E-Books and E-Rights Addendum

NATIONAL WRITERS UNION

GUIDE TO BOOK CONTRACTS

This addendum to the NWU Guide to Book Contracts, ©1995, revised ©2007, is based on three primary sources: (1) the ©2007 revised version of the NWU Guide to Book Contracts, (2) the ©2010 NWU white paper "E-Book Contract Amendments," and (3) the ©2016 webinar "E-Books and E-Rights: What Authors Need to Know" created by a joint committee of the NWU Book and Grievance and Contract Divisions. This addendum updates and replaces all text about electronic rights in the ©2007 revision of the NWU Guide to Book Contracts.

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I. **RIGHTS AND COPYRIGHT**; **3. Subsidiary rights**; d. Income splits

ix. Electronic rights

Over at least the last 20 years, enormous changes have taken place in electronic publishing. At first, electronic publishing was often summarized in boilerplate language that typically granted conventional paper-and-ink publishers control over rights to "all electronic media now known or hereafter devised." That type of open-ended language remains for all rights in some contracts, so make it a high priority to have it stricken.

Nowadays it is standard company policy for major publishers to try to control e-book rights — that is, the conversion of the entire work in its original sequence into an electronic or digital form. Do not be surprised if you or your agent is told by the editor that if the company doesn't get e-book rights, the deal is off. However, some houses have been known to back down to avoid losing a very desirable book, and terms for e-book licensing and other electronic rights are often negotiable. If your publisher refuses to negotiate, then it is time to reserve your e-book and all electronic rights and either look for an e-book publisher or explore self-publishing.

When considering the publisher's offer for e-books, it is important to research the company's history with producing, promoting, and selling e-books. If e-books are given equal play in the publisher's catalogs, are professionally produced, and are launched at approximately the same time as the printed book, then ask the editor how the publisher's sales of both compare with industry standards for comparable books. If you're satisfied with the answers and the royalty rate is acceptable to you (more about that in the next section), then grant the publisher the right to publish your e-book. The grant of rights should read something like the following:

The Author grants to the Publisher the exclusive right to issue an e-book that contains the entire text of the Work in its original sequence and that does not contain additional audio, video, or graphic elements.

The publisher, however, may also be interested in other digital versions such as increasingly popular interactive multimedia adaptations, in licensing books on compact discs or posting to online databases, in smartphone apps, and in other web uses. These are often spelled out in the contract.

Distinguishing between a sale and a license for electronic media is critical. You cannot sell electronic content since it exists only in digital form. What you can sell is a license to access and use a digital item (which is distinct from a device on which it is installed). That means contract clauses that refer to "sales" don't apply to e-books, but clauses that apply to "licenses" do apply to e-books and other electronic media.

You, your agent, and an NWU Contract Advisor (upon request) should be able to review proposed third-party licenses for all electronic uses beyond e-books and approve or turn down such licenses offered to the publisher. (Royalty terms for third-party licensing are covered under II. 3.i. Royalties.)

If you plan to reserve performance rights, then it also makes sense to retain control of interactive multimedia adaptations — where the text is combined with graphics, music, or video. Such adaptations may allow the reader to maneuver throughout the work in a variety of different ways. So be sure to license them in tandem. Some genres of books — like sci-fi, horror, or mystery titles — also have the potential to be adapted for such multimedia uses as computer games.

In some cases the publisher may want the right to bring out its own interactive multimedia adaptation. If that issue is not specifically addressed in the contract, be sure to ask the publisher about it, especially if the book may become a best seller. If so, request that royalty terms for an adaptation be covered in a mutually agreed-upon addendum to the contract at some point in the future. In that case the grant of rights should include:

The right to license interactive multimedia adaptations of the Work is reserved by the Author. Such licenses shall be subject to the Author's approval, and the division of revenues shall be negotiated prior to the planned exploitation or licensing of such electronic rights.

Another consideration is that most publishers ask for exclusive electronic rights as they do for print rights, but you need to determine whether that's in your best interests. You may want to sign over nonexclusive e-book rights to the publisher and limit that to a two-year license. That will allow you to seek out a better deal in the future if your e-book takes off.

Ultimately, you may wish to retain e-book rights and rights to all electronic uses if you are not pleased with the royalty or revenue-sharing terms offered by the publisher. (Royalties are discussed under II.3.i. Royalties.) You have two choices:

- You may seek a different publisher for your e-book. (For a discussion of contract issues that come up when you negotiate directly with electronic publishers, see Appendix D, POD.)
- You may self-publish an e-book edition. While royalty rates are much higher for self-publishing, you must be willing to self-promote, which requires constant, time-consuming attention and expense.

Three top priorities for electronic rights:

1. We cannot stress enough that it is vital to avoid granting the publisher control over rights 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 altogether. Technology is changing too fast to give a potential candy store to the publisher. Force the publisher to come back to you to negotiate any additional rights it may want.

2. The contract must contain language that provides for the reversion to you of any electronic rights that the publisher fails to exercise or license within 12 months of publication and that states the assignment of electronic rights is for a limited term. Also make sure the publisher is required to inform you of any inquiries it receives about licensing electronic rights. That would alert you to the fact that the publisher may be resisting worthwhile offers. There is no reason for the publisher to hold rights it cannot or will not exploit or to neglect to inform you of inquiries. Here is suggested language:

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 Author shall be notified of all inquiries, including proposed contract terms, that the Publisher receives about electronic rights not covered in this contract, and has the right to ask the Publisher to negotiate better terms for the Author.

3. Make sure that any wording about electronic rights will not have an adverse effect on out-of-print provisions in the contract. The presence of the work in databases and other electronic media, let alone as an e-book, must not affect your book's out-of-print status. That could potentially keep you from revising it for a future edition with another publisher or from self-publishing it as a new edition of your work. (See IX. Out-of-Print [or Termination] Clause.) Suggested language is as follows:

The Work shall be deemed 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. Whether the Work is deemed out of print shall not be affected by whether copies are reproduced by print on demand (POD) publishing (which permits it to be stored in an online database) or whether there are licensed e-books or other electronic versions.

II. Royalties; 3. Royalty rates

1. Electronic versions

A brief history of e-book royalties: In the 1990s the NWU and other writers' groups argued that the publisher's share of licensing income from all electronic subsidiary rights, including e-books, should be limited to a commission-like cut of 10 to 15 percent, since e-books, unlike printed books, do not require a huge investment in printing, binding, warehousing, or shipping.

The upper limit on revenue for a few subsidiary rights at that time was 75/90 percent to the author (as long as an agent was not involved) for rights like first serialization (exclusive permission to print a portion of the book in magazines or newspapers before publication), translations, and merchandising. So a split of 85/90 percent to the author for publication of an e-book should then have been acceptable to publishers. But the industry strongly resisted such a "generous" author share for e-books. While some major publishers held onto electronic rights without spelling out a split, when one was offered, it was 50/50.

By 2009, as e-books began to take over an ever larger segment of the market and as e-book readers proliferated, major publishers were changing standard contract

terms for e-books. They also asked established authors to agree to e-book amendments to contracts going back decades before e-books existed. Some publishers offered the same percentage as for printed books: 10 percent of the list price (based on the sticker price of the e-book). Others offered 25 percent of the net price (after deductions for the wholesaler's or distributor's cut and other expenses like shipping, rebates, special discounts, and returns). (List and net are defined in II.1. Royalties.) But the NWU contended, given publishers' limited financial investment in creating e-books, that both these offers did not sufficiently compensate authors as 50/50 subsidiary rights had in the past.

The NWU issued a white paper in 2010 with comprehensive instructions to members who received proposed e-book contract amendments. The first step was to look for terms about e-books in their existing contracts and, if they had questions, to consult a contract advisor. Once a contract is signed, it is binding on both the publisher and the writer. Nobody is ever "required" to sign or agree to an amendment to an existing contract.

Based on our 2012 "Member Survey on E-books," we found out that some authors had never signed over their e-book rights. If they wished, they were free to seek out a better deal for an e-book edition with another publisher or to self-publish an e-book edition. Other members had better e-book terms than they had realized, while others were not receiving royalties based on the terms in their contracts. Some didn't know that their publisher had already issued an e-book and had surreptitiously hidden revenue at 10 percent of net in their royalty statements, as though e-book licensing revenue was from "sales" of printed books. Still others were happy to learn they owned e-book rights after their books went out of print.

After much discussion, the NWU recommended the following minimum shares of e-book revenues for writers, which have since become widely adopted by other writers' organizations:

- 35 percent of the e-book's list price

- 50 percent of the publisher's net proceeds

We arrived at the list and net percentages because they are relatively comparable to each other, as you will see in Figure 1.

Figure 1. Recommended royalty rates for e-books.

Recommended royalty rates for e-books

Negotiate for at least 35% of list or 50% of net.

	List	Net
Cover price	$5.99	$5.99
Distributor cut	N/A	30%
Publisher Expenses	N/A	10%
Basis for calculating royalties	5.99	3.59
Royalty rate	35%	50%
Author earns per copy	$2.10	$1.80

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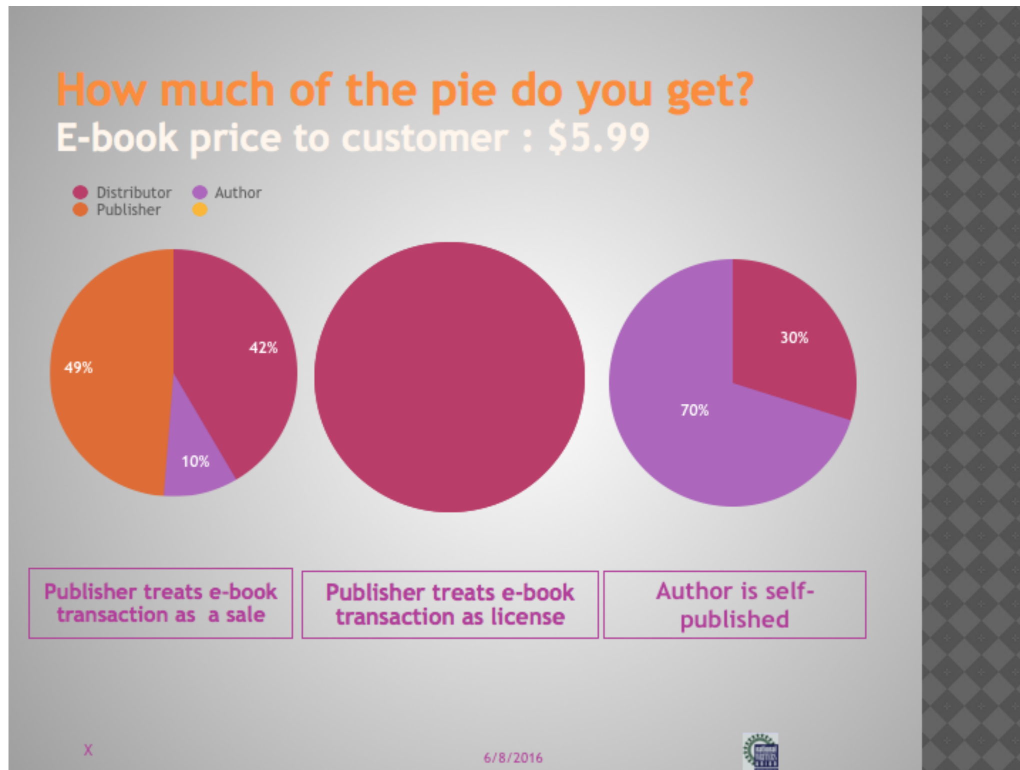
Some publishers argue that 25 percent of net is a good deal since the royalty for many printed books these days is 10 percent of net. But, as the NWU asserts, publishers have none of the usual costs for e-books that they have for printed books, and publishers' net proceeds are much more difficult to monitor.

*The NWU urges authors to try to avoid royalties based on net and to negotiate strongly for royalties based on list. Better yet, if your print publisher won't budge from net royalties, it is time to reserve them and publish an e-book yourself. (*The NWU has a white paper, "Negotiating Contracts over the Phone," which provides proven, effective negotiating techniques. Members can download it from the Grievance and Contract Division's section on the NWU website: https://nwu.org/grievance-and-contract-division/contract-resources/.

A chart showing the author's revenue share of the three different royalty arrangements — list, net, and self-publishing — appears in Figure 2.

Figure 2. Percentages of royalties that the author, distributor, and publisher get based on an e-book price of $5.99.



Suggested wording for the clause about the royalty split for electric licenses, which is modeled on the terms for traditional subsidiary rights, is as follows:

The revenue from e-book licenses shall be a 50/50 split based on the list price of the e-book between the Author and the Publisher. All other electronic licenses shall be a 50/50 split between the Author and the Publisher. All such royalty agreements are open to renegotiation and modification on mutually agreeable terms.