CHAPTER 11

NEGOTIATING A BOOK CONTRACT

Receiving a serious offer of any size from a publisher to pay you an advance and publish your book is cause for celebration. Publishing any book calls for a major investment. If it has made you an offer, the publisher has had professionals read and re-read your submission, analyzed its projected earnings and loss, and concluded either that it will profit from investing in your book, or that your work is so good that it must be published, even at a loss. Truly, congratulations are in order if you have reached this stage.

NEGOTIATION BASICS

The offer might be embodied verbally or in a letter or a "deal points memo" that contains the financial and other basic terms of the transaction and will be the basis of the first phase of negotiations. The terms at this stage typically include a description of the work, the scope of the rights to be granted—territories, formats, languages, and certain subsidiary rights, the advance and its payment schedule, base royalties and subsidiary rights fee splits, the manuscript delivery date, and possibly other features of publication, such as a publicity plan. These terms are the meat of the

deal and tend to be the focus of the most intense part of the negotiations. The advice in this chapter applies both to the deal points and the formal contract.[66]

Once these basic terms have been settled, you will be given the publisher's standard form contract to sign. It should contain the basic terms you have agreed to, but it will also probably be long, detailed, and written in so-called legalese. If the document incorporates the agreed deal points, you might be tempted to sign it without trying to fully understand, much less negotiate, the boilerplate. Resist that urge. The contract will govern your relationship with the publisher for years to come. If you sign the standard form without requesting changes, you might someday regret having done so. Beyond the deal points, many other critical terms governing the business relationship appear, and they are drafted to favor the publisher's interests at the expense of yours. Your agreement to the deal points does not oblige you to accept these other terms. No matter how many or how few books you have previously published, you can successfully negotiate changes to the contract, but you must ask for them.

This is not to say the publisher will agree to all your requests. There will surely be a gap between your ideal terms and what the publisher will concede. You are more likely to encounter intransigence from genre fiction publishers, particularly, it seems, from category romance publishers (i.e., Harlequin, Kensington). Their boilerplate terms are generally stingier across the board, with lower royalties and subsidiary rights shares, a larger scope of rights demanded, and more onerous option and noncompetition clauses. No matter what kind of contract you are dealing with, the best way to help yourself is to choose the issues most important to you, rank them in order of importance, and concentrate on negotiating the corresponding terms. Achieving an acceptable compromise on your high priority clauses will be a significant accomplishment.

Most book contracts appear on forms referred to as "boilerplate" that your publisher supplies. The parties can amend the boilerplate by deleting, adding, and revising terms as agreed. If the publisher cannot process the changes into the document, they can be attached as an addendum incorpo-

[66] Every writer who is offered a book contract should read Mark L. Levine's book *Negotiating a Book Contract* (Asphodel Press, 2009). It explains the terms of a publishing contract clearly and gives invaluable negotiating advice.

rated by reference or added by hand or typed directly onto the document, in which case, both parties should initial all changes to the form.

If you have an agent, she should be practiced in successful negotiations. If she has previously sold other clients' work to your publisher, she should have her own, prenegotiated "agency version" of the publisher's form, which favors her clients' interests. Still, review the proposed contract and don't be afraid to suggest additional changes to suit your priorities, and remain engaged with your agent throughout the negotiation.[67]

The following explanation covers the typical provisions of most trade book publishing contracts in thematic sections corresponding to the business relationship: ownership and control of the work; acceptance and publication of the manuscript; financial matters; allocation of the legal risks of publishing; and the future of the book and the author/publisher relationship. Genre fiction and academic publishing contracts will differ somewhat in their terms (usually to the writer's detriment) and in what the publisher will agree to change, but the advice here does apply to these contracts.

Although a member of the editorial department will probably negotiate the deal points, many publishers have a contracts department that handles legal negotiations. For that reason, the best way to request changes might be in a letter to your agent (if you have one) or editor, who can forward it to the contracts department.

OWNERSHIP AND CONTROL

THE GRANT OF RIGHTS

The heart of the transaction is the author's grant to the publisher of some rights under copyright[68] to exploit commercially in exchange for a share of the proceeds. The "grant of rights" clause sets forth the rights you are licensing to the publisher. You can limit the grant according to the kind of

[67] Members of the Authors Guild receive a Model Trade Book Contract and Guide and may call on Guild attorneys to review, explain, and advise on their contracts at no charge. If you need help understanding or negotiating provisions, and especially if you do not have a literary agent, you should join the Guild and take advantage of these valuable tools.

[68] The rights under copyright include: reproduction; distribution of copies; public display; public performance; and the creation of derivative works. These rights can be further divided according to such specifics as territory, languages, and formats, and can be granted exclusively or nonexclusively. See chapter 2 for basics of copyright and licensing.

media or formats the publisher intends to exploit (e.g., "the right to print, publish and sell hardcover and/or paperback and/or mass market paperback editions"), the territory (e.g., "the right to sell copies in North America" and/or "world rights"), languages, and duration (e.g., "for the full term of copyright," or less). These rights are valuable to each party. The key tension in the negotiation will therefore involve the division of rights. As a rule, you should reserve rights the publisher cannot gainfully exploit and seek the highest possible revenue for the rights you do grant. The publisher, in turn, will seek the broadest scope of rights it can get for the lowest possible payment.

Read the grant of rights clause carefully. It should say that you are granting your publisher the right to print, publish, and sell your work in book formats (possibly including ebooks) in the United States and its territories. It might also include additional rights that the publisher will not directly exploit, but that it wishes to control ("subsidiary rights"). It might do this through extremely broad language, such as "The Author grants to the Publisher all rights in and to the Work," or " . . . grants the copyright in the Work," or " . . . grants all rights of whatever nature in and to the Work." You should reject such broad language and request that the contract delineate every right you are granting in words you can understand. A blanket grant of all rights or the entire copyright is not industry standard for a trade book contract, and you should not agree to it.[69]

If you grant more than the right to publish the work in various book formats, then the contract should contain a separate "Subsidiary Rights" clause, listing each ancillary right and the allocation of income earned from them to be shared by author and publisher. Beware of any "catchall" right (e.g. "all other rights to license the work in any format . . . ") in the subsidiary rights clause; you are more likely to see this in genre book contracts. If you cannot delete it, seek at least a 50 percent share and prior approval for exploitation of such rights.

SUBSIDIARY RIGHTS

Rights that your publisher takes but does not directly exploit, instead sublicensing them to third parties, are known as subsidiary rights, or "subrights."

[69] Some academic publishers request a grant of the copyright, but they are generally willing to limit the grant and to revert the rights when the work is out of print.

It can be helpful to think of subsidiary rights as falling into three general categories: print-related, non-print-related, and foreign. Each category is treated somewhat differently. Print-related subrights include reprints of the book in other formats (e.g., paperback) by another publisher, abridgments, book club versions, first (prepublication) and second (postpublication) serial rights (i.e., excerpts appearing in periodicals), the use of selections in anthologies, coursepacks, or other publications, and audio books. Non-print-related rights include syndication, merchandising uses, film, television, dramatizations, multimedia uses, and translations. Typically, the author grants exclusive print-related subrights to the publisher, but reserves nonprint and foreign rights if she has an agent. It is generally better to reserve rights that you or your agent can directly market, because the income from them goes directly to you instead of being applied against your publishing advance.

PRINT-RELATED SUBRIGHTS

Print-related subsidiary rights are typically granted to the publisher and the income from exploiting most of them are shared with the author 50-50. The exceptions are first serial and audio book rights: if you have an agent, she will try to reserve those rights for you; if you grant first serial rights to the publisher, your share of the income should approach 90 percent. Consider asking for the right to approve of how and to whom the publisher sublicenses the work in print-related formats, how much of the book may be used, and the fees charged. Otherwise, the publisher may sell these rights for any price it chooses without your knowledge, unless and until the sale appears on your royalty statement.

NON-PRINT-RELATED SUBSIDIARY RIGHTS

Although many boilerplate contracts include grants of non-print-related subrights, it is unusual to grant them. Because the publisher cannot directly use or market these rights, it should not control or receive a share of the proceeds from them. The publisher might argue that by publishing the book, it is making a large investment, without which third party filmmakers and others would not know the work has value. If you have an agent, that argument will hold no water and she will reserve these rights on your behalf. If you do not have an agent or the means to exploit the rights, you might be better served by granting dramatic (including film and television) and other rights. But if you grant any of these rights make sure to include appropriate safeguards and

payment terms. The publisher should not receive more than 10 percent of the income as its share (or up to 25 percent for foreign sales of these rights). The rest should go to you.[70] For all such subrights, it is important that you retain the right to prior approval of any proposed sublicenses (especially for dramatic, film, and multimedia rights), to limit the number of years the publisher has these rights before they revert back to you (two to three years after the book is published is reasonable), to receive your share of advances paid for these rights immediately, without having it applied against your unearned book advance (this right is called "flow through"), and to obtain certain royalty accounting terms (such as those set forth at the end of this chapter) in the sublicenses. In any case, it is unwise to grant merchandising rights to the publisher. Doing so could interfere with your ability to write sequels or use certain characters or to exploit other reserved rights.

FOREIGN RIGHTS

The right to publish in countries outside of the United States and its territories and to publish in languages other than English might be listed as separate subsidiary rights or included in the main grant of rights (i.e., "worldwide rights in all languages"). If you have an agent, she will try to reserve foreign rights. Many of the largest publishers have international affiliates or operations, however, and might demand exclusive publishing rights in the foreign countries in which they operate, or even worldwide rights. Before you grant any foreign rights, scrutinize the royalties offered for foreign sales. They are usually lower than royalties for US sales and they could be significantly lower than an unrelated foreign publisher would be willing to pay if you contracted directly with it. If you grant your US publisher the right to publish in foreign countries, consider asking it to agree to match (or exceed) the best royalties available on the open market in each territory, or to allow you to bring in a better offer from a different publisher in a territory. You should also ask for a higher advance to reflect the extra value of what you are granting; remember, if you reserved and licensed those rights to foreign publishers, you would receive separate advances from them.

Your agent should reserve the rights to publish in countries where your publisher does not publish directly. If you do not have an agent, it makes

[70] Children's book publishers might ask for up to 50 percent of the income for these rights. Taking more than 50 percent in any context is unreasonable and unfair.

sense to grant foreign rights to your publisher. The income from foreign sublicenses is typically split 75 percent to 85 percent to the author and 15 percent to 25 percent to the publisher, corresponding to an agent's share (including a foreign agent's commission). Typical boilerplate contracts allow the publisher to subtract its expenses, including a foreign agent's commission, from this income before splitting it with you; this is double-dipping and unfair. If your agent reserves and sells the rights, she will typically take a 20 percent to 25 percent commission to cover both hers and the foreign agent's commission.

Whether you grant foreign publication rights directly or as subsidiary rights, consider asking the publisher to revert the rights back to you if they are not sold within two or three years after US publication. Another option is to grant foreign rights nonexclusively, which allows you to market them yourself whether or not the publisher does so.

ELECTRONIC RIGHTS

For almost twenty years, authors and agents have wrestled with publishers over electronic rights. The issues of contention included the kinds of digital formats to be granted, whether ebooks and multimedia uses were treated as subsidiary or direct publication rights, and the corresponding amount of royalties and/or subsidiary rights fees. But these arguments were largely theoretical until 2007. That was the year ebooks, defined as digital versions of a printed book without significant additional material (sometimes called "verbatim electronic rights" in contracts), became a substantial and growing component of the retail market, thanks to the reading public's embrace of eReaders such as the Kindle, the Nook, and the iPad. Growth in the number of sales of ebooks is rising rapidly, and this—along with Amazon's current dominance of that market—is wreaking big changes in the industry.

Negotiate the scope of electronic rights to be granted at the time you discuss the advance and other deal points. The contract should distinguish ebooks from multimedia uses, which add audio, animation, images, and other media to the text. Most publishers will ask for ebook rights and treat them as another book format, offering a royalty per sale, and will often agree to let the author reserve multimedia rights. If you grant ebook rights, include a clause stating that the publisher may exploit the book electronically only in its entirety and without changes, or ask for the right to approve in advance

of hyperlinks, abridgments, anthologies, or the exploitation of excerpts. If you grant multimedia rights, reserve the right to approve of all formats and other media added to the work. Obtain assurance that the work will be protected from unauthorized copying using at least industry-standard technology and that sublicensees will be required to display a copyright notice prominently and also to use the best available means to prevent unauthorized copying. Ask for a reversion of rights to you of digital uses that the publisher fails to exploit for a specified period after first print publication. Multimedia rights are not directly exploited by publishers and are more akin to non-print-related subsidiary rights; this fact gives you a good argument that you should get more than a 50 percent share for these rights.

LENGTH OF THE GRANT

The duration of the grant of rights (and, therefore, the duration of the contract) is usually "the full term of copyright and any renewals and extensions thereof."[71] The publisher is likely to veto a request for a shorter term. However, as explained below, every contract should also provide that your rights will revert back to you and the contract will end when the work goes out of print. As mentioned, you might also request a reversion of non-print-related and foreign subsidiary rights if not exploited by the publisher within a short window of time—such as two or three years—from the date of first publication. As long as the reversion of rights clause appropriately defines "out of print," it is generally not worth arguing about the duration of the grant of rights.[72]

RESERVATION OF RIGHTS TO AUTHOR

Every contract should provide that "all rights not specifically granted in the contract" are reserved by you. If yours does not, add it. Above all, do not allow the reverse, that is, for the publisher to be the owner by default of any rights that you did not specifically grant. As well, make sure that any non-competition restriction in the contract (explained later in this chapter) does not defeat the purpose of your reservation of rights by prohibiting your use of a new, or newly popular, method of exploiting the work.

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[71] The full term of copyright currently expires 70 years after the author's death.

[72] Even if your book never goes out of print, you have an inalienable right under the Copyright Act to terminate any license after thirty-five years. See chapter 2.

DELIVERY, ACCEPTANCE, AND PUBLICATION OF THE MANUSCRIPT

The clauses addressing this aspect of the relationship are the preamble to the contract, terms addressing what you must deliver and how the publisher must treat the manuscript, and the publisher's obligation to publish.

THE PREAMBLE

This clause typically introduces the contract and should identify the work by describing the proposed subject matter, format, length, and possibly the market (e.g., "young adult"). Make sure the description is consistent with your proposal and what you plan to deliver. Consider giving yourself some flexibility here. For example, you might avoid characterizing the point of view of the book or describe the length in terms of the "approximate number of book pages" (which can be adjusted) rather than the number of words or manuscript pages. Your book will be defined for purposes of the contract as the "Work."

DELIVERY OF THE MANUSCRIPT

The contract will give the deadline for your delivery of the complete, "satisfactory" manuscript. The publisher is planning to publish your book in a particular seasonal catalog and needs the finished manuscript within a certain time frame in order to do so. Still, its plans will not come to fruition for many months and are likely to be somewhat flexible. You should be realistic about how much time you need to deliver—and then add more time for unexpected delays. If your book depends on future events, the availability of information, or other contingencies, then add a clause that permits you to extend the deadline unilaterally with written notice if such contingencies prevent delivery on deadline. After the contract is signed, if you agree to extend the delivery deadline, make sure to formalize the extension in writing signed by the publisher.

Most importantly, delete any words to the effect that the deadline for delivery is "of the essence." Courts allow a reasonable grace period for late contract performance unless the contract says that "time is of the essence" regarding a deadline. If that language, which is not standard in the book industry, appears, then delivering even one day late is a breach that cannot be remedied.

Be careful of language requiring the author to deliver "all" or "any" additional materials deemed necessary by the publisher. This language makes you vulnerable to demands for work—an index, illustrations, appendices, for example—that you did not consider when you agreed to the advance and deadline. It is better to specify in the contract as precisely as possible the materials you have agreed to provide, or at least state that additional materials must be "mutually agreed" by author and publisher. The publisher might require that illustrations be delivered at the same time as the manuscript for art books, children's books, and similar works.[73] Otherwise, allow yourself a realistic time and grace period to prepare any other materials you have agreed to provide.

Most contracts make the author responsible for obtaining and paying for permissions to include others' work in the book. You might argue that the publisher is better able to pay for permissions, but the publisher might then want to reduce the advance. For anthologies, textbooks, and similar works, publishers often agree to provide a budget for permissions. For more information about obtaining permissions, see chapter 5.

SATISFACTORY MANUSCRIPT

Most book contracts are offered on the basis of a proposal and give the author several months or more to deliver the manuscript. Almost every contract further states that the author must deliver a "satisfactory" or "acceptable" manuscript. Be careful about the wording of this clause. If the manuscript must be "satisfactory [or acceptable] in the publisher's sole discretion," the publisher may legally reject the manuscript and terminate the contract even if the book is professionally competent and fits the contractual description. Should this occur, the publisher's obligation to publish vanishes and the author can be deemed in breach and obliged to repay the advance received. Events such as your editor's departure from the publisher, the publication of a competing work, a decrease in general interest in the subject matter, or a change in the publisher's financial outlook could all be deemed legitimate reasons to reject a publishable manuscript.

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[73] If you are providing illustrations, consider inserting a clause requiring the publisher to provide insurance against loss or damage to the original artwork and to return it to you when no longer needed.

Authors' advocates recommend substituting "professionally competent and fit for publication" for "satisfactory." The publisher is more likely to agree to stipulate that the manuscript must be "acceptable in form and content to the publisher" or "satisfactory in the publisher's editorial judgment" or its "reasonable judgment." This additional language is the bare minimum you should negotiate for; and it should prevent the publisher from rejecting a competent manuscript because of countervailing events outside your control.

You can also protect yourself by requiring the publisher to give you written editorial comments and a realistic period, such as sixty days, to submit revisions before rejecting the manuscript, and by making sure the preamble and delivery clauses contain accurate descriptions of what you intend to deliver. If the publisher made the offer on the basis of an entire manuscript rather than a proposal, indicate that the satisfactory manuscript "has been delivered," or that it will be deemed satisfactory with minor edits. Consider asking whether you may submit portions of the work in progress and get the publisher's acceptance of each portion within a reasonable time of receipt.

Another protection is a stipulation that if the advance must be returned because the publisher rejects the manuscript for editorial reasons, it will be repaid out of the "first proceeds" of a subsequent contract with another publisher for the same book. Some publishers will agree to provide that repayment must be made from first proceeds or by a specified date, whichever occurs first.

Finally, negotiate for language that allows you to keep the entire advance and quickly terminate the contract if the publisher decides not to publish for other than editorial reasons. This would free you to sell the work elsewhere and keep your advance.

COPYEDITING, PROOFREADING, AND CORRECTION OF PROOFS

You should obtain a right to approve of any substantive changes your editor makes to the manuscript, although the publisher might insist that your approval not be "unreasonably withheld." Copyediting changes—punctuation, grammar, spelling, and capitalization, and corrections of errors of fact or manuscript inconsistencies—could affect the manuscript significantly, and so should be subject to your review. Most publishers will reasonably ask you to review page proofs and to pay the cost of your alterations to proofs that exceed 10 percent of the cost of their composition, unless caused by printer's errors.

PUBLICATION

Make certain that your contract gives the publisher a specific deadline to publish after acceptance of the manuscript, and that "publication" means the distribution of printed books in the United States. Most contracts require the publisher to publish the work within twelve to eighteen months after acceptance, or up to twenty-four months for smaller publishers or children's picture books. Except in special circumstances, any period longer than that is unreasonable.

If possible, provide that if the publisher fails to publish a US edition on time, you may terminate the contract, recover your rights, and keep the advance; some publishers will agree to this only after the author makes a written demand and gives the publisher an additional grace period of several months. Art books and children's picture books are especially vulnerable to open-ended publication clauses that depend on the selection of the artist and completion of the artwork, two details that fall outside the author's control. Negotiate deadlines for the publisher's completion of these events; otherwise you could wait many years for publication.

Most contracts allow the publisher to publish the work "in a style, manner, and price" that it determines unilaterally. A right to consult on retail price and print runs (i.e., the number of copies published) is probably out of the question for all but the most powerful authors. But title, design, and artwork can be crucial elements of the book, and you might want some input into them. Publishers will often agree not to change the title unless the author consents, and to consult with the author about the format and style of the text, graphic material, and cover design. If it allows you to approve of any of these elements, it will probably require that your approval not be "unreasonably withheld or delayed." Whether you should negotiate for these concessions depends on their importance to you, because the publisher will consider them to be significant.

MARKETING AND PROMOTION

Almost universally, authors are unhappy with their publishers' marketing and promotion efforts. Unless your contract specifically provides for promotion, book tours, and publicity, expect very little from the publisher beyond a listing in its catalog and possibly the mailing of review copies. If your advance is higher than $25,000, however, it is worth discussing an advertising budget and promotional plans. If the publisher offers you a

book tour or advertising budget, it will nonetheless be reluctant to put that promise into the contract, so it will not be a legal obligation. In any case, plan on arranging most publicity efforts on your own.

COPYRIGHT REGISTRATION

The contract should require the publisher to register the copyright with the Copyright Office in your name within three months of publication.[74] Do not allow the publisher to take your copyright or to publish the copyright notice in any name other than yours. Except in the case of academic or textbooks, registering copyright in the publisher's name is not standard in the industry and could harm your economic interests.

FINANCIAL MATTERS

Many of the financial terms will be negotiated before you receive the contract. In order to negotiate the financial terms effectively, you should understand some basics underlying the transaction.

Money in hand is worth more than the promise of money in the future. Therefore, the publisher will not want to pay more in advance of publication than it can negotiate, and in any case, will not normally agree to advance more than it projects the author will earn in royalties over the life of the contract. On the other hand, the larger the publisher's initial outlay, the more likely it is to invest in making the book a commercial success.

There is a principled basis for calculating an advance and royalties, although that basis is not necessarily used in the publisher's first offer. For example, royalties, the author's share of the proceeds from the sale of each copy, should equal what remains after the costs of editing, designing, printing, storing, shipping, overhead, interest lost on the advance, and all other costs, as well as a profit margin for the publisher, are subtracted from the proceeds received by the publisher.[75] Subsidiary rights fees are shared in a higher proportion with the author because the publisher is not spending

[74] Copyright registration filed later than three months after publication (unless you previously registered the manuscript) could bar recovery of statutory damages and attorneys' fees in cases of infringement.

[75] The higher the number of sales, the lower the unit cost of each copy sold, which is why many contracts increase, or "escalate" the royalty rate after a certain number of sales. Also note that most of those costs are eliminated in the ebook format.

funds to produce and distribute the licensed product; it is granting the right to a third party, which itself incurs those costs and calculates them in the agreed license fee.

When negotiating royalties and subsidiary rights shares, you can help offset a weaker negotiating position by gathering as much information as you can about the publisher's practices and plans. For example, if you know the standard discount the publisher offers to retailers and distributors for each edition it publishes, you can readily calculate what your actual royalty will be for royalties based on "net receipts" from copies sold. If you know the planned size of the first printing of your work, and the format (that is, hardcover or paperback), you will know better which royalty category to try to increase and the highest realistic advance to aim for. If you know the markets in which your publisher is active, such as the library market for children's books or the university market for academic nonfiction, you can focus on increasing the royalties offered for those sales.

You will have an "account" with the publisher upon receipt of an advance payment. The advance is counted as a negative balance in your account. Your earnings from the book will be applied against the advance and all other amounts you owe the publisher (for such things as indexing costs and books you purchase) until it reaches zero, at which point your earnings will begin to accrue as a positive balance. The publisher will report to you (or your agent) on your earnings, and once you have "earned out" the advance, it will pay what it owes you on a periodic (usually semi-annual) basis. During at least the first year after publication, the publisher will withhold a portion of royalties due as a reserve against returned copies.

THE ADVANCE

The advance is the amount paid to the author before the book is published, which is deducted from the author's earnings. Advances vary considerably, depending on such factors as your reputation and platform, the success of your last book, the subject matter, potential audience, the illustrator's reputation (for children's books), and the publisher's likely income from subsidiary rights. The advance offered is usually a portion of the royalties the publisher calculates will be earned by the author on projected first year (or first print run) sales. Before you agree to the advance offered, try to ascertain (1) the publisher's projection of first year sales (or the size of the first print run); and (2) the expected retail price (or the format). Then, cal-

culate what the publisher projects your earnings will be by multiplying the applicable royalty by the projected sales or print run. Aim for an advance in this amount.[76]

As a general rule, you should negotiate for as large an advance as you can get. The publisher's first offer is less, sometimes significantly, than what it ultimately is willing to pay. It does no harm during the deal points negotiation to ask the publisher for more, especially if you are granting non-print-related subrights. The advance is your hedge against the risk that your work might disappoint commercially, as most books do. Through the advance, the publisher shares this risk. Moreover, the higher the advance, the greater the publisher's incentive to make the book a success.

By the same reasoning, you should have no obligation to repay any part of an unearned advance unless you have failed to deliver an acceptable manuscript. The contract should clearly state that the advance is "nonrefundable." If your contract contains or implies any obligation to repay an unearned advance (or to have an unearned advance counted as indebtedness in another contract with the publisher), you should strike it.

Usually, the publisher agrees to pay one-half of the advance upon execution of the contract and the balance on acceptance of the manuscript. To avoid long payment delays, try to limit the publisher's time to accept the manuscript or to respond with specific comments within a specified time after you have delivered. Unless the advance is for six figures or more, it is unusual for any portion to be withheld until publication.

ROYALTIES: "LIST" VERSUS "NET"-BASED

The primary royalty rates in most trade book contracts are based on suggested retail (or "list") price of each book sold. Some publishers instead offer royalties based on "net" (or wholesale) price. Because it greatly affects your earnings, it is crucial to understand the difference. "Net receipts" or "net price" means the amount the retailer or wholesaler pays the publisher—at least 45 percent to 60 percent off the retail price. If your royalties

[76] Sometimes the author's share of projected first year subsidiary rights income is included in the advance. Frequently, the publisher determines the amount of the advance after assessing whether licenses can be sold, or even after agreeing on sales. It is worth asking whether your publisher is marketing or has completed any subsidiary rights sales before agreeing to an advance. If you grant reprint rights, this is the time to ask for "flow through" of the advance paid by the reprint publisher.

are based on "net price," "net proceeds," or "the amount received by the publisher," they will in fact be much lower than list-based royalties computed at the same rate. For example, where a book listed at $20 retail is sold to booksellers at a 45 percent discount (i.e., for $11), a 10 percent royalty based on list price is two dollars, but a 10 percent royalty based on "net" is one dollar ten cents. To approximate the list-based royalty would require a rate of 18.1 percent based on "net." In negotiations, you might not be able to learn the projected list price, but you can find out the publisher's standard discount to booksellers and the intended format (i.e., hardcover or paperback) for your book. If any of your royalties are based on net (and at least some of them are likely to be), you would be well served by finding out the standard discount to retailers and using it to calculate your actual royalty compared to the amounts recommended here.

The rates in the following sections are the standard rates offered by established, large and midsized publishers in the adult trade, children's, and text and academic markets. Standard royalties were established long ago on the principle that the author and publisher would equally share the profit from each copy sold. Thus, your royalty for printed books should roughly equal your publisher's profit. That said, your publisher's rates could differ from those presented here. If the publisher is small, they might be lower. Although publishers are unlikely to agree to higher percentages than the following, they might be willing to decrease the number of sales (i.e., "escalation points") at which the percentages increase.

ROYALTIES—HARDCOVER TRADE BOOKS

For adult trade hardcover books, publishers typically pay 10 percent of the retail price for the first 5,000 copies sold, 12.5 percent for the next 5,000 copies, and 15 percent for all copies sold in excess of 10,000. Established authors can often obtain better terms, such as 15 percent on all copies sold. If your publisher operates in the United Kingdom and you have granted rights to publish there, the royalty rates for all formats there should mirror those of the US rates (i.e., 10 percent of the UK retail price for hardcover, etc.), but the escalation points might be higher.

TRADE PAPERBACK ROYALTIES

The typical royalty rate for trade paperback editions (which are of higher quality and higher retail price than "mass market" paperbacks) is at least

7.5 percent of the retail price on all copies sold. Some authors can do better. For example, you might receive 7.5 percent up to 25,000 copies and 10 percent thereafter. The advantage of permitting your hardcover publisher to issue its own paperback edition, as opposed to sublicensing reprint rights, is that you do not share the royalties received from the paperback publisher; the disadvantage is that you do not receive a separate advance for the paperback rights. Take this into account when negotiating your advance.

MASS MARKET ROYALTIES

Mass market editions are the cheaper, smaller paperbacks you find for sale at newsstands, airports, and grocery stores. So-called genre fiction titles, such as category romances, westerns, and science fiction, are often published only in this format, and major fiction titles are often published in this format after hardcover publication. Most publishers offer an initial royalty of 8 percent of the retail price on sales of up to 150,000 copies and 10 percent to thereafter. Some authors can negotiate rates of 12.5 percent up to 15 percent or more, or receive a three-tiered escalation.

ROYALTIES—CHILDREN'S BOOKS

Royalty rates for children's books should be similar to those for adult trade books. Young adult book authors can expect the same royalties as are offered for adult titles. The royalty escalation points for books for younger children (up to about eight years old) are sometimes higher, for example 10 percent on the first 10,000 copies, 12.5 percent on the next 10,000 copies, and 15 percent on all copies in excess of 20,000. When artwork represents a significant portion of the work (in which case the book is referred to as a "picture book"), the illustrator typically receives a separate contract that is comparable to the text author's, and each contributor separately receives half of the royalties paid. Some children's book contracts provide that the royalty for library editions will be based on net receipts rather than on list price. Because a substantial part of a children's book's sales might be in this category, it is worth trying to aim for a list-based royalty for the library-bound edition that approaches or equals the rate offered for the trade edition.

ROYALTIES—TEXT AND ACADEMIC BOOKS

Royalties for professional, scientific, and technical books are customarily based on net receipts instead of list price. The discount to distributors and retailers for textbooks is in the range of 25 percent to 33-1/3 percent, so the effect of a net-based royalty is not as significant as for trade books. A typical royalty rate should approximate 15 percent based on net. A substantial part of sales are likely to be library and/or export sales, so try to increase the rates in these categories. For college textbooks, the royalties are also based on net price, and the standard discount to bookstores is 20 percent (although some publishers offer as much as 33 percent). For a hardcover textbook, try for 15 percent of net receipts on sales up to a specified number of copies (between 7,500 and 15,000), and 18 percent thereafter. An original paperback textbook will earn royalties in the range of 10 percent to 15 percent of the net price.

EBOOK ROYALTIES

Publishers sell ebooks to retailers based on two different models: the so-called "reseller model" and the "agency model."[77] Under the reseller model, the publisher sells to the retailer at its standard discounted price (typically a 50 percent discount) and the retailer decides what to charge consumers. Under the agency model, the publisher sets the retail price and the seller acts as its agent, earning a 30 percent "commission" for each sale, but the publisher commits to set the price of the book well below the price for hardcover sales. Each unit of an ebook sold is significantly cheaper for publishers to produce and distribute than are traditional printed books. It is therefore logical to expect a higher royalty than those offered for printed books, regardless of the sales model employed. Currently, however, most publishers are offering 25 percent of the "amount received" for each

[77] Five of the "Big Six" publishers agreed to let Apple sell ebooks for the iPad and other applications under the agency model in 2010, but the US Justice Department has sued all these parties for colluding to fix prices. All five publishers—Hachette Book Group, HarperCollins, Simon & Schuster, Penguin, and Macmillan—have settled the case against them by agreeing not to use the agency model for two years. (Random House made a deal with Apple the following year and is not a defendant.) Industry observers, citing Amazon's demand to use the reseller model coupled with its practice of pricing many ebook titles at a loss, believe the Justice Department's suit will help Amazon grow its market dominance into a monopoly, dramatically harming bookstores and publishers in the process.

sale of an ebook.[78] This rate is not considered fair, reasonable or rational by authors' advocates, because it skews the basic formula that author and publisher share the profits equally; publishers earn a higher rate of return, and writers a lower rate, for ebook based on these royalties. The result is a natural publisher's bias in favor of ebook over print sales, which is manifested in promotion and print-run decisions. The Authors Guild and other advocates argue that no less than a 50-50 share of net proceeds is the appropriate balance, and eventually this should become the norm. But there is a catch: most standard ebook royalty clauses contain a "most favored nation" clause, whereby the publisher promises automatically to increase the writer's ebook royalties if and when it agrees to a higher rate with any other writer. While including "most favored nation" protection is a must for you, its existence in most contracts makes publishers extremely reluctant to increase any writer's ebook royalties, because to do so could require an increase for all.[79]

"DEEP DISCOUNT" ROYALTIES

Most contracts provide that when the book is sold at discount of more than 55 percent (hardcover) or 60 percent (paperback) to a distributor or retailer, royalties on those copies are reduced to 10 percent of the publisher's net receipts. This "deep discount" rate could sharply decrease your royalties and puts too much control over your royalties in the publisher's hands. The publisher could theoretically increase its profit by selling at just enough of a discount to cut your royalties by more than half.

Powerful retailers can demand discounts of up to 55 percent or higher, so try to specify that the deep discount rate applies only when given "to

[78] Ironically, some of the genre publishers' contracts—which tend to be far less favorable to writers than trade book contracts—have long required writers to grant them "all other rights not listed [in the contract]," in exchange for 50 percent of the net proceeds from these rights. Apparently upon realizing that this "catchall" clause could be read to include ebooks, and that 50 percent is twice what most trade book publishers are paying for them, Harlequin began to send letters their backlist authors attempting unilaterally to change the royalty for series ebooks to 15 percent of net digital receipts and single title ebooks to 25 percent.

[79] The wording of such a clause is fairly simple: "Notwithstanding the foregoing [royalty rate], during the term of this Agreement, should the Electronic Book royalty in the Publisher's contract boilerplate [or, "in any other contract offered by Publisher to an author"] reflect a change to the Author's advantage, the contract shall be automatically amended to replace the current royalty with the new royalty."

a purchaser not ordinarily engaged in the business of bookselling" or "outside of normal trade channels" (i.e., "special sales"). If your publisher will not agree to this limitation, your best option is to try to increase the triggering discount percentage so that it exceeds the publisher's standard discount by as much as possible. Another reasonable compromise is to agree to reduce your royalty rate by one-half of 1 percent for each 1 percent that the publisher increases the discount over the triggering percentage. Many authors have negotiated this kind of "shared-loss" royalty provision. The Authors Guild Model Trade Book Contract and Guide has appropriate wording if your publisher or agent cannot provide it.

Publishers' contracts vary in the royalties for mail order, book club, export, "small printings," and other sales outside normal trade channels, but all these categories tend to be lower than retail sales rates. You might be able to achieve increases in the offered rates, and it is worth attempting if you think the book will sell significantly through any of these channels. If you have granted the publisher foreign rights in the English language, it is important to ask it to match, or at least approach, your US rates for export sales.

REMAINDERS

"Remainders" are overstock copies that are sold to remainder houses and resold to consumers for a fraction of the retail price. Most contracts offer the author at most 10 percent of the amount received for the sale of remainders—a very small amount. Your best alternatives are to increase the royalty for remainder sales, and/or to get the right to purchase remainders at the lowest price offered to remainder sellers and to arrange to sell them yourself. If you want the latter option, provide that the publisher must notify you before it remainders the work in any format or edition and allow you to purchase the remainder copies at cost or the remainder price. Many publishers will agree to this but will also specify that they will not be in breach if they mistakenly fail to notify you.

FREE COPIES AND AUTHOR'S DISCOUNT

Most publishers give the author twenty-five free copies (hardcover) and twenty-five free copies (paperback), and a 50 percent discount to you to buy additional copies. This clause might also provide that copies you purchase must be for "the author's own use, and not for resale." If you think you might want to

sell your own copies, negotiate that right into the contract, but do not expect to earn royalties for copies you purchase, whether or not you may resell them.

AGENCY CLAUSE

Your agent will make sure that an agency clause is added to the publishing contract. Make sure it embodies your agreement with your agent (see chapter 15), and that you have negotiated your arrangement with your agent before she negotiates with the publisher on your behalf. The typical agency clause authorizes the publisher to discharge its payment obligations to you by paying your agent, and allows the agent to take her commission from said payments.[80] The publisher has little or no stake in your deal with your agent, so it is unlikely to argue over the terms of the clause your agent requests.

ACCOUNTING AND STATEMENTS

Most trade publishers send semi-annual statements accounting for sales and include a check for the royalties and license fees owed. Some traditional trade publishing might offer quarterly accounting, but this is rare. In no event should you accept statements and payments less frequently than twice a year. Accounting periods depend on your publisher's fiscal year. It is not uncommon for publishers to send statements and payments three or even four months after the end of the accounting period.

Some publishers' statements are clearer than others, but you ought to be able to understand the number of sales made and royalties due for each edition. Some publishers will agree in the contract to disclose the number of copies of the work that were printed, bound, and given away, as well as the number of copies on hand at the end of the accounting period.[81] Statements should also include all subsidiary rights income received in each category and the identity of the licensee. Review your royalty statements carefully and do not hesitate to ask (or have your agent ask) for any information needed to verify the statement's accuracy or if it contains anything you do not understand.

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[80] This is obviously not as good for you as an agreement to pay you and your agent your separate shares of the amount due.

[81] When requesting this, you could argue that this information will have to be revealed if you exercise your right to audit the publishers' records.

RESERVES AGAINST RETURNS

Almost every publisher offers a full refund to retailers and distributors for books ordered and returned unsold. Royalties are not due to you for returned books. For that reason, virtually every contract allows the publisher to withhold a "reserve against returns," that is, to hold royalties otherwise due in order to avoid overpaying for returned books. Although reasonable in theory, some publishers withhold far more than a reasonable estimate of future returns for too long, thus depriving you of money that is rightfully yours. The Authors Guild recommends that reserves against returns for hardcover and trade paperback books not exceed 15 percent of reported sales in a given accounting period. The reserve should be withheld no longer than eighteen months after first publication. For mass market paperbacks, it recommends reserves of 35 percent or less. If the publisher will not agree to these limits, ask it to agree to withhold a "reasonable reserve." The Guild recommends limiting reserves to the first three accounting periods or eighteen months after initial publication. After that, it is unlikely the publisher will receive significant numbers of returns.

JOINT ACCOUNTING

Watch out for language saying that "all" amounts the author owes the publisher under contracts for other books may be deducted from royalties due under your current agreement. Such "cross-collateralization" or "joint accounting" clauses allow the publisher to deduct from this book's earnings all amounts owed by you for page-proof alterations, permissions payments, books purchased, or other obligations associated with different books. Some publishers might even claim the clause entitles them to deduct unearned advances for other books, although this is less likely if each contract describes the advance as "nonrefundable."

Try to strike joint accounting provisions from the contract. The concept can appear in various places in the payment terms and is manifested in words such as "this or any other agreement between the parties" or "any other amounts owed to the publisher." If your publisher will not delete the clause, it is important to add that "amounts due under any other agreement between the parties will not reduce the advance, including flow through amounts due for subsidiary rights licenses." It is equally important to make clear that an unearned advance under another contract is not a debt to be repaid out of earnings from the current contract.

SUBSIDIARY RIGHTS PAYMENTS AND ACCOUNTS

The complexities of subsidiary rights accounting have plagued publishers for years, leading to inadequate and undocumented payments to authors for their share of income from such sublicenses as book clubs, foreign publishing, and audio books. In response to this problem, a committee of the Book Industry Study Group created the Subsidiary Rights Payment Advice Form that appears as Appendix D at the end of this chapter. Try to provide that the publisher will require sublicensees of your work to include this form or its suggested explanations with their payments.

EXAMINATION OF THE PUBLISHER'S RECORDS

It is very important to make sure your contract contains the right to audit the publisher's records regarding your book's financial performance. The audit clause should allow you or your representative to conduct the examination and should not limit who your representative may be or how she may be paid. For example, it is unreasonable to require the examiner to be a CPA, that she sign a nondisclosure agreement covering your book's information, or that she not be compensated through a contingency fee based on the amount of underpayment she detects. The audit clause should provide that the publisher will pay your examiner's fee if the audit reveals that it erred to your detriment by more than 5 percent of the amount due on the statement(s) examined. It should not limit the period in which you have to examine the records. Many publishers want to limit your "look back" period to two years after you receive a royalty statement. This is unreasonable; if your examiner detects a discrepancy in payments that extend back to the beginning of the contract, you should be able to correct it at any time. At the least, provide the right to audit the records back for the length of the statute of limitations for breach of contract (currently six years in New York).

LEGAL RISK ALLOCATION

Publishing a book entails risk. One category of risk is legal. The publisher could be sued based on the content of your book for copyright infringement, defamation, invasion of privacy, or other personal injury. Unpublished writers have sued Michael Crichton, J. K. Rowling, and other

successful writers and their publishers alleging infringement; although these suits were thrown out of court, the costs of defending even frivolous suits are significant.[82] This section will examine how the contract allocates the legal risks of publishing your book.

WARRANTIES AND INDEMNITIES

The author's representations, warranties, and indemnities appear in every publishing contract. The representations and warranties are your promise to the publisher that you are free to enter the contract, that you own the rights to the work you are granting, and that no third parties can allege the work infringes their rights or causes them harm. The indemnification obligation requires the author to defend and pay all costs and losses of the publisher, including payments to investigate and settle claims and attorneys' fees, arising out of any third party's claim against the publisher based on the book. If you fear such an accusation might be made about your book, you should discuss it with your publisher early and work together to decrease the risks.

Doing so will not eliminate your risks, unfortunately. The typical contract requires the author to indemnify the publisher (and its employees, agents, and sublicensees) not only against legal judgments resulting from an actual breach of warranties, but for all expenses incurred for an alleged breach, no matter how little merit the claim has. This term places all the risk squarely on you, which is unfair and unreasonable unless you knowingly infringed copyright or defamed a person. There are ways, however, to balance the risk allocation more fairly.

Try to limit your indemnity obligation only to cases of a final judgment resulting from an "actual," not an "alleged," breach of warranties.[83] Require the publisher to submit any proposed settlement with a third party to you for your approval. Exclude third party content and changes required by your publisher from the material you warrant. Scrutinize the warranties carefully. It is reasonable to warrant that your work does not infringe intel-

[82] Claimants almost always sue the publisher, the perceived "deep pocket," whether or not they name the author.

[83] Sometimes this takes only the substitution of "actual" for "alleged" in the contract language.

lectual property rights, defame, or otherwise legally injure a third party, but if your work contains recipes or formulas, you should not have to guarantee that no harm will come from a reader's misuse of the content. Most publishers are reluctant to change their warranty and indemnity clauses, sometimes claiming their insurers have approved the boilerplate and will not cover claims for contracts that have altered the language.

In practice, no matter what the contract says, publishers often treat expenses, settlements, and liabilities from legal claims, especially meritless suits, as a cost of doing business. In most cases, it will seek to recoup its costs from royalties due instead of requiring outright payments from their authors. Unless the publisher specifically agrees to this in the contract, however, it has no legal obligation to do so. Fortunately, most publishers also agree to name their authors as "additional insureds" under their liability insurance policies, which costs little or nothing. But deductibles are high and your indemnity obligation could still require you to cover the deductible and other expenses not covered by the insurance. If the publisher agrees to add you as an insured, make sure this appears in the contract, and try to limit your share of the deductible to an amount you can realistically cover or to a percentage of your advance, and to have amounts due from you withheld from royalties instead of directly payable. If the publisher does not have media insurance or requires you to pay the entire deductible, consider obtaining your own liability insurance. Your writers organization might be able to refer some insurers.

BANKRUPTCY

If your publisher files for bankruptcy, control over its business and its assets is placed in the hands of the bankruptcy court. All rights in books held by the publisher are considered assets, and no bankruptcy clause in a contract can override the court's control over those assets. For that reason, do not spend too much capital negotiating the bankruptcy clause. Other kinds of financial calamity for a publisher do not lead to court control, however, so it is a good idea to provide that your rights will revert automatically upon the publisher's insolvency or liquidation. Even better, try to agree that the publisher's failure to remit statements or royalties for a specified period will lead to automatic termination of the contract without limiting your other remedies.

TERMINATION

Unless you provide for the right to terminate your contract upon the publisher's breach, your remedies against it, even for breaching its most important obligations, are limited to money damages, which you must sue to receive. It behooves you, therefore, to provide for the right to terminate the contract and retrieve all rights granted if the publisher fails to provide royalty statements, make required payments, or publish by the agreed deadline.

ADJUDICATION OF DISPUTES

Consider asking for an arbitration clause to address disputes. Arbitration is cheaper, more direct, and faster than litigation in court; in simple cases you do not need a lawyer. Larger publishers usually refuse arbitration clauses, because they can afford the cost and delays of litigation better than their authors. Smaller publishers might agree more readily.

THE FUTURE

As noted, the contract likely provides that the grant of rights, and therefore all the other contract terms, extend for the entire term of copyright. Even if your book becomes a perennial seller and earns both parties a nice income for many years, you do not want the publisher to control your career. If the book stops bringing in income, you should have the right to end the contract and get the rights back. The following terms address the future of the book and of your writing career in either circumstance.

OUT-OF-PRINT/REVERSION OF RIGHTS

Virtually all book contracts include an "out-of-print," or "reversion of rights" clause. The out-of-print clause encourages the publisher to sell the work for as long as it is profitable for both parties. It provides that the rights granted to the publisher will revert to you and the contract will terminate when the work is no longer "in print," thus allowing you to remarket or repurpose the book freely. In negotiations, focus on the definition of "in print." When the publisher stops investing in printing, distributing, and marketing the book, it should also relinquish the right to profit from it (except for the right to profit from existing sublicenses). Logically, your book should therefore be deemed "in print" only if copies of an English-

language hardcover or paperback edition are offered for sale in the United States through regular trade channels and the book is listed as such in the publisher's catalog. But the publisher will want to keep the rights for as long as it can, so it is not likely to agree to define "in print" so restrictively.

Some contracts do not define "in print" at all, and the publisher can use that obscurity to argue that the existence of a foreign edition or non-book version renders the work "in print." It is perfectly reasonable for you to insist on a definition that includes the book's availability through regular trade channels in the United States. The publisher will likely want formats such as ebooks and "print-on-demand" versions to constitute "in print," but will likely agree to revert the rights if the work is not available for sale in printed book editions in the United States and the author has not earned a certain minimum in royalties (e.g., $500) in two succeeding accounting periods. If you do not include this, the publisher can claim the work is "available for sale" even if no print editions exist and few digital copies are sold. Also, consider requesting reversion to you of specific rights, such as hardcover or paperback editions, if the publisher stops producing and selling them, even if it retains digital rights.

The typical out of print clause does not require the publisher to inform you that the work is out of print; unless you include this, you must determine that for yourself through your royalty statements. Many contracts require the author to request that the publisher put the work back into print and to give the publisher several months to comply before rights revert. If yours has this term, give the publisher no more than sixty days to respond to your request and no more than six months from the date of your request to re-issue a printing. Also, provide that the rights will revert automatically if the publisher does not put the work back into print instead of relying on the publisher to confirm that the rights have reverted.

REVISED EDITIONS

Contracts for textbooks, technical books, and some children's books often contain a clause that requires the author to revise the book for later editions upon the publisher's request, sometimes without further payment (except for the continued payment of royalties).[84] Typically, the revised

[84] Revised edition clauses should not appear in contracts for nonfiction trade books and novels. If the parties in these cases believe a new edition is warranted, they can mutually agree to amend the contract.

edition clause states if the author will not or cannot make the revisions, the publisher may hire another author to do so and charge that person's payment (on a flat fee or royalty basis) against the original writer's earnings. To protect yourself from losing control of your work and money owed to you, include the following terms: (1) that the publisher's requests for revisions must be reasonable and subject to your approval; (2) that the second author must be subject to your approval; (3) that in no event shall your compensation be reduced below a specified minimum; (4) that the authorship credit to you and to the subsequent author shall be subject to your approval; (5) and that you shall have the right to remove your name from later editions.

THE OPTION CLAUSE

Giving the publisher an option to publish your next book helps the publisher, not you. It gives the publisher the privilege of publishing your next book or books only if it chooses. If not properly limited, an option can bind you to the publisher for all your subsequent works, even if it performs badly, your editor leaves, or you can get better terms elsewhere. It prevents you from seeking other opportunities for a period of time that, if not curbed, could be fully controlled by the publisher. Ideally, therefore, you should strike the option clause from the contract.

From the publisher's perspective, investing in a book by an unproven writer is financially risky. Having the option to publish her future works on terms over which it has some control hedges the risk. Even so, some publishers are willing to delete the option clause altogether. If your publisher will not strike it entirely, it is important to negotiate revisions to the typical clause to neutralize its most harmful effects.

An option to publish your next work on the "same terms" as the current contract is unacceptable because it effectively gives away your ability to negotiate the terms of your next—and all future—publishing contracts. Change any such clause to state the next contract will be on terms "to be mutually agreed" at the time the second contract is negotiated.

Granting the publisher "last refusal rights" allows it to acquire your next work by matching another offer received. This effectively prevents you from getting other publishers to consider your next work; no publisher will invest in making an offer if it knows a competitor can take the work on the terms it worked out with you. At most, permit the publisher

a "right of first refusal," or give it the right to "top" another offer by at least 10 percent.

Do not agree to an option that requires you to submit a complete manuscript for consideration. At most, agree to submit a summary and sample chapter or two or a proposal for the optioned work. Do not allow the publisher to consider your next work for any period of time that begins after publication of the current work, which by definition could be years from now. The consideration period should begin no later than on acceptance, not on publication, of the current manuscript, and should not exceed six weeks. The negotiation period should also be reasonable, not more than four to six weeks, before you can walk away and freely shop the work elsewhere.

Finally, limit the option to cover only books that are similar to or in the same market as the current work (e.g., "biography for children" or "technology industry study"), or if applicable, only to works written under your pseudonym or by you and a collaborator together, not separately.

NONCOMPETE CLAUSES

Standard contracts contain clauses restricting the author from publishing another book based on material in the current book, or from publishing material that competes with the sale of the current book. Some also state that the book to be delivered will be the "author's next work." A broadly worded noncompetition clause can harm your interests. For example, the publisher could try to prevent you from using your characters in sequels and prequels, or claim that the author of a textbook, cookbook, or other educational work may not write other works on the same subjects while the contract is in force. Although courts require noncompetition clauses to be reasonable in scope and not unduly restrictive, it is best to change the contract to limit the definition of what is "competitive."

First, if your work is fiction, your next novel cannot logically "compete" with it, so you should try to delete the clause entirely. If the work is nonfiction or if the publisher will not strike the clause, describe the type of work to which the clause applies as specifically as possible as to subject matter, market, and format. Do not give the publisher the discretion to decide whether a work will compete with the contracted book—limit the restriction to works that "actually" compete with the primary work.

By the same token, if you deliver your manuscript on time, the publisher should not care whether the work is the author's "next work." If the publisher will not agree to delete either the "next work" or "noncompetition" clauses altogether, you can protect yourself by adding the following sentence:

> Notwithstanding the foregoing [noncompetition and/or next book clause], it is understood and agreed that the author may write and publish [TYPE OR GENRE] books in the field of [SUBJECT], and this paragraph is not intended and shall not be interpreted to prohibit or limit such writing and publishing activity by the author.

AUDIO LICENSES

Interest in audio rights has grown dramatically over the past fifteen years. In the past, audio rights were nearly always granted to the publisher as a subsidiary right, but with the recent popularity of downloadable audio books, established authors are now attempting to reserve the rights. Consider whether or not your publisher will be able to sell audio rights better than you or your agent or whether it can produce its own audio books. If so, you might want to grant an option or a right of first refusal to your print publisher.

There are a number of issues that arise in audio rights licensing, whether they are included in your book publishing contract or separately licensed. Limit the grant of rights with respect to duration, territory, language, and exclusivity. Unlike book rights, which are usually tied to the term of copyright (provided that the book remains in print), the duration of audio rights is often shorter. The reason for this is simple: as with digital book formats, audio books need never go out of print because it is relatively inexpensive to make single copies. Thus, it is not uncommon for agents to limit the grant of audio rights to a term of seven to ten years after initial publication. The publisher might require an option for sixty days or more in which to negotiate for an extension or renewal of the audio rights.

Publishers generally want the widest possible territory, i.e., worldwide rights, and all languages, but might settle for English-language rights. Again, make sure that your publisher has access to all the markets included in the grant. One way to do this is to ask the publisher for a breakdown of gross sales by country.

The question of whether to grant exclusive or nonexclusive audio rights turns on similar factors as the scope of territories and languages granted. Is the publisher better situated than you or your agent to sell audio rights? If you believe the book will have strong sales, consider retaining at least a nonexclusive right to audio versions because the value of the rights, and the potential players in any sale, will change dramatically if the book is successful. On the other hand, granting only nonexclusive rights will affect the publisher's incentive to market them because they are worth less and harder to sell. Either way, specify that the audio version of the book will be a nondramatic verbatim reading of the entire text of the work. This is important to ensure that there is no confusion as to rights in other possible forms of audio or audiovisual works, such as multimedia productions, the soundtrack to a movie, or even a film itself.

If you enter into a separate contract for audio rights, you should receive an advance against royalties. The standard royalty rates in audio book contracts are generally low, typically escalating from 5 to 10 percent (sometimes with 1 percent added per 10,000 units sold). They also are based on net receipts rather than retail price. Thus, you should generally negotiate for a substantial advance on the theory that there might not be much more income forthcoming for your audio rights. Most trade book contracts with traditional publishers now offer an audio download royalty of 25 percent of net receipts. However, as discussed earlier with respect to ebook royalties, the Authors Guild and other advocacy groups believe a 50-50 split of proceeds would represent a more equitable balance.

FINAL NOTE OF ADVICE

Asking for changes to your contract will not harm your publishing relationship. If anything, demonstrating your business and industry savvy will increase your publisher's respect for and confidence in you. Even if it rejects most of your requests, it is likely to accept some of them and this benefits you. In any case, protecting your interests, especially control of your writing career, is the right thing to do.

APPENDIX D

(To be sent by Publisher to licensees)

SUBSIDIARY RIGHTS PAYMENT ADVICE FORM

This form must be completed and delivered to us when you send payment pursuant to licenses granted by us to you. You may deliver this form to us by mail, including it with your check, or you may scan the form and attach it to an email sent to _____ or fax it to _____ .

Failure to do so may result in our inability to record your payments and prevent us from determining that you are in compliance with the terms of your license(s).

- Amount remitted: _____
- Check or wire transfer number: _____
- Check or wire transfer date: _____
- (for wire transfers) Bank and account number for which moneys were deposited: _____
- Publisher/agent payor's name _____
- Title of the work for which payment is being made: _____
- Author(s) of the work: _____
- Our Unique Identifying Number for the work as it appears in the Appendix to the relevant contract. If none, the original publisher's ISBN number of the work: _____
- The period covered by the payment: _____

The following information will be very helpful, so we ask that you also provide it:

- Reason for payment (guaranteed earned royalty, fee, etc.): _____

  _____

- Payment's currency: _____
- Type of right (book club, reprint, translation, etc.): _____

  _____

  _____
- Summary justification of your payment:

  Gross amount due: _____

  Taxes: _____

  Commissions: _____

  Bank charges: _____

  Net amount paid: _____