# NATIONAL WRITERS UNION

# GUIDE TO BOOK CONTRACTS

**by**

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**<For NWU Members only>**



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# INTRODUCTION

Being offered that first book contract is a milestone in the life of a writer. Yet the excitement of having a publisher express interest in your work is often followed by feelings of confusion and disappointment. You are dismayed to find that the contract sent to you for signing contains provisions that are either indecipherable or totally one-sided in favor of the publisher.

For many authors those feelings continue throughout their writing career: They either resign themselves to the idea that publishers will always have the upper hand, or they depend on agents to fathom the mysteries and to try to tip back the balance of power.

It is the premise of the NATIONAL WRITERS UNION GUIDE TO BOOK CONTRACTS that authors need not be powerless or uninformed when it comes to book contracts—whether or not you are represented by an agent. Book contracts are complicated documents that often reflect entrenched industry practices that favor publishers, but they are not beyond comprehension. With the aid of this document you can evaluate a proposed contract and get a sense of what changes you should try to negotiate yourself (if you are working without an agent) or urge your agent to negotiate. In addition to general advice, the Guide contains suggested contract language.

## THE OFFER

When considering an offer from a publisher, keep in mind that proposed contracts are not take-it-or-leave-it propositions; you should never simply sign on the dotted line. Certain provisions may have been agreed to orally by you or your agent and have to be regarded as given, but treat everything else in the contract as up for grabs—though to varying degrees. Some provisions in the publisher's standard contract (known as boilerplate) are easy to change, some can be changed with difficulty, and some can be changed only if you are a big name or someone with a hot project. (The commercial book business is not egalitarian.) Still other provisions cannot be changed at all in individual contracts; dealing with these will require industry-wide reforms of the kind advocated by the NWU.

The Guide will give you a clear sense of where each contract clause fits into this set of possibilities, so you will neither pass up opportunities to improve your contract nor waste time pressing for changes that may be next to impossible to get. The Guide is oriented primarily to contracts with trade publishers (those that issue a wide range of works for a general readership), but there are separate sections for variations relevant to academic houses, small presses, POD, children’s books, and book packagers.

Do not assume that your agent, if you are working with one, will catch every problem. There are many capable and thorough agents, but there are also some who focus only on the key money provisions of a contract and let other issues slide. Whatever the competency level of your agent, it behooves you to review a proposed contract and raise questions and concerns. This Guide will help you to do so in an informed and effective manner.

Although all book contracts tend to contain the same list of provisions, they don't all present them in the same way. The exact wording of provisions on a given subject will vary

among contracts, even when essentially the same thing is being said. So do not be surprised if the language in a contract presented to you does not match exactly what is described below. Also, there is no standard order of presentation in book contracts. The presentation in the Guide is based in part on logical sequence, in part on what is most common in contracts. But, again, do not be concerned if the order of subjects in your contract is different.

## THE NEGOTIATION

In writing this Guide, we tried to be comprehensive in our treatment of contract clauses. We cover items that are critical to your relationship with the publisher as well as some that may be trivial. We cannot make absolute statements about the relative importance of each item—what to one author may be a major concern may be insignificant to another. For example, if your book will contain a great deal of material from other sources, you may be quite concerned about who pays permission fees. If your book consists exclusively of your own work, this issue may be of no importance at all.

Don't be surprised if you cannot get your publisher to agree to all or most of the changes you request. Publishers like the fact that industry practices are stacked in their favor, and they will resist ceding ground to you. They do, however, have to show some flexibility to avoid being shunned by agents and authors. Ultimately, the question is whether they bend enough to make the contract tolerable to you. If not, you should take your book to another of the many publishing houses in operation; aside from the large trade houses there are thousands of smaller and/or specialized presses. If you assume that no other publisher would be interested in your work, you are in effect negotiating from fear, which is the surest guarantee that you will end up with a mediocre contract.

Again, bear in mind that no contract is cast in stone. Despite a publisher's insistence that "this is what we have always done" or "this is our standard contract," changes can be negotiated. When you are negotiating a contract, either in person or over the telephone, do not feel pressed to break a silence when the editor or other representative does not respond quickly to a request. Simply wait for an answer; if you say something too soon you are apt to ask for less than you originally wanted.

The goal of this Guide is not simply to help NWU members get better contracts—the ultimate aim is to change the rules of the game in book publishing. The Guide and other documents and educational efforts of the NWU serve this end by making writers better informed about industry practices. As authors become more knowledgeable, they are better able to demand more favorable contract provisions, and that will help push the industry in the right direction. When these individual pressures are combined with collective political efforts by writers, many of the unfair industry practices described here will begin to change.

## NWU CONTRACT ADVISERS AND GRIEVANCE OFFICERS

Turning back to current realities, remember that as an NWU member you are entitled to more than a copy of this Guide. You also should take advantage of the Union's network of book contract advisers, who can answer questions that may not be addressed in this document.

A contract adviser also can help you plan a negotiating strategy. This would include ideas for playing off one demand against another. You can decide to give in on certain points and use that as leverage to get more of what you want in another area. The art of negotiating is not easy to master, but this Guide and the assistance of union contract advisors will put you in a much better position when dealing with your publisher or when trying to figure out how you want your agent to deal with the publisher.

Also keep in mind that if you have a problem with a publisher *after* your contract has been signed, you can call on an NWU grievance officer for assistance. Negotiating a good contract will make you less susceptible to publisher abuses, but problems can always arise. Don't hesitate to call on the Union, which has an excellent track record of getting publishers to do the right thing.

You can get in touch with a book contract adviser or a grievance officer by contacting the coordinator of contract advisers and grievance officers at GCDCoordinator@nwu.org.

## Acknowledgments

Numerous persons have assisted in the creation of the first edition of this Guide. Within the NWU we would like to thank the following people who read and commented on various drafts: Chris Ammer, Donna Demac, Frank Free, Amy Randall, Steve Turner, Harry Youtt (who also helped draft the sections on rescission and arbitration), and most of all, Archie Brodsky, who provided extensive and invaluable suggestions. We want to extend a special thank-you to staff organizer Alice Sunshine, who did excellent copyediting of the text.

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The positions stated herein are those of the authors and the National Writers Union, and are not necessarily those of the readers.

P.M. and M.P.

NWU members who have been especially helpful for the revised edition are Barbara Rogers and NWU members Mike Bradley, Carol Busby, Esq., Bryna Fireside, Bruce Hartford, Alice Rogoff, Ken Wachsberger, Miryam Ehrlich Williamson, and especially Phil Mattera.

In addition to minor changes throughout, the principal sections that have been revised are those concerning electronic rights and dispute resolution, and there are five new appendices, for contracts for the literary small press book, academic books, book packagers, print on demand (POD), and children’s books..

C.A.

# I. RIGHTS AND COPYRIGHT

There are three basic types of right involved: copyright, publishing rights, and subsidiary rights.

*Copyright* relates to the question of who is the author (and thus owner) of the work for legal purposes; *publishing rights* are the terms under which the copyright holder authorizes the publisher to print and sell the work; *subsidiary rights* are the terms under which the copyright holder authorizes the publisher or others to produce (or adapt) the work in forms other than the primary edition.

**1. Copyright**.

Copyright consists of those rights and privileges guaranteed to the legal author of a work under federal law. These include, above all, the right to reproduce the work and the right to prepare derivative works, such as a film adaptation. Under U.S. copyright law, the copyright in a literary work belongs to the person or persons who write the work from the moment the words are expressed in some fixed form (except in cases of works made for hire—see below). Copyright protection lasts for the lifetime of the author plus 70 years.

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**WORKS MADE FOR HIRE (WMFH)**

Works for hire, also called works made for hire, are commissioned projects in which the person who actually writes the book is not the legal author and rights holder. Instead, the person who *commissioned* the work is considered the author and rights holder.

Under U.S. copyright law, as amended in 1976, there are two main categories of works for hire: (1) Works written by an employee in the course of his or her job. The employer is automatically the legal author and owner of such works; (2) works in which a non-employee (a free-lancer or independent contractor) is commissioned to create the work.

Copyright law has strict requirements for the second category of WMFH. The project must meet these requirements to be legally a work for hire:

- The work must be specially ordered or commissioned; the contract must apply only to the named commissioned work rather than applying to “all works in the future” or “all works already published.”

- The commissioning party and the author must agree in writing that it will be a work made for hire, and the term “work made for hire” or “work for hire” must be used in the contract.

- The work must fall into one of the following nine categories:
  1. A contribution to a collective work*
  2. A part of a motion picture or other audiovisual work

3. A translation
4. A supplementary work
5. A compilation
6. An instructional text
7. A test
8. Answer material for a test
9. An atlas

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  * Contributors to anthologies are often pressured by editors to give up their copyright, but there is no reason to do so. Contributors can retain the copyright on their contribution, while the editor can register a copyright on the entire volume as a collective work.

For contract guidance on these works, see the Union guide to work-for-hire contracts on the Union web site.

**If the work contracted for does not fall into one of the above-named categories, it is not a WMFH under copyright law.** Contracts may include a clause that claims the project is a WFMH under copyright law, but the projects rarely are. Consequently such a contract will

also include a clause saying if it's not legally a WMFH, the author hereby transfers the rights to the publisher. That is the clause that is operative to change the ownership of the copyright.

Why does this matter? If the project is a legitimate WMFH, the writer never held ownership, whereas if it is a transfer of copyright, the writer did initially own the work The copyright law contains a provision allowing an author (or his/her heirs) to terminate transfer rights during the five years beginning at the end of thirty-five years from the date of publication, or forty years from the date of the transfer, whichever is earlier. The author of a true WMFH never owned the copyright, never transferred it, and so can never regain it.

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*Aside from legitimate work-for-hire situations, there is never a good reason for giving up your copyright. In addition to the principle that writers should remain the legal owners of their work, there are important practical considerations. If your work goes out of print and you don't hold the copyright, you would need permission from the publisher to make any subsequent use of your own work. There is no reason to put yourself in that position. Moreover, if someone infringes on your work, you can only sue after your copyright is registered (before or within five years of publication).*

Academic presses and smaller publishers have long insisted on taking out copyright in their name rather than the author's. They may claim it is "university policy," or that "it doesn't make any difference." To the latter statement you should respond that if it does not make any difference, you would prefer that the copyright be in your name. Do your best to resist the notion of "university policy," which is little more than a power ploy.

Often, writers will be asked to give up their copyright in projects put together by book packagers, in ghostwriting, in textbook writing, and in situations in which the writer is contributing a small part of a larger volume. Sometimes these are erroneously presented as work-for-hire situations; in other cases the writer may be required to assign the copyright.

In most contracts with trade book publishers there should be no problem regarding copyright. The publisher's boilerplate will include language requiring the publisher to register the work with the U.S. Copyright Office in the name of the author. Do not confuse the issue of who does the registering with the question of who holds the copyright. The fact that the publisher takes care of registration (which is standard practice) does not mean the copyright is in its name.

*To repeat: you should do everything possible to hold on to your copyright. When you are writing a trade book in particular, industry practice makes it possible for you to be adamant on this point.*

The copyright clause in your contract should read something like the following:

**The Publisher shall register the Work in the Author's name in compliance with U.S. copyright law and the Universal Copyrights Convention. The Publisher also shall print in every copy of the work a copyright notice in the Author's name and see to it that such notice is contained in all editions of the work issued by licensees.**

In the event that the publisher will not register the copyright, as may be the case with self-published or POD books, it is advisable for the author to register it with the U.S. Copyright Office. You can get instructions and forms from its web site, www.loc.gov/copyright/forms.

**2. Publishing rights**

Unless you are planning to self-publish, you as the copyright holder will need to find someone else to publish your book. When you sign a book contract, you are, in essence, granting various rights to a publisher. These publishing rights (which derive from your copyright) are the terms under which the publisher is allowed to print and distribute your book.

a. Grant of rights--format.
In most book contracts, the basic publishing right granted by the author is the right to publish the work in an original hardcover edition. In some cases, your primary publisher will also want the right to issue the work in paperback and other formats. When a publisher intends to publish both the hardcover and paperback versions of a work, it will propose what is known as a "hard-soft deal."

A hard-soft deal can be advantageous to you, as long as the size of the advance on royalties reflects the broader grant of rights, and the royalty rate for paperback copies is adequate (see Section II.3.b below). The advantage comes about because, when your primary publisher puts out the paperback edition, you get a full royalty on each copy sold; when paperback rights are licensed by the primary publisher to another publisher (a reprint house), you have to share the royalties with the primary publisher. There is, however, a potential pitfall in selling paperback as well as hardcover rights to the primary publisher. If the work turns out to be a smash hit, you will be deprived of the right to auction off the paperback rights at a high price.

Another format issue of growing importance concerns the conversion of the printed work to electronic form. For more details on this, see the discussion of electronic rights in Section I.3.d.ix below.

b. Grant of rights--duration.
The customary practice in the United States is to allow the primary publisher to retain exclusive publishing rights for the duration of the work's copyright term (which is currently 70 years from the author's death), as long as the work is kept in print. Sometimes the rights continue even after the primary edition is out of print, if a subsidiary edition is still being sold. See Section IX on termination.

Technically, as mentioned above, the U.S. Copyright Act provides that authors or their heirs may terminate any grant of rights after 35 years. However, since this provision has been effective only since the beginning of 1978, it is unclear what sorts of legal challenges may emerge when authors or their heirs attempt to exercise this right.

In England, the Society of Authors and the Writers Guild of Great Britain have negotiated minimum-terms agreements with various publishers that include an expiration date for the grant of rights given to the primary publisher. When the initial grant expires (usually after ten years), the parties may negotiate new terms, or the author may take the work elsewhere.

*The concept of a more limited duration of the grant of rights should be explored in the United States as well. No author should be stuck for decades with an unsatisfactory contract. While limiting duration to ten years, for example, may be impossible for most authors, those writers with the most clout should try to bargain for it.*

c. Grant of rights--geographical scope.

The final issue for publishing rights is the extent of the geographical area in which the primary publisher is authorized to exercise those rights. Traditionally, the primary publisher would ask for the **exclusive** right to issue the work in the English language in the United States, its territories and possessions (Virgin Islands, Guam, etc.), Canada, and the Philippines. British Commonwealth rights would usually be kept by the author for sale directly to a British publisher, but often the primary publisher would be granted the **non-exclusive** right to sell the English-language edition elsewhere in the world (the so-called open market).

In recent decades, publishers increasingly have sought to gain much broader geographical rights, and in many cases they demand exclusive world rights in English—sometimes in all languages. To some extent this reflects the globalization of publishing and the ability of large publishing houses to sell their wares in many parts of the world. Yet, since such a broad grant usually allows the publisher either to issue the work itself abroad or to license someone else to do so, the demand for world rights also reflects the ability of primary publishers to gain additional profits from the sale of foreign rights. The licensing process is in effect an exercise of subsidiary rights and thus is discussed in more detail below.

*As with the granting of hardcover and softcover rights, it may make sense for an author who is less experienced or working without an agent to give the publisher world rights, as long as the size of the advance and other money provisions reflect the greater profit potential the publisher thus achieves. If you are quite experienced and/or working with an agent, you might try to reserve not only the traditional areas (British, open market and translation rights) but Canadian rights as well.*

If you have granted the publisher very narrow rights, the grant of rights clause might read as follows:

**The Author hereby grants and assigns to the Publisher, for a period of ten years, the sole and exclusive right to print, publish, distribute and sell the original hardcover, English-language edition of the Work in the United States, its territories and possessions.**

You may also wish to allow the Publisher to sell an English-language edition in non-English speaking countries, so you might add to the clause:

**and the non-exclusive right to publish the Work in book form in other countries except the British Commonwealth (not including Canada) and the Republics of South Africa and Ireland.**

For still broader distribution, you might allow the Publisher to license translations of the Work, but for a limited time, so if the Publisher does not exploit this right you or your agent may do so::

**and the exclusive authorization to license on Author's behalf the right to translate and publish in book form in languages other than English in all countries, provided that Author may terminate such authorization after 24 months from the first U.S. trade publication.**

Finally, the broadest grant of rights would read as follows:

**The Author hereby grants and assigns to the Publisher, during the full term of copyright, the sole and exclusive right to print, publish, distribute and sell the Work in book form in all languages throughout the world, to license others to do so, and to exercise the subsidiary rights specified below.**

**3. Subsidiary rights**

a. Granting vs. reserving rights

Subsidiary rights relate to the issuing or adaptation of the work in forms other than the primary publisher's edition. Since these uses of the work often account for the lion's share of the potential income, you should pay close attention to these provisions of your contract.

When the author grants particular subsidiary rights to the primary publisher, the publisher typically has the right to do one of two things. It may exercise those rights itself (for example, by issuing its own paperback or audio edition) and pay a royalty to the author according to rates specified in the contract; or it may license those rights to others (for example, selling translation rights to a foreign publisher or film rights to a movie studio) and share the proceeds with the author according to formulas stated in the contract.

Deciding whether it is better to reserve (i.e., keep ) various rights or grant them to the publisher is a complicated matter. In the past it was standard practice, at least among trade publishers, to allow authors to reserve certain "secondary subsidiary rights" (British Commonwealth rights, foreign rights, movie/TV rights, merchandising rights and first serialization). Today, however, publishers increasingly want to have exclusive control over as many subsidiary rights as possible. This is because of the increasing value of these rights, especially with regard to electronic media.

*If you are an experienced author with an agent who has solid contacts for selling foreign rights and doing movie deals, you should reserve as much as possible. This would allow you to enjoy 100 percent of the resulting income (minus agents' commissions) rather than sharing it with the publisher. It also means you will receive income from these subsidiary rights even if the advance on the original edition of the work has not been earned out.*

*On the other hand, if you are a less experienced author—and particularly if you are working without an agent—your chances of selling these rights independently are not good. Thus it would make sense for you to give control of most or all rights to the publisher. Fifty, 75 or whatever percent of something is better than 100 percent of nothing.*

***BOOKS VS. MAGAZINES WITH REGARD TO RIGHTS***

*Book contracts are different from magazine deals when it comes to control of rights. When you give up electronic rights to an article, you do not share in the future income from those rights and you lose control of the piece. But in book contracts, the question is whether you will control certain rights exclusively and enjoy 100 percent of the resulting income (minus any agent's fees), or whether you will share the income with the primary publisher. Unless the publisher is a thief, trade-book authors are never completely deprived of income from any subsidiary use of the work. In the book world that may only happen when a writer cedes copyright ownership from the start (for example, by agreeing to do a project on a work-for-hire basis) and consents to being paid a flat fee for the work.*

b. Notification; reversion of rights

There are several other considerations with regard to ceding subsidiary rights. First, try to get language that requires the primary publisher to notify you in advance of any deal while it is still in negotiation, so that you may raise any objections before it is too late. Second, be prepared if it appears that the publisher is not managing to sell various rights. Sometimes it is just not possible to achieve a sale, but in other cases the publisher's subsidiary rights department simply fails to do its job.

*To protect yourself, try to get language in your contract putting an expiration date on the period during which the publisher has the exclusive right to sell various rights, especially foreign and movie rights. That deadline (sometimes called a turnaround clause) might make the publisher act faster, and in any event it would, at some point, free you or your agent to make independent efforts. Publishers tend to resist such clauses in general, but you may have more luck in getting a turnaround clause with regard to electronic rights. (See Section I.3.d.ix below.)*

Suggested language:

**The Publisher shall notify and consult with the author on any subsidiary rights licenses that are being negotiated before an agreement is signed. Any subsidiary rights that the Publisher fails to exploit within three years of the date of this agreement will automatically revert to the Author, upon written receipt by the Publisher of notification from the Author. Publisher shall provide Author with copies of any licenses granted under subsidiary rights.**

NOTE: Such notification, like all important correspondence with the publisher relating to rights, should be sent by certified mail, return receipt requested.

c. Flowthrough/passthrough

You should also pay attention to the manner in which the proceeds from the sales of subsidiary rights are paid to you by your primary publisher. Publishers prefer an arrangement in which your share of proceeds is credited to your royalty account and paid at the time of your next royalty statement, which may be many months away. In addition, they typically want to apply subsidiary rights proceeds to any portion of your advance that has not yet been earned out.

*Try to change one or both of these provisions. The best language, which will be difficult to get, would be that your share of any subsidiary rights monies (or at least those from key rights such as translations and performance) pass through to you immediately upon receipt by the publisher, regardless of whether the advance has been fully earned out. The second choice would be to have immediate (or within 30 days) passthrough/flowthrough of proceeds received* after *the advance has been earned out.*

The best (and very difficult to attain) language would read:

**The Publisher shall pay to the Author his or her share of all income from licenses immediately after the money has been received. This shall occur whether or not the advance on royalties has been earned out.**

d. Income splits

If you have managed somehow to reserve all subsidiary rights, then there would be no need for a subsidiary rights clause in the contract. Otherwise, you will see a provision that says, for example:

**The following additional and subsidiary rights in the Work are hereby included in those granted and assigned to the Publisher by the general grant of rights above...**

This will be followed by a list of the various subsidiary rights that the primary publisher has the exclusive right to exploit. (Those rights you have reserved will be omitted.) For each there will be an indication of how the proceeds from that right are going to be divided between you and the publisher. For most rights, publishers will ask that the income be split 50-50; when dealing with inexperienced authors, they often want this arrangement to apply to **all** rights.

Keep in mind that when the publisher sells subsidiary rights, it is in effect acting as your agent and ideally should be entitled only to a percentage similar to that taken by agents, namely 10 to 15 percent. This argument, however, will not be taken seriously by publishers unless you are a superstar—and in that case you probably have a superagent who has reserved as much as possible and is selling those rights independently.

However, for the secondary subsidiary rights listed in Section 3.a above—i.e., the ones that traditionally were reserved by authors—it is not difficult for the average author to get a share above 50 percent and frequently one in the 75-90 percent range.

The following is a list of the various types of subsidiary right, along with information on how the proceeds typically are divided between the author and the primary publisher.

[Note that in some cases (e.g., first and second serialization) the income from the sale of such rights will be a one-time fee, while in other cases (e.g., paperback rights) the licensee will pay on a royalty basis, including an advance. Royalty rates for subsidiary editions issued by the primary publisher are discussed in Section II.3 below. Also note that income from subsidiary rights sold by the primary publisher will be paid directly to that publisher, which will credit the author's share of the money to the author's royalty account and report it on the royalty statement.]

**i. Paperback reprint rights**
If the work is issued originally in hardcover form, then the right to issue a paperback reprint of the work (or to license someone else to do so) is a subsidiary right. A paperback house that purchases reprint rights from the primary publisher will pay an advance and, once that advance has been earned out, will also pay royalties on each copy sold. All of this license income is paid initially to the primary publisher, which divides the money with the author according to the split specified in the contract. For recommended royalty rates when the original publisher brings out the paperback version, see Section II.3.b below.

*Typical author's share of licensee payments: 50 percent. It will be difficult to get more.*

**ii. First serialization**
This is the right to license a newspaper or magazine to publish excerpts from the work **before** it is issued in book form. Because this right is usually issued on an exclusive basis, it is more valuable than second serialization, which is usually granted on a non-exclusive basis. This is one of the subsidiary rights most commonly reserved by authors.

*Typical author's share: 75-90 percent.*

**iii. Second serialization and anthology rights**
Second serialization is the right to license a newspaper or magazine to publish excerpts from the work **after** the work is issued in book form. Anthology rights relate to the reprinting of an excerpt from the book in another volume.

*Typical author's share: 50 percent. Not a big-ticket item.*

**iv. Book club**
When the primary publisher controls a book club that wants to distribute your book, there is a potential for abuse. Ask to see the details of the deal and make sure there is an arm's-length relationship between publisher and book club. In any book club deal, beware of language that says that the publisher will pay you 50 percent of undefined "net proceeds," since this

would allow the publisher to subtract the overhead expenses of its subsidiary rights department before you get your share.

*Typical author's share: 50 percent of all income received. It's tough to get more, though you could try to raise the percentage once a certain amount of income (say $10,000) has come in.*

**v. Translation and foreign English-language rights**

Since these rights once were reserved by just about all authors (and still are in many trade-book contracts), it is not difficult to get a share above 50 percent. The primary publisher frequently will demand a non-exclusive right to sell its edition in countries outside the British Commonwealth. (Also see I.2.c above)

*Typical author's share: 50-90 percent. Avoid settling for less than 60 percent; when possible, push for 75 percent or more.*

**vi. Audio rights**

Once considered trivial, audio rights have become a big business. Try to allow the publisher to license only non-exclusive audio rights. This is important both because it is not uncommon for different audio editions to be issued at the same time, and because an exclusive grant of audio rights could conflict with a movie or TV soundtrack deal, which is usually more lucrative.

*Typical author's share: 50 percent. It may be difficult to get more.*

**vii. Merchandising**

This right, which relates to the licensing of companies to produce T-shirts, coffee mugs, toys, etc. based on the work, is not an issue for most non-juvenile trade books. If you think a character in your novel could become the next major cultural icon, or if you have a children's book that could set off the next juvenile fad, then it becomes more relevant.

If your book has potential for film or cartoon adaptation, you should avoid granting merchandising rights to the publisher, especially if you are reserving film rights. This is because movie producers almost always require merchandising rights. If the publisher controls the disposition of merchandising rights, it could seriously complicate your dealings with the film company.

*Typical author's share: 50-75 percent. Reserve these rights if you are keeping film and other performance rights.*

**viii. Performance rights**

These rights, which consist of the right to adapt the literary work for film, television, radio, or the theater, once were almost always reserved by the author and today still are in many trade-book contracts. If you have ceded these rights to the publisher, you should get a share well above 50 percent.

*Typical author's share: 50-90 percent. Avoid settling for anything less than 75 percent unless the work has no potential for performance adaptation.*

**ix. Electronic rights**

With the increasing use of electronic media—data bases, CD-ROM, DVD-ROM, commercial online services, e-books, interactive television, etc.—publishers covet **all** electronic rights associated with conventional paper-and-ink titles. Boilerplate language typically grants the publisher control over rights relating to "all physical media now known or hereafter devised." Even most trade books are still sold in traditional print form, authors should prepare for the time when e-books do become a key source of revenue and avoid ceding total control to publishers.

*If you or your agent are savvy about electronic rights, make every effort to reserve them.* This may be impossible, since some major publishers have made it company policy that they must control electronic rights. Do not be surprised if you or your agent are told by the editor that if the company can't get electronic rights, the deal is off. On the other hand, some houses will back down on this issue to avoid losing a very desirable book.

*If you cannot reserve all electronic rights, at least limit what you grant to the publisher.* The rights you may have to cede, if you cannot keep them all, are those that relate to the conversion of the entire work in its original sequence into electronic form, such as an e-book. This process is closest to adaptations such as book club editions and audio cassettes, which in most cases are under the control of the publisher. Avoid granting the publisher the right to issue a print-on-demand version of the book since that may cause complications with the out-of-print clause (see Section IX below).

*Retaining control of multimedia rights is important if you have reserved performance rights.* Some books have the potential of being adapted for multimedia uses such as computer games. If that is the case for your title and you have already reserved performance rights, try to reserve multimedia adaptations as well, since they may have to be licensed in tandem. (That includes adaptations that combine the text with features such as graphics, music, and video and that allow the reader to maneuver in different ways through the work. Such products, known as interactive multimedia, currently are available in the form of DVD-ROM and several other kinds of electronic format.)

*Try to get the right of approval over electronic licenses.* You and your agent should be able to review any proposed electronic uses and turn down those that you think would be inappropriate for your book. You should also be able to check that the publisher is not licensing electronic rights too freely, and licensing should be as specific as possible.

*If you do cede electronic rights to the publisher, try to negotiate a split that gives you more than half of the licensing revenue.* In the 1990s the Union and other authors' groups argued that the publisher's share of licensing income from e-rights should be limited to a commission-like cut of 10 to 15 percent. The industry strongly resisted, and today the most common split is 50-50. Nonetheless you can try to get a higher share (perhaps up to 75 percent), especially if you have gotten this split for performance rights.

In some cases the primary publisher seeks electronic rights not for licensing but to bring out their own electronic products. Some print publishers are issuing their own DVD-ROMs and other electronic products. For e-books published by the original publisher, you should receive a royalty on every copy sold through normal trade channels, ideally 25% of list price but more often 15% of list. Bear in mind that the publisher's cost for converting a print book to an e-book is small.

Three final points about electronic rights: First, a*void granting the publisher control over rights relating to media not yet known or developed. Court rulings on the enforceability of such clauses have been inconsistent, so the safest course is to avoid them. Technology is changing too fast to give so much to the publisher. Force the publisher to come back to you to negotiate additional rights it may want.*

Second, *try to get language providing for the reversion to you of electronic rights that the publisher fails to license or exercise within a certain period of time (say, 12 months from publication). This is especially important, given that many publishers are uneasy about licensing electronic rights and may want them just to be able to sit on them. There is no reason for the publisher to hold rights it cannot or will not exploit. You should also try to get language requiring that you be notified of all inquiries regarding electronic rights, which could alert you to the fact that the publisher is resisting worthwhile offers.*

Third, *watch out for the effect that ceding electronic rights may have on the out-of-print provisions in the contract. Any ambiguity concerning a book's being out of print can create later problems. (Also see* Section IX.)

To summarize: if you have an agent or can license electronic rights on your own, do your best to reserve these rights. If that is not possible, try to limit the grant of rights so that it reads something like the following:

**The Author grants to the Publisher the exclusive right to license electronic editions of the Work that contain the entire text of the Work in its original sequence and that do not contain additional audio or video elements. (The right to license multimedia adaptations of the Work is reserved by the Author.) Such licenses shall be subject to the Author's approval, and both the royalty and Author's share shall be negotiated immediately prior to the planned exploitation or licensing of electronic rights.**

The last phrase -- negotiation of royalty and author's share – may be very difficult to obtain, but it is worth trying for. If you don't succeed, the clause might say:

**The income from such licenses shall be divided as follows: 75 percent to the Author, 25 percent to the Publisher. If the Publisher decides to exercise any electronic right itself, the parties will negotiate applicable royalty rates. This royalty is open to renegotiation on mutually agreeable terms two years after first publication of the electronic edition.**

Again, 75 per cent may be impossible to get, even though the Publisher, in licensing rights, is in effect acting the same as an agent with a 25 percent commission. We advise that the very least you should accept is 50 per cent, which is what most publishers now offer.

**Any electronic rights that have not been licensed within 12 months of the publication of the original Work shall automatically revert to the Author, upon written receipt by the Publisher of notification from the Author.**

**The availability of print-on-demand (POD) copies or the presence of the work in databases or other electronic media does not affect its out-of-print status.** (See under Termination in Section IX.)

[For a discussion of contract issues that come up when you negotiate directly with electronic publishers, see Appendix D, POD.]

**x. Miscellaneous and unspecified rights**
Publishers like to assert exclusive control over subsidiary rights that may not be specified.

*Don't go for this. Any unspecified rights should be reserved by the author. This is all the more important in light of the rapid development of new media.*

Suggested language:

**Any rights not expressly granted to the Publisher under this agreement are fully reserved by the Author.**

## II. ROYALTIES

### 1. Method of calculation

Royalties—payments based on the number of copies sold—are the means by which most authors are compensated for their work. These payments are usually calculated in one of two ways:

- **List** (or gross) royalties are a percentage of the book's cover price;

- **Net** royalties are a percentage of the money received by the publisher after discounts are given to the bookselling retailer or wholesaler (often called "the publisher's dollar receipts" or "net proceeds" or “wholesale price”).

Traditionally royalties almost always were paid on the cover price. Occasionally, a publisher would complain that this arrangement was too onerous for books with high production costs (e.g., art and photography titles) and would insist on paying net royalties. What started out as a rare situation became common practice among smaller publishing houses and university presses. In addition to adopting the practice for reference and heavily illustrated "coffee-table" titles, trade publishers often insist on paying net royalties for copies sold through certain channels, such as mail order and deep-discount sales (see Section 3 below).

*You may find it difficult to avoid accepting net royalty language in these circumstances, though you should do what you can to resist it. Unless there are special circumstances, you should never accept net royalties for copies of trade books sold through normal trade channels. Also, do not agree to provisions that allow the publisher to subtract any of its overhead costs when calculating its net proceeds.*

Sometimes publishers are not paid promptly by distributors; in some cases a distributor has actually filed for bankruptcy. In such cases a publisher may claim it does not need to pay royalties because it was not paid for books sold. Nonpayment is a standard risk of doing business, and authors should not be penalized for it. To protect yourself, you might insert a clause such as:

**There shall be no reduction in royalties or "amount received" because of nonpayment by Publisher's customers.**

Further, it might be wise, in the case of a contract specifying net royalties, to substitute the term *amount payable* for *amount received.* A suggested clause would read:

**In this Agreement "net receipts" means all monies payable to Publisher from the sale or licensing of the Work. In determining "net receipts" for the purposes of the royalty and licensing percentages due to the Author, shipping, handling and insurance charges, and sales and similar taxes shall be excluded.**

When you accept net royalties, you are effectively cutting your income by at least 40 percent (i.e., the minimum discount given to booksellers) or even 50 percent for copies sold through retail channels. *Therefore, when you cannot avoid a net-royalty contract, at least try to raise the royalty percentages (see below) to make up some of the difference.*

### FREIGHT PASS-THROUGH

In some contracts you will see language stating that royalties will be based not on the list price, but instead on "the publisher's invoice price, which is the suggested retail price less any freight pass-through."

This refers to the practice by some publishers of helping booksellers recoup the cost of having books shipped to their stores. Publishers raise the cover price of the book and let the bookstore keep the difference; this amount is known as the freight pass-through or freight allowance. Publishers obviously do not want to pay royalties on that portion of the cover price that represents the freight allowance, so they subtract that amount when calculating your royalties. The result is that your royalty is a percentage of what is known as the **invoice** price, rather than the cover or list price.

What the bookstore actually pays is the invoice price minus the applicable discount. This amount is relevant to you only if you are receiving net royalties.

The practice of freight pass-through is acceptable, provided that there is a limit on the amount of the allowance. A reasonable clause would read:

**Royalties will be calculated based on the invoice price of the Work, which is the suggested retail price less any freight pass-through. In no event will the pass-through per copy exceed the greater of 5 percent of the invoice price or $1.00 for hardcovers and 50 cents for paperbacks.**

**2. Advances**

This is a major factor for most authors (and agents) in book deals. When the media report that Stephen King or Danielle Steel is receiving several million dollars for a book, they are referring to the size of the advance on royalties (also called the advance *against* royalties).

An advance is a payment (actually, a series of payments) that a publisher agrees to give to the author in exchange for the right to publish the book. The author is entitled to keep the advance even if the publisher does not sell a single copy of the work. Assuming copies are sold, the publisher credits the author's royalty account for so much per copy, according to the agreed-on royalty terms. Once the total reaches the amount of the advance—at which time the book is said to have "earned out" the advance—the publisher begins to make additional payments to the author.

In many cases, especially when the advance is large, income from subsidiary rights is also applied toward earning out the advance. *One way to make a small advance more palatable is to negotiate a provision saying that it applies only to sales of the publisher's own hardcover and/or paperback edition. Income from subsidiary rights would thus pass through to the author regardless of whether the advance has been earned out. (See Section I.3.c above.)*

When negotiating an advance, remember that for most authors the advance may be the only compensation they end up receiving for writing the book, because most titles do not earn out their advances.

See Section III.6 below for a discussion of issues relating to the refundability of an advance when a manuscript is rejected.

a. Size of the advance

One of the biggest mysteries in publishing is how to determine the size of the advance. From the author's point of view, the process seems entirely arbitrary and subjective. It is difficult to understand why some works command advances in the seven-figure range while others barely get into four figures.

Keep in mind that the discussion here focuses on trade books. Small houses and university presses often pay no advance at all. Sometimes they insist that authors accept what is in effect a negative advance: the authors subsidize the publication of the work by putting up some of their own money to cover production costs, or by forgoing royalties until sales reach a certain level. This unsavory practice is tantamount to vanity publishing. (See Appendix A and Appendix B on literary small presses and academic presses.)

The size of the advance is a function of several matters: the negotiating ability of the writer or agent, the eagerness of the acquiring editor to sign up a particular work, and the publisher's estimate of how well the book will sell. If the work ends up being sold in an auction, the competitive juices of editors also will play a role. The traditional rule of thumb used by editors is to offer an advance equal to the amount of royalties the book is expected to earn during its first year of publication, so that the advance earns out after one year. For example, a $30 book that sells 5,000 copies at a royalty rate of 10 percent yields $15,000 for the author. However, the factors listed above—and others, such as the expected income from the sale of subsidiary rights—make this a far from rigid rule.

There are two schools of thought on whether it is advisable for a less experienced writer to seek the highest advance possible. On the one hand, getting the maximum amount of money as soon as possible is a compelling argument, and agents generally take this approach.. Books with big advances get more attention from the publisher's promotion people and sales representatives, and therefore have a greater chance of commercial success.

On the other hand, many books with big advances do not earn out, and the failure to earn out an advance is usually taken as a sign of poor performance. Thus, this line of reasoning goes, it is better to accept a smaller advance that will more easily earn out, making your editor and his or her bosses happy.

It is up to you and your agent to decide which approach is better. If you are a new writer, and especially if you're working without an agent, this may be a non-issue: You may have to take whatever the publisher offers. That advance probably will be a small one, but what "small" means depends on the publisher you're dealing with. *You may want to accept a token advance of a few hundred dollars from a small press, but when you're signing with the likes of Simon & Schuster or Random House to do a trade book for an adult audience, you have every right these days to expect an advance at least in the neighborhood of $25,000. If you have a hot project or have a good track record with previous books, then this amount should be multiplied accordingly.*

b. Schedule of advance payments

When you consider the minimum advance you can settle for, keep in mind that the amount is usually paid out in several installments. This is particularly relevant if you are negotiating a contract based on a proposal and sample chapters, and have not yet written the whole book. Unless you have other sources of income, the advance will have to take care of your living expenses (and research costs) for as long as it takes you to complete the manuscript. Publishers sometimes offer authors research grants (apart from the advance), but this is unusual.

In the most common arrangement, half of the total advance is paid on signing the contract (though it usually takes weeks for the check to be cut) and the remainder is paid on acceptance of the completed manuscript. (See Section III.6 for a discussion of issues relating to manuscript acceptance.)

In some cases, payments will be made in more installments, such as one-third on signing, one-third on completion of a certain portion of the manuscript, and one-third on acceptance.

When the size of the total advance is relatively large (say, $100,000 or more), publishers frequently will want to hold back a portion of the advance until some point after acceptance, such as the date of publication.

*Unless your total advance is quite large, insist that the final portion of the money be paid on acceptance of the manuscript. You can try to make a modest total advance more palatable by asking that it be front-loaded; i.e., try to get more than half on signing and/or a substantial intermediate payment, so that you end up receiving, say, 75 percent or more of the total before submitting the manuscript, and only 25 percent or less remains to be paid on acceptance.*

The clause relating to advances should be something like the following:

**The Publisher shall pay to the Author as a non-returnable advance on royalties the total sum of [insert amount] according to the following schedule: One-half on the signing of this agreement; one-quarter on the delivery of one-half of the manuscript; and the balance on the acceptance of the complete manuscript.**

A caveat: unless the advance is in six figures or more, do not accept a schedule such as one-third payable on signing the contract, one-third on acceptance of the Work, and one-third on publication. Publication may be delayed, or at the very least may not occur until one year after acceptance. There is no reason for you to wait that long.

c. Bestseller clause

Some authors have been able to negotiate special clauses that provide for the payment of additional advance money if the book ends up on the bestseller list (usually the one published by *The New York Times*) Such a clause might read as follows:

**As an additional advance against royalties, the Publisher shall pay to the Author up to $25,000 should the original hardcover edition of the Work appear on the New York Times Bestseller List, based on the following schedule:**

**No. 1 on list: $2,500 per week**
**No. 2 on list: $2,000 per week**
**No. 3 on list: $1,500 per week**
**Nos. 4-10 on list: $1,000 per week**

**3. Royalty rates**

Royalties are calculated as a percentage of either the list price of the book or the amount received by the publisher after discounts are given to booksellers. (See Section II.1 above for details.)

Note that royalties usually are not paid on copies given away for review and promotion purposes, those sold to the author at a discount, or those lost or damaged in the warehouse or in transit. Also, royalties are paid on the net number of copies sold, i.e., the number shipped

minus the number returned by booksellers during the royalty period. *Do not confuse "net" in this sense with "net" in relation to the method of calculating royalties.*

a. Hardcover editions.
The standard royalty rates for hardcover trade books have long been as follows:

**10 percent of the list price on the first 5,000 copies sold;**
**12.5 percent on the next 5,000 copies;**
**15 percent on all copies beyond that.**

*It is sometimes possible to negotiate both the percentage and the escalations (also known as breakpoints). Successful authors often can start at more than 10 percent and escalate more quickly, sometimes to as much as 20 percent . If you have been forced to accept royalties on a net basis, definitely try to get an initial rate of more than 10 percent to make up some of the lost income.*

b. Paperbacks.
Paperback rights are of two types: "trade paperback" and "mass market." A trade paperback is the upscale softcover version, usually priced these days between $15 and $20 and sold primarily in bookstores. Many books today are issued in trade paperback only (with no hardcover edition).

Trade paperback royalties are almost always lower than those for hardcover editions. Moreover, the breakpoints are steeper (i.e., you have to sell a lot more copies to get to a higher rate) and sometimes are not offered at all. The most common royalty rates for trade paperbacks are:

**7.5 percent of the list price for the first 20,000 copies**
**10 percent thereafter**

Starting rates, however, may be as low as 5 percent, and escalation limited to 8 percent.

Mass-market editions are the less expensive versions that usually have smaller page sizes and are sold in drugstores, newsstands, supermarkets, airports, and other outlets as well as bookstores. (Keep in mind that not all mass-market books are reprints of hardcover works. Many genre books such as romances, mysteries, and science-fiction are issued only in mass-market format.)

There is much greater variation in royalty rates for mass-market paperbacks—they can start as low as 4 percent and go to 15 percent or more—and the breakpoint is usually much higher, often as high as 150,000 copies.

For both trade and mass-market editions, authors should try to get some escalation of royalties, even if only when a huge number of copies have been sold. Once a work has sold tens of thousands of copies, the publisher usually has recouped its investment and is

enjoying fat profits. Authors should share more fully in that bounty rather than being stuck at a low royalty rate.

c. Special sales/deep discount.
Situations may arise when a publisher is in a position to make a bulk sale of your book outside normal bookstore and wholesale channels. For example, if you write a book about a corporation, that company may decide it wants to buy enough copies to give one to each of its employees. In such cases the buyer is probably going to negotiate a very big discount. Publishers typically argue that the author should be willing to accept a reduced royalty rate for such special sales because these are copies that otherwise would not have been sold. It is common for book contracts to cut the author's royalties in half for special sales when the discount given is above a certain level (say, 50 percent). Alternatively, the publisher may not change the royalty rate for special sales but instead switch from a list basis to a net basis, which also reduces your royalties drastically.

Whereas deep discounts—i.e., those beyond the traditional bookseller discounts of 40-45 percent—were once limited to special sales situations, today the big bookstore chains and on-line booksellers like Amazon and Barnes & Noble are powerful enough to command them on many of their orders. Most publishers, of course, want authors to make up the loss of income by accepting reduced royalties in these circumstances as well. There have been situations in which books have sold very well, but because the sales were concentrated in chains receiving deep discounts, the authors received sharply reduced income.

*Avoid accepting a deep-discount clause unless it specifies that the reduced royalties apply only to copies sold outside of normal trade channels (which should include discount retail outlets and on-line booksellers).*

*If this is not possible, try to limit the deep-discount provision to copies ordered in large quantities (say, 1,000 or more). Moreover, you should try to negotiate a less drastic reduction in royalty rates. For example, negotiate language saying that the rate, rather than immediately being cut in half, would drop by half a percentage point for each percentage point of discount above 50 percent. Thus, if a 10 percent basic royalty rate were in effect, the royalties on copies sold at a discount of 54 percent would be 8 percent (instead of dropping to 5 percent). There also should be a limit on the extent to which the royalty rate can be reduced. This gradual reduction in list-basis royalties is preferable to a switch to net royalties.*

*Do not agree to a deep-discount clause if you are being paid royalties on a net-receipts basis for all sales, since in that case your royalties are already being reduced when larger discounts are offered.*

To summarize, if you cannot remove the deep-discount clause or limit it to copies sold outside of normal trade channels, try to modify the language to something like the following:

**For copies sold in quantities of 1,000 or more at a discount of more than 50 percent, the Author's royalty rate will be reduced by 0.5 percentage point for each 1 percentage**

**point of discount above 50 percent. In no event, however, will the Author's royalty be reduced by more than 5 percentage points.**

d. Mail order.
This is another area in which publishers have commonly insisted, with even less justification, on paying reduced royalties. Contracts frequently will specify a rate of 5 percent and sometimes will switch from a list to a net basis. Publishers say this is to cover the costs of buying mailing lists and sending out catalogues, but they ignore the fact that when copies are sold directly to individuals the publisher offers no discount and thus receives the full list price.

*Try to avoid a lower royalty rate for mail order copies, or at least try to limit the reduction in the rate to less than 50 percent.*

e. Foreign sales.
Publishers usually insist on paying reduced royalties (typically half of the regular rate) on copies sold in Canada and other countries, supposedly because their distribution costs are higher. Few copies of the original edition of most books are likely to sell overseas, but *if your book promises to sell in significant numbers in Canada, try to avoid the reduced rate, or at least limit the reduction, for sales in that country.*

f. Small print runs and low sales.
Sometimes, especially with regard to children's books, publishers will insist on paying lower royalty rates if a book is selling slowly but the publisher wants to keep it in print by doing small additional print runs (usually defined as 2,500 copies or fewer). Authors are supposed to show their gratitude by agreeing to cut their royalties on these copies (often in half). The same approach is sometimes used when sales from a larger print run have dwindled below a certain level.

*Resist these attempts to reduce your income. These days small print runs are the rule for all but the biggest-selling works, so there is no reason to accept lower royalty rates.*

When the primary publisher decides to exercise some of the subsidiary rights it has been granted (rather than licensing them to another party), it will pay royalties on those versions of the work. The following are some of the more common situations:

g. Book club sales.
Although book clubs usually license the right to bring out their own edition, sometimes they buy copies from the publisher's inventory. Such sales are usually made at a substantial discount, so publishers frequently insist on paying the royalties on these copies on a net basis. (See Section I.3.d.iv above for a discussion of income relating to book-club licenses.)

*Try to maintain royalties for book club sales on a list basis.*

h. Audio cassettes.
Royalty rates for audio cassettes are usually similar to those given for the hardcover print version, though the rates often are based on net proceeds rather than list price, and the breakpoints are often higher.

*Try to keep audio royalties as close as possible to hardcover print ones, in terms of rates, basis, and breakpoints. Also, try to arrange it so that the publisher has only a non-exclusive right to put out an audio cassette. This is important both because it is not uncommon for different audio editions to be issued at the same time, and because an exclusive grant of audio rights could conflict with a motion picture soundtrack deal, which is usually more lucrative.*

i. Electronic versions.
More and more publishers are creating electronic works of their own. For a discussion of issues relating to electronic editions, see Section I.3.d.ix above.

**4. Royalty statements**

Royalty statements are the means by which the publisher reports to the author on the sales of the book and the receipt of subsidiary rights income. They are supposed to be accompanied by a check for monies due to the author. If you are represented by an agent, the publisher sends the statement and the check to your agent, who forwards a copy of the statement and the money (minus the commission) to you.

Trade book publishers usually issue statements semiannually, while small houses and university presses usually do so annually. There is a lag of 60-120 days from the end of the royalty period to the date when the publisher is contractually obliged to deliver the statement and make any payments. Publishers are supposed to send out statements even if no money is due to the author (but see Paragraph e below).

Ideally a royalty statement will include an accounting of the number of copies printed, the number of copies sold, the number of copies returned, and the number of copies being held as a reserve against returns (see Paragraph c below). However, most often royalty statements are cryptic documents that are not understood by most authors—or even by some agents. Certain key information, such as the print run of the book, is almost never included. Reports on foreign sales almost never show the number of copies sold but simply state the author's share of the dollar amount received from the licensee.

In recent years, in part under pressure from writers' groups such as the NWU, some publishers have been revising their standard royalty forms to provide more detailed data. Some of these new forms are quite complicated, though they usually still leave out important information, including the size of the print run. In addition, publishers continue to insist on lag times of up to four months before royalty checks are sent out. These delays are totally unjustified in an era of computerized accounting, but the industry has grown used to a practice that in effect gives publishers an interest-free loan of author funds.

Usually, it is not possible for an individual author to negotiate changes in a publisher's standard royalty form or in the payment schedule; it will require industry-wide reform. Until then, your royalty statement clause will read more or less as follows:

**The Publisher shall render a statement of account, together with payment of the amount due, no later than September 30 and March 31 for the six-month periods ending June 30 and December 31. The statement will include an accounting of sales of the Publisher's editions as well as income from licenses granted to others. Statements shall be sent even if no money is payable to the Author for the accounting period.**

There are, however, some royalty-related issues you can bargain over:

a. Flowthrough/passthrough.
This addresses how quickly money from subsidiary rights licensing is paid to the author. See Section I.3.c above.

b. Auditing.
One of the disadvantages of being paid on a royalty basis is that you generally have to take a publisher's word as to how many copies of your book have been sold. That word is not always truthful. Most book contracts allow you to verify the data on the royalty statement by bringing in an auditor of your own to review the publisher's books.

*Try to get language that clearly gives you the right to audit the publisher's books, with the proviso that if the audit shows a discrepancy of 5 percent or more in your favor, the publisher pays for the audit, which can cost several thousand dollars.*

An audit clause should read as follows:

**The Author or his/her duly authorized representative shall have the right, upon reasonable written notice, to examine the books and records of the Publisher insofar as they relate to the Work, provided such examination is conducted during normal business hours. Such examination shall be at the Author's expense, unless errors of accounting amounting to more than 5 percent of the total sum paid to the Author in any royalty statement are found to the Author's disadvantage, in which case the cost of such examination shall be borne by the Publisher.**

A service called Nielsen BookScan tracks about 70 percent of all retail sales of books. It is used mainly by publishers to track sales of their books. Possibly one might include a clause in the contract enabling one to use the publisher's subscription:

**Author shall have the right to consult Nielsen BookScan, under Publisher's subscription, to check sales records of the Work.**

c. Reserve for returns.
The reserve is a portion of your royalties that the publisher withholds in case many of the copies that were shipped to bookstores are not sold and are returned to the publisher for

credit. In a given royalty period, royalties are calculated on the number of copies shipped minus the number returned. The problem arises when a substantial number of copies shipped in one period are returned in subsequent periods. Publishers worry that, in such circumstances, authors could end up owing them large sums of money that would be difficult to collect.

For this to occur, there needs to have been very heavy ordering of a book with a relatively small advance that is quickly earned out, and the returns must come in many months after the books are ordered (not the practice today among bookstores, which tend to send back slow-moving titles very quickly). Although all of this may occur with perhaps one book in a hundred, publishers want the right to withhold reserves for **all** of their titles—even reference works, which are generally kept on the bookstore shelves indefinitely rather than being returned. As a result, publishers are getting a huge interest-free loan of their authors' money.

The amount of that loan is also a matter of dispute. Publishers tend to insert language giving them the right to withhold a "reasonable" reserve for returns. Of course, their idea of what's "reasonable" is not beyond reproach. There have been cases of publishers holding close to 100 percent of the royalties due on books with a record of limited returns. Moreover, publishers sometimes don't make it clear on the royalty statement how much has been withheld; they simply reduce the reported number of copies sold, causing you to think the book has sold worse than is the case.

*Try to replace the "reasonable" language with a provision setting an absolute ceiling on the portion that can be withheld—say, 15 percent of royalties only (not all income) for hardcovers and trade paperbacks and 30 percent for mass market paperbacks (which get returned in larger numbers). Try to limit the right to withhold reserves to the initial one or two royalty periods after the book is published, since that is when the most books are ordered and returns are most likely to occur. Finally, get the publisher to clarify when reserves are to be released.*

If you cannot remove the reserve for returns clause entirely (which is difficult), try for wording such as this:

**In calculating royalties, the Publisher shall have the right to allow for a reserve for returns, not to exceed 15 percent of the amount due to the Author for royalties on the Publisher's hardcover and trade paperback editions of the Work and 30 percent for mass-market paperbacks. Reserves may not be withheld beyond the first two accounting periods for any edition. If a reserve is withheld, the dollar amount of the reserve shall be clearly stated on the royalty statement. All amounts held in reserve shall be credited back to the Author's account no later than the second royalty statement after the one in which they are withheld.**

d. Basket accounting.

This practice—also known as cross-collateralization, joint accounting, or consolidated royalty accounting—involves the attempt by publishers to recoup losses (i.e., an unearned advance) on one book from the income generated by another title written by the same author.

An explicit basket accounting clause will say: "All monies from this Work shall be accounted for jointly with any monies earned under any other agreement between the Publisher and the Author."

However, something approximating that provision is often inconspicuously inserted through a clause that says the publisher has the right to deduct from royalties any overpayments relating to "this or any other agreement." It is legitimate for the publisher to reimburse itself for excess royalties that may have been mistakenly paid to you. But those words "or any other agreement" can be used by the Publisher, for example, to withhold royalties due on one book to recoup a disputed amount relating to another book.

Play it safe by trying to get that phrase removed. Take the position that the contract is only for one book, so references to other agreements are irrelevant.

*The only instance in which basket accounting may be acceptable is when you are offered a very lucrative multi-book deal on the condition that the accounting on all the titles is to be done on a joint basis. Note that it is standard practice for various editions of a single work (e.g., hardcover and paperback versions) put out by the same publisher to be accounted for jointly.*

e. Skipped royalty statements.
When earnings are minimal (often defined as $25 or less) publishers frequently want the right to skip that payment to save on processing costs.

*This is tolerable, but be sure that "minimal" is not defined at a much higher level (say, $100), and be sure that the publisher is still required to send you a royalty statement. You want to know how your book is doing, even if you haven't earned much money. This also applies to the period before the advance is earned out.*

f. Deferred payments.
At one time, authors and their agents, concerned about high tax rates, allowed publishers to put clauses in contracts limiting the total amount of money that could be paid out to an author in a given year. This practice, sometimes known as royalty spreadforward, no longer makes sense in tax terms, and most publishers have eliminated it from their boilerplate.

*If such a clause remains in a contract sent to you, be sure to have it removed.*

## III. MANUSCRIPT DELIVERY

### 1. Subject, length, and form

The contract should give some indication of the nature of the work, or at least a tentative title. You may also wish to make your proposal a part of the contract (by attaching it). This will help later if the publisher rejects your manuscript by claiming that you did not deliver the kind of work that was expected.

While the agreement should always identify the estimated length of the manuscript to be delivered, as previously agreed on by you and the publisher, the word count should be specified as one that is approximate, to protect you if the manuscript turns out to be somewhat longer or shorter.

The contract should also specify the form in which the manuscript must be submitted. There is no reason for the publisher to expect you to deliver more than one copy of the work on paper. Nowadays it is more common for publishers to ask that you submit the work in electronic form, usually on a CD. Your particular word-processing program should be specified.

*If you are offered a small advance (or none at all) and you are asked to produce camera-ready pages (as is sometimes the case with small presses), then you should definitely ask for compensation for the considerable amount of additional work and expense involved.*

**2. Deadlines**

The delivery date should be made explicit and should allow a grace period. Try to remove language that says that "time is of the essence," since this could make it easier for the publisher to cancel the contract if you are unable to deliver the manuscript on time. If there is an intermediate payment of the advance due upon the delivery of a portion of the manuscript, that should be stated in this section.

Extensions of the delivery date should be put in writing prior to the passing of the original deadline. Too often an editor agrees to an extension orally, only to have the publisher's lawyers later cancel the contract for lateness. In such circumstances, the publisher often will claim that the editor lacked authority to modify the contract. Indeed, most contracts contain a clause that dictates that the contract cannot be changed except in a written document signed by both parties.

*There should also be a written amendment to the contract if, after signing, the author and editor agree on significant changes to the content of the work. If these changes involve substantially more effort on your part, you may want to seek an increase in the advance.*

Combining the various points above, the language dealing with delivery of the manuscript should read more or less as follows:

**The Author agrees to deliver within 60 days of [deadline date] a manuscript of approximately [insert number] words. The Author will supply one clean, double-spaced, and legible copy of the manuscript on 8.5 x 11" white paper printed on one side only. The Author also will supply the manuscript on a CD, using the [name] word processing program.**

**3. Supplementary materials: Illustrations**

Many contracts make it the author's responsibility to supply supplementary materials such as photographs, artwork, charts, and graphs—and the manuscript will not be deemed acceptable until those materials are delivered. If your book involves a substantial amount of such materials, try to get the publisher to share in the cost of their preparation. You should negotiate a separate deadline for the delivery of those materials if you plan to put off that task until after you finish writing the manuscript. For example:

**If Author does not submit supplementary materials within 90 days after submission of the manuscript, Publisher shall, after 30 days' written notice to the Author, provide such materials at Author's expense.**

If the publisher will share some of the costs of additional materials, specify what materials (the exact number of photos, drawings, tables, etc.) and what percentage of costs will be paid by the author and publisher. Further, if you think the publisher is in a better position to negotiate permissions, try to have your share of the cost be paid by the publisher and deducted from your royalties or other earnings:

**Any share of costs or permissions payable by Author shall be advanced by Publisher and repaid only by deductions from royalties or other earnings payable to Author under this agreement.**

Even if you must pay all the costs, specify the additional materials and beware of a clause saying what materials are necessary *in the publisher's discretion.*

In contracts for children's books where the publisher will provide the illustrations, add a clause specifying this and giving the author the right to approve (or at least consult with) the illustrator. Such a clause might read:

**Publisher shall provide [x number] of illustrations at its own expense and consult with Author concerning the selection of illustrator.**

If you are supplying the illustrations, consider adding a clause that requires the publisher to provide insurance against loss or damage to your original artwork

In contracts for books such as anthologies, art books, or the like, where the publisher is to provide a fixed sum for permissions (also see Section 4 below), special fees, or other expenses, a clause should state something like:

**Publisher shall pay a non-recoupable sum of $_____ for the additional materials specified above and for permissions.**

In some instances, especially in the case of indexes, the contract will state that if the author does not provide a certain item, the publisher may hire someone else to do the work and charge the author for the cost. *If you cannot avoid this common provision, at least insert*

*language saying that the cost of such work will be in line with industry standards.* This will allow you to challenge an amount that appears to be excessive.

**4. Permissions**

When you plan to use in your book material that is covered by someone else's copyright, you will need to get written permission to do so (unless your use is covered by the principle of Fair Use—see box below). Often the publisher of that material will charge you a fee.

Most publishers make it the responsibility of the author to secure permissions, and most also require the author to pay all related fees. However, in some cases publishers will share the cost and actually obtain permissions on your behalf (see Section 3 above). If you expect to use little or no copyrighted material in your book, this is not an issue to be very concerned about. For anthologies, textbooks and similar works, publishers often do pay the entire cost of permissions, but academic presses and many trade publishers make the author entirely responsible for this cost.

**PERMISSIONS vs. FAIR USE**

Some authors have been led to believe that they always must obtain permission to quote even a single sentence from another book. This ignores the fact that in many cases the copyright law permits authors to quote short excerpts from other works **without permission**. This is part of the Fair Use principle, which is designed to encourage commentary, criticism, news reporting, teaching, scholarship, and research.

Contrary to common opinion, there is no absolute number of words one can always quote without permission. Whether an unauthorized use of copyrighted material can be considered fair use depends on four primary considerations:

1. the purpose and character of the use; e.g., whether it is commercial in nature
2. the nature of the copyrighted work
3. the proportion of the copyrighted work that was used (in both quantitative and qualitative terms) and
4. the economic impact of the use.

These four criteria suggest some rough rules of thumb: It is easier to claim fair use when you are quoting the material for a non-commercial purpose; when the quotation is essential to what you are writing (e.g., a book review); when the material you are quoting is factual; when the amount you are using is a small portion of the total work; and when your use of the material will not undermine the market for the original work.

However, court decisions concerning fair use have been highly variable. To be absolutely safe, get permission. Often it is granted without a fee or only a low fee, depending, of course, on the prestige of author and publisher. If, after a diligent search, you can’t find the

owner of the copyright, it is probably all right to use the material, with a full citation of the source.

If you are in doubt about a specific fair-use situation, consult an intellectual property attorney. It may be worth it to avoid being sued.

If, however, you are producing an anthology of numerous previously published pieces or a heavily illustrated work, the time and money involved in getting permissions can be substantial. In such cases it is not reasonable for you to absorb all the permission costs, unless you are getting a large advance that was determined with these costs in mind.

Otherwise, *try to get the publisher to share in permission costs. If that is not possible, at least try for language that obliges you to pay the costs only up to a specified level, with the publisher responsible beyond that. At a minimum, try to get the publisher to lay out the money for the fees and charge it to your royalty account.* (Also see Section 3 above.)

In heavily illustrated works or anthologies, be sure that the contract contains an estimate of the amount of material requiring permissions that you will be expected to supply. This way the publisher cannot later try to cancel the contract because you failed to secure permissions for a sufficient number of items.

When obtaining licenses, be sure that you obtain permission for all uses of your work. If the licensor insists on dealing with your publisher, be sure to get the right to approve the terms of any such deals.

**5. Author's next work**

Sometimes a contract will state that the book must be the “author’s next work,” meaning that you cannot submit a different manuscript to another book publisher until this work is delivered. You should always try to remove this language. Once you agree to a delivery date, a publisher should not restrict you from pursuing additional work. (This clause should not be confused with the option clause; see Section VII below.)

**6. Manuscript acceptance**

Manuscript acceptance is one of the most contentious issues in book publishing. Numerous authors who sell books on the basis of a proposal (and perhaps a couple of sample chapters) find that when they later deliver the full manuscript, the publisher claims the work is unsatisfactory and demands repayment of the advance.

Publishers are supposed to do this only when they honestly believe that a work is substandard, but all too often rejections have nothing to do with the quality of the manuscript. Among the real reasons may be that the house has been acquired by another publisher and ordered to pare its list; that the acquiring editor has left the company and no one else is excited enough about the book to take primary responsibility for it; that the

subject of the work is not deemed as "hot" as it was when the contract was signed; or that the subject has become "too hot"—e.g., a politically sensitive exposé or an unflattering biography of a powerful person that the publisher belatedly has decided is too risky to publish. In 2002 a three-judge panel in California's Ninth Circuit Court of Appeals ruled that a publisher cannot cancel a contract because of changed market conditions. Although the publisher still did not publish the book, it was required to compensate the author for time lost in the years spent working on the book. It should be noted that this ruling does not automatically apply nationwide.

Ultimately, it is not possible to compel a publishing house to put out a work it does not wish to publish—nor is it desirable, since an unenthusiastic publisher can publish a book in such a way that virtually no one will know it exists. The proper contract language can, however, make it more difficult for a house to reject a manuscript frivolously and may cause the publisher to take the work more seriously.

In addition, the right contract language can make it more difficult for a publishing house to demand repayment of the advance if it does end up rejecting the manuscript. The NWU has long held that, if an author writes the book, the advance should be non-refundable. To allow the house to recoup the advance is to take all risk out of the publishing contract for the publisher. If the publisher genuinely does not like what the author has produced, then it should simply cancel the contract and write off the advance as a business loss. The industry, however, has strongly resisted this principle, so until industry-wide reforms can be enacted authors will have to focus on the contract alternatives described below.

a. Standards and revision

Publishers should not be allowed to reject a manuscript outright, based solely on a subjective evaluation. The acceptability of a manuscript ought to be linked to some objective standard, but publishers tend to resist this. It won't be easy, but try to get language that says:

**Author agrees to deliver a manuscript that is satisfactory in style and content and meets the professional standards of publication.**

There are several ways to avoid rejection. One is to submit portions of the manuscript to the editor for approval as it is finished and to document that approval in writing. Another is to attach the original proposal and sample chapters to the contract, so that the clause might read:

**Author agrees to deliver a manuscript in accordance with the attached proposal and sample chapters.**

When a manuscript is considered unsatisfactory, the contract should require the publisher to give a detailed written statement of exactly what is deemed deficient. This statement, which should be delivered in a timely manner, must be as specific as possible, so it can serve as a guide for the author in making revisions. The publisher should be required to give the author an opportunity to revise the manuscript in a way that addresses the stated objections, and a reasonable deadline should be set for the delivery of the revised manuscript.

The contract should thus state:

**The Publisher will convey to the Author its comments, in writing, concerning the acceptability of the manuscript within 60 days of its delivery, unless the Author agrees to an extension of this deadline. If the Publisher considers the manuscript in whole or part unfit for publication, the Publisher will provide a detailed description of the perceived deficiencies and will indicate what revisions are necessary to make the manuscript acceptable. The Publisher and Author shall agree on a mutually acceptable deadline for the delivery of a revised manuscript.**

b. Reversion of rights

If the revised manuscript still is found unsatisfactory and the publisher decides not to publish the work, then the author has to be concerned with getting back the publishing rights (reversion) and the question of what happens to the advance.

Ideally, the agreement should include a self-executing reversion clause:

**In the event this contract is canceled by the Publisher because the manuscript is deemed unacceptable, per the standards set forth in this agreement, all rights shall revert automatically to the Author upon receipt of notice.**

In practice, publishers will want the reversion to be contingent on the refunding of the advance. (See the next section for a discussion of how this typically is done.)

You should, of course, save the cancellation letter or, if the manuscript is canceled orally, you should document the conversation by sending a follow-up letter to the publisher that restates the facts. Also be sure to document all conversations with your editor about requested changes in the manuscript.

c. Disposition of the advance

If possible, the contract should state that in case of termination by the publisher the author may keep at least a portion of the advance. This may be hard to get, but it's worth trying for:
**If the contract is terminated by publisher, Author shall retain [____ percent] of the total advance and receive any part of that not yet paid. If Author has received more than [____ percent] of the total advance, Author shall repay without interest any portion in excess, but only from those proceeds received by Author under a subsequent contract for publication of the Work.**

-- First-proceeds clauses

First-proceeds clauses are a mechanism publishers have come up with to make repayment of advances less burdensome. They're not as good as non-refundable advances, but until we can reform the industry they are often the best terms an author can get.

First-proceeds clauses allow authors—who usually have spent their advance by the time they submit a manuscript—to avoid having to refund the money directly out of pocket. Instead,

the publisher frees the author to shop around the rejected manuscript to other houses. When the work is resold, then the first publisher is repaid out of the first proceeds received from the new publisher. In some first-proceeds clauses the original publisher will agree to accept less than 100 percent of what was paid to the author. The amount kept by the author is in effect a kill fee.

In most cases "first proceeds" means the initial advance paid by the new publisher. If that payment is not sufficient to cover the amount that needs to be repaid, the first publisher will usually insist that the balance be paid out of the remainder of the advance and, if necessary, future income deriving from the work.

Some first-proceeds clauses state that if the work is not sold within a certain period (usually 12 months), then the author is obliged to repay the advance directly. *Avoid this version in favor of language without a time limit. Even better is language that states that if the work is not resold within 24 months, for example, the obligation to repay the advance would terminate. It should also be clear that the first-proceeds clause does not apply to the sale of a work that is substantially revised after its final rejection by the original publisher.*

Suggested language:

**If the contract is canceled for unsatisfactory delivery, all rights to the Work will revert immediately to the Author provided, however, that the Author agrees to repay the sum of [insert amount] previously advanced under this contract out of those proceeds first received as a result of subsequent sale of the Work. Such repayment shall be limited to a period of two years from the cancellation date. This paragraph applies only to the resale of publishing rights to the canceled Work and shall not extend to income from non-publishing rights, such as film or television rights, or the sale of similar works or substantially revised versions.**

Another issue in first-proceeds situations has to do with the agent's commission. Since the sum that is refunded to the original publisher includes the amount taken by the agent as a commission, many agents will take no fee on the advance from the second publisher. The argument for this practice is that the client is not really receiving any new income (since the new advance goes to repay the original publisher), so the agent should not get a new commission. Some agents, however, feel they are justified in being compensated for the trouble of negotiating a new deal. The Union frowns on this practice, known as “double commissioning.” It is acceptable, however, for an agent who has negotiated a larger advance on the resale of the work to take a commission on the difference. Be sure to clarify your agent's policy on double-commissioning.

**7. Change of editor**

In some cases, the only reason an author is willing to sign a contract with a given publishing house is to work with a particular editor. Given the frequent job-hopping of editors these days, there is a good chance that the editor who signs you up will no longer be around when you hand in your manuscript.

Some authors with clout have been able to negotiate language that allows them to cancel the contract and take their book elsewhere if their editor leaves, or even if the editor is still with the house but has been taken off the project. If this is a concern of yours and you have sufficient leverage, try for something like the following:

**If at any time during the writing, editing or production of the Work the acquiring editor [*insert name*] becomes dissociated from the Work for any reason, Author may terminate the contract upon repayment to Publisher of any advance monies received.**

## IV. FAILURE TO PUBLISH

Be sure that your contract includes a clause that requires the publisher to publish the book within a specified amount of time. A deadline of 12 months is best, though many publishers insist on 18 or 24 months. Should a publisher fail to publish by the end of that period, the author must have the right to terminate the contract unilaterally.

Suggested language:

**Publisher agrees to publish the Work within 12 months of acceptance of the Work and agrees to notify Author of the publication date. Should Publisher fail to publish the work by this time, the Author may notify Publisher of an intention to terminate this agreement. If within 60 days the Author and Publisher cannot agree on a revised publication schedule or the Publisher fails to respond to the Author, the Author may terminate this agreement by sending written notice to Publisher. Upon receipt of such notice by the Publisher, all rights shall revert entirely to the Author, and the Author shall be free and clear to sell the Work elsewhere. The Author shall also be entitled to keep any advance monies already paid.**

*Try to remove the clause that often appears in publishing contracts saying that in the event of a failure to publish, the author's only remedy is to retain the advance. This would unfairly prevent you from taking other legal action that might warrant damages (e.g., a lawsuit charging that the failure to publish was a breach of contract that caused you substantial harm).*

## V. PRODUCTION AND PROMOTION

### 1. Editing and typesetting

The contract should state clearly that the publisher is responsible for the costs of production. The publisher should arrange for the manuscript to be professionally copy edited and should send you the edited manuscript for review. Do this review carefully, since if you fail to catch editor's errors at this stage, you may be charged for fixing them in the proofs (see below).

Although the publisher will insist on language saying that the manuscript must conform to standards of spelling, grammar, etc., *the contract should state that no substantial changes in the content of the work or the title may be made without the consent of the author. Thus:*

**The Publisher shall have the right to copyedit the manuscript to make it conform with accepted standards of spelling, grammar, etc. The Publisher shall not make substantive changes in the manuscript or alter the title of the Work without the consent of the Author.**

Today, most publishers edit manuscripts directly on the computer rather than on hard copy. If you confront this, insist that the publisher use software that will allow you to see what changes are being made to the text. Otherwise you will face the tedious task of doing a line-by-line comparison of your manuscript and the edited copy.

Once the work has been set in type, you will be sent proofs for review. Traditionally, the author would first receive galley sheets to review, and after those had been corrected, page proofs. Since manuscripts today are frequently submitted on computer disks, publishers will often skip the galley-sheet stage and go straight to page proofs.

Publishing contracts will typically require you to review proofs promptly. It is also common for contracts to state that the author is responsible for the cost of making Author's Alterations (but not the cost of fixing printer's or editor's errors) to the proofs, to the extent that such costs exceed 10 percent of the original costs of composition.

It is difficult to get publishers to remove such language, because they want to discourage authors from doing significant rewriting once the book has reached the proof (especially the page proof) stage. Indeed, you should try to make any necessary changes before the work goes into production. If, however, you are writing a non-fiction book on a current topic that might require last-minute modifications, try to get the publisher to absorb all the costs of Author's Alterations, or at least set a higher threshold for when your responsibility begins.

Whatever language you end up with, be sure to keep a copy of the corrected proofs, so you can challenge excessive charges for alterations that may later appear on your royalty statement.

**2. Production decisions**

Publishers typically insist on controlling the details of production, distribution, pricing, and promotion. It will be next to impossible for you to have any control over some of these issues—the price of the book, for example.

You should, however, try to negotiate some role with respect to the creative decisions that will be made regarding the production of your book, especially the cover and dust jacket copy. The best clause would be one that gives you veto power over such decisions. If that is not possible, at least get language that requires the publisher to **consult** with you on those decisions **on a timely basis**, which would allow you to make a fuss about a problem while it is still possible to do something about it.

The best language would read:

**All creative decisions relating to the production of the Work—including the format and style of the trade edition; the text; the title; graphic material; Author's photograph; design of the cover and the dust jacket copy; catalog copy—shall be subject to the approval of the Author.**

**3. Promotion**

Promotion—or the lack of it—is one of the greatest sources of frustration for authors. Publishers issue many titles with so little fanfare that only an author's relatives and friends know of the book's existence. Given the tendency in publishing to devote most of a house's promotional budget to a handful of titles from well-known authors, there is not much the average author can do to get more resources devoted to his or her book.

To a significant extent, the size of a book's promotional budget will be determined by the amount of the advance paid out by the publisher. Publishers who have more invested in the books with big advances will have an obvious interest in pushing those titles.

Whether your advance is large or small, try to get the publisher to put a specific dollar-amount in the contract for promotion. If this is not possible—which is usually the case—then at least seek a commitment that the publisher will promote the work "diligently, professionally, and to the best of its ability." Also, get the publisher to promise to consult with you on its promotional strategy for the book. Be sure to document all conversations regarding promotion, in the event there is a dispute about "diligence" later.

If you have published with the same house before and were satisfied with the promotional effort, try to get language as follows:

**Publisher will promote the Work diligently, professionally, and to the best of its ability, and will at a minimum engage in the same amount of promotional effort it employed for the Author's last book.**

**4. Author's copies and discount**

The contract should entitle you to a reasonable number of free copies of your book in each edition in which it is published. For example:

**The Publisher agrees to give the Author 25 free copies of each of its editions and 10 copies each of any licensed paperback reprint or translation.**

You also should be entitled to purchase additional copies at a discount of at least 40 percent (the most common reduction given to bookstores). You may also ask for a discount of 50 percent or the best distributor's discount; though not all publishers agree to this. Publishing contracts often bar you from reselling these copies. Try to change that restriction so that it

refers only to normal retail channels. There is no reason why you should not be able to sell these copies at speaking engagements, for instance.

Often a contract will stipulate that no royalties are paid on free copies (as to book reviewers) or copies purchased by the author. If possible you should delete the latter, since you are now acting as a distributor and generating extra sales. If you cannot get agreement on this and you intend to purchase a large number of copies, you might want to do so through a business entity, which would allow you to receive a discount **and** get paid royalties on those copies.

## VI. WARRANTIES & INDEMNIFICATION

### 1. General provisions

It is not unreasonable for the publisher to ask that you promise that the work you are submitting is original, that it has not been previously published (unless it is a reprint), that it does not infringe on someone else's copyright, and that you are free to grant the specified publishing rights.

Most standard contracts will also ask the author to promise that the work is not obscene or libelous, that it does not invade anyone's privacy, and that it does not contain recipes, formulas, or instructions that may be "injurious to the user."

All of this is known as the author's warranty, and it is usually presented together with what is known as an indemnification clause, which makes the author responsible for any legal expenses and damages resulting from lawsuits that involve violations of the above promises. Some editors resist negotiating on this area of the contract, saying that the house's standard language was drawn up by lawyers and cannot be modified. Don't take this for an answer, and if necessary speak directly to the legal department to get some of the modifications suggested below.

There are many problems with the typical warranty and indemnification clauses. The first is that the author cannot be expected to be an expert on the law of obscenity, libel, privacy, etc., which may vary from state to state At the very least, in these areas you should be expected only to promise that, "to the best of the author's knowledge," the manuscript does not violate these principles.

Standard contracts will typically require the author to cooperate with the publisher's lawyers in modifying passages that may be obscene, libelous, etc. That is reasonable (as long as the lawyers aren't too conservative), as is the provision that allows the publisher to cancel the contract if it turns out that the manuscript is not original or is otherwise unpublishable for legal reasons.

What is not reasonable is sweeping language requiring you to pay the publisher's legal expenses in the event a lawsuit is brought. *Ideally, the contract will say that if you cooperate with the publisher's lawyers and modify the manuscript so that the lawyers think it will pass*

*legal scrutiny, you should be free of all responsibility for legal expenses.* Publishers have lawyers on staff or on retainer, so why shouldn't they pay to defend lawsuits?

The best language, which will be very difficult to get, would thus say:

**The Author will cooperate with lawyers retained by the Publisher to be sure that no part of the Work is libelous, obscene, an invasion of privacy, or a violation of any copyright or trademark. Once the manuscript has passed legal review by the Publisher's attorneys, the Author shall not be responsible for any legal expenses relating to lawsuits brought in connection with the Work but will cooperate in defending against such suits.**

Publishers, supposedly concerned about those rare cases in which an author submits a completely plagiarized manuscript, tend to insist on the inclusion of an indemnification clause. The fallback position can be that you are responsible for legal expenses only when the plaintiff is successful, which means that you are not responsible for expenses relating to frivolous or unsuccessful claims. The principle is that you should be held responsible for the publisher's legal costs only if a court has in effect found that you breached your warranties.

The contract language would thus say:

**The Author represents and warrants that he or she has full power to execute this agreement; that the Work is original and is not in the public domain; and that to the best of the Author's knowledge, the Work contains no material that is libelous, obscene, an invasion of privacy, or a violation of any copyright or trademark. The Author shall be responsible for the Publisher's legal expenses related to the defense of lawsuits involving a breach of these warranties only if the plaintiff has won a final judgment in a court of law or if a settlement has been reached, with the Author's consent, in favor of the plaintiff.**

*In many cases the best you can do is to get the publisher to agree to a 50-50 split of costs relating to a successful defense. As for unsuccessful defenses, it will be difficult but try to get the Publisher to put a dollar limit on your liability, e.g., an amount equal to one-half of the advance you received. Also, try to get coverage under the publisher's libel insurance policy (see Section 4 below).*

**2. Withholding of royalties**

Standard contracts typically give the publisher the right to suspend royalty payments once a claim relating to the warranty has been received. This will be difficult to resist entirely, but at least try to put a ceiling on how much they can withhold and a time limit on the withholding if a suit is not actually filed. Suggested language:

**If a claim is brought involving alleged breaches of the Author's warranties, the Publisher may hold in escrow, in an interest-bearing account, up to one-third of the compensation otherwise due to the Author. In no event, however, may the amount withheld surpass the amount of damages claimed in the complaint. If no suit is brought**

**within 12 months of the original notice to the Publisher, the Publisher shall release the funds, along with accrued interest, to the Author.**

**3. Choosing counsel**

Publishing contracts often require the author to consent to being represented by the publisher's counsel in the event a suit is filed against the author and publisher. This would put you in a difficult position. If you are even partially responsible for legal expenses, it would be to your benefit to consolidate representation and thus reduce costs. However, your interests will not always coincide with those of the publisher, so having the same lawyer is likely to cause problems. Also, if there is a conflict of interest, the publisher's lawyer cannot ethically represent the author.

The best language, then, would be that which allows you to choose either option, depending on which one seems preferable in the particular situation. Suggested language:

**In defending lawsuits involving an alleged breach of the Author's warranties, the Author may choose either to be represented by the Publisher's counsel or to retain independent counsel at the Author's own expense.**

*If you cannot get this option and must settle for being represented by the publisher's lawyer, insist on language giving you a right of approval over any proposed settlement of the suit.*

**4. Libel insurance**

For any book that is investigative or controversial in nature, you should try to get coverage under the publisher's libel insurance policy. Viking Press pioneered this practice and a number of other houses now either provide this coverage routinely or will agree to do so if the author makes a firm request. Usually the policy—which may be described in a side letter rather than the contract itself—will cover other forms of liability (invasion of privacy, etc.) as well as libel.

Beware of the deductibles contained in these policies, which may require an author to pay the first $50,000 or more in damages. Try to get the publisher to pay the deductible, or at least put a cap on your liability. For example, the clause may read as follows:

**The Publisher shall arrange for the Author to be covered as an additional insured under the Publisher's liability insurance with respect to the Work. The Publisher shall be responsible for paying the entire premium due under the policy. The Author shall be responsible for any deductible that may be payable in relation to a suit brought against the work, but the Author's liability will be limited to an amount equal to 50 percent of the advance on royalties received by the Author.**

**– Media perils insurance**

For a time in past decades, the National Writers Union could offer members group media liability insurance. However, for the past several years this kind of coverage has not been available in a group policy.

Individual policies are available through many insurance brokers but are very expensive. Typically such a policy will insure the writer against claims of libel, defamation, invasion of privacy, plagiarism, and trademark or copyright infringement. Authors of cookbooks, technical, and health-related books may want to add errors and omissions insurance, to protect themselves if a reader claims to have been harmed by information conveyed in their books.

These policies often cost multiple thousands of dollars, but if your book is very controversial and the publisher will not cover you as an "additional named insured," it may be worth it. A Web search on *media liability insurance* will yield much information, including contact information for brokers and companies that will insure individuals.

**5. Copyright infringement by other parties**

In some circumstances, it may be **you** who brings suit—against parties that rip off your writing. Strangely, most standard contracts give the publisher the right, **but not the obligation**, to pursue legal action against those who infringe on the book's copyright.

You should insist on language that does not restrict your ability to pursue infringement actions on your own if the publisher does not want to be bothered with the issue. The clause would read:

**If the copyright on the Work is infringed, the Publisher shall have the right, but not the obligation, to pursue a claim for infringement. If it does so, any recovery shall be divided equally between Publisher and Author after the Publisher has recouped its expenses related to the action. If the Publisher does not pursue a claim within 90 days after notice from the Author, the Author may do so independently, at his or her own expense, in which case any recovery shall belong solely to the Author.**

## VII. OPTION CLAUSE

Option clauses (sometimes known as the right of first refusal) are provisions that give the publisher the right to consider your next book project before you show it to any other house. Ultimately, you cannot be compelled to sign a new contract with the same house, but the option provision can seriously encumber your ability to offer the new work to other publishers. These clauses are also unfair; you are obliged to offer the new book to the publisher, but the house is not obliged to accept it.

These clauses originated at a time when relationships between authors and publishers were much less fluid than they are today. Publishers could argue that they were making substantial investments in their authors and that they should be able to protect those investments by

making it difficult for authors to switch to another house after enjoying some measure of success.

Whether or not this position was justified in the past, it certainly makes no sense today. Publishers do not invest a great deal in every author, and it is accepted practice that authors switch houses frequently. Yet option clauses remain in many boilerplate contracts.

The most desirable alternative is to remove the option clause entirely—a step that many publishers will agree to without much resistance. Others will remain adamant about keeping the clause. In that case, you should try to modify (i.e., weaken) the provision in various ways.

*Do not under any circumstances agree to an option clause that requires you to submit a complete manuscript to the publisher for consideration. This language would compel you to spend a long period of time writing before you could seek a contract and an advance. Instead, agree only that you will submit a proposal for the new work and, if the publisher insists, at most a few sample chapters.*

*If you write in different genres, specify that the option clause will apply only to your next work in the same genre.*

*Set a strict deadline (say, 30 days after submission of the proposal) by which the publisher must make an offer on the new project.*

*Do not agree to language that binds you to the same terms as the original contract, and do not consent to restrictions on your right to reject the publisher's offer in favor of another offer—even one that is less lucrative. There may be circumstances in which you decide it is best to go with a house that is offering less money but in conjunction with other terms that are more attractive.*

*Do not agree to language that bars you from submitting a proposal for a new book until after the original book is accepted or published. This, too, could seriously delay your ability to pursue new projects.*

A tolerable option clause might read:

**The Author agrees to give the Publisher the first opportunity to consider a proposal for the Author's next book-length work in the same genre. Thirty days after the submission of the proposal, the Author shall be free to submit the proposal to other publishers. Nothing in this clause shall prevent the Author from accepting an offer from another publisher, regardless of the terms of that offer.**

If the publisher insists on a more restrictive option clause, you can respond by insisting that, in exchange, the publisher follow the Hollywood practice and pay you a separate fee for the option.

One final point: option clauses are even more of a problem if you are working with an agent. See Section XIV below.

## VIII. Competing/Conflicting Works Clause

This clause, which comes in various guises, is designed to prevent you from unfairly reusing the material from your book in a deal with another publisher. If all this provision was meant to do was guard against those extremely rare instances in which an unscrupulous author tries to sell the same manuscript to more than one house, then it would be tolerable (though the publisher would have other legal remedies in such instances).

The problem is that competing/conflicting-works clauses are often written in a way that limits your ability to publish a book with another house, if the first publisher fears—with or without justification—that it may limit the sales potential of the title it is issuing. In particular, language that bars you from publishing another work on a "similar" subject can put the publisher in a position to inhibit the course of your writing career.

Competing-works clauses are also inherently unfair. There is no provision limiting the ability of the publisher to bring out a work by another author that may undermine the sales of your book. They are also short-sighted; sometimes a new work can increase demand for an author's earlier books.

The best alternative is to remove this clause entirely. If this is not possible, then you should try to restrict it in the following ways:

*Limit the restriction to competing works on the same (not simply similar) subject, and if possible define that subject as narrowly as possible.*

*Limit the restriction to other works for the same market (trade, reference, children's books, etc.).*

*Put a time limit on the restriction.*

The clause might then read as follows:

**Author agrees that, in the next two years, he or she will not publish any competing trade books on the subject of the mating habits of second-generation North American house flies, without prior permission of the Publisher.**

## IX. Out-of-Print (or Termination) Clause

The out-of-print clause (sometimes referred to as the termination or reversion-of-rights clause) deals with the circumstances surrounding the decision of the publisher to take your book out of distribution.

If written correctly, this clause can be an author's salvation, allowing you to recapture rights from a publisher that may have failed to execute its responsibility of properly editing, packaging, and promoting a book. As it is often written, however, this clause can keep your book in limbo and make you wait years for a reversion of rights.

In many cases, publishing contracts will say that a book cannot be considered out of print sooner than 24 months after its publication. From an author's point of view, this clause can be either good or bad. The advantage of the language is that it may prevent the publisher from "killing" a book before it has found its readership. The disadvantage is that it can delay a reversion of rights from a publisher that has not done its job well. You can decide for yourself whether you want to try to change this provision.

Another complication has arisen with the growth of print-on-demand (POD) publishing. This guide deals only briefly with contracts offered by small presses that publish on demand (see Appendix D below). With larger trade houses, the problem arises after a conventionally printed work sells out its print runs and the publisher decides not to produce more copies. Instead it may retain an electronic file of the work and print single copies in response to orders.

The Union believes this is not appropriate for a trade publisher. If the publisher is not willing to invest in printing more copies, it should allow the work to go out of print and return the rights to the author, who would be free to make the work available through an independent POD service and not share the resulting income with the original publisher.

A proper termination clause will, first of all, clearly define what it means for a work to be out of print. Ideally, this should refer to availability of the original edition (or paperback reprint) in its primary market. The best language would be:

**The Work shall be deemed to be out-of-print if the original hardcover edition or paperback reprint is no longer available in an English-language edition through normal retail channels in the United States. It shall not be deemed out of print by virtue of copies reproduced by print on demand (POD) permitting it to be stored in an on-line database or other electronic means, such as computerized on-line versions, or by copies sold through an on-line distributor such as Amazon.com.**

This would mean that the original publisher could not claim the work was still in print if the only forms in which it was available were translations, audio cassette, etc. Thus the publisher would forfeit its claim on the work, and the author would directly receive all income deriving from remaining licenses. Unfortunately, publishers usually insist on retaining income from licensed versions of the work.

A more specific out-of-print clause might read:

**The Work shall be deemed out of print if there has been no royalty over $25 or fewer than 50 copies have been sold in two successive royalty periods, whereupon all rights granted herein automatically revert to Author.**

Next, the clause should require the publisher to notify you when it has decided to take the work out of print. This commonsense requirement is almost never to be found in publisher boilerplate. Instead, the typical language requires **you** to inquire about the status of the work. At that point, if the work is not available for sale, the publisher is usually given six months to decide whether to reprint it. Only after that period of time are you entitled to reclaim the rights, if the publisher has not taken steps to reprint the work.

The absence of a publisher notification requirement means that your book may effectively be out of print without your knowledge. In many cases, when a publisher has sold all its copies of a title, it will neither reprint it immediately nor admit the work is out of print. Instead, it will label the title "out of stock indefinitely" and keep it in that limbo status until the author moves to enforce the termination provision of the contract—which many writers never do. This allows publishers to sit on rights relating to titles they don't want to spend money to reprint.

If you are an author with substantial clout, try to place the burden of notification on the publisher. Try for language such as the following:

**When the number of copies of the original edition of the Work in inventory falls below 250, the publisher shall notify the Author of this fact and indicate whether the Publisher intends to reprint the Work within 60 days. If the Publisher does not intend to do so, it shall immediately revert all rights to the Author in writing, though the Publisher shall have the right to dispose of the remaining copies, the revenue from which shall be subject to the royalty provisions stated elsewhere in this agreement.**

**If the Publisher does indicate an intention to reprint but fails to do so within 60 days, the Author shall have the option to terminate the contract and reclaim all rights relating to the Work, or else to grant the Publisher an extension.**

If this language is unattainable, a fallback position would be:

**If the Work is no longer in print per the standard stated above, the Author may write to the Publisher and request a reprinting. If the Publisher does not commit to republishing the Work within 90 days or by another mutually acceptable date, or if the Publisher agrees to reprint but fails to meet the agreed-upon print schedule, the Author may terminate this agreement by written notice to the Publisher. Upon receipt of such notice, all rights herein automatically shall revert to the Author, and the Author shall be free and clear to sell reprint rights elsewhere. Termination shall not preclude a Publisher from selling the remaining stock, the revenue from which shall be subject to the royalty provisions stated elsewhere in this agreement.**

If you are not sure of the status of your book, ask a bookstore to order a copy or have a friend try to order it directly from the publisher. Also check with an on-line store such Amazon.com and if it is “out of stock” ask when it will be available.

Also, be sure that all reversions of rights are put in writing.

## X. REMAINDERING

Remaindering is the way in which the publisher disposes of copies of your book it has decided it can no longer sell through regular distribution channels. The copies (sometimes referred to as "excess inventory") are sold at a huge discount to remainder houses, which either resell them directly to the public through discount mail order catalogues or distribute them to bargain book outlets.

There are several types of remaindering. When a publisher has decided to put your book out of print, it will remainder **all** of the remaining copies in stock. In other cases, a publisher may decide to reduce the inventory of a slow-selling title that is being kept in print. The latter is known as **partial remaindering**. It is also common for publishers to remainder the inventory of the hardcover edition of a book soon after the paperback version is released.

In any of these cases, the contract should require the publisher to:

· *notify you before the copies are remaindered, to give you an opportunity to purchase all or some of the copies yourself;*

· *offer you the copies at the publisher's cost of production, or at the lowest price at which the copies may be sold to remainder houses;*

· *give you the opportunity, in the event of total remaindering, to purchase the plates or negatives at their depreciated value.*

A few publishers have adopted the practice of paying royalties (on a net basis) on remaindered copies sold above the cost of production. *Try to get your publisher to do so as well.*

The contract language would read as follows:

**If at any time after two years from the publication of the Work, the Publisher has copies on hand which, in its judgment, cannot be sold through usual distribution channels, the Publisher may dispose of all or some of these copies through remaindering. Remaindering may occur sooner than two years after publication if it occurs at the same time that a paperback reprint or other edition of the Work is being issued.**

**Before copies are sold in this manner, the Publisher shall give the Author an opportunity to buy any or all of them at the lowest price at which the Publisher proposes to sell the copies to remainder houses.**

**If all of the Publisher's remaining stock is to be disposed of through remaindering, then the Publisher shall designate the Work as being out of print and shall immediately revert all rights to the Author. At this time the Author shall be given an opportunity to**

**purchase (at their depreciated value) the plates or negatives used in the production of the Work.**

**The Publisher will pay the Author a royalty equal to 10 percent of the monies received from all remainders sold above the cost of production.**

## XI. REVISED EDITIONS

The seemingly innocuous issue of revised editions can be a major headache for authors of successful non-fiction works that the publisher wants to update on a regular basis. Ideally, the contract you sign for a book will apply only to the original edition of the work; a revised edition would require a new agreement. This would give you an opportunity to negotiate better royalty rates, for instance, if the book is doing well. It could also allow you to get a new advance, which would be quite important if the revision is going to be time-consuming.

In practice, however, publishers almost always insist on the right to publish new editions under the same contract. They want to decide when the revisions are to be made, and they want the terms of the original contract to apply to the new editions. It will not be easy, but you should try to limit this power grab by the publisher.

On the issue of a new contract, try for language that requires a new agreement when the amount of revision is substantial, say, one-fourth or more of the original text.

Also, for works that could be revised regularly, try to prevent the publisher from having complete control over the frequency of the new editions. State the minimum amount of time between revisions, e.g., two years.

The suggested language would thus read:

**The Author will not have to revise the Work more often than every two years. If more than one-fourth of the text must be revised, said revisions shall constitute a new work subject to a new agreement.**

If the revisions are expected to be less extensive and less frequent, then it may be difficult to avoid language that states that revised editions will be subject to the same contract terms as the original edition. If so, be sure that the contract states that the deadline for the submission of the revisions is to be determined by the mutual consent of you and the publisher, to avoid the imposition of unreasonable timetables.

Beware of two other pitfalls. The first has to do with the royalty rates that will apply to the revised edition. Assuming your agreement provides for escalating royalty rates (see Section II.3), it is common for boilerplate contracts to state that when a revised edition is issued, the royalty rate will drop down to the original level, rather than continuing at the higher rate that a successful title will have reached. Although it is commonplace, there is no justification for this practice, which in effect penalizes the author for having a successful title. Instead, there should be a clause either in the royalty section or the revised edition section stating that:

**For the purposes of determining the applicable royalty rate, sales from revised editions shall be regarded as cumulative.**

You might put yourself in a better position to get this language if you tie this issue to that of getting an advance on the new edition. By playing these two points off against each other, you may be able to get the publisher to concede on one of them. You'll need quite a bit of clout to win on both scores.

The other pitfall concerns what happens if you are unwilling or unable to do a revision when the publisher wants one. Unfortunately, many publishers insist on clauses that allow them to proceed with the production of a revised edition without you. Such language undermines your position as the copyright holder and may cause personal and professional problems if the revision states facts or makes conclusions with which you do not agree. In fact, the presence of this provision in a trade book agreement is an improper application of language from the world of textbooks. Because of the large investment often involved in the creation of textbooks and the need for regular updating, publishers often insist on holding the copyright and on being able to control the process of revision. To a great extent, textbook publishers consider themselves the *owners* of their titles. (See also Appendix B on academic press contracts.)

*Do whatever you can to avoid clauses that allow the publisher to hire someone else to do the revision and then charge you for the cost of that person's labor. If you cannot prevent the insertion of such language, at least insist on the right to be consulted on who is chosen to do the revision. Also make sure it is stated that you will remain the primary author of the work and that this will be made clear on the cover, title page, etc.*

*Further, consider asking for a clause that states that if you have substantial disagreement with the revision writer about substantive issues, you retain the right to have your name removed from the book or to put in alternative interpretations.*

*Beware of revised-edition clauses that deprive you of your right to royalties and other income if you decline to do more than one revised edition. Such language should definitely be removed from trade-book contracts. For textbooks, reference works, and professional titles, however, you may have to agree to a reduction in your income for each edition that you decline to revise. Try to make this reduction as gradual as possible, e.g., a 10 percent drop in your income for each revision you pass up.*

A suggested clause would be:

**If Author cannot or will not revise the Work, Publisher may arrange revision by another competent individual, whose selection is subject to Author's approval. Author also must be able review the revisions. In no event shall Author's royalties for the second edition be less than 75 percent of the amount due for the previous edition, 50 percent for the third edition, and 25 percent for all subsequent editions in which Author's work appears.**

## XII. BANKRUPTCY

Most boilerplate contracts provide for a reversion of all rights to the author in the event the publisher files for bankruptcy. However, such clauses, devised under state contract law, have been superseded by changes in federal bankruptcy law. These changes stipulate that publishing rights must be treated like other assets during a bankruptcy, which means that they may end up in the hands of banks and other secured creditors with priority claims. Authors, as unsecured creditors, are in a weak position to get back their rights. There are special circumstances, however, so you should contact the NWU if you find yourself in this situation.

In a handful of instances, authors of substantial clout have been able to negotiate "secured creditor" status in their publishing agreements. This status would greatly increase your chances of getting back your rights as well as some portion of any royalty money owed to you. If you can negotiate secured creditor status, your contract must require the publisher to execute and deliver to you all forms required to perfect the security interest, in keeping with the Uniform Commercial Code. You should file those papers with the appropriate state offices. NWU grievance officers can assist you in this process. Here is the type of clause a handful of authors have been able to get:

**1. As collateral security for the payment of all money owed to the Author under this contract, the Publisher hereby grants to the Author a Security Interest in the Work and all products and proceeds thereof.**

**2. Upon delivery of the Work, the Publisher shall execute and deliver to the Author Uniform Commercial Code (UCC-1) forms to perfect the Security Interest, and the Author is authorized to file said forms in all appropriate jurisdictions.**

**3. With respect to the said Security Interest, the Author shall have and enjoy all of the rights, privileges and powers granted to a Secured Party under the Uniform Commercial Code of the State of New York [or whatever state], as it is now in effect and as it may be hereafter amended.**

Sometimes, the best an author can do is watch for the warning signs of bankruptcy. Late or missed royalty payments are an important clue, as are rumors in the industry. If bankruptcy seems imminent, an author should attempt to terminate the agreement based on the publisher's breach of performance (missed payments). Understand, however, that a court may invalidate any actions that occur 90 days prior to a bankruptcy filing.

If notified that a publisher has filed for bankruptcy, it is essential that the author contact the court and the bankruptcy Trustee (who manages the bankrupt company's assets) to inquire about the status of the title. In a bankruptcy, the individual author agreements are considered to be "executory contracts," thus requiring whoever purchases them to either affirm the contract (meaning it would resume publishing the work) or reject it (meaning that rights could revert to the author). In some cases the Union has intervened in bankruptcy situations to negotiate rights for all the authors affected.

## XIII. SUCCESSORS & ASSIGNS

Contracts typically will contain language that says the agreement is binding on all successors, heirs, administrators, and assigns. (This would apply, for example, when a publishing house is sold or merged.) That's okay, but watch out for clauses that bar you, for example, from assigning the right to collect royalties to another party but do not limit the publisher's right to make assignments. Insist on language that requires either party to get the written consent of the other party before assigning any part of the contract. Generally, an author's obligation to write the book and a publisher's obligation to distribute the initial print run are agreements for special services and should not be assignable.

The contract should thus say:

**This Agreement shall be binding on the parties and their respective assigns, heirs, executors, or administrators. No assignment shall be binding upon either of the parties without the prior written consent of the other, such consent not to be unreasonably withheld. The Author may, however, assign any sums due him or her without such consent from the Publisher. The Author's obligation to write the book and the Publisher's obligation to distribute the initial print run of the Work are agreements for special services and are not assignable.**

## XIV. AGENCY CLAUSE

This is the clause that establishes the right of your agent to act as your representative in dealing with the publisher, primarily in collecting money owed to you. It should also specify the commission to be received by the agent.

Some agents have standard clauses that they want inserted in each client's publishing contract. Whether the language comes from the agent or the publisher, make sure it does not refer to an *agency coupled with interest* , as this purports to give the agent a property right, as opposed to a financial interest only, in your work. This issue also may come up if your agent asks you to sign a representation agreement. A similar phrase is *interminable agency,* meaning the agency never ends even if the book goes out of print and rights revert to the author. If the author then self-publishes or places the book with another publisher, the agent would be entitled to a commission on each copy of the book. Also be cautious about the term *irrevocable.* Your agent's right to receive its commission under this contract is irrevocable but no other grant or right in this clause should be so characterized.

Preferably, the agency clause also would make it clear that if you and your agent end your relationship, you can instruct the publisher to send your royalty statements and earnings to you directly, rather than via the agent. In contrast, an agent whose right to a commission survives the termination of the relationship with you would get his or her money from the publisher. Fortunately, most agents don't know what "agency coupled with an interest" means and, if informed that it comes from the shipping industry, they will drop the term.

A good agency clause would read as follows:

**All sums of money payable to the Author under this agreement, and all accounting related thereto, shall be made to the Author's agent [insert name and address], and receipt by the agent shall be a valid discharge of such indebtedness. For his/her services, the Author agrees to pay and hereby assigns to Agent a commission of [insert percentage] of all monies payable to the Author under this agreement. In the event that the Author and the agent end their professional relationship, the Publisher shall, upon written request from the Author, send royalty statements and pay the Author's income directly to the Author, subtracting the Agent's commission, which will be sent separately to the Agent.**

Your relationship with an agent is greatly complicated if you have signed a contract with an option clause. If, after the first work is published, you end the relationship with the agent but end up signing a contract with the same house for your subsequent work, the agent may, on the basis of that option clause, claim the right to a commission on the new deal. This can be quite a problem if the second contract was negotiated by a new agent, who naturally expects a commission as well. This is another reason to resist option clauses (see Section VII).

For more detailed discussion on dealing with agents, see the **Preferred Author-Agent Agreement** and the accompanying guide, **Understanding the Author-Agent Relationship** on the Union web site.

## XV. RESOLUTION OF DISPUTES

### 1. Applicable law

Most often, boilerplate contracts will specify that the agreement will be governed by the laws of the state in which the publisher operates. If the contract you are offered specifies that the laws of another state will be used, try to have it switched to New York or California, which are the states with the most developed body of law pertaining to publishing. As for the place where conflict resolution is to take place (not necessarily the same as the state whose laws govern), it may be best to leave that open, so that either party can file suit in their own locale.

If an author decides to file suit for non-payment (but see Section 2. below), inserting the following clause allows for this:

**Notwithstanding any language herein, it is agreed that Author, in case of any claim for non-payment by the publisher or literary agent or any other party to this contract , may bring an action in any court of general jurisdiction in the state in which Author resides to recover the amounts due, costs, disbursements, and reasonable attorney fees.**

### 2. Alternative Dispute Resolution: Arbitration and Mediation

If a publishing contract has been breached, the author has the right to file a lawsuit against the publisher. Unfortunately, this course of action is so costly and time-consuming that authors rarely are able to use the courts to resolve claims. Besides the initial cost of filing suit, which can run as high as $10,000 in federal court, a publishing company has the advantage of

substantially more money and, often, lawyers on retainer or in-house. Lawyers are trained to make litigation difficult for the other party and they may stall and file motions and requests for information until the author gives up. That is known as "burying the plaintiff in paper." Occasionally, if an author has a very open-and-shut case, the publisher's attorneys will settle, but that is exceedingly rare.

Nevertheless, if you are impelled to file suit, see the clause suggested in paragraph 1 above.

But there are more practical ways for authors to seek justice, known as "alternative dispute resolution." There are two main kinds: arbitration and mediation. Arbitration is much like a trial but in a non-courtroom setting: each party presents evidence to the arbitrator. The arbitrator then issues a ruling that is binding on the parties. If the parties have agreed to "binding" arbitration the decision can be registered with a court but not appealed. A "non-binding" arbitration is rare but does allow for appeal. If faced with a non-binding arbitration, the author would be better served with a mediation since the publisher can decide not to abide by the decision (and so can the author).

Arbitration has some down-sides. It can cost as much as a trial. One need not be represented by a lawyer – authors can represent themselves or be represented by a NWU grievance officer at no charge – but if the publisher has a lawyer (almost invariably the case) it may be advisable for the author to hire one. The filing fees for arbitration are high and sometimes require the author to travel to the site of the evidence, that is, the publisher's headquarters. Finally, arbitrators most often deal with big businesses and may be less experienced in dealing with an individual author. On the other hand, an arbitrator who has not worked in the publishing industry may be shocked at the one-sided nature of the contract and thus be inclined to rule in the author's favor.

Arbitrations are usually conducted under the rules of (and by arbitrators working with) the American Arbitration Association (AAA). Their web site at www.adr.org contains the rules for arbitration and mediation, as well as fees and forms.

In mediation the parties agree on a mediator who hears both sides and works with them to achieve a resolution. Mediation has some significant benefits over arbitration. It is not an imposed solution but one that has to be agreed upon by both parties. Also, the "facts of the case" are described by each party, and mediators can readily inquire into the details of a dispute to understand each viewpoint. Usually the author does not need an attorney and there are no filing fees. The mediator will charge a fee but that is often lower than that of an arbitrator and who is responsible for payment can be part of the negotiation.

However, a publisher may refuse to agree on a mediator. Further, in mediation the parties are not required to make a decision or come to an agreement, so a dissatisfied party can stop the talks and walk away or file in court. This is a two-edged sword. An intransigent publisher can refuse to come to reasonable solution of the dispute. As pointed out, lawsuits are expensive, but they are costly to the publisher as well as the author, which might help achieve a settlement.

In short, there is no easy answer to what method of dispute resolution is best. You should decide for yourself which approach you prefer. Chances are your publisher's boilerplate contract does not mention arbitration or mediation, so if you prefer one of those methods you will have to negotiate relevant language.

Some publishers agree to arbitration clauses in their author contracts as a matter of course, others will consent to the clause if the author requests it, and still others will never consent to it. The most common arbitration clause provides for recourse to the American Arbitration Association (AAA). It will say, for example:

**Any and all disputes arising from this agreement shall be settled by arbitration under the rules of the American Arbitration Association in [name of city], and any resulting judgment may be entered in any court of competent jurisdiction.**

Try to delete publisher boilerplate language that requires the arbitrator to be someone familiar with book publishing, since you may get better results from an arbitrator unaware of the publisher-biased practices of the industry. Also omit setting a specific venue for the arbitration if that place will be a problem for the author.

Some publishers will agree to a mediation clause, such as:

**Any and all disputes arising from this agreement shall first be taken to a mediator. Each party will nominate no more than two mediators, and one mediator shall be selected from those choices. The parties will make every effort to resolve their differences and come to a mutual agreement.**

Be aware if a site for mediation is indicated, consider deleting it.

Finally, should a publisher refuse any such clauses**,** the contract should omit any required dispute resolution method. However, see Rescission in Section 4 below.

**3. Small Claims Court**

If the monetary amount being disputed is relatively small, small claims court is a relatively inexpensive alternative. The amounts handled in a small claims court vary from state to state, ranging from as little as $1,500 to as high as $15,000. The author may represent him- or herself without the aid of an attorney. A possible clause allowing for this would be:

**Either party at his or her option may elect to bring directly in small claims court any action in which the amount in controversy is within such court's monetary jurisdiction. The parties agree that they shall consider the decision of the small claims court to be final and binding upon them.**

If your contract doesn't include a small claims provision, don't worry, since that recourse is available to you nonetheless.

**4. Rescission**

If the publisher absolutely refuses to insert a dispute resolution clause of any kind, one alternative would be to include language that recognizes the right of the author to rescind the contract if the publisher commits a serious or material breach of the contract. For example:

**Failure by the Publisher to perform in accordance with the key terms of this agreement—including major delays in publishing the work, major delays in paying advances and royalties, and serious failure to edit, produce, and market the work in an appropriate manner—shall constitute a material breach. If the Publisher fails to rectify the breach within 30 days of written notice from the Author, this agreement shall automatically terminate and all rights herein granted shall automatically revert to the Author.**

While rescission (i.e., unilateral termination) of a contract is always difficult for an author to achieve, it is most difficult where a contract does not indicate that certain publisher responsibilities, if not performed, constitute material breaches. If the contract does not indicate the seriousness of a breach, it is too easy for a publisher to argue that late royalty statements, the failure to publish on time, or the failure to promote, for instance, are simply routine business mistakes.

There are two other drawbacks of rescission. One is that the publisher can bring a legal challenge to a unilateral claim of rescission. And second, another, new publisher may not acknowledge that the author has successfully rescinded the contract. If the publisher will not directly affirm the rescission, the author's only other option is to send a letter to the publisher outlining the material breach and concluding:

*If I do not hear from you disputing this information on or before* [insert date about two weeks ahead], *you agree that the contract is rescinded and that I have no more obligations to you regarding this book, nor you to me.*

Keep track of when the letter is sent and when the time has expired, and send a follow-up that states the publisher's lack of response indicates the publisher has acknowledged the rescission. Keep in mind, however, that the publisher could still challenge the rescission at a later date. The absence of the publisher's acknowledgment that the contract has been rescinded could create complications if you seek to sell the rights to another publisher.

## APPENDIX A. THE LITERARY SMALL PRESS BOOK

The general information in this Guide applies to both small and large publishers, but poetry and fiction writers who publish with small presses have their own publishing issues. Also, like most large publishers, some small presses require manuscripts to be submitted through an agent; see the Union web site for a Preferred Literary Agent Agreement.

A small literary press, on the average, publishes one to fifteen titles per year, with an average print run of 500 to 1,500 copies (although it could be as few as 100 and as many as 10,000

copies). It has a staff of one to six persons. Its mission is to publish new and emerging writers and it looks for literary quality. It is not primarily motivated by commercial interest.

In the small-press world, your editor may be your best friend, or a respected local poet. This can make negotiations either easier or more complicated.

Small presses often do not give an advance against royalties or the best royalty rates. One reason is that they only print small runs. Another is that they are likely to depend on grants, which may be erratic. If an advance is offered, it may be in the range of $250 to $3,000, depending on the size of the publisher. Royalty rates may vary from 5 percent to 30 percent. A low royalty often can be negotiated to escalate if the book sells more than a certain number of copies. The printing method can make a difference in costs. Methods range from hand-set type and hand-sewn bindings (expensive) to print-on-demand (POD, inexpensive; see Appendix D below).

A writer receiving royalties usually receives five to ten free copies of the book. You should also be able to buy more copies at 40 to 50 percent discount and be permitted to sell them at readings and book fairs, which often constitute an important part of their sales. You should receive regular royalty statements, especially if your book is sold on the Internet or through an on-line house like Amazon.

Writers who want and need compensation for their work must think carefully about what they agree to accept. For example, if the publisher wants to subtract printing costs when calculating a net royalty, the writer should try to negotiate a better deal. Some small presses propose profit-sharing, where the publisher and author split the profit after expenses are paid. In that case the expenses should be clearly specified.

For some books, or for winning a contest, the author may be compensated only with a set number of copies that he or she may then resell. This applies especially to poetry chapbook contests. Sometimes a contest award is a flat fee, such as $500. Beware, however, of contests that charge high entry fees or are in effect vanity publishing. A contest, too, may have a standard contract for a fee or for royalties. Before entering, ask to see a contract to avoid unwanted clauses that you can't negotiate after you win.

Many small-press writers find they have to do all of their own marketing and distribution. Try to put specifics about marketing into the contract. A press might also ask you for a marketing plan.

Negotiate for mutual input on the book's design, cover, and title. Smaller presses may require writers to provide their own artwork, or a press might have a designer who will work with you.

Poets and short-story writers often wish to re-publish individual poems or stories in magazines or anthologies, and it is important for them to have the legal right to do so. Hence the book should be copyrighted in the author's name, with rights reverting to the author when it goes out of print. Some presses and magazines will require permission or a credit for such re-publication. Also avoid a non-competition clause.

Secondary rights for translation and, consequently, for sales outside the United States, are relevant.

Bankruptcy, termination, and out-of-print clauses are important. For print-on-demand publication, specify when or how your book will be deemed out of print. You could ask for a limited term if you are considering a future larger run with a bigger publisher.

If you are starting out with a small press, you are not writing for "big money," but a poet or fiction writer can potentially earn a few thousand dollars a year that will supplement other income. Getting a book published also qualifies one for further awards, grants like the National Endowment for the Arts Poetry and Fiction Fellowships (grants for which one can still apply for oneself), creative writing teaching jobs, and reading programs. Finally, many writers prefer the artistry and atmosphere of the small-press milieu and so overlook its commercial disadvantages.

– Alice Rogoff

## APPENDIX B. ACADEMIC PRESS CONTRACTS

Contracts from publishing houses that publish textbooks, essay anthologies, encyclopedias, dissertations, and other academic books are similar to contracts from trade publishers in outline only. For the most part the clauses cover the same issues, but academic publishing contracts are more oppressive. They ask for more rights, give back less in return, and actually may make authors pay for the right to use their imprints.

Too often academic authors comply**,** in the mistaken belief that there is no money in academic publishing. In fact, publishers benefit to the tune of billions of dollars from the publish-or-perish culture that pervades academia. One article you write for a journal or encyclopedia or essay collection that appears first in print may appear in some electronic edition of the same publication, and the publisher earns money every step of the way – through direct sale of articles or sales of ads that appear on the Web site.

Like any contract, academic contracts are not cast in stone, and you can negotiate for a better deal. Note, *this appendix is a supplement to the Guide for Book Contracts.* What follows are thoughts and ideas pertaining to areas where academic contracts differ.

**Copyright.** Academic publishers, especially textbook publishers, long insisted on taking out copyright in their name. Resist this. The publisher doesn't need the copyright to publish the book. Rather, insist that copyright be taken out in your name. Many now agree to do so, so you may say this is becoming current industry practice. If your arguments fail, fight for other concessions, such as a higher royalty rate, or a rate based on list rather than net (see **Royalty** below).

For writing an entry to an encyclopedia or contributing an essay to an anthology, it may be more difficult to retain copyright. Even though a publisher or editor of an anthology can retain a copyright in the collective work, contributors sometimes can retain copyright for their individual contributions. If you cannot achieve this, at the very least insist on having your name (byline) appear with your contribution.

**Royalty.** The standard for hardbound trade books has long been 10% of list (or cover) price on the first 5,000 copies sold, 12.5% on the next 5,000, and 15% thereafter. On trade paperbacks, it is 7.5% on the first 20,000 and 8%-10% thereafter. (Note that this can vary considerably.)

Whatever you are offered for an academic book, it probably will be less than the trade standard and be based on *net price,* which means list minus expenses. Whatever you are offered, ask for an escalating royalty structure rather than, for example, 7.5% on all copies sold, and make sure the royalty on subsequent editions is based on cumulative sales. Note that the latter will be hard to obtain.

A major problem is the definition of "net." To get a clearer idea, ask your editor (1) what will be the cover price for a book? (2) how much of that price will be deducted before you get down to net, and for what reasons: does it include printing, shipping and handling, discounts paid to distributors and bookstores, promotion, credits for returns, bad debts incurred during the royalty period, depreciation of equipment? What else? *The National Writers Union recommends that you avoid agreeing to a contract in which any expenses other than discounts and credits for returns are factored into the net receipts. Resist a deal in which printing costs and overhead are included.*

Once you know on what actual dollar figure the royalty is based, ask how many copies they expect to sell, that is, projected sales. That figure times the dollar amount on which royalty is based times the royalty rate itself will tell you approximately how much you can expect to earn from the book.

Some academic publishers, especially university presses, may also market your book as a trade book. Ask your editor if it has that potential, and if it does, try to negotiate for better terms, like the standard ones for trade books. (See Section I.3 in the Guide above.)

Another factor is **royalty statements.** Many academic publishers issue royalty statements only once a year, a practice dating from the quill-pen era. Computers enable them to calculate your royalty with a few keystrokes. If you expect to make a lot of money from royalties, push for two statements a year. If you don't expect high earnings, let this issue go.

Still another issue is **advance against royalties**. Once the royalties you earn on your book exceed your advance, you start receiving royalty checks. The general rule is asking for as much of an advance as possible, because that may be all the money you will ever see for your efforts (but see **Resale clause** below). The higher the advance, the more your publisher will promote your book; the less it invests, the less it will spend on promotion.

For negotiating for a better royalty by phone, see "Negotiating a Book or Journalism Contract over the Phone" on the Union web site.

**Costs to you.** Some academic publishers will ask you to pay for formatting graphs and tables, or even for editing the manuscript. You may not want to agree to these. More often, however, they will include the costs for obtaining *permissions* for using material under copyright and for preparing an *index.*

If you do not plan to include illustrative matter (photographs, charts, drawings, diagrams, or the like) that is copyrighted, permissions are not a big issue. But if you do, calculate how much permissions to use this material will total and ask the publisher to pay as much of the cost as possible. (See III.4. in the Union Guide above.)

The going rate in 2007 for a trained indexer to prepare an index is $3 to $5 per page. If you plan to use the publisher's indexer, set this fee (or the going rate) as a limit on how much you will pay. You can also hire your own indexer, or you can do your own indexing. Popular indexing software is available for $300 to $600, depending on how elaborate your index is to be. For more on indexing software and finding an indexer, look at the American Society of Indexers web site at www.asindexing.org.

Another cost that probably should be avoided is **subvention,** an advance that **you** pay the publisher. Unless you can somehow benefit from this cash outlay (through obtaining tenure, speaker's fees, the resale clause, personal sales), look into self-publishing before agreeing to a subvention.

**Honoraria.** For an entry to an encyclopedia or an essay in an anthology, you may be paid only by the word, a sum sometimes called an "honorarium." A typical range will be 10 to 15 cents a word, and some presses offer only the "honor"of claiming a byline or free copies of the book. At the least, ask for twice whatever the publisher offers you; note that journalists often can get $1 per word.

**Grant of secondary rights.** Before you grant any secondary rights, ask which they will be actively exploiting. For example, if they don't have an agent in Hollywood for turning books into movies, don't give them any form of performance rights. If they do plan to make books into movies, ask how successful they have been. Performance rights you may want to retain include audio (sound recording), video, motion picture, multimedia version, TV and radio, cinema, cassette, filmstrip, disk, wire recording, stage, dramatic, public reading, adaptation, visualization, and recording.

**Electronic rights.** These rights, which range from publishing or licensing an e-book version of your book to placing the text in a database for print-on-demand or other kinds of sale, have become a standard part of contracts. (See Section I.3.d.ix in the Union Guide above.) Unlike what some publishers may claim, an e-book is *not* an extension of print rights. A routine contract may offer only 10 to 15% net on e-book rights. Ask for at least 50%.

**Resale clause.** The typical resale clause says that Author may buy books at somewhere between 25 and 40% off cover price for personal use, not to resell. Royalties shall not be paid on books at this discount.

This clause harms both publisher and writer, because it treats the author as a competitor of the publisher rather than a partner. You are potentially not only a writer but a distributor, with your own network of buyers: friends, colleagues, students, attendees at a lecture or book signing or reading organized by you at your expense. Therefore, cross out that section and replace it with "50% off cover price or the best distributors discount, for possible resale by Author." If the phrase concerning nonpayment of royalty does not appear, don't bring it up; if

it does, cross it out. If your editor objects, explain that sales you make represent free money for the publisher.

**Return of notes and other materials.** Academic press contracts sometimes stipulate that all research, photos and related materials and information developed during the writing of the manuscript are the sole and exclusive property of Publisher, and that after publication the Author returns all research and related materials to the Publisher. Strike this inherently unfair clause. You may want to reuse your material in different forms, store the photos to which you hold copyright, and so on.

*Never* send the only copy of a photo or other image if you want it back. Such work can easily get lost. In every case send a laser-ready copy or an electronic file and keep the original.

**Delivery of manuscript.** Many contracts call for two double-spaced printouts of the completed manuscript in a standard word-processing format. Counter that clause by offering to send an electronic attachment in whatever form they want.

**Peer review.** Because the nature of academic works is often highly specialized, academic publishers may send a manuscript to four to six reviewers considered knowledgeable in the field. The manuscript is sent "blind" – the reviewers do not know who the author is, and they are paid an honorarium to review the book and submit comments. When this process takes place before a contract is signed (on the basis of a proposal), the publisher is not obliged to pass on comments or helpful suggestions to the author to make the book publishable. *Ask for them anyhow, preferably with copies of the peer reviews.*

Should the review take place after a contract is signed based on your query letter and the book is rejected, you do have the right to a detailed analysis of why it was rejected and how you can make it acceptable – *if you had the foresight to include such a provision in your contract.* **(**See under III.6. in the Guide above.)

**Production and promotion.** A frequent clause states that Publisher will determine all details of publishing, including format, jacket design, pricing, and marketing strategy, except that it may consult with Author on these matters. Substitute *will consult* for "may consult." They may insist on determining price and format, but at least you should have input on jacket design and marketing strategy.

Although an academic publisher is not likely to send you on a book tour, you can ask them to send you an author's *contact sheet,* where you can list academics who might adopt your book for classroom use, every journal you can think of that might review it, and other individuals and organizations you think should receive review copies and press releases. Also suggest conferences and book fairs where the book should be displayed or where you should do signings. Ask for electronic copies of any press releases that you might use for your own contacts with media or other sales possibilities.

Let the publisher know that once the book comes out, if they pay for transportation and food you may be able to travel for promotion, using the Union's Authors Network to save them lodging expenses. (See the Union web site for more about this.)

**Complimentary copies.** Whatever they offer you, ask for twice the number.

**Confidentiality.** Some contracts stipulate that you may not share the terms of your contract with other writers. Cross out that clause and don't back down.

**Finally....** Be sure to read the entire Union Guide to Book Contracts and compare it with your offer. And consult a Union contract adviser before signing a contract (to find one contact GCDcoordinator@nwu.org). A more complete article about academic contracts can be found by contacting Ken Wachsberger at ken@azenphonypress.com.

- Ken Wachsberger

## APPENDIX C. BOOK PACKAGERS

Book packagers function as a kind of middleman. They produce books either for a publisher or for a retailer. Since publishers today are more and more concerned with marketing and promotion, they may spin off the physical part of publishing to packagers who do just that: they present a whole package ready to publish. Packagers can take care of hiring writers, editing, photo and art acquisition, editing, layout, and all the physical components that require specialized staff, thus lowering the cost for the publisher. Highly illustrated and coffee-table books require specialized capabilities that many publishers don't have and don't think it worth acquiring since they can contract these books out to specialists. Packagers fill this gap, with sophisticated photo-gathering systems, a staff of photo editors, and so on. Reference books that require engaging a number of specialists and coordinating and editing their work is another job often spun off to packagers.

Some packagers generate book ideas and sell them to publishers; they then hire one or more writers and one or more illustrators to produce the book and sell the entire package. This procedure is especially true of "coffee-table books" found on sale tables in bookstores. Also called *promotional books,* they were never sold at the cover price but are designed for these overstock shelves. Some were published to be used as corporate gifts or special promotions, others only for overstock sales. Packagers keep the rights to these books so they can sell them over and over in different countries, basically only licensing them. The writer is simply paid with a fee.

Increasingly, some books are packaged directly for wholesalers or retailers (bypassing the publisher). These are known as *proprietary sales.* The retailer buys from the packager, and these follow the same pattern as their promotional books. Among the biggest purchasers of such packages are Barnes & Noble and AMS (Advanced Marketing Services); the latter went into bankruptcy in 2007.

**Contracts.** Packagers normally are paid a flat fee by the publisher, and they in turn hire the writers, photographers, et al. to do the actual work. This is almost always on a *work for hire* basis (see Section I.1 in the Book Contract Guide above) because the packager is not getting royalties and the publisher has no real contact with the authors and illustrators. Only rarely does a publisher contract with the packager to allow royalties to the writer. The writer has no rights to the material, even after the book goes out of print.

Writers often are paid on an installment basis, that is, a percentage (often 50%) of the total fee for signing a contract, perhaps another portion when some of the work is completed, and the rest on completion or on approval of the manuscript by the publisher. As with trade publishing contracts, it is wise to avoid waiting for a payment until the book is published; payment should be made on acceptance.

Most British packagers, many of whom handle travel books, work on the basis of a 40% advance on signing contract, 40% on completion (acceptance), 20% on publication. They justify this policy by saying with a work-for-hire contract they want to be sure the writer remains available for last-minute changes (such as a natural disaster at the travel destination) and to review galleys, captions, etc.

Books packaged directly for retailers also are normally on a work- for-hire basis, but since the packager here is the publisher, the terms may be more negotiable. In general, however, packagers tend to bypass a royalty arrangement, since it requires keeping track and paying royalties, adding another layer of staff.

Why do writers accept these contracts? For one thing, some pay quite well, better than one would earn with royalties. The money is there now, not maybe or in the future. Packagers often are not fussy about a writer's expertise, especially for promotional books, so it is a good way to break into a field or subject. A writer who has not published before can get book-writing credentials and cachet with magazines as the author of a book on XXX. Because these books are easy to do, receive virtually no editing (such as fact-checking, etc.), and for a competent writer need no rewrite, they are fast jobs. One can do as many as six a year.

**Delayed payment.**

**1.** Packager won't pay writer until packager is paid by the publisher. This is especially tricky if your contract stipulates that payment depends on the publisher's approval. Protective wording would state that payment will be made on *acceptance by packager.*

**2.** Delayed payment owing to packager's cash flow. Packagers often work very close to the margin and make part of their money by investing what publishers pay them. In one case the writer had to wait until packager's quarterly dividends came in before she was paid. In another case the writer had to go to the publisher and threaten to seek an injunction to prevent the book from being distributed until the packager paid her for the text (which still belonged to her until it was paid for). A threat like this, of course, is only possible if the writer knows the identity of the publisher.

**3.** Another caveat: packager offers writer more work before the previous work is due or paid for. Writers hesitate to either turn down work or jeopardize negotiations by insisting on waiting for payments before signing. If they sign on for more and the new contract is separate, they can go on forever, always behind on being paid.

**-** Barbara Rogers

## APPENDIX D. PRINT ON DEMAND (POD)

Print on demand, or POD, is a means of printing a single copy of a book, or a few copies of a book, at the time they are ordered. The book becomes part of a database from which such printings are drawn. POD is in contrast to the traditional practice of printing a large number of books and storing them until customers buy them.

A full report on POD by NWU member Bruce Hartford was completed in February 2007 and is available to members on the Union web site. This appendix covers only a few of the main issues.

POD today may be used in a number of ways:

(1) by traditional book publishers to extend the life of a book that is not selling well or is out of print through ordinary channels;

(2) by authors who self-publish their books, pay for printing and perhaps distribution, and receive royalties on the copies sold;

(3) by small publishers who use it for printing, as well as shipping and other services.

(4) by an on-line retailer such as Amazon.com, which in 2007 launched a Books on Demand service.

The main issues for authors who decide to self-publish are choosing a reputable POD company, deciding what aspect of publishing they want the company to perform and what they will do themselves (for example, promotion, marketing), and negotiating a fair contract.

Nearly all the major POD companies offer a non-exclusive contract, meaning the author can sell the book through other channels. Most do not screen the manuscript, and most distribute the book through their own Web site (a few also do so through on-line bookstores such as Barnes&Noble and Amazon.com). Fees charged for their services vary considerably, depending also on whether the author wants them to produce a hardcover book, a paperback, or both; use color on cover and inside the book; etc.

Royalties tend to be paid on net receipts and range from as much as 75% of net to as little as 20%. A few will pay royalties on the retail (cover) price for direct sales and external sales. For example, depending on the outlet through which the book is sold, Amazon's Books on Demand service pays the author 80% of list price if it is sold in a particular e-store and 70% if it is listed on Amazon.com.

For authors contracting rights with a traditional publisher that may use POD (now or in the future), particular care must be taken in excluding POD from an out-of-print clause, for with POD a work can theoretically remain "in print" forever.

Another issue may be that a publisher decides to arrange for POD for a book that is actually out of print. The contract phrase to watch for assigning rights is "[the right to publish] in forms now known or yet to be devised" - or words to that effect.

Finally, if the author agrees to POD, the royalty terms need to be specified.

## APPENDIX E. CHILDREN'S BOOKS

Most large publishers of children's books consider only manuscripts submitted by an agent; smaller houses may be more flexible, considering material submitted by the writer.

Advances tend to be small, ranging from $500 to $5,000. Royalties usually are paid on a net basis (but not always). With a heavily illustrated book, the writer and illustrator split the royalty.

If you use photographs or have to travel, be sure to get publisher to pay for photographs and travel expenses.

Most publishers prefer to choose the illustrator. Do not submit the manuscript along with a friend's illustrations (this generally leads to a wholesale rejection). If, however, a relative of yours is an illustrator, you can submit a couple of illustrations, making sure you indicate that this person is related to you.

The sales force is usually small and limited, but addresses a targeted market. You will be expected to do some serious marketing yourself.

Advantages of children's books: a lot of attention from your editor; an attractive product; a relatively long time in print (because there are always new children who can read it).

To learn more about the market, join the Society of Children's Book Writers and Illustrators (SCBWI, www.scbwi.org), go to some of their conferences, and network with other writers of children's books. Editors often will look at a writer's work if on the envelope he or she indicates SCBWI membership.

- Bryna Fireside