollywood will be similarly enthralled. However, if you are writing a book that has potential dramatic appeal and your publisher is not experienced in licensing dramatization rights, you might consider reserving these rights and finding an agent that specializes in dramatization to sell these uses of your work.

## Commercial Exploitation Rights

*Commercial exploitation rights*, also sometimes called *merchandising rights*, cover commercial applications of your work, such as the use of it in games, t-shirts, toys, and other consumer goods. These rights are potentially lucrative for authors of popular fiction and related genres, but don't underestimate the possibilities for other types of work: There has been a lot of merchandise sold in connection with *Hamilton: An American Musical*, which is based partly on a Ron Chernow biography.

## Serial Rights

*Serial rights* (also called *serialization*) refer to the right to publish excerpts from your book in a periodical, such as a newspaper or magazine. During the Victorian era, it was common for novels to appear in serial form in weekly or monthly magazines. Charles Dickens' *The Pickwick Papers* was first published this way, as were the first Sherlock Holmes stories. Today, serial rights still play an important role in marketing and promoting new books, particularly if an excerpt can be placed in a conversation-starting magazine like *The New Yorker* or *Vanity Fair*.



There are two types of serial rights: first serial and second serial. First serial is the right to use some of a book's content *before* its publication; second serial is the right to use some of its content *after* publication. The term “serial rights” is typically used regardless of whether the use is one-time or a part of an ongoing series, though one-time uses may also be called *excerpt rights*.

### **Book Club Rights**

Book clubs are organizations that offer books to subscribers on a monthly basis. While book clubs aren't nearly as common as they once were, *book club rights* can still be important because such clubs often engage in bulk ordering. For example, in exchange for a large order from a book club, a publisher may agree to release a modified version (such as a version with a different cover) specifically for book club members.

In addition, it's not uncommon for a book to be “pre-sold” to a book club in advance of publication, guaranteeing a certain volume of sales. Book clubs are also important for authors in specific genres (like romance, mysteries, or children's books), as they

provide a means of promoting an author's work to a receptive audience.

## GETTING YOUR FAIR SHARE

No matter which subsidiary rights you transfer, the contract should specify how revenues will be divided up between you and your publisher. With revenue splits, it doesn't hurt to be overly cautious. Even if you don't think it is likely that your book will ever be turned into an audiobook or a screenplay, you may want to make sure that a revenue split for these rights is written into the contract anyway.

### Literary Lesson

Natalie Novella assigned the copyright to her short novel *Cracked-back Canyon* to her publisher. Because her publisher is a small indie press specializing in literary fiction, Natalie did not think to include any provisions concerning licensing revenues. Imagine Natalie's surprise when her publisher did a deal with WebSnap Studios to make the novel into a TV series. Since her publisher owns the copyright and the contract does not require it to share any licensing revenue, it could do the TV deal without getting

Natalie’s permission or paying her any additional royalties.

It is a good idea to include a catch-all provision that defines the split for any revenues that aren’t specifically negotiated, such as:

Publisher shall pay to the Author ... X percent of net receipts from all other subsidiary rights not mentioned.

A perennial question from authors is “how much should I be able to get?” Unfortunately, it is difficult to provide guidance on what “normal” revenue splits are because they vary widely by genre, publisher, and from author to author.

Lastly, pay attention to how your publisher is calculating the amount that it will be splitting with you. There are several different accounting methods that can be used to tally up revenues, which are discussed in **Chapter 13: Royalties.**

## OTHER WAYS TO HAVE A SAY

It might be important to you to be able to influence if, for how long, and to whom your publisher licenses subsidiary rights in your work. The same strategies for limiting grants of rights discussed in **Chapter 5: The Grant of Rights Clause** can also be applied to limit subsidiary rights. In addition, approval and consultation provisions give authors some say in how their books are used and notice provisions obligate publishers to notify authors when subsidiary rights are licensed. If you negotiate for approval, consultation, or notice rights, it is especially important to make sure your publisher always has your up-to-date contact information.

### **Approvals and Consultations**

Just because you don't own or control a particular copyright doesn't mean you don't want the opportunity to weigh in on how your publisher will use your work. Often, authors will negotiate for *approval* or *consultation rights* if their works are licensed for specific uses. For example, an author may be happy for her publisher to license reproduction of her work for educational purposes, but would want to be consulted about

any other uses. Such an approval clause could look like this:

If Publisher receives a request from an educational institution, photocopying service, or faculty wishing to reproduce the Work in limited quantities for classroom use, it may grant permission without obtaining the consent of the Author. For all other requests the Publisher will first seek the Author's consent, not to be unreasonably withheld, before granting reproduction permission.

You could also try to negotiate a general approval clause that would apply to all third-party licenses from your publisher, like so:

Publisher shall not license the Work without first obtaining the approval of the Author, which shall not be unreasonably withheld.

Note the “not be unreasonably withheld” language here, which your publisher may insist on. This phrase means that you don't have an absolute right to approve all licensing deals. Rather, your publisher is obligated to



seek your approval before licensing your work, and you are also obligated to give your approval unless you have a good reason not to.

If your publisher does not agree to a general approval clause for all third-party licenses, you could try to negotiate for a right of approval over the licensing of one or more named subsidiary rights, especially if you have a reason to want to weigh in on these specific uses.

### Success Story

An author interviewed for this guide wanted to maintain some control over the development of the audiobook version of her book and its adaptation into a screenplay. After explaining to her publisher that it was particularly important to ensure the integrity of the dialect and voices of her characters, her publisher agreed to give her the right of approval over the licensing of these subsidiary rights.

Alternatively, some publishers may not agree to approval rights, but will agree to consult you before decisions are made. This doesn't give you the same level of control as an approval right—your publisher

would still have final say in any decision—but at least it would be obligated to discuss the matter with you and to hear any concerns you may have before going forward.

### **Notice Provisions**

Your contract could also include a *notice* provision that requires your publisher to provide you with “timely notice” of any uses of the work, including licensed uses by third parties. With a notice provision, a publisher does not have to seek approval before licensing out certain rights, but it does have to notify the author when this happens. This is important, as it helps authors keep track of where their work has been published and what revenues they should expect to see on their account statements. (For more on this, see **Chapter 14: Accounting.**)



## CONTRACT CHECKLIST


### CHAPTER 5: THE GRANT OF RIGHTS CLAUSE

- Is your grant of rights an assignment, an exclusive license, or a non-exclusive license?
- Does your contract limit the scope of the rights granted?
- Does your contract limit the duration of the grant?
- Do you have a license-back for your own future uses?
- Does your contract contain a revert-back clause in case your publisher doesn't exploit certain rights?
- Does your grant of rights section reserve all rights not granted to your publisher?

#### **CHAPTER 6: SUBSIDIARY RIGHTS**

- What subsidiary rights have you granted to your publisher to use or license?
- Does your contract contain any broad language (like “all technology now known or hereafter invented,” “always,” “never,” and “lifetime”)?
- Does your contract specify revenue splits for all rights that will be licensed out, as well as a “catch all” provision?
- Do you get a right of approval or consultation for third-party licenses?
- Will you receive notice when your work is licensed?

# SECTION III: YOUR OBLIGATIONS




NOW IT'S TIME TO TAKE A CLOSER LOOK AT your responsibilities under the contract. **Chapter 7: Your Book** explains common provisions in publication contracts concerning the author's contractual obligations related to the book. **Chapter 8: Future Works** explains provisions that relate to future obligations you may owe to your publisher after your book is published.



# CHAPTER 7: YOUR BOOK





THIS CHAPTER STARTS BY COVERING WHAT commitments you'll make to your publisher regarding the manuscript and its editing process. Your contract may also ask you to make certain assurances about the contents of your book and to protect the publisher in the event of a lawsuit over your book. These important provisions are covered in the **Third-Party Permissions** and **Warranties and Indemnities** sections below.

## MANUSCRIPT

Book publication contracts have what is commonly referred to as a *manuscript* clause. Among other things, this clause specifies what your manuscript must contain (such as its subject matter and length); when it must be delivered to your publisher; and what procedures apply for revising, copyediting, and proofing the

manuscript. These provisions often appear in a stand-alone section, but don't be surprised if you find them spread out across the contract. Either way, pay close attention, because failing to meet your manuscript requirements could result in publishing delays or even termination of your contract.

### **Delivery of Manuscript**

Your contract should contain a detailed description of your book that will serve as a guide as you prepare your manuscript. It is crucial that this section be accurate, so don't be afraid to tell your publisher if changes are needed—you know your book better than anyone else. Often, this detailed description will be attached to the back of the contract as an exhibit. For example:

The Author is writing or has written a Work, as detailed in the exhibit attached to and forming part of this Agreement, provisionally entitled: [NAME OF WORK].

In addition to describing the manuscript, the delivery provisions lay out four key obligations:

1. delivery date;
2. approximate length of the manuscript;
3. delivery format; and
4. any additional material to be delivered.

As you review these terms, first make sure that you and your publisher are allowing a reasonable amount of time to complete your book. It's not a bad idea to overestimate how long a project will take to complete and to allow for contingencies. For example, if you need access to specific information that is controlled by others (say, you've requested government records that are not currently publicly available), then your contract should allow for an extension of the delivery date if circumstances beyond your control cause a delay.

Second, for books not already completed, the manuscript clause typically identifies how many words you expect to submit in the final manuscript. Typeface, line spacing, and page margins can dramatically alter document length, so it's better to use a word count rather than a page count; this way, no one is unpleasantly surprised. (Your publisher may be unhappy if your

manuscript is longer than agreed because this increases production costs and could require significant editing to trim the manuscript down.) Some contracts will even specify that a publisher can charge an author for the additional costs incurred if the manuscript is more than a set number of words.

Third, the contract should clearly state the delivery formats for your manuscript. Typically, this will be a digital copy either emailed to your publisher or submitted to an online drop box.

Fourth, if you are required to submit additional materials along with your manuscript—such as photographs, tables, illustrations, or charts—you’ll want your contract to specify exactly what materials you’re required to deliver and when they are due. The contract should also detail who will bear the costs of producing these materials. If you want to use copyrighted material from third parties in your book, review the **Third-Party Permissions** section below.


### **Conditions That the Manuscript Must Satisfy**

Most publication contracts include a *satisfactory manuscript* clause, which publishers use to protect themselves from being obligated to publish incom-

plete or poorly prepared works. This clause provides the standard for judging whether your manuscript is satisfactory to your publisher and should require your publisher to inform you in writing if your manuscript is considered unsatisfactory. Though the wording of these clauses varies considerably, they typically look something like this:

If the Author delivers the final and complete work on or before the due date, the Publisher shall, within ninety days after such delivery, notify the Author whether the work is acceptable to the Publisher in form, organization, content, and style. The Publisher may require the Author to make changes to the Work as a condition of acceptance. If the Author does not make the changes requested by the Publisher within thirty days after receipt of such request ... or if such changes to the Work are not, in the Publisher's judgment, complete and satisfactory, the Publisher may terminate this Agreement....

As a general rule, publishers will want to give themselves broad discretion in evaluating and rejecting manuscripts. This sample clause certainly achieves that



goal: Here, there are no specific limitations placed on how the publisher will determine whether a work is “complete and satisfactory,” other than the publisher’s own judgment. This gives the publisher a lot of leeway in deciding whether to accept a submitted manuscript for publication. That said, the publisher doesn’t have absolute discretion, as it still has a responsibility to act in “good faith.”<sup>14</sup> An obligation to act in good faith is implied in every contract. This means that, among other things, the parties are expected to faithfully carry out their duties under the contract, to reasonably adhere to commercial standards of behavior, and to not intentionally defraud or take unfair advantage of each other. Courts have held that this requirement prevents a publisher from rejecting a work without giving substantive editorial input to an author.<sup>15</sup> Basically, this means that the publisher must have some legitimate reason for rejecting a manuscript, such as a legal, financial, or literary concern.

Authors can clarify the standard used by their publisher by negotiating changes to the contractual meaning of “satisfactory.” For example:

The Publisher shall accept the Work, provided that it is of the extent, character, and scholarly or professional standard which has either been agreed or might reasonably be expected, and conforms in nature, scope, length, format, and style to the specifications given in Clause X as well as conforming to the original book proposal and/or synopsis....

This is a more author-friendly provision for two reasons. First, it specifies the basis on which the publisher can determine whether a manuscript is satisfactory—i.e., the work is “of the extent, character, and scholarly or professional standard” agreed to or expected. Second, it identifies specifications concerning the “nature, scope, length, format, and style,” which helps an author know whether her writing is likely to meet her publisher’s standards. To clarify further still, the author could attach to the contract a short excerpt from a work that previously met the publisher’s satisfactory manuscript clause.

If a publisher decides that a submitted manuscript is unsatisfactory, the satisfactory manuscript clause might require it to give the author specific feedback and

an opportunity to fix whatever problems it has identified with the manuscript, like so:

If the manuscript or any portion thereof delivered by the Author is not, in the Publisher's judgment, editorially satisfactory, the Publisher shall provide the Author with a written critique stating how the manuscript should be changed to make it acceptable to the Publisher and will allow the Author a reasonable period, no less than forty-five days and no more than ninety days, to revise the manuscript.

This provision requires the publisher to specify its requested changes in writing and gives the author at least forty-five days to complete the revisions. Thirty days is generally the minimum, and ninety days the maximum, time permitted for edits to the manuscript. Editing clauses also typically specify how long the publisher has to respond with comments on the manuscript (or any revisions). For example:



Publisher shall use reasonable efforts to advise Author within forty-five business days of receipt of a complete manuscript whether or not the complete manuscript is acceptable.

If an author doesn't make the requested revisions, the publisher generally reserves the right to terminate the publication contract (as discussed below in **Conditions For Termination**). And the publisher may also insert language like this into the contract:

In the event that the Author does not wish or is unable for any reason to undertake [revising the manuscript to make it acceptable], the Publisher may employ a competent editor or editors to carry out such work and any fee payable to such an editor or editors shall be deducted from any monies payable to the Author according to the provisions of this Agreement.

A clause like this not only gives the publisher the right to designate someone else to revise your book, but you will ultimately have to pay for it. All the more reason to

ask for a reasonable time frame for revisions and to do the revisions yourself.

### **Copyediting and Proofreading**

Publication contracts sometimes include an *editing clause* that specifies who is responsible for copyediting and proofing the final manuscript before publication. Sometimes this obligation falls on the publisher, but other times it is the author's responsibility. If your contract is silent or explicitly disavows the publisher's responsibility to provide copyediting and you would like the publisher to provide these services, you may want to negotiate for this to be specified in your contract. For example:

The Publisher shall perform customary copyediting of the Work, which is defined as follows: correction of grammar, spelling, punctuation, and usage; styling to achieve consistency and to conform to a commonly recognized standard; occasional rewriting or elimination of sentences for clarity; and queries and suggestions addressed to the Author for such other improvements as the Publisher may think are necessary.

If your publisher is providing copyediting services under the contract, they will often require you to participate in the process and to respond to requested changes within a specific time:

The Author will respond promptly to any questions raised by the copyeditor or the Publisher during copyediting of the Work.... Author will read, check, and correct all proofs of the Work and send corrections to the Publisher within four weeks after the Author's receipt of the proofs, failing which the Publisher may consider that the proofs have been approved and may continue with the production and publication of the Work.

Be aware that substantial revisions should be made to the manuscript before the copyediting and proofing stage. In fact, some contracts require authors to pay for significant editorial changes that are requested at these later stages:

Author agrees to be responsible for the completeness and accuracy of corrections she makes and to bear the cost of alterations of the final copy in excess of

10% of the total cost of preparing the book for publication (other than those alterations resulting from production errors).

The point of editing is to improve the readability of the work and correct any errors. If you are worried that your book may be materially altered during the editing process, you might try to add a provision that clarifies that even after delivery of the manuscript, you will still have the right to approve any substantive changes to the book:

The Publishers shall not make substantive changes to the accepted Work without the Author's approval, such approval not to be unreasonably withheld or delayed.

Additionally, one way to ensure that your book doesn't get an unwelcome makeover in the editing process is to work with an editor you know and trust. If you have a lot of clout with your publisher, you may even be able to negotiate for a *key man* or *travelling* provision. Under this clause, if collaboration with the specific editor is no longer possible (say, because she leaves the company

or retires), this provision would specify how a new editor must be selected. And, if you can't agree with your publisher on who that editor would be, a travelling clause may even give you the right to terminate your contract. However, most publishers will be resistant to this type of provision, so only make this proposal if you know a particular editor with whom you'd like to work and feel strongly that she is the best person to help you polish your manuscript.

## Indexing

In addition to requiring authors to participate in the copyediting and proofreading process, some contracts will also oblige them to prepare or pay for the *index* for the book. While some authors may prefer to prepare their own index, this can be a very costly and time-consuming task, so you might consider trying to shift the labor, and potentially the financial responsibility, to the publisher, like so:

The Publisher shall prepare an index, if required, promptly after proofs are available for making the index.

## Conditions for Termination

The manuscript section may also include language regarding *termination* of the agreement in the event of an unsatisfactory manuscript. (For more about contract termination in general, see **Chapter 17: Termination**.) It is common for publishers to have the option to terminate your contract if your manuscript does not fulfill the satisfactory manuscript clause, if you fail to meet the delivery deadline, or if you don't successfully revise the manuscript following comments from your publisher. Here is what a termination provision might look like:

If [after revisions have been made] the revised manuscript is found to be unsatisfactory to the Publisher, the Publisher may terminate this agreement by giving written notice to the Author, whereupon the Author shall return the advance already paid in full to Publisher and all rights granted to the Publisher by this agreement shall revert to the Author for Author's sole use.

In addition to specifying that the publisher has a right to terminate if the revised manuscript is unsatisfac-

tory, this provision also states that upon termination of the agreement, all copyrights granted to the publisher revert back to the author. This is important—you don't want your publisher to be able to walk away from your book deal and still hold onto your copyrights. But also note that this provision requires repayment in full of the author's advance. (For more on this topic, see **Chapter 12: Advances.**)

## THIRD-PARTY PERMISSIONS

It is common for book contracts to include terms requiring authors to deliver documents to their publishers showing that they have obtained all necessary *third-party permissions*: i.e., that the author is legally authorized to use any materials owned by third parties that are incorporated into the book. Permissions may be required to use someone else's copyrighted work—such as artwork, illustrations, or photographs. You may also need to get permission to use works in the public domain that are subject to access restrictions. For example, archives sometimes require permission and payment to reproduce works in their collections, even if the copyrights in these works have long expired.

Here's an example of a typical permissions clause:

If the Work includes textual extracts or illustrations, photographs, maps, diagrams, tables, or artwork from third-party copyrighted works, the Author shall be responsible for obtaining written permissions from the respective copyright owners to reproduce the same in the Work and shall forward the originals of the permissions to the Publisher as soon as possible after signing this Agreement and in any event, no later than the date agreed with the Publisher for delivery of materials. The costs of permissions shall be borne by the Author.

Clauses like this do not acknowledge the right of an author to rely on exceptions and limitations to copyright. For example, under certain circumstances, an author's use of a reasonable amount of another's work to prove or illustrate the author's point may be fair use, which does not require third-party permission or payment. (For more information about fair use, you may wish to consult *Authors Alliance's Fair Use for Nonfiction Authors* or the codes of best practices in fair use for




a variety of disciplines.)<sup>16</sup> If you plan to rely on fair use, you may want to ask for a clause like this:

If the Author uses any copyrighted text, tables, illustrations, or other materials in the Author's Work, whether these are the Author's own or those of another, and if this use does not meet the criteria specified in the fair use section of U.S. copyright law, the Author agrees to obtain and deliver to the Publisher proper and complete permissions to reprint such materials from the owners of the copyrights....

Although many publishers will assist their authors in obtaining necessary permissions, it is still quite common for the contract to place the ultimate burden on the author. If you are unsure how to get the required permissions and what form they should take, you might want to propose a clause like this:

Publisher agrees to assist Author by providing its required permission request forms and guidance in obtaining these rights.



Or, even better, you could try to shift the obligation to obtain permissions (and pay related fees) over to your publisher—though this is likely to be a harder sell. However, even if your publisher is contractually required to obtain all permissions, you might still want to be involved in the process. This is particularly true if you have a relationship with the owners of the content that would make it easier (and cheaper) for you to ask for permission directly. Sometimes third parties will ask for a license fee, but other times they may be willing to give permission for free as long as their work is attributed to them.

If the material you want to include in the book will be expensive to license, you could ask for the publisher to agree to pay up to a certain amount for permissions and then split any additional costs, like so:

The Publisher shall be responsible for any costs that may be associated with obtaining such permission up to \$500. Permission costs over \$500 will be shared equally by the Publisher and the Author.

It is common that this type of cost-sharing clause provides that the relevant receipts be shared to

demonstrate that the agreed-upon threshold has been reached. For this reason, it is a good idea to keep track of any permissions expenses.

Also, make sure that any permissions you receive are broad enough to enable future uses of your work, including digital rights. For example, if you hope to include materials licensed from other authors in future editions, formats, or derivative works, make sure the permission you receive covers these uses.

## WARRANTIES AND INDEMNITIES

Publishers want assurance that they won't get sued for copyright infringement or other legal violations as a result of publishing an author's book. Publishers also want assurance that if they get sued, authors will reimburse them for any costs they incur during the suit, and even pay any damages that courts may award for legal violations. This is why publishers strongly insist that **warranty** and **indemnification** clauses be included in book publication contracts. This section explains how warranty and indemnification clauses function and offers some options that you might propose to soften these clauses and lessen the potential risk they pose.

## Literary Lesson

Wanda Whistleblower gets fired from her job at Culpable Construction Corp. Furious at her former employer, Wanda decides to write a tell-all book where she reveals the company's long history of illegal activity. When her book is published, both Wanda and her publisher are sued for defamation by Culpable. Wanda's publishing agreement contains a broad indemnification clause, requiring her to defend her publisher in the event of a lawsuit and to pay any damages it might suffer. As a result, Wanda could get stuck with paying her publisher's legal bills as well as her own, even if the suit is unjustified.

## Warranties

Authors are typically required to promise (to warrant) that three things are true:

1. that the work is original and does not infringe on someone else's copyrights or other rights;
2. that the work does not defame anyone; and
3. that the work is accurate.

For example:

Author warrants and represents that the Work is original, that all the facts contained therein are true and accurate, and that the Work has not been published elsewhere, and does not infringe any copyright, proprietary, or personal right of any third party.

Publishers generally reserve the right to terminate publication contracts if authors breach any of these warranties—i.e., if it turns out that these promises were not in fact true. If you have any concerns about the meaning or scope of your warranties, you may want to consult an attorney.

***Originality and Third-Party Rights:*** As part of the warranties, you will likely have to promise that your work is original and doesn't violate anyone else's legal rights. The most significant rights in this context of warranties are copyrights (which are usually explicitly mentioned), but a book can potentially violate other intellectual

property or information rights, such as trademarks, trade secrets, and privacy rights. Plagiarism is also at issue here, and your publisher likely will want to ensure that what you submit is your own work.

As noted above in **Third-Party Permissions**, you may need permission or a license to include someone else's work in your own, but sometimes you can rely on an exception to copyright law, like fair use. (For more information about fair use, you may wish to consult *Authors Alliance's Fair Use for Nonfiction Authors* or the codes of best practices in fair use for a variety of disciplines.)<sup>17</sup>

**Defamation:** You will likely also have to promise that your work doesn't make false statements that injure someone's reputation. The legal words used in the contract may include promises that the work is not "defamatory," "libelous," "obscene," "unlawful," or "misleading." Defamation law is beyond the scope of this guide. But, because you as the author are warranting that you have not defamed anyone, you should familiarize yourself with this concept. If you have concerns, talk to your agent, editor, or a lawyer.

**Accuracy:** Your contract might also ask you to promise that the facts, or statements asserted as facts, in your book are true and accurate.

***Is There a Way to Relax the Warranties?*** Rest assured, you are not the only one feeling uncomfortable making these broad warranties about your work, especially if you're not an expert on topics like copyright law, privacy law, and defamation. One way to soften the promises you make is by including phrases known as “qualifiers” to the relevant promises. This, for example, is an unqualified promise:

All statements asserted as fact in the Work are true.

A qualified promise reads like this:

To the best of the Author's knowledge, all statements asserted as fact in the Work are either true or based upon generally accepted professional research practices.

Here, the phrases “to the best of the Author's knowledge” and “based upon generally accepted

professional research practices” narrow the scope of the promise. With these additions, the publisher would not be able to plausibly claim that the author breached her warranty because the work contained inaccurate facts unless it could show that the author knew a statement was false or was based on faulty research.

Authors commonly ask for a qualifier such as “to the best of the Author’s knowledge” to be added to a warranty clause, as it is quite reasonable to argue that they shouldn’t be potentially liable for things that they had no knowledge of at the time the warranty was made. It is therefore worth trying to negotiate a qualifier into each warranty contained in your contract.

Additionally, you could try to clarify the warranties to make sure that you don’t end up promising something over which you have no control. Take, for example, the warranty “The author warrants that the Work is original.” The final published Work might include material that your publisher contributed, not you, such as the cover art. Imagine, for example, your publisher suggested a photograph for the cover but forgot to get proper permission to use it. In this case, it’s your publisher who infringed somebody else’s



copyright, not you. To avoid such a scenario, your contract could include the following language:

The Author represents and warrants that with respect to any material prepared by the Author for the Work, such material ... shall not infringe upon or violate and copyright, trademark, trade secret or other right of the privacy of others.

Because the language used in warranty provisions is often formal and the grammatical structure torturous, it is easy to gloss over them. Resist this urge. The warranties you make are very important because inaccuracies could cause your publication contract to be terminated or the indemnification provisions to be triggered, potentially putting you on the hook for your publisher's legal expenses and any financial liabilities that may result.

### **Indemnification**

In general, to indemnify someone means that you agree to compensate that person in the event of a harm or a liability that she incurs. In a typical indemnity provision in a publication contract, you promise to pay

for any expenses your publisher incurs (including legal fees) as the result of a lawsuit involving your work.

Why are these provisions included? Imagine that a publisher is sued as a result of something an author wrote. The publisher might be able to terminate the author's contract, but even if the contract is cancelled after the fact, that doesn't make the lawsuit go away. Therefore, publishers typically require authors to agree to an indemnification clause that holds the author accountable for any damages that result from promises that the author made to the publisher that proved untrue (i.e., breaches of warranties).

Some indemnification clauses are very broad, requiring the author to indemnify the publisher against any claims, lawsuits, or demands that come from expansively defined events (such as "the publication or sale of the work"). For example:

The Author shall indemnify and hold the Publisher harmless from any claim, demand, suit, action, proceeding, or prosecution (and any liability, loss, expense, or demand in consequence thereof) asserted or instituted by reason of publication or sale of the Work or the Publisher's exercise or enjoyment

of any of its rights under this agreement, or by reason of any warranty or indemnity made, assumed, or incurred by the Publisher in connection with any of its rights under this agreement.

If your publisher proposes an indemnification provision this broad, consider asking for alternative language that limits your obligation to actual breaches of your warranties, rather than covering any lawsuit or claim that might arise.

### Success Story

*Authors Alliance* founding member Kevin Smith's publisher insisted he sign an overly broad indemnification clause in the contract for his book. Not one to let sleeping dogs lie, Smith wrote about this experience on his blog, and his thoughtful arguments caused his publisher to offer to revise his contract.<sup>18</sup> The revised indemnification clause reads as follows: Author shall indemnify and hold harmless against claims, liability, loss, or expense (including reasonable attorneys' fees) arising from a breach of the above warranties. Now the indemnification clause

is tied to a breach of the given warranties, making it clear what Smith is, and isn't, responsible for.

Even if you are able to tie your potential legal exposure to things that are within your control, fear of legal costs might rob you of sleep at night. One possible way to further soften this provision and help you get some shut-eye is to propose an exclusion of “frivolous” lawsuits from the clause. (A frivolous lawsuit is one that is without merit because of a lack of a supporting legal argument or factual basis for the claims.) If you exclude frivolous lawsuits from the indemnification clause, it means that you will only be required to indemnify your publisher in the event that a claim has merit.

However, some publishers may be reluctant to alter their indemnification clauses because their insurance policies require specific indemnity language be included in their author contracts. In this case, you could ask your publisher to add you as a named “Insured Party” under its Errors & Omissions (“E&O”) insurance policy (sometimes called a “special perils” policy) so that you would be covered in the event of a lawsuit. Alternatively, you could try to add language to the contract saying that your indemnification obliga-

tion is limited to paying a portion of your publisher's E&O insurance deductible. For example:

Author's obligation to indemnify Publisher shall be limited to one-half of the deductible in effect on the Publisher's Errors and Omissions insurance policy.


And if your publisher won't soften your indemnity obligations, consider getting your own E&O policy to protect you in the event of a lawsuit. You could also ask that your publisher's attorney review the manuscript to flag potential issues (this is sometimes called a "legal read").

As a last note, you may want to ask for the right to participate in any claims or lawsuits against your publisher where the outcome will affect you, like so:

Publisher and/or its insurer has the right to select counsel, and Publisher can settle any claim upon the terms and conditions it and/or its insurer deems satisfactory after consultation with the Author. Author may elect to participate in the defense of any such claim, demand, or suit at Author's own expense with counsel of Author's own selection.



# CHAPTER 8: FUTURE WORKS



NOW THAT YOU KNOW WHAT'S EXPECTED from you for the book that's the subject of your contract, it's time to start thinking about the future. It takes a lot of money and time for publishers to find authors who can deliver high-quality writing, so they naturally want to hold onto successful authors for as long as possible and to discourage these authors from jumping to a competitor if their books are successful. This chapter covers three clauses in a contract that may affect authors' future works: option, revised edition, and non-compete provisions.

## OPTION PROVISIONS

**Option** provisions in a publishing agreement give publishers the right (but not the obligation) to publish future books by an author. For this reason, option

provisions favor the publisher: You're obligated to give them the choice of whether or not to publish your next book, but they are under no obligation to do so. There are several different ways an option can be structured. The two most common option types are: (a) your publisher gets a right to purchase a future work on pre-set terms (say, the same terms as your first contract); or (b) your publisher gets a right of first refusal on future works. Here's a fairly author-friendly example of the latter:

The Publisher shall have the first opportunity to read and consider for publication the Author's next work of a similar nature. If the Publisher and Author are unable to agree to terms for its publication within a reasonable period, the Author shall be at liberty to enter into an agreement with another publisher provided that the Author shall not subsequently accept from anyone else terms equivalent or less favorable than those which have been offered by the Publisher.

While it may be appealing to work on your future book projects with a publisher that you already have



a relationship with, some authors prefer not to agree to option provisions and to negotiate for each future project separately. This could result in more author-favorable terms in the future, particularly if they have multiple offers for their next book.

Luckily for authors, publishers are generally willing to negotiate option provisions and sometimes will remove them altogether. Even if the publisher insists on some sort of option, there are several author-friendly modifications you can request:

- You could limit the option period to a set number of years and require the publisher to decide on any submitted work soon after submission (say, thirty days).
- You could include a right to refuse the publisher's offer. For example, some authors include language saying that the publisher's offer to publish is not binding and the author can contact other publishers.
- You could alter the provision to require only that you submit a proposal to the publisher. This would force your publisher to decide on whether it is

going to exercise its option earlier in the writing process.

- You could limit the definition of “next work” to something closely related to the original work (e.g., the next book in a series).

Be wary of option clauses that require subsequent contracts to be “on the same terms” as the original contract. You may be in a stronger position to negotiate subsequent books than you were for your first, especially if sales data is available that shows your first book performed well in the market.

## REVISED EDITIONS

Many publication contracts, especially those for non-fiction and academic works, contain a *revised edition* clause that covers publication of new editions. If your book is likely to have subsequent editions, think carefully about what you might want to do with it in the future. Some authors will want to continue writing later editions of their books; others find this to be a grind and would rather go on to other projects. Either way, your agreement should reflect what you’re willing to do

for your publisher in the future when and if revisions occur.

One option is to punt: Omit the revised edition clause and negotiate your involvement in the next edition when the time comes. Some contracts anticipate this negotiation as follows:

Any revised edition of the Work shall be subject to the agreement of the parties, as to be determined through good faith negotiation.

If your publisher won't agree to this, you may want to include language in the revised edition clause that clarifies the amount of work you'll have to do for future iterations of the book and what you'll get out of it.

### **When Will You Have to Complete a New Edition?**

If you are obliged to write revised editions, you will want to ensure that you will have enough time to put together a new edition, particularly if you anticipate making significant changes. Be realistic about how long it will take you to make revisions, set yourself a reasonable deadline, and include your revision timetable in the contract.

## **How Much of the Original Text Will You Have to Change?**

It is unlikely that either you or your publisher will want the book to be entirely rewritten with each subsequent edition. Nevertheless, you might consider including terms that limit how much text you will be required to change with each update. It's also not a bad idea to include language in the contract that requires the publisher to pay an additional advance if you're asked to surpass that limit.

## **How Will Royalties Be Calculated for a New Edition?**

Your publisher may ask for the right to hire another author to write the next edition if you are not willing or able to do so yourself. If this happens, your contract should specify the amount of royalties you will retain for each subsequent edition. For example, if the publisher hires a substitute to write the second edition of your book, you might get 75% of the royalties and the new author 25%. On the third edition, royalties may be split evenly. And on all other editions you may get 25% and the new author 75%.

## How Will the Revised Edition Be Credited?

Usually, when a new author takes over a revised edition, her name is added to the book. If it's important for you that a revised edition will be published in your name only (with credit given to the reviser in, say, the preface), you may want to specify that in your contract. You may also want to propose a procedure by which you are either consulted or have power to approve whomever the publisher wants to do the revision if you are unable or unwilling to do so yourself.

## NON-COMPETE PROVISIONS

*Non-compete* provisions restrict what types of work you can publish in the future, as well as when and where you can publish them. A publisher's rationale for wanting a non-compete provision is relatively straightforward: Non-compete clauses reassure the publisher that its investment in an author will not be undercut by the author doing a deal with another publisher for a directly competing book. It's understandable that your publisher would not want some other firm to publish similar works by you, because similar works will compete for readers' money and attention and may make your original work obsolete.

A standard non-compete provision restricts authors from publishing new works on the same topic as the work covered by the publishing agreement. This provision may last for a specific length of time, but it could also extend for the “life of the agreement.” How strict the non-compete provision is will vary from contract to contract. Some provisions restrict you from writing anything even remotely related to your original topic, whereas others might prevent you from writing a very similar book within a set period of time. A relatively broad non-compete provision may look something like this:

The Author may not, without the prior consent in writing of the Publisher, publish or edit for any other publisher any work which may reasonably be regarded by the Publisher as likely to compete with or prejudicially affect the sale of the Work or the exploitation of any rights in the Work granted to the Publisher under this Agreement.

Academic authors and nonfiction authors may need to pay particular attention to these terms because their

ability to pursue a scholarly research agenda by publishing new works on similar topics could be directly affected by these provisions.

### Success Story

As an academic author, *Authors Alliance* founding member Jessica Silbey was concerned that a standard non-compete clause would unduly limit her ability to publish other works based on her research and data. When she placed *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property*, Professor Silbey negotiated a narrowed non-compete clause that allows her to publish future works based on her research, as long as these do not function as market substitutions. This revised non-compete clause protects her publisher's investment in her book and enables Silbey to realize the dissemination goals that are crucial to her academic career.

Authors can narrow the scope of non-compete provisions by defining a competing work as one that directly harms the sale of the earlier work, by limiting the time period of the non-compete, and by limiting what it

means for the work to be “similar.” See the following example:

No Author shall, without the Publisher’s prior written consent, prepare or assist in the preparation of any other Work on the same subject as the Work that might, in the Publisher’s reasonable judgment, interfere with or injure sales of the Work.

To further limit the scope of the non-compete provision, authors may want to add language to their contracts that limits the effect of the clause to a specified number of years after the work is first published. In addition, especially if you’re an academic author, you may want to include an exception to the non-compete clause that covers scholarly or professional uses so that your contract does not unnecessarily interfere with your career. For example:

The Author may draw on and refer to material contained in the Work in preparing articles for publication in scholarly and professional journals and papers for delivery at professional meetings provided



that appropriate acknowledgment is given to the Work and the Publisher.

In some states, non-compete clauses, particularly broad ones, are unenforceable. If you feel unduly constrained by your non-compete clause, you may want to consult a lawyer to find out the extent to which you are bound by it.

## CONTRACT CHECKLIST

### CHAPTER 7: YOUR BOOK

- What are the specifications for the content, form, and delivery of the manuscript?
- Will your publisher provide specific feedback on how to revise an unsatisfactory manuscript?
- What are the conditions for termination in the event of an unsatisfactory manuscript?
- What are your responsibilities during the copy-editing and proofreading stages of book production?
- Who is responsible for obtaining and paying for permissions from third parties to include any copyrighted material in your book? Are you allowed to rely on fair use?
- What are you warranting to your publisher?
- For what are you indemnifying your publisher, and on what terms?

#### **CHAPTER 8: FUTURE WORKS**

- Do you want to give your publisher an option on your next book? If so, under what circumstances?
- Does the contract oblige you to write revised editions in the future? If so, on what terms?
- Does the contract limit your ability to publish future works on the same topic?

# SECTION IV: GETTING YOUR BOOK TO MARKET

ONCE YOU'VE DELIVERED YOUR FINAL MANUSCRIPT, it's time for your publisher to provide the finishing touches that get your book to market. **Chapter 9: The Finishing Touches** details the contract provisions that concern how your book is published, priced, and packaged. **Chapter 10: Copyright Registration** provides information about the benefits of registering copyright and the provisions that concern registering your work with the U.S. Copyright Office. **Chapter 11: Advertising and Promotion** describes provisions that govern how your work will be marketed and offers suggestions to help ensure that your book will get the attention it deserves.



## CHAPTER 9: THE FINISHING TOUCHES

CONTRACTS TYPICALLY INCLUDE CLAUSES that allocate the decision-making authority for important parts of the publishing process: When will your book be published? How much will it cost? What will the title be? What will the cover look like?

Drawing on years of experience and expertise, your publisher will likely approach most of these decisions about the publishing process with an eye towards maximizing the profit they (and you) can make from your book. You, however, might view these decisions not just from a business perspective, but also with your intellectual legacy in mind. After all, your work is a part of you, and the way it will be presented to the world will reflect back on you and influence how you are perceived by potential readers.

## WHEN WILL YOUR BOOK BE PUBLISHED?

Once you've completed the manuscript, you'll undoubtedly want to see your book in print as fast as possible. However, business plans and production workflow may dictate a different schedule for your publisher. To prevent your book ending up in limbo, your contract can include a **duty to publish** provision. This provision not only obliges the publisher to publish the book (no surprise there), but also provides a timeline for publication.

Consider the following author-unfriendly example:

The Publisher shall produce, publish, sell, rent, distribute, or transmit the Work at a time, in the manner, and at such prices as the Publisher, in its discretion, deems appropriate.

In this example, the publisher can publish the book “at a time” it deems appropriate. That means that if the publisher “deems it appropriate” not to publish the book for another three years, there’s little you can do about that. To avoid such a scenario, you may want



to include a publication timeline in the contract. For instance, it's common for a publisher to be given 18–24 months after it has accepted your completed manuscript to publish it.

The Publisher shall publish the Work within 18 months of delivery and acceptance of the manuscript.

Keep in mind that a publisher is likely to insist on exceptions to the duty to publish provision, such as for “acts of God” or “force majeure” (natural disasters) or other events beyond the publisher’s control (civil disturbances, strikes, labor disputes, and the like). It’s reasonable to let your publisher adjust its timeline if unexpected events delay publication, but once the situation is resolved, your publisher should go full steam ahead. Watch out for catch-all phrases that would allow it to push back your publication date at its sole discretion. For additional clarity, authors may also want to specify a time frame for publication if external circumstances delay the publication.

Finally, it is a good idea to include language that stipulates that rights revert to the author if the publisher fails to publish the book in a timely manner.

## THE PRICE OF YOUR BOOK


Book *pricing* is at the heart of your publisher's marketing strategy. Traditionally, it was common for publishers to release a book at different times in differently priced formats in order to maximize profits. This practice is called *windowing*. For example, ardent fans of Harry Potter (the ones who can't stand the thought of not knowing who dies in the Battle of Hogwarts) are likely to run out and buy an expensive hardcover version of the book on the first day it is released, but less motivated readers may shy away due to the book's high sticker price. For these readers, a cheaper paperback version will be made available later, usually once hardcover sales start to drop. By releasing books in different formats and prices during specific time "windows," publishers are able to both satisfy demand from different types of consumers and maximize the return on their investment. But note that the traditional windowing strategy is in decline, especially now that ebooks are commonly published simultaneously

with the first release of the hardcover or paperback book.

Your publisher will likely select a price for your book based on historical sales figures, prices of comparable books, cost of production, and other factors. Therefore, if it is important to you that your book is sold at a specific price, you can ask your publisher to share its anticipated production expenses and sales projections for your book so you can better understand its pricing strategy. For instance, say you're writing an academic book and it's important to you that it be available at a price that is affordable to students. If you understand what factors are driving your publisher's pricing decision, you could negotiate for specific changes—such as agreeing to a lesser page count or using fewer illustrations—that will help keep the price low.

### Success Story

When Pamela Samuelson, a co-founder of *Authors Alliance*, negotiated the contract for her forthcoming book, making it available at an affordable price in both hardcover and paperback editions was one of her key concerns. Therefore, before negotiating she



looked at the price of other books on similar subject matter issued by the publisher. Professor Samuelson singled out those books that had a price within her acceptable range and whose page count and format were comparable to hers, and then told her publisher she wanted her work to be priced like those books. To sweeten the deal, she offered to forgo an advance on royalties, which would reduce her publisher's upfront costs. As a result, Samuelson was successful in getting her publisher to agree to price the book in the range that she wanted.

Even if you can't get your publisher to agree to sell your book at a specific price, there are still some indirect strategies you could pursue to make your book more affordable. One strategy is to ask your publisher to release your book only in paperback, make it available as an ebook, or simultaneously release your book in hardcover and paperback. The latter option could read like this:

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The Publisher agrees to publish the Work simultaneously in hardcover and paperback.

This can help prevent your ideas from turning stale while everybody's waiting for a cheaper version of your book to be released.

### Success Story

An author interviewed for this guide regretted the long delay between the release of the expensive hardcover version of his book and the release of an affordable paperback version, especially when sales dropped significantly before the paperback was released. The author was not happy about this, as it meant that his ideas did not get the attention he hoped they would. So, for his next book, the author negotiated for the hardcover and paperback version to be released at the same time.

## THE LOOK AND FEEL OF YOUR BOOK

The format and design of the book—its cover (or “dust jacket,” if hardcover), title, and the overall look and feel—may be one of an author's highest priorities. But, at the same time, publishers have experience and knowledge when it comes to what sells best and why. Deciding how a book is designed is often a careful

balance between an author's vision and a publisher's well-honed commercial instincts.

### **Format**

Some books are only made available in ebook form, some only in paperback or hardcover, and still others are available in all three. If it is important to you that your book be available in a certain format, you may want to discuss this with your publisher to make sure it will be able to accommodate your preferences. (See *The Price of Your Book*, above, for more information about the timing of the release of various formats.)

### **Book Cover and Title**

Despite the old adage, most people do judge a book by its cover. A good *cover* and *title* can make or break a book—wouldn't you rather read *The Great Gatsby* than *Trimalchio in West Egg* (Fitzgerald's working title)? For this reason, publishers often try to maintain tight control over a book's title and cover. In fact, unless your contract says otherwise, your publisher is free to choose both. This comes as a surprise to many authors.


## A Cautionary Tale

Author Jo Schmidt provided her publisher with a detailed description of her book's protagonist as well as pictures that she thought would inspire the cover artist. However, she did not negotiate for a contractual right to approve or be consulted on the final design. Imagine Jo's unwelcome surprise when the author copies of her book arrived in the mail and her dark-haired Irish heroine had turned into a blue-eyed blonde on the cover!

To avoid getting stuck with a title or a cover you can't abide, you can try to negotiate for a provision that requires your approval of your book's cover and title or the right to be consulted by your publisher in its decision.

## Success Story

When *Authors Alliance* member Janice Rhoshalle Littlejohn negotiated the contract for her book *Swirling: How to Date, Mate, and Relate; Mixing Race, Culture, and Creed*, she encountered a provision that would allow her to pick a book cover out of three options. Because she knew that her book's theme would be



challenging to portray artistically, she crossed out this provision and added in language giving her final say over the book's cover. Her publisher accepted this change. Later, when her publisher sent Janice three unappealing book covers to choose from, Janice proposed that a graphic designer she knew should design the cover instead. Her publisher initially balked, but when she pointed out that she had final approval rights her publisher relented and gave Janice the cover she wanted.

That said, remember that your publisher wants your book to be successful too, and the choices it makes concerning the design of your book reflect your publisher's best judgment on what will help it sell. In some instances, it might be best to make your preferences known, but ultimately let your publisher make the final decision.

If you cannot get a right of approval over your book's title and cover, a good alternative is to ask to be consulted by your publisher in any design decisions. With a right of consultation, the publisher still has



the final word, but it has to consider your ideas in the process. A consultation clause might look like this:

The Publisher shall consult with Author on jacket, cover design, and copy.

### **Book Design and Production**

Beyond the cover and title, there are countless other decisions that go into a book's *design*: What dimensions should the book have? What typeface should be used? Will it have a dust jacket? Should the photos be original or stock, in color or black-and-white? Typically, these decisions are made by the publisher, as many publishers have a "house style" that reflects their corporate identity and makes their books more recognizable in stores. In addition to making marketing easier, adopting a house style also helps publishers minimize overall production costs and expedites the editorial and design process. Moreover, some standard dimensions have developed in the bookselling industry for certain types of books. While sometimes it might be advantageous for you to have a different look from

other books of its type, in other cases your book may be more pleasing to the bookseller if it can be stocked and displayed as a standard size. These are things you should freely be able to discuss with your publisher.

There are aspects of the design, however, that you should consider and, depending on your goals, negotiate. For instance, you and your publisher can discuss whether your book will be one-, two-, or full-color and if it will contain any visual material (such as photographs or illustrations). If it will be in full color, this will increase production costs significantly. Therefore, unless you are writing something where color really matters (like an art history text), your publisher is likely to recommend printing in one or two colors. If this is a problem for you, you might want to consider sweetening the deal for your publisher by making concessions in other parts of the agreement or by paying for the difference in production costs out of your royalties. This also holds true for other production values like dust jacket and paper quality. It may come down to the question of whether these things are important enough to you that you're willing to pay for them yourself.





# CHAPTER 10: COPYRIGHT REGISTRATION

#### RECALL FROM **CHAPTER 4: WHAT RIGHTS?**

that copyright exists from the moment a work is “fixed in a tangible medium” without having to do anything more. However, there are still substantial advantages to *registering* a work with the U.S. Copyright Office. If you assigned the whole of your copyright, your publisher will likely register its claim of copyright in the work. If you assigned less than the whole, the publisher can register the part that it owns, and you can register the rights you retained. And if you negotiated to keep your copyrights, you can register your whole claim of copyright yourself. In practice, it is common for publishers to register copyright in the author’s name.

Why should you or your publisher register your work? If someone infringes a work and the copyright owner wants to go to court to enforce his rights, the

work must be registered first. Further, registering a work either before an infringement occurs or within three months of publication makes the copyright owner eligible to receive statutory damages. This means that, rather than having to prove actual monetary damages from the infringement, the copyright owner can instead recover up to \$150,000 for each infringement, plus attorneys' fees. Lastly, registration within five years of publication creates a legal presumption of ownership and validity, which could give the copyright owner a defense should someone ever accuse him of infringement.

### A Cautionary Tale

An author interviewed for this guide was shocked to find her work was reused without her permission or knowledge. The author knew that she owned copyright in her work from the moment she had written it, but it wasn't until she consulted a lawyer that she learned that, because that copyright wasn't registered, her legal remedies were limited. Without the ability to collect statutory damages, she had little chance of recouping much, if any, money from the infringer, making litigation a losing proposition.

Registration also establishes a public record of copyright ownership and makes it easier for third parties to find out if the material they want to use is copyrighted and whom to ask for permission to use it. Without a public record, you could lose revenue from licensing opportunities and miss out on the chance to grant permission for uses which you would welcome even without payment.

In short, your book should be registered with the U.S. Copyright Office within three months of publication. Oftentimes, publication contracts will explicitly say who is responsible for registering a work. For example:

The Publisher shall register the copyright in the Work with the United States Copyright Office in the name of: [AUTHOR] and shall publish the Work with the copyright notice in such name....

In addition to the language above, it is a good idea to clarify that the publisher should register the work within three months of publication. Note that this provision also requires the publisher to include a copyright notice, such as © Anna Author 2018. Even

though a copyright notice is not required by law, you may want your publisher and its licensees to include one on your work as a way to let people know that your work is copyrighted and that they need permission for any use not otherwise allowed by copyright law.

You might have noticed that a lot of copyright notices include the add-on “All Rights Reserved. No part of this book may be reproduced without permission in writing from the publisher.” Legally speaking, this is not completely accurate because under U.S. copyright law, fair uses are allowed without permission from the copyright owner. What this notice may do is scare people away from using your work in ways that are allowed and encouraged by law.<sup>19</sup> Therefore, if you want to encourage fair uses of your work, you may want to negotiate that this “All Rights Reserved” language be removed or replaced with something friendlier like “All rights reserved: For permission to reproduce more of the content than the law allows, contact the publisher.”







# CHAPTER 11: ADVERTISING AND PROMOTION

**ADVERTISING AND PROMOTION** ARE LIKELY TO play key roles in the success of your book. But know that, in general, publishers don't have a duty to promote your book beyond a minimal effort. A publisher basically satisfies this obligation by listing your book in its catalogs and sending out a few promotional copies. Therefore, if there isn't specific language in your contract regarding marketing, advertisement, or promotional events, your publisher is under no obligation to provide extensive marketing services.

This might seem peculiar: Isn't it in your publisher's interests to actively promote your book? After all, your publisher has made a substantial investment in the book, and more exposure and good advertising will likely increase readership and sales, right? Fair enough, but the reality of the publishing business is that many

publishers have limited resources available for advertising and promotion. Publishers have to decide how to best channel their resources. There is only so much room on the table right at the bookstore entrance—which publishers pay for, by the way, as a part of advertising programs with bookstores.

Also, your publisher might have a different idea than you do of what good promotion looks like. For example, you might prefer for your publisher to buy an ad on a podcast that is popular with your intended audience rather than placing an ad in a newspaper, but your publisher might not see this as a good use of its advertising dollars. Therefore, if you want to ensure that your publisher devotes certain resources to marketing your book, you can try to negotiate that into the contract. Consider the following example:

The Publisher will promote the Work through its website, other Internet avenues of promotion, mailing lists, etc., as well as through published literature, which may include advertising in popular reader publications, both online and off. The Publisher will make every effort to maintain an attractive, updated website.

Even if your publisher does offer marketing services, don't assume that this takes the burden off of you to promote your own work. Often, the strongest promotion comes when there is involvement from the author. In fact, you might encounter a provision in your contract that requires you to assist in promoting your book, such as by attending events like book signings. For instance:

Author agrees to cooperate with Publisher in promoting the Work in such manner and at such mutually agreed times and places as Publisher shall reasonably request at Publisher's expense as approved by Publisher.

In addition, it may make sense for you to hire an independent publicist to promote your book. Your publisher may even be willing to cover or split the costs with you. Some authors spend a portion of their advance on independent publicity, or they accept reduced royalties in exchange for explicit guarantees concerning promotion and advertising from their publisher. (Keep in mind, though, that hiring a publicist can be expensive, with

no guarantee that it will result any additional interest in your work.<sup>20)</sup>

### Success Story

John Copenhaver, *Authors Alliance* member and author of the crime novel *Dodging and Burning*, was willing to invest in an independent publicist to make sure his book received the attention it deserved. After hearing about his plans—and perhaps encouraged by John’s own commitment to his work—his publisher offered to split the cost of hiring an independent publicist.

Alternatively, instead of trying to pressure your publisher into promoting your book, you could also incentivize it to do so by negotiating for a large advance. In doing so, you make sure that your publisher has more incentive to aggressively promote your book, as it stands to lose more money than it would otherwise.

## USE OF YOUR NAME AND LIKENESS

To help promote your work, your publisher may ask you for a photograph to include on the book jacket

and in promotional materials and for a short personal biography. This bio typically includes your name, professional experience, any past works you've published, and other details that would be helpful or interesting to potential readers. For example:

Andrew Author is an art historian who teaches at Umpqua University. An expert on the works of Salvador Dalí, Andrew's previous book *Melting Time* won a Palette Prize for nonfiction. Andrew lives with his husband, four kids, three cats, and two goats in Portland, Oregon.

Likewise, your contract may contain a ***name and likeness*** clause that specifies what personal information your publisher can use about you, and for what purposes. For example:

The Publisher shall have the right to use the name, likeness, and biographical data of the Author on any edition of the Work or on any derivative work thereof, and in advertising, publicity, or promotion related thereto without limitation, and may grant such rights in connection with the licensing of any

subsidiary rights in the Work. The Author shall provide in a timely manner any information reasonably requested by the Publisher for use in promoting and advertising the work.

Did you notice “without limitation” in the above clause? This means that the publisher would be able to use your name and likeness however it wants for the specified purposes (“advertising, publicity, or promotion”), and would not need your permission to do so. These types of provisions may also give such rights to your publisher’s affiliates or licensees.

You may be concerned about how your name and likeness will be used by your publisher. For instance, you may worry that your publisher will want to use your photograph to promote your book in a way that you find distasteful or that is inconsistent with your professional image. If so, you could include some “author approval” language into this section that requires your publisher to get permission for each use of your name or likeness. However, if you ask for this don’t be surprised if your publisher counters and asks that you be contractually obligated to respond to any approval requests from you publisher without “unreasonable delay.” This way,



your publisher doesn't have to worry about missing deadlines while it waits for your approval. (Remember, as discussed in **Chapter 6: Subsidiary Rights**, you can use this kind of softening language throughout your contract when you're negotiating for approval or consultation rights.) Don't despair if your publisher won't give you explicit approval rights; you likely still have some control over how your name and likeness are used as you'll probably be the one writing your bio and selecting your photo.

If you negotiate for approval or consultation rights, make sure your publisher always has your up-to-date contact information. This is a surprisingly common problem, so don't forget to tell your publisher when you move, change phone numbers, or get a new email address.

At present, U.S. copyright law does not provide a right of attribution (the right of an author to be credited as the author of her work) to authors of literary works. Authors publishing in the United States may therefore want to insert a clause in their publication contracts that requires the publisher to associate their name with their book. For example:

The Publisher agrees that every publication of the Work will specify that it was written by [INSERT NAME OF AUTHOR].

You may even want to specify that your name appears on the title and cover page of the book. Lastly, if you publish under a pseudonym, make sure your contract explicitly states what name will be used in all promotional materials.

## REVIEW COPIES

**Review copies** are advance printings that are sent out to reviewers before the book is released. The goal is to bring attention to the book, which hopefully will result in positive reviews and media attention.


Check to see whether your contract specifies whose responsibility it is to send out the review copies; although it is not common, some publishers expect authors to send out their own review copies. If it's your job, think long and hard about who should receive these copies. Remember, review copies are marketing tools. While it's tempting to send them to all your friends, you're probably better off sending copies to reviewers who are well-known. A well-placed positive review

can make all the difference in your book's literary and financial success.

If, as is the general practice, your publisher is responsible for distributing review copies, it may be worth asking for a list of the people to whom they intend to send the book. This will allow you to research what kind of review you might expect (if any) and what sort of audience this review might reach. Also, if there are important critics or tastemakers that aren't on your publisher's list, you can ask for them to be added. This step may be particularly important if you're writing about a niche topic and can direct your publisher to the influential people in your field.

## AUTHOR'S COPIES

Traditionally, authors receive a set number of free *author's copies* of their work from their publishers. It is not unusual to get up to 12 free copies of a hardcover edition (or more when the book is a paperback edition). But this number can vary depending on genre and format. Talk to your publisher about how many copies you want. Try to be realistic—the publisher probably won't give you a hundred copies—but at the same time, don't be afraid to ask for more.



Once the freebies are gone, you'll have to purchase additional copies just like everyone else. You may want to make sure your author's copies clause also allows you to purchase copies at a discount, usually between 40–60% off the book's retail price.



## CONTRACT CHECKLIST

### **CHAPTER 9: THE FINISHING TOUCHES**

- Is there a duty to publish provision that defines a timeline for the publication of your book?
- Is your book priced the way you want it to be?
- What say do you have in your book's format, title, cover, and design?

### **CHAPTER 10: COPYRIGHT REGISTRATION**

- Who will register the copyright with the U.S. Copyright Office and in whose name?

#### **CHAPTER 11: ADVERTISING AND PROMOTION**

- Who is responsible for promoting and advertising your book?
- Under what circumstances can the publisher use your name and likeness?
- Who is responsible for sending out review copies of your book?
- How many copies of your book will you receive for free?
- Will you receive a discount on future purchases of your book?

SECTION V:  
FOLLOW THE  
MONEY



AUTHORS DESERVE FAIR COMPENSATION FOR their work. This section is dedicated to helping you secure just that. **Chapter 12: Advances** covers the upfront payment you may receive for your book. Next, **Chapter 13: Royalties** discusses ongoing payments owed to you by your publisher—usually, a percentage of the book’s sales. Finally, **Chapter 14: Accounting** addresses the part of the contract that governs how your publisher tracks (and shares) information about sales of your work.





# CHAPTER 12: ADVANCES

OFTEN, THE FIRST PAYMENT YOU'LL RECEIVE from your publisher will be an *advance*, which is a payment credited against all or some part of your future earnings. (Note that while advances are typical in trade publishing, they are uncommon for scholarly works published by university presses.) If you receive an advance, your book must first earn back this amount before you'll receive any additional royalty payments (and possibly other payments). People in the book business often refer to this process as *earning out* or *recouping* your advance.

### Literary Lesson

If you get a \$1 royalty per book and a \$20,000 advance credited against your royalties, you'll need to sell 20,000 copies of your book to recoup your

advance. Therefore, if only 15,000 copies are sold, you will still have \$5,000 left to “earn out” before you see any royalty checks.

An author’s advance is influenced by many factors, including the potential market size for the book, whether the author is a new or established writer with an existing audience, the book’s timeliness and competition, and a publisher’s calculation of risk and reward.

A sample advance clause looks like this:

The Publisher agrees to pay the Author as an advance against all Author’s earnings accruing under the terms of this Agreement the sum of X, of which Y is payable on the signing of this Agreement and Z is payable on delivery of the final manuscript.

Advances are sometimes broken into two payments: half when the book contract is signed and the other half when the final manuscript is delivered to the publisher. However, some publishers follow a different payment schedule, and a recent trend is to break the advance into three, four, or even five payments.

You may want to think about what payment milestones make sense for your project. For example, some common milestones are the signing of the contract, delivery of the manuscript, acceptance of the manuscript, or publication. Be sure you understand the amounts that will be paid and what's required for each milestone, and make sure this works with your needs. For example, if you are writing a book that requires a lot of research and will take years to complete, it might make sense to receive payments earlier in the process than you would if you have a near-finished manuscript. One purpose of an advance is to support the completion your book, so be realistic about what you need and when you need it—authors can't live on words alone!

Less author-friendly terms delay payment until acceptance of the manuscript or until publication. These milestones force the author to wait the longest to be compensated and require some action from the publisher in order to trigger the payment. If you absolutely cannot avoid this kind of language in your advance clause, consider trying to include a schedule that has a payment deadline:

Publisher shall pay to Author as a royalty advance against all monies accruing to the Author under the Agreement, half payable upon signing of the Agreement, and half payable upon initial hardcover publication of the Work or X months from delivery of the complete manuscript, whichever is sooner.

## HOW MUCH SHOULD YOUR ADVANCE BE?

Unfortunately, there aren't any hard-and-fast rules about the size of an advance, because every book deal is based on so many variables.

Sometimes, it makes sense to negotiate for the biggest advance possible. In some parts of the book industry, such as in trade publishing, an advance is often seen as a proxy for how dedicated a publisher is to a particular book. Remember, because an advance is a credit against your royalties, if your publisher pays you a big advance, it has an incentive to market your book aggressively so that it sells enough copies to recoup this payment. Generally, you want your publisher to have

“skin in the game,” and a large advance is one way to ensure it will do its best to make your book successful.

### Success Story

An author who was interviewed for this guide wanted his book to be affordable and to be widely distributed, and he knew marketing would be important. Not being familiar with the publishing business, he hired an agent. The author and his agent pushed for a large advance in exchange for a modest cut in his royalty percentages. This way, the publisher would have the biggest financial incentive to market his book, as it stood to make more money once the author recouped. Further, the author agreed to use half his advance to hire an independent publicist to promote his book. This made it easier for his publisher to agree to a large advance as this increased the likelihood that the author’s book would be financially successful.

On the other hand, it’s possible that you may not receive an advance at all. This is more common than

many authors realize, especially outside of trade publishing. And, in certain circumstances, you might not want to take an advance. For example, your publisher may offer you a higher royalty percentage if you don't take an advance, which could result in you earning more money over the long term if your book is successful. Or, you might be able to use a low (or no) advance as a bargaining chip to get better terms in another part of the contract.

Whatever the size of the advance you settle on, it's important that you pay attention to how your advance will be recouped. Commonly, an advance is credited against "all earnings" under the contract with the publisher, meaning both royalties and money earned from subsidiary rights that are licensed to third parties, such as translation rights or movie rights. (For more on licensing of these subsidiary rights, turn to **Chapter 6: Subsidiary Rights**.) Sometimes, an advance is credited only against royalties (i.e., the money earned from selling physical or digital copies of the book—for more on royalties, see **Chapter 13: Royalties**). You may want to try to limit recoupment of your advance to royalties rather than "all earnings" because this means you could see some additional money sooner.



## Literary Lesson

Bailey Blockbuster gets a \$50,000 advance for her dark legal thriller *The Plea Bargainer*. Before the book is published, Bailey's publisher sells the movie rights to the novel for \$45,000. If Bailey's advance is calculated based on "all earnings," she won't get an additional check from her publisher as she is still unrecovered. If her advance is based on royalties only, however, she'll get her cut of the movie rights money before her advance earns out because her publisher has to pay her a percentage of third-party licensing revenues.

## WHAT HAPPENS IF YOUR BOOK DOESN'T EARN OUT?

Not every author is a bestseller, nor does every book earn back its advance. In some rare cases, your contract may specify that you have to repay the part of your advance that doesn't earn out. This shifts a lot of financial risk to you, so if your contract includes such terms, you may want to negotiate them out. But in most cases, you just won't receive any royalty payments until the advance is fully recouped.

It is important to understand whether your contract includes a **cross-collateralization** clause. A cross-collateralization clause (also called **basketing**) allows the publisher to recover any unearned advances from one book against money coming from another book by the same author. Publishers use this clause to ensure repayment of an otherwise non-recoupable advance as it allows them to count income from any of an author's books against unrecouped amounts.

### Literary Lesson

Donovan Dragon submitted the manuscript for the second book in his fantasy opus *A Song of Water and Smoke* to his publisher. The first book in the series, *A Contest of Chairs*, earned back only \$18,000 of the \$25,000 advance he received. According to his agreement, he is to receive a \$20,000 advance upon delivery of his second book, *A Melee of Monarchs*. However, when the check arrives it's for \$13,000 instead of \$20,000. Accounting error? Nope: cross-collateralization! In this case, Donovan's publisher deducted the remaining unrecouped \$7,000 from his first book from the advance for his second.


If your agreement contains cross-collateralization language—often, this will say something like “all works covered by this Agreement and any other agreement between the parties shall be considered one joint account...”—you may want to try to remove the clause completely. Short of that, specifying a dollar cap on the cross-collateralization is another way to limit its effects.

If your agreement is just for one book, it may seem like this clause won't come into play—and it won't, if this is the only book you'll ever publish with this publisher. But the cross-collateralization clause might matter a lot if you land another book deal with the same publisher, and you will likely thank yourself for paying attention the first time around.

## OTHER SITUATIONS IN WHICH YOU MAY HAVE TO REPAY AN ADVANCE

There are two additional situations where an author may have to repay his advance:

1. if the manuscript is not to the publisher's satisfaction; or
2. if the author fails to deliver a manuscript to the publisher on time (or at all).



A contract may include language in the advance clause spelling this out. Under the first scenario, the publisher might decide the submitted manuscript is unacceptable or unpublishable. If this happens, the author will usually be given the chance to fix the manuscript to make it acceptable to the publisher. (For more about satisfactory manuscript clauses, see **Chapter 7: Your Book**.) If the author can't—or won't—fix the manuscript to the publisher's satisfaction, or if the manuscript is still deemed unacceptable after revisions are made, the author may have to repay the advance and the book contract will likely be terminated. (For more information on terminating contracts, see **Chapter 17: Termination**.) However, some contracts allow an author to keep all or part of her advance, even if the publisher ultimately decides not to publish her book. If your publishing contract contains payback language, you may want to try to negotiate a change so that you are allowed to retain your advance money, especially in cases where you've made a good faith effort to provide a satisfactory manuscript.

In the second scenario, if the author fails to deliver a manuscript on time, the publisher might allow an extension. If the author fails to meet the

second deadline, the contract may allow the publisher to terminate the publishing agreement and require the author to pay back the advance.

Provisions covering this scenario often look like this:

Should the Author fail to deliver all materials specified in Clause X ... the Publisher may decline to publish the Work. If the Publisher so declines in writing, this Agreement shall terminate and ... the Author shall refund any part of any advance already paid by the Publisher within 30 days of a request in writing from the Publisher to do so.

If your contract requires repayment of your advance under similar circumstances, then pay close attention to where the repayment funds will come from. Sometimes, the advance must be repaid immediately upon termination of the book contract, which likely means you'll have to pay out of pocket. A better option is to include a *first proceeds* clause. This type of clause specifies that any money you receive from a future publication contract for the same work (say, an advance you get from another publishing house) must be used

to repay your publisher. In other words, you get to delay paying back your advance to your first publisher until you've struck a deal with another publisher. This type of clause also typically mandates that you make every effort to sell the book to another publisher to repay the first publisher's advance. And in some cases, if you don't secure another contract within a specified period of time, you may be required to pay back the advance out of your own pocket.





# CHAPTER 13: ROYALTIES



Royalties are the amount of money that authors get from the sales of their books, usually expressed as a percentage. You need to pay attention to how exactly your royalties are defined and calculated. Suppose that your contract specifies that you'll receive "10% of retail book sales." Great, you might say, but what does "retail book sales" mean, and how is it calculated? These are the key questions to ask as you're negotiating your royalty terms as there are a few different ways to define and calculate sales for royalty purposes.

There are three main types of royalties:

1. royalties based on the book's published price (also called the "list price," the "cover price," or the "manufacturer's suggested retail price");

2. royalties based on the publisher's net income from sales of the book (also called "price received" or "sales proceeds"); and
3. royalties based on the publisher's net profit.

To calculate your royalties under any of these systems, you'll need to know both the percentage you will be receiving and the price from which that percentage is taken. While this may seem overly technical, it can make a huge difference in your future bank statements. This chapter discusses each type in detail.

## PUBLISHED PRICE ROYALTIES

*Published price royalties* are based on the list price (the price printed on the book). Your royalty in this situation would be a percentage of the retail price multiplied by the number of copies sold.

$$\text{Published Price Royalty} = \text{List Price of Book} \times \text{Number of Books Sold} \times \text{Royalty Percentage}$$

For example, if your book has a list price of \$16, you sell 1,000 copies, and you receive a 10% published price

royalty rate, then your royalty check will be \$1,600: \$16 per copy x 1,000 copies x 10% royalty.

Here's an example of a published price royalty clause:

The Publisher shall pay the Author a royalty of ten percent (10%) of the retail price thereof on the Work.

## NET INCOME ROYALTIES

*Net income royalties*, also called *price received* or *sales proceeds* royalties, are like published price royalties, but with a twist. These royalties are based not on the list price of the book but on the amount the publisher receives when the book is sold to retailers or distributors.

$$\text{Net Income Royalty} = \text{Net Income per Book} \times \text{Number of Books Sold} \times \text{Royalty Percentage}$$

Because the net income the publisher received from each copy of a book is usually less than the list price, the royalty percentage rate for net income royalties is

generally higher than for published price royalties. For example, your book may have a list price of \$16 but it is sold to retailers for \$10, which means that a royalty percentage based on net income needs to be higher for you to make the same amount of money:

- \$16 list price × 1,000 books sold × 10% published price royalty = \$1,600
- \$10 net income received × 1,000 books sold × 10% net income royalty = \$1,000
- \$10 net income received × 1,000 books sold × 16% net income royalty = \$1,600

This example shows why “percentage of what?” is an important question to ask: Here, 10% of list price results in a much bigger royalty payment (\$1,600) than 10% of net income (\$1,000).

A net income royalty clause might look like this:

The Publisher shall pay the Author a royalty of twenty percent (20%) of the revenue received by the Publisher attributable to the Work.

Remember that under the net income royalty model, the list price of your book does not change your royalty,

but the actual price at which it is sold to retailers does. Therefore, it's important that you understand how your book is being distributed by your publisher and under what circumstances the price might change. For example, it's common for retailers to negotiate significant discounts to the list price, which means that your per-book royalty will be lower when sold through these retailers. (For more on this, see **Deep Discounts** below.)

Because of volume discounting, published price royalties are generally thought to be better for authors than net income royalties, as an author's per-book earnings don't change. This makes it easier for authors to keep track of and anticipate the amount of royalties they're owed.

### Literary Lesson

Sara Scary negotiates a 20% net income royalty for her new thriller, *The Emeryville Horrors*. Sara expects her book to be sold to retailers for the volume price of \$10 per copy. However, Nile Books, a major online bookseller, strikes a deal with her publisher to buy copies for \$5 each. Therefore, Sara receives \$2 for each book sold to other retailers, but only \$1 from

books sold to Nile. Had Sara known about her publisher's deal with Nile, she might have negotiated for a higher royalty percentage.

When your publisher sells books directly to consumers (say, through its own website), you may actually end up getting a percentage of the list price, even under a net income royalty model. This is because the publisher is likely selling your book directly to a consumer at full cover price, rather than to retailers at a discount.

## NET PROFIT ROYALTIES

*Net profit royalties* are based on the amount of profit that is left after the publisher deducts costs associated with producing the book, such as editing, printing, publicity, warehousing, and shipping. Net profit royalty arrangements are rare. Since the basis for a net profit royalty is far lower than in the two other types (because there is always less profit than there is gross revenue), the royalty percentage is usually significantly higher. Some net profit royalty percentages can be 50% or more.

The key to understanding this royalty structure is understanding how “net profit” will be defined by your

publisher and making sure this definition is written into your contract. Because net profits will determine your royalties, you'll want to make sure you clearly understand what expenses are factored into your publisher's net profit calculation.

Be on the lookout for vague terms like “associated costs.” You'll want to clarify these terms to avoid extra costs that are unrelated to your book, such as administrative overhead. For example, an author-friendly clause would clarify that only costs which are directly and solely related to an author's book may be deducted; this way there's less ambiguity when it's time to calculate net profits. Also, because net profit accounting can be complex, it is a good idea to include an audit clause that allows you to inspect your publisher's accounts and finances to make sure profit is calculated properly. This helps ensure that unauthorized expenses are not deducted. (For more information, see **Chapter 14: Accounting.**)

## PUTTING IT ALL TOGETHER

This side-by-side comparison of royalty models demonstrates how the royalty basis can affect an author's bottom line:

PUBLISHED PRICE	NET INCOME	NET PROFIT
Alfredo Author's book sells for \$20 list price at bookstores. His contract specifies a <b>12% published price royalty</b> , meaning he will earn \$2.40 per book sold.	Bookstores buy Alfredo Author's book wholesale for \$16 each. His contract specifies a <b>12% net income royalty</b> . Therefore, he earns \$1.92 for every book the stores buy.	Alfredo Author's book sells for \$20, but the publisher incurs \$15.20 in costs, netting \$4.80 per book. His contract specifies a <b>12% net profits royalty rate</b> . He earns \$0.58 for each book sold.

On the other hand, it's possible to earn the same amount per book under each accounting method, even if the percentage rates are wildly different.

PUBLISHED PRICE	NET INCOME	NET PROFIT
Alfredo Author's book sells for \$20 list price at bookstores. His contract specifies a <b>12% published price royalty</b> , meaning he will earn \$2.40 per book sold.	Bookstores buy Alfredo Author's book wholesale for \$16 each. His contract specifies a <b>15% net income royalty</b> . Therefore, he earns \$2.40 for every book the stores buy.	Alfredo Author's book sells for \$20, but the publisher incurs \$15.20 in costs, netting \$4.80 per book. His contract specifies a <b>50% net profits royalty rate</b> . He earns \$2.40 for each book sold.



In sum, there are two essential questions to ask when you're negotiating your royalty provisions:

1. What am I being offered a percentage of (e.g., list price, net income, net profits)?
2. How is this royalty calculated?

For some royalty structures, the math is relatively simple. Other times, the accounting is complex, requiring a detailed analysis of all the costs associated with manufacturing and selling your book. Either way, it is important that your contract be clear on how royalties will be calculated and for you to understand how your publisher's business model will influence your royalty earnings.

### Success Story

Sergio Troncoso, an author of short stories, essays, and novels, as well as a savvy negotiator, pushed for his royalties to be a percentage of the list price, reasoning that this would likely be the more lucrative option. His publisher was initially resistant, but after a few rounds of back and forth, Sergio's patience and perseverance paid off. His publisher agreed to a compromise: Rather than getting the published price

(list) royalty he had asked for, he would receive a higher percentage of the net profit royalty than was originally offered.

## OTHER FACTORS THAT MAY INFLUENCE YOUR ROYALTIES

### Escalations

Sometimes, a contract will specify that the royalty rate increases as more copies of a book are sold. These are called *escalations* or *ladders* and are common in trade book contracts. For example, you may start off at a 7.5% published price royalty rate, but after 2,000 copies sold your royalty percentage increases to 10%; then, after another 3,000 copies sold it increases again to 12.5%; and finally, after an additional 5,000 copies sold it increases again to 15%. A clause based on this structure would look something like:

The Publisher agrees to pay royalties to the Author as follows ... 7.5 percent on the first 2,000 copies sold; 10 percent on the next 3,000 copies sold, 12.5 percent

on the next 5,000 copies sold; 15 percent on all copies sold thereafter.

Escalations may also be tied to non-numeric measures of success, such as appearance on a bestseller list.

### **Small Reprintings**

Some publishers include a provision that reduces your royalties in cases where a *small reprinting* is made, often of 1,000 copies or less. The reduction in your royalties will either be by a fixed percentage (often two-thirds or three-quarters of your regular rate) or be calculated based on net income rather than list price.

This type of provision is not friendly to authors, and you may want to try to get it removed. It is a relic of the days before print-on-demand technologies, when it cost more for a publisher to do a small print run.

### **Reserves on Returns**

By industry custom, book retailers can return unsold books to publishers for a refund. Returns are quite common in publishing, which is why the *reserve on returns* clause is important. This clause allows the

publisher to withhold a portion of an author's royalties as a "reserve" against future returns.

### Literary Lesson

National chain Tons-o-Tomes has ordered 10,000 copies of your book, and, after all the math is done, you're getting \$1 per book in royalties. However, when you get your check it's only for \$8,000. Why? Because your publisher has withheld the remaining \$2,000 (20%) against the possibility of returns.

A reserve on returns clause might look something like:

In reporting sales the Publisher may withhold a reasonable reserve for future returns.

Some publishers roll reserves over every accounting period without limit. This means that if the book remains in print, the publisher can hold back a reserve indefinitely. You can try to eliminate this by including a time limit on how long the reserve can last. You could also try to specify a reserve cap, say 15% – 25% of revenues. Or you could do both. For example:

The Publisher may retain a 20% reserve for future returns for two consecutive royalty periods, provided the royalty statements indicate the amount of the reserve and how it has been applied.

You might also want to discuss with your publisher what to do with returned copies. For example, you could try to get your publisher to agree to donate returned copies to libraries, or you could ask for the option to buy unsold copies yourself at cost so that you can sell them or give them away. Keep in mind that some of the copies will come back damaged and need to be pulped.

### **Deep Discounts**

Many publication contracts will also include provisions that address reductions to an author's royalty rate for certain heavily discounted sales. Often, these provisions will define a *deep discount* or *quantity discount* as any sale that has either a "greater than 50% discount of list price" or is more than the publisher's "normal wholesale discount." Deep discount provisions are most commonly found in contracts where the normal royalty structure is based on the published price. This is because publishers don't want to be obligated to pay

authors the same amount for each copy of the book sold if some of these copies bring in far less revenue.

A deep discount clause might look like this:

From sales of the Work at discounts of 50% or more from list price ... 50% of the applicable royalty rate specified in Clause X.

If your contract contains a deep discount provision, you may want to request a copy of the publisher's current discount schedule before locking in your royalties. For instance, the deep discount provision might not be important if your publisher sells only 5% of its books at a deep discount. But if it discounts 85% of the books it sells, you'll want to take that into consideration as you're negotiating. Mind you, selling at a deep discount isn't necessarily a bad thing—bulk orders at a discount mean lots of books are being sold, after all—but it's still something you should consider as you work through the financial terms of your contract.

Sometimes, contracts will restrict the deep discount provision to “special” sales, such as non-re-turnable bulk sales. Limiting the reduced royalty rate to “sales not within the scope of normal wholesale and

retail trade bookselling channels” is a common author-friendly approach.

Another variation is to reduce the royalty in proportion to the size of the discount the publisher gives its customer—e.g., if the buyer gets a 20% discount, your royalties go down by 20% as well. This way, the reduction in earnings is shared equally between you and your publisher.

### **Remaindered Books**

If publishers have more copies of a book than they can reasonably hope to sell through normal channels, they may *remainder* these copies. This means they sell their overstock to retailers at discounts as steep as 90% off the original list price, which is often at or below the manufacturing cost. Publishers may also find a different way to dispose of remaindered books, such as donating them to libraries or destroying the books for pulp. However, as printing efficiency and technology allow for shorter print runs, remaindering is becoming less common.

Typically, the remainder clause sets out that an author’s royalties on such sales will be 10% of the net amount received for the book. These amounts are

usually minuscule. As an alternative, you may want to try for the right to buy the remaindered books so someone else can sell them, or so you can sell or give them away them yourself. Here's how that might look:

Remainder sales will not be eligible for royalties, but prior to sale to a remainder dealer, the Publisher will make reasonable efforts to notify the Author and accord the Author the opportunity to purchase all or part of such overstock at the remainder price.

This example contains a compromise between the publisher and author. Although the author agrees to forgo her royalties on the remaindered books, she is given the option to buy the remaindered copies. Ideally, you'll want to ask for the option and the standard 10%, but be ready to compromise.

Here's an even more author-friendly version:

Should the Publisher decide to remainder the balance of its inventory of the Work, such remaindering not to occur during the first twelve months after Publisher's initial publication, it shall first offer copies to the Author at the manufacturing cost of the last



printing, and the Author shall have ten business days to respond to this offer.

This example prohibits the publisher from remaining the book in its first year of life, greatly reducing the chance that it will appear on discount shelves only months after publication. If your publisher has a packed release schedule, such a clause may be worth asking for and it can give your book a fair chance to gain traction before it's pushed aside by newer titles. Note that this clause gives the author a limited period of time in which to respond to the offer, which is a common feature of these clauses.



# CHAPTER 14: ACCOUNTING

THIS CHAPTER DISCUSSES HOW YOUR PUBLISHER keeps track of the money it makes from publishing and licensing your work. (For more on these different revenue streams, see **Chapter 6: Subsidiary Rights**.) It also discusses when and how you can double-check your publisher's accounting.

## ACCOUNT STATEMENTS

Publication contracts typically require publishers to provide regular *accounting statements*. These documents list all revenues from sales of your work, in all formats, during a set period. Semi-annual or annual statements are the norm, though some publishers will issue more frequent statements. But even if your book is not a big moneymaker, it is still a good idea to specify in the

contract that you will receive detailed accounting statements. For example:

Publisher shall render to the author semi-annual statements of account for sales and Author's share of licensing proceeds ... regardless of the amount due.

The following cautionary tale is a good example of why it is important to be up to date on what is happening with the sales of your book.

### A Cautionary Tale

An author interviewed for this guide learned the hard way the importance of receiving statements from her publisher. While on vacation, she discovered that a copy of her poetry book, originally published in Belgium, had been translated and was being sold in another country without her knowledge. Because she was not receiving accounting statements, she had no idea in which countries her book was being sold, nor did she have any idea who had translated her poems, or if the translations were any good. Now, she always negotiates to make sure the contract provides her an

accounting of where her book is being sold, as well as a right of approval for any translations.

Keep in mind that some publishers' royalty statements might contain different details than others. You can ask to see a copy of the publisher's standard accounting statement to determine if any information you might want to track is omitted. Here are some examples of what you might want to know:

- number of copies sold in each royalty category (e.g., hardcover, paperback, ebook, audiobook);
- royalty rate and amount of royalties paid;
- reserve against returns currently and previously withheld;
- number of copies returned;
- amount received from third-party licenses the publisher has issued (subsidiary rights); and
- number of copies the publisher has in stock in that period.

Most royalty statements do not get this specific by default, so you may need to ask to amend the contract so that your statements will include the details you want.

Beware of provisions that provide an accounting statement only when the sum owed is greater than a certain amount, such as \$50. In practice, if sales remain low for a long time, authors will often stop receiving regular statements, which makes it difficult to keep track of how many books have ultimately been sold. Even if your book isn't selling well, information about the number of books sold, revenue, and the like is important to know, especially if you try to exercise the rights reversion clause in your agreement (see **Chapter 15: Rights Reversion** for more about this). Therefore, at a minimum, try to include a provision that lets you receive a statement by request, even if your publisher isn't obligated to provide regular accounting.

## PAYMENTS

In addition to detailing the information that will be contained in your accounting statements, your contract should also specify when your royalties get paid, how they get paid, and how you can remind the publisher to make the payment. If your contract doesn't include this, you may want to add some clarifying language. For example, you could ask to receive a semi-annual statement within a set amount of time after the close

of each period, accompanied by the payment of the amount due. You may also consider including language that specifies what recourse you have if payments are not timely made. Some contracts include clauses that allow the author to terminate the agreement if the agreed-upon payment schedule is not followed or payments are still not received within a set amount of time after written notice.

Separately, you may want to consider how any licensing income (the money made from licensing your work for use by third parties) is paid, as opposed to royalty income. If you expect to receive significant income from licensing, you might want to try to add a *pass-through* clause (also called a *flow-through* clause) to the payment section of your contract. This provision obliges your publisher to “pass through” income made from licensing on a regular basis (often monthly), rather than waiting to include it in an annual or semi-annual accounting of royalties.

### Success Story

Howard Zaharoff, a literary attorney interviewed for this guide, helped an author negotiate for a pass-through clause that required the publisher to issue a

payment to the author within 30 days of selling any subsidiary rights. As a result, when the publisher placed the rights, the author got a \$40,000 check four months earlier than he would have under the original terms of the contract.

Don't be surprised, though, if your publisher resists this kind of language. Even if holding onto your cut of licensing revenues for a longer period isn't necessary, some publishers like to make all payments to authors on the same schedule, as this helps them manage their own records and expenses.

## RECORDKEEPING AND AUDITS

Your contract should also give you the right to double-check that your publisher has correctly tallied up the sales of your book and is paying you the proper amount—that is, the right to *audit* your publisher.

The audit clause specifies exactly how you can request, and conduct, an audit. Without this clause, publishers are not contractually required to comply with an audit request or to provide access to records.



An audit clause typically requires a publisher to do the following:

- maintain accurate records for a set period (e.g., 5–7 years);
- provide access to recordkeeping documents (e.g., publisher’s accounting books, methods used to calculate royalties); and
- reimburse the author for audit expenses if the audit finds there is an underpaid amount of royalties that exceeds a certain percentage (usually 2–10%) of the amount reported and paid.

If you do not see one or more of these provisions, you can ask for them. You might also ask for a provision that would allow you to request that an independent auditor check the publisher’s accounts, which would give you and your publisher a bit more confidence in the results. But keep in mind that audits conducted by independent auditors are usually at the author’s expense and can be very pricey. Therefore, unless you hold particular suspicions about your publisher’s accounting (such as a large underpayment of royalties), it might not be worth your time and expense to request an independent auditor.

## LIMITATIONS ON AUDITING

Sometimes, publishing agreements will limit the amount of time available for authors to request an audit. This is done through a **look back** provision, which says how long you will be able to review previous royalty periods. Once this window has closed, accounting statements are “deemed final and binding.”

For example, imagine that during an audit it is revealed that the publisher made unintentional errors in accounting statements three years ago. However, the contract also specifies that the author has “six months after a statement is rendered to state specific objections to the statement,” and if the author doesn’t, “the statement shall be deemed final and binding.” Because of this provision, those three-year-old statements are final and cannot be changed. You may want to try and remove this provision entirely or ask for a longer look back period.

Another thing to look for is a clause that specifies which documents are available for review. This provision is often vague and gives the publisher discretion over which documents it shares with an author. For example, a contract might give the author the right to review “relevant records maintained by publisher” or

“all documents necessary to verify royalty payments,” but be silent as to what specific documents are “relevant” or “necessary.” A better contract provision will clarify which specific documents will be made available during an audit. For instance, you might want to require in your contract that your publisher provide a copy of your publication agreement, all royalty statements from publication date to present, records pertaining to the distribution of books, and documentation regarding copies returned.

Lastly, your contract should specify how long your publisher has to respond to any audit request and how long you have to complete your audit. If your contract does not include these deadlines, it could take a long time to get the records you need, especially if your publisher has limited resources.

## CONTRACT CHECKLIST

### CHAPTER 12: ADVANCES

- Will you receive an advance? If so, how much is it?
- Will your advance be delivered in one payment, or several?
- Will your advance be delivered on signing, on a specific date, or on the completion of a milestone event, such as manuscript delivery?
- How will your advance be recouped?
- Is your advance subject to cross-collateralization?
- Under what circumstances will you have to repay your advance, and on what terms?

#### **CHAPTER 13: ROYALTIES**

- How are your royalties calculated?
- Does your royalty rate escalate when your book sells a certain number of copies?
- Is there a limit on how much of a reserve your publisher can hold against returns? If so, for how long?
- Does your royalty rate change if your book is sold at a deep discount?
- Under what conditions can your publisher remainder your book? What is your royalty rate in the event your book is remaindered? Will you be given a chance to buy remaindered books?

#### **CHAPTER 14: ACCOUNTING**

- How often will you receive statements?
- What information will each statement contain?
- Does your contract have a pass-through clause covering licensing revenue?
- Can you request an audit of your account? If so, under what terms?

# SECTION VI: PARTING WAYS

EVEN IN THE HAPPIEST OF AUTHOR-PUBLISHER relationships, there may come a time when interests in a book diverge. It doesn't have to be an unhappy split—often, it happens because a book has simply completed its commercial life and the publisher is no longer interested in making new copies available.

**Chapter 15: Rights Reversion** discusses clauses that allow authors to get their copyrights back from a publisher if the book falls out of print or another triggering condition is met. Contracts may also be assigned from one party to another. **Chapter 16: Assignment Provisions** discusses the part of your contract that controls whether your book can be transferred from your original publisher to another publisher. Finally, contracts can be terminated when one party does not meet its obligations under the contract. This situation is addressed

in **Chapter 17: Termination.**

Admittedly, these may not be the most thrilling parts of your contract. But they are still important to read, understand, and evaluate, because they have the potential to create complications—or tremendous relief—down the road.







# CHAPTER 15: RIGHTS REVERSION

CONSIDER THE FOLLOWING SCENARIO: YOUR book has sold well over the past five years, but now its revenues have fallen to the point where it's not feasible for the publisher to continue producing, storing, and keeping track of your book. But you still want to get your ideas out to the public, and you would consider self-publishing or giving your book away for free online. Or maybe your publisher is not prepared to issue a revised version, but you've received an offer from another publisher to do so. All of these are great options, but you might have a problem: You've assigned or exclusively licensed your copyrights to your publisher, and the license hasn't expired. This means your publisher still controls the rights to your work, even if it is not actively exploiting those rights and has no plans to do so in the future.

The solution: a **rights reversion** clause—also commonly called an **out-of-print, discontinuance**, or (somewhat confusingly) **termination** clause. These provisions allow you to get some or all of your copyrights back from your publisher if certain conditions are met. (*Authors Alliance’s* guide to *Understanding Rights Reversion* outlines the steps authors can take to revert rights either by exercising contractual clauses or through negotiations with their publishers.<sup>21</sup>)

The word “termination” can actually mean three different things when it comes to your contract. First, there’s the kind mentioned above—a “termination clause” that deals with rights reversion. Second, there’s termination of the contract itself, covered in **Chapter 17: Termination**. Finally, there’s statutory “termination of transfer,” which is a right the Copyright Act gives to authors that allows them to terminate some transfers of copyright, notwithstanding contractual language to the contrary. To be eligible for statutory termination of transfer a work typically must be at least 35 years old, and notice must be given at least two years before the right is exercised.<sup>22</sup> (For information on statutory

termination of transfer, visit the *Authors Alliance/ Creative Commons Termination of Transfer Tool* at [rightsback.org](http://rightsback.org).)

There are typically three components that make up the rights reversion clause:

1. a triggering condition that must be satisfied before your book is eligible for reversion;
2. steps that must happen if the clause is triggered and you want to exercise the right to revert; and
3. any additional obligations related to the reversion.

This chapter reviews variations of these components and helps you identify terms that serve your interests and future plans.

## TRIGGERING CONDITIONS

Generally, a rights reversion clause will contain a ***triggering condition*** that must be satisfied before you have a contractual right of reversion. Since the reversion of your copyrights generally depends on the triggering condition being fulfilled, it is in your interest to precisely detail these conditions so there is no

confusion about whether they've been met. This section introduces the most common triggering conditions.

### **Out of Print**

*Out-of-print* triggering conditions are common in reversion clauses. Under this type of trigger, a book becomes eligible for reversion when the publisher ceases to keep the book “in print.” Before the advent of print-on-demand and digital technology, this usually meant that the triggering condition for reversion was satisfied when the publisher stopped printing copies of the book and had no copies or licensed editions available for sale. However, in the digital age, the definition of “in print” has become less straightforward: Is a book in print if it is only available as an ebook? What if it is only available via print-on-demand technology? Can anything be truly out of print these days?

You can avoid this ambiguity either by requesting a specific definition of what constitutes out of print in your contract, or by choosing an entirely different triggering condition.

Watch out if your contract defines a book as being in print if it is available in electronic formats or as print-on-demand without further specifying

that a minimum amount of sales is required. Without a requirement that a certain number of electronic or print-on-demand copies be sold each year, your book may effectively never go out of print. To avoid this situation, consider including language that requires a certain threshold be met for the electronic edition to be considered in print, like so:

If the Work is only available as an Electronic Book or through a form of print-on-demand capability, the Work shall not be deemed in print unless such Electronic Book and/or print-on-demand capability generates combined sales of no less than 250 copies per year.

If it's important to you that your book always be distributed in a certain format (say, as a hardcover with four-color printing), then you might try to define the reversion trigger in a way that is tied to your preferred format.

## Success Story

An author interviewed for this guide recognized the importance of a clearly defined triggering condition for reversion. Her publisher's standard contract had a rights reversion clause that was triggered by a works in-print status, but it didn't specify what it meant for the work to be in print. In particular, she was concerned that "in-print" could include digital formats. After raising this concern with her publisher, the publisher inserted a provision into the author's contract that linked the definition of "in print" to the availability of hard copy print formats.

## Earning and Sales Thresholds

In order to avoid difficulties in interpreting what the phrases "out of print" or "in print" mean, some publishers have shifted to reversion clauses based on the amount of revenue earned or the number of copies sold. Under these clauses, books become eligible for reversion if the revenue earned or number of copies sold in a given period of time falls below a certain threshold.

For example, if an *earning threshold* is the trigger, an author is eligible to revert rights when royalties dip



below a certain amount. Such clauses typically specify that a work is deemed out of print if the author earns less than a certain amount in any given royalty period.

### Success Story

Pamela Samuelson, a co-founder of *Authors Alliance*, wanted to make sure that she could get her rights back if her book was no longer selling well. The original version of her publication contract included a triggering condition that was based on the availability of English-language editions. Concerned that the mere availability of an ebook version of her book, regardless of sales, would mean that this triggering condition would never be met, Professor Samuelson negotiated for a change to the publisher's standard triggering condition. After some initial resistance from the publisher and through persistent but respectful communication explaining her concerns, her reversion clause now is triggered if author earnings fall below a certain level. The clause now also directs the parties to discuss open access or similar distribution as an alternative to a full reversion of rights.

Another possibility is to use a *sales threshold*, where reversion is triggered if the publisher sells fewer than a certain number of copies:

In the event that the sales of the Publisher's edition(s) of the Work in print format and in any ebook format(s) are fewer than the average of 50 copies annually in any two consecutive calendar years ... the Author may request to have all rights granted to the Publisher under this Agreement reverted....

If your book isn't a particularly high royalty-earner, or if copies are often sold at a deep discount, an earning threshold may be a better alternative than a sales threshold.

### **Stock Threshold**

Although not common today, some reversion clauses include triggering conditions that are based on the publisher's stock of a book. Under these clauses, a book becomes eligible for reversion if the publisher's stock of the book falls below a specified *stock threshold*.

This kind of triggering condition doesn't have much bite, because if the publisher is willing to set aside room to keep a certain number of copies around, it can prevent you from ever getting your rights back. Further, it can be difficult for an author to find out how many copies the publisher has in its inventory.

### **Hybrid Triggers**

Many contracts include *hybrid* triggering conditions that mix-and-match different types of triggering criteria. For example, a contract could say that reversion is triggered if the publisher stops offering physical copies for sale and sells fewer than 250 electronic copies per accounting period. This means that if a publisher ends physical production, the reversion clause wouldn't be triggered so long as the publisher continues to actively sell the book in digital form. Another hybrid form would be to combine a sales and earnings threshold, where a book has to sell a set number of copies and has to earn a certain amount in royalties for it to remain "in print."

Remember that although this section has presented several common examples of triggering conditions, a right of reversion can be triggered by any

condition you and your publisher agree to. Whatever triggering condition you settle on, try to tailor it to your overall publication goals, even if this results in a somewhat unconventional set of conditions.

## INITIATING A REVERSION

Once you've established a clear triggering condition, your contract should precisely define what happens when that condition is triggered. Consider this author-*unfriendly* rights reversion clause as an example of what not to do:

If the Work has been declared out of print by the Publisher in the United States, the Publisher may, but shall not be obligated to, offer to revert rights to the Work to the Author.

Under these terms, rights reversion may never occur, even if the out-of-print condition has been triggered, as reversion is left entirely to the publisher's discretion. Instead, you want your contract to specify that, once the triggering conditions are met, your copyrights will revert to you and your publisher is obligated to provide all necessary documentation of that fact.

Commonly, rights reversion provisions require that an author first gives notice to her publisher that the triggering condition has been met. After notice is received, the publisher may be allowed a certain amount of time—typically two to six months—to “cure” the triggering event and avoid reversion. For example:

If [triggering condition], then the Author may give notice in writing to the Publisher to reprint or reissue the Work. If no agreement is reached for the reprinting or reissuing of the Work within 3 months of the Author’s request, all the Publisher’s rights in the Work shall terminate.

It is a good idea to include language that specifies that the publisher must provide the author with a letter within a set time confirming that all rights granted under the agreement have reverted to the author.

## ADDITIONAL OBLIGATIONS

There are a few additional issues related to reversion that you may want to make clear in your contract. For instance:

- Will your publisher give you the rights to the cover and other art or materials, or offer to sell them to you at fair market value? Will this include both the copyrights to the work and also the physical documents?
- Will your publisher give or sell you the digital design files of the book?
- Will your publisher give you the option to purchase any remaining inventory at cost?
- Are there any outstanding licenses of your work to third parties? If so, what are the terms of these agreements with the publisher? How will these licenses be treated now?
- When will you receive any unpaid royalties that accrued prior to reversion?

Here's an example that addresses some of these issues:

Upon reversion, the Author may, within 30 days, purchase [all production materials and digital files] and any remaining copies at cost, or at the remainder price, whichever is lower; otherwise, the Publisher may dispose of said materials, subject to the royalty provisions of this Agreement.

One potential problem with this example is that it specifies that you can acquire the production materials and digital files that you would need to produce additional copies of your book, but it doesn't mention whether you can acquire ownership or permission to the copyrights that reside in these materials. For example, you may need to acquire both the source files and a copyright license to reuse cover art that was created (or commissioned) by your publisher. A better clause would therefore address both physical materials and intellectual property rights needed for future printings.

Finally, make sure that you have a plan for your book once you revert rights. See *Authors Alliance's* guide to *Understanding Rights Reversion* for more information on this topic.<sup>23</sup>



# CHAPTER 16: ASSIGNMENT PROVISIONS



OFTEN, AN AUTHOR CHOOSES A PUBLISHER for very specific reasons, such as the ability to work with a particular editor, the acclaim given to other books in the publisher's catalog, or because of the publisher's marketing acumen. Similarly, it's important to many authors that their publishers have a good reputation and that they don't engage in business practices or promote ideas that the author doesn't agree with. Given how closely authors, editors, and publishers work together during the publishing process, authors want to feel secure in their decision and know they'll be in good hands. This is why the assignment provisions of a contract are important.

Recall that **Chapter 5: The Grant of Rights Clause** discussed assignments that are transfers of *copyrights* from one party to another (e.g., from

an author to a publisher). This chapter addresses something slightly different: the transfer of *contractual rights* from one party to another. In the context of a book publication contract, assignment clauses usually come into play when a publisher wants to assign the right to publish an author's work to another company, often as part of a merger or acquisition of one of the companies. For example, if publisher Tiny Tomes, Inc. is acquired by Big Books Corp., Tiny Tomes may want to assign all of its publication contracts over to Big Books as part of the sale.

Assignment provisions determine whether the contract parties are free to assign their rights and obligations under the contract to other parties. (Again, don't confuse this with the assignment of copyright.) If a contract is assigned to a third party, the "assignee" takes over all the rights and obligations of the "assigner" of the contract. In the example above, Big Books would take over Tiny Tomes' rights and obligations in the publication contract when Tiny Tomes assigns them. Depending on to whom it is being assigned, an assignment of your contract could have positive as well as negative implications—that's why it's good for you to have some say in the process.

A very author-*unfriendly* clause would say that the publisher is free to assign the contract to other parties without the author's consent, whereas the author would still have to fulfill all of his obligations under the contract. For example:

This Agreement is personal to the Author but the Publisher expressly reserves the right to assign or license its rights and obligations under this Agreement in whole or in part.

With such a clause, the author has no influence whatsoever on who his future publisher is going to be. If this thought causes your pulse to quicken, you'll probably want to limit your publisher's ability to assign your contract in some way, like so:

***Assignment Clause #1:*** Neither party to this Agreement may assign any of its rights or obligations under this Agreement without the consent of the other party, such consent not unreasonably to be withheld.

But don't be surprised if your publisher prefers a clause that spells out scenarios in which your consent is not required:

***Assignment Clause #2:*** No assignment, except to a parent, affiliate, or subsidiary of the Publisher or as part of the merger or sale of substantially all the assets of the Publisher, shall be binding on either of the parties without the written consent of the other.

Notice the difference? The second clause is in fact a little less author-friendly than the first one. To see how, imagine that your publisher gets acquired by a less prestigious publishing house. Under the first clause, this might be a valid reason for you to withhold your consent to the assignment. But under the second clause, written consent is not required in the case of a “merger or sale,” so your contract can be assigned even if you protest.

Regardless of what type of assignment provision you and your publisher settle on, you might also want to consider adding language that requires your publisher to provide you with notice if your contract is assigned. That way, even if your publisher doesn't have to get

your permission ahead of time, it will still have to let you know if an assignment happens. Also, you could add a provision requiring that any transfer that impacts the copyrights in the work (e.g., your publisher assigns its rights to a third party) be recorded with the U.S. Copyright Office. Doing this will help maintain a clear chain of title for the copyrights and could prevent a work from becoming an “orphan” (a work for which a copyright owner cannot be identified or found) in the future, if it becomes unclear who owns what rights. Finally, authors may want to review royalty statements from the new publisher after an assignment to be sure that their new publisher is calculating payments according to the agreed-upon terms.



# CHAPTER 17: TERMINATION

TERMINATION PROVISIONS DESCRIBE WHEN and how an agreement can be ended if one party has not met its obligations under the contract. Termination provisions may show up throughout the contract (e.g., in the manuscript section as well as in the rights reversion section), or they may be consolidated into a single section.

## TERMINATION CONDITIONS

Sometimes, a contract's termination provisions will be very specific, which might look something like this:

The Author may terminate this Agreement immediately by notice in writing if the Publisher ... has failed to publish the Work in accordance with Clause X and

has failed to remedy that breach within a reasonable time following notice from the Author to do so.

Other times, termination provisions can be more general, such as when the provisions simply say that the contract may be terminated if the other party is in *breach* (the party has not performed its obligations under the contract). And not all broken promises are equal: Some are small and will probably be overlooked, whereas other are “material” to the agreement and result in termination. A *material breach* is basically a broken promise that is significant enough to release the other party from their obligations, such as a publisher not paying your royalties. But how do you know what’s minor and what’s material to a contract? Unfortunately, the contract isn’t going to say—for this, you’re going to have to look to industry norms. For example, industry practice is that the author should be able to terminate if the publisher fails to publish a work. Likewise, the publisher should be able to terminate if an author doesn’t deliver a manuscript. Both of these occurrences would likely be considered material breaches of the contract that could trigger termination as well as monetary liability for any harm caused.



Contracts may also include language that allows termination for reasons other than a breach. For example, some termination provisions will allow an author to terminate her contract if the publisher goes bankrupt and thus is no longer able to print and publish books. Here is an example of such a clause:

If the Publisher is adjudicated bankrupt, or a receiver or trustee is appointed for all or substantially all of the Publisher's property, or if the Publisher seeks to take advantage of any insolvency law, all rights hereby granted to the Publisher will revert to the Author, and this Agreement will terminate.

Be on the lookout for termination language that allows for termination “at will,” “for convenience,” or “at the publisher’s discretion.” This language gives your publisher the right to terminate the agreement at its own discretion, for any reason whatsoever. While courts have imposed some limitations on such termination provisions, under certain circumstances broad termination rights are legally enforceable.<sup>24</sup> Therefore, to protect your sizeable investment of time and energy in your book, you may want to limit your publisher’s

ability to terminate the agreement to specifically identified circumstances.

## NOTICE PROVISIONS

Before a contract can be terminated, contracts usually require one party to give the other party *notice* that they are not fulfilling their contractual obligations. Notice provisions ensure that both parties keep each other informed if something goes wrong in the relationship and are given a chance to fix it. For example, if an author fails to deliver the manuscript on time, under a notice provision the publisher may send a notice informing the author of the lapse. Typically, such notices will specify how long a party has to fix whatever has gone wrong, the so-called *cure period*. (Note that contracts may also include a *grace period*, a set amount of time past a deadline that an action can be completed and still count as complying with the obligation.) Notice provisions can be a powerful tool to ensure your publisher responds to your requests in a timely manner (and vice versa).

Sometimes notice requirements are placed in their own section of the contract; other times, notice provisions will be sprinkled throughout. Notice requirements

can show up just about anywhere, but most commonly they are found in the sections pertaining to subsidiary rights, the manuscript, publication, termination, warranties and indemnities, and rights reversion.

Here is an example of a free-standing notice provision:

Any notice given under this Agreement shall be in writing and may be served by mail, fax, or email. Each party's address for service shall be the address set out in this Agreement or such other address as specified by notice. A notice shall be deemed to be served 48 hours after it was mailed, or if it was served by fax or email, at the time of transmission if within normal business hours failing which the next business day.

This provision describes the notice process. It does not specify anything else, such as the length of the cure period after notice is given. This is likely because different parts of the contract specify different cure periods. For example, perhaps the publisher has given the author 30 days to revise her manuscript after notice

but has given itself 90 days to respond to any request for a rights reversion.

When you read through your contract's notice provisions, think about how, when, and where you or your publisher will have to give notice. Sometimes the provisions specify the method of delivery, such as a requirement that notices be sent by certified mail. Commonly, notices become effective upon delivery, meaning that the cure period starts once the notice reaches the correct destination. To make sure you can receive notices from your publisher, always keep your contact information up to date.

## LIQUIDATED DAMAGES

Sometimes when an agreement terminates, one of the parties ends up owing the other money. For example, an author may be entitled to unpaid royalties following termination by the publisher. To limit the amount of money they could potentially owe, publishers will sometimes include a provision called a **liquidated damages** clause where they agree to pay a pre-determined amount of money if they breach the contract in a specific way. For example, your agreement may specify what amount you'll receive if your publisher fails to

publish your book. In a typical liquidated damages clause, an author will be entitled to keep her advance but will also have to give up her right to sue for more.

Liquidated damage clauses are helpful in instances where it difficult to determine how much an injury is worth (e.g., how much profit did you lose if your book was never released?). But liquidated damages also have a downside, in that they set a ceiling on the amount of money that can be recovered. If you're out-of-pocket more than the liquidated damages clause allows for then you're out of luck, as you're barred from recovering the full amount of your actual losses. While this might be a reasonable trade-off for some authors, if you've invested additional time or money in the project (say, in licensing artwork to include in the book) this could be a bad outcome. On the flip side, courts do not always enforce liquidated damages clauses that they view as punitive rather than compensatory (e.g., they are for an excessive amount), so keep this in mind when negotiating a liquidated damages amount.

## AFTER TERMINATION

The contract may include some obligations that you or your publisher must fulfill even after termination. For

example, your publisher may need to continue making royalty payments because of sales that accrued (but were unpaid) before termination or from licenses that are still ongoing. And you will still be bound by your warranty and indemnity obligations to the publisher.

Upon termination, all copyrights granted to the publisher should return to the author. Authors should also get back any physical property given to the publisher, such as original manuscript pages. Some contracts may also allow authors to purchase their books in the publisher's inventory for the production cost of the books.



## CONTRACT CHECKLIST

### **CHAPTER 15: RIGHTS REVERSION**

- Does your contract include a rights reversion clause?
- What is/are the triggering condition(s)?
- Is there a notice requirement?
- What happens after the condition is triggered?
- Does the clause provide for other considerations, such as production materials, overstock copies, and third-party licenses?

### **CHAPTER 16: ASSIGNMENT PROVISIONS**

- Under what circumstances can your publisher assign the contract to a third party?



#### **CHAPTER 17: TERMINATION**

- When and why can your contract be terminated?
- What are the requirements for giving notice of termination?
- Is there a grace period and/or a cure period? If so, how long?
- Does the contract set a limit on damages that can be recovered for termination?

# SECTION VII: CONCLUSION

THIS GUIDE IS FULL OF INFORMATION AND strategies to help you understand the provisions in your publication contract and to empower you to negotiate for terms that advance your goals. Although the prospect of reading, understanding, and negotiating a publication contract may seem tedious or even intimidating, doing so will bring you one step closer to realizing your publication ambitions now and in the future.

Negotiation provides an opportunity to fashion a deal that fits both parties. While negotiations are sometimes tense and often tedious—but once in a while actually *fun*—in the end you’ll almost certainly be glad you made the effort. So even if the talk gets tough, remember that you bring something very valuable to the table (your book and your copyrights) and,

ultimately, your publisher knows this and wants your book to succeed.

It is our hope that this guide will empower you to understand and negotiate a publication contract that benefits you, your publisher, and readers—and increases the impact of your book. So, go forth and negotiate! And be sure to share any creative terms you and your publisher agree to with *Authors Alliance* so we can feature them as “Success Stories” in future editions of this guide.



## KICKSTARTER BACKERS

Hal Abelson  
Amy Adler  
Clark Asay  
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## ENDNOTES

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2. See Authors Alliance, *About Us*, <https://www.authorsalliance.org/about/#mission>.
3. New technologies have opened up many opportunities for authors, including the opportunity to self-publish. Self-publishing reduces barriers to publication for authors who might not otherwise attract the attention of traditional publishers, and it can give authors more control of their works. But self-publication typically comes without the services and support for authors that a traditional publisher can offer, which may be a downside for some authors. For more information on self-publishing, see Jane Friedman, *Start Here: How to Self-Publish Your Book* (July 2, 2017), <https://www.janefriedman.com/self-publish-your-book/>; Jane Friedman, *Should You Self-Publish or Traditionally Publish?* (June 21, 2016), <https://www.janefriedman.com/should-you-self-publish-traditional/>.
4. *Supra* note 1.
5. This is known as the “first sale” doctrine in copyright. Under this rule, the owner of a *particular* copy of a work is allowed to resell it, give it away, or otherwise dispose of their copy without the copyright holder’s permission. See 17 U.S.C. § 109.
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11. For more on the experiences of authors who have opted to self-publish their works under open licenses, see James Boyle and Jennifer Jenkins, *Open Legal Educational Materials: The Frequently Asked Questions*, 11 WASH. J.L. TECH. & ARTS 13 (2015); Eric Goldman and Rebecca Tushnet, *Self-Publishing an Electronic Casebook Benefited Our Readers—And Us*, 11 WASH. J.L. TECH. & ARTS 49 (2015).
12. The U.S. Copyright Act also protects works that were created but neither published nor registered before January 1, 1978. The duration of copyright in these works is computed the same

way: life of author plus 70, or 90, or 120 years, depending on the nature of authorship. See U.S. Copyright Office, CIRCULAR 15A: DURATION OF COPYRIGHT, available at <http://www.copyright.gov/circs/circ15a.pdf>.

13. The U.S. Copyright Act gives authors the right to terminate certain grants. See 17 U.S.C. § 203; 17 U.S.C. § 304(c); 17 U.S.C. § 304(d). For more information on termination of transfer provisions, see [www.rightsback.org](http://www.rightsback.org) and Authors Alliance, *Termination of Transfer*, <https://www.authorsalliance.org/resources/termination-of-transfer/>.
14. See, e.g., *Helprin v. Harcourt, Inc.*, 277 F. Supp. 2d 327, 334 (S.D.N.Y. 2003) (publisher granted “wide discretion to terminate publishing contracts if the submitted draft is not acceptable, ‘provided that the termination is made in good faith, and that the failure of the author to submit a satisfactory manuscript was not caused by the publisher’s bad faith.’”) (citation omitted). See generally Martin P. Levin, *A New Guide to Negotiating the Author–Publisher Contract*, 6 CARDOZO ARTS & ENT. L.J. 411, 428–435 (1988) (discussing satisfactory manuscript clauses).
15. See, e.g., *Dell Publishing Co. v. Whedon*, 577 F. Supp. 1459, 1462–63 (S.D.N.Y. 1984) (holding that publisher owed author “something more than simply an honest belief that the manuscript was unsatisfactory as written. It owed her, at the very least, a detailed explanation of the problems it saw in the manuscript, and an opportunity to revise it along the lines its editors suggested.”); *Harcourt Brace Jovanovich, Inc. v. Goldwater*, 532 F. Supp. 619, 620 (S.D.N.Y. 1982) (holding that a publisher does not have “absolutely unfettered license to ... reject a book for any reason whatever ... [T]here is an implied obligation in a contract ... for the publisher to engage in appropriate editorial work with the author of the book.”).

16. *Supra* note 7.
17. *Id.*
18. Kevin Smith, *A New Contract*, In the Open (Nov. 5, 2017), <https://intheopen.net/2017/11/a-new-contract/>.
19. *Supra* note 7.
20. Jacqui Lipton, *To PR or Not to PR*, Luna Station Quarterly (Aug. 8, 2018), <http://lunastationquarterly.com/to-pr-or-not-to-pr/>.
21. Authors Alliance's guide to *Understanding Rights Reversion* is available at <https://www.authorsalliance.org/resources/rights-reversion-portal/>.
22. *Supra* note 13.
23. *Supra* note 21.
24. *See, e.g., Helprin v. Harcourt*, *supra* note 14.

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