

STATEMENT OF PRINCIPLES ON CONTRACTS BETWEEN WRITERS AND ELECTRONIC BOOK PUBLISHERS

by the National Writers Union

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Book publishing is at the threshold of a new era. An industry that for hundreds of years has put ink on paper is now delivering more and more of its wares in the form of floppy diskettes and multimedia CD-ROMs; some publishers are also beginning to distribute books via on-line networks. Although the electronic book publishing industry is young and still very much in flux, it is not too early to try to establish some standards for the writer-publisher relationship in this field. This document represents an attempt by a major writers' organization to come up with some general principles that we hope will be adopted in contracts between writers and electronic publishers, primarily for works distributed in disc form.

These principles address the four main types of projects writers and electronic publishers would enter into: ones in which the author of a print work who holds electronic rights licenses them to an electronic publisher; ones involving original electronic projects centered on a writer's text; ones centered on the work of numerous writers or other creators; and ones in which the writer's work plays a secondary role in an original electronic project dominated by other content such as music or video.

In all four categories the writer's traditional role is altered. Electronic books, by their nature, involve elements beyond the stringing together of words. The skills of programmers, computer- graphic designers, musicians, videographers and others are also required. Creating a book almost invariably becomes a collaborative effort, in some cases as complicated as that involved in making a film. Figuring out how to participate in the new nature of authorship will be a challenge for every writer who wants to become involved in electronic publishing.

It will also be a challenge for publishers. If electronic publishing is going to thrive, it will need the diversity and talent of the most creative members of the writing community. Setting fair standards will be essential in encouraging writers to make the leap from print to the digital world.

I. COPYRIGHT. In print publishing most writers are accustomed to holding the copyright on the books they write. It is only under certain circumstances (textbooks, reference works, etc.) that authors may be put in a work-for-hire position, i.e. one in which the copyright vests with the publisher or other commissioning party.

There is no reason why the principle of authors retaining their copyright should not be extended to the electronic realm. In cases where a print work is adapted to electronic form or an original electronic

work is centered on a writer's work, there should be no question but that the writer would retain the copyright on the text portion of the work while licensing it to the publisher. Where there are numerous writers, each would hold the copyright on his or her text. Separate copyrights could exist for the user interface, retrieval software or additional multimedia elements inserted in the work.

The matter is more complicated when the writer's contribution to a multimedia work is less predominant, e.g. a CD-ROM mostly made up of electronic photographs or video clips, with the text limited to simple captions. In the case of such electronic coffee table books it might not be unreasonable for a writer to be brought in on a work-for-hire basis on the premise that the writing is a contribution to a collective work. However, if the writing is more extensive and has to be closely coordinated with the producers of the other creative content, it might make sense for writers and the other creators (who may be acting in a partnership) to hold joint copyright in the entire content.

II. GRANT OF RIGHTS. The publishing rights granted by a copyright holder to a publisher typically cover three main issues: the geographical scope of the rights, the formats in which the rights can be exercised, and the duration of those rights.

Electronic book publishers typically want the right to distribute the work throughout the world, and some want rights in all possible formats. Whether the author wants to grant such sweeping rights should be a matter of negotiation, in which a broader grant of rights should be reflected in the size of the advance and the royalty rates.

One important principle that should characterize all deals, is that publishers, after some reasonable amount of time, forfeit rights for any formats they have not exploited. The practice of sitting on rights should be discouraged.

In addition, given the rapidly changing nature of electronic publishing, there should--unlike the practice in print publishing--be a time limit even on rights that are exploited. An author should not be tied indefinitely to a publisher that may not be adequately promoting or distributing the work or is failing to keep up with changes in technology.

III. CREATIVE CONTROL. It is customary in most print book contracts for the author to have ultimate creative control over the content of the work--except for the publisher's right to ensure that the work conforms with some generally accepted standards of style, spelling, grammar, etc. and that the book is not obscene, libelous or an infringement on someone's copyright. Most publishers will assert greater control over matters such as cover design and jacket copy, but often authors will have the right of approval in these areas.

A similar degree of author's creative control should extend to electronic publishing. Texts should not be altered in any significant way without the consent of the author, who should also be consulted on the packaging of the disc.

Where there are substantial multimedia elements in the work, the issue of creative control is more complicated. Some electronic publishers may say that, in the same way that print publishers generally don't consult with authors on what typeface will be used, they should have exclusive control over issues such as user interface. This is a mistake. A successful multimedia work is one in which interface, images and sound are in harmony with the text. The best approach is for creative control to be a

collective matter, involving publisher, writer and contributors of other creative content, rather than the hierarchical approach used, for example, in the film industry.

Indeed, under the Berne Convention and federal law, moral rights protection is much stronger for visually-based works than it is for text. The rights of integrity and paternity will become increasingly relevant for multimedia works.

IV. "MANUSCRIPT" ACCEPTANCE. One of the major sources of friction between print authors and publishers is the issue of manuscript acceptability for books that are contracted on the basis of a proposal rather than a finished work. A substantial number of such works are deemed unsatisfactory when they are delivered a year or more later, and the publisher seeks the return of the advance, which the author invariably has long ago spent. Writers' groups charge that many of these rejections are for reasons that have nothing to do with the quality of the work--that the real explanation is that the original editor has left, or the house has been taken over and the new owner doesn't like the project, or the house has simply changed its mind.

It's too early to tell whether electronic publishers will adopt these same practices. What would be better is for the industry to regard advances as an investment that entails a certain risk. If by the time the author delivers the text the publisher has for whatever reason changed its mind about the project, or if the writer has made a good faith effort but has produced something unsatisfactory, then the project should be cancelled and the advance written off as a business loss.

If the publisher feels the writer has not made a serious effort to fulfill the contract, the publisher should file an arbitration claim (see item X below).

V. ROYALTIES. The electronic book publishing industry is still too young to have the kind of more-or-less standard rates seen in the print world. For the time being, rates will be negotiated on a case-by-case basis. However, royalty rates should be higher for electronic books on discs than for print books to reflect the lower costs of production and the fact that the full income potential after cost recovery is unknown, and, at the very least, should be fairly divided and accounted so that authors may share in any long-term financial success of the product.

Royalty rates should be even higher in situations such as network distribution of electronic books or "CD-ROM on Demand" kiosks, in which production costs may be negligible.

There is one practice, however, that should be adopted widely from the start: that of paying royalties based on the list price of the work rather than the net. The experience of print publishing is that where royalties are paid on net (mostly small presses or reference works), there is simply too much potential for abuse on the part of the publisher. Authors tend to be suspicious of the mysterious figures that appear on royalty statements and often feel ripped off when they realize what a small percentage of the list price they are receiving.

It is true, however, that for some electronic publishers, a substantial portion of their sales come from discs that are supplied to hardware manufacturers to bundle with their CD-ROM drives or multimedia kits. Electronic publishers argue that they could not possibly afford to pay list-price royalties on these copies, which are sold at huge discounts.

This issue can be addressed by adopting the print publishing practice of paying lower and/or net royalties on those specific copies that are sold outside of normal trade channels. (In the case of electronic books, normal trade channels would include computer and software stores as well as book stores).

VI. ROYALTY STATEMENTS. Royalty statements are the bane of print authors. Most of them are indecipherable documents that seem to conceal more than they reveal. Some print publishers, however, have begun to revamp their statements to provide more detailed data (though this sometimes makes them less rather than more intelligible).

Given the sophistication of new technology, electronic publishers should follow the best practices of the print industry. Royalty statements should include complete information on the number of copies produced, shipped, returned, and remaining in stock. Authors should be in a position to know when their work is close to being out of stock or out of "print."

Electronic publishers should avoid the antiquated practices of print publishers, in which it typically takes 90 or 120 days after the end of the semi-annual accounting period before the publisher supplies the author with the royalty statement and a check for any monies owed. In an industry producing works for use on computers, it would be only appropriate to follow a time frame more appropriate to the computer age. There is no reason why accounts should not be settled within 30 days of the close of the royalty period. Following the practices of many other businesses, publishers should pay a penalty of 3-4 per cent for each month a royalty payment is delayed.

VII. TERMINATION. Print book contracts typically provide for the termination of the grant of rights if the publisher does one of several things: fails to publish the book within a reasonable amount of time, fails to pay royalties, or allows the work to go out of print.

All of these provisions should be adopted in electronic book contracts. Yet the concept of "out of print" has to be re-thought in the electronic era, when small quantities or even single copies of a work can be reproduced easily and cheaply. The real criterion for whether a publisher can retain rights is whether the work is still being actively marketed.

The sensible procedure would be to require the electronic publisher to notify the author when it has decided that it no longer makes sense to make even minimal efforts to promote the work. At that time the work would be deemed "out of promotion," and the rights would revert to the author, who may choose to purchase all or some of the remaining copies at a big discount.

VIII. OPTION. The option clause common in print book contracts is a holdover from a time when the author-publisher relationship was more like a marriage rather than the one-night stands prevalent today. The clauses are ultimately unenforceable (in legal or practical terms) and serve mainly to inconvenience the author. They have no place in electronic book contracts.

IX. NON-COMPETITION. Another controversial provision in print book contracts is the clause that bars the author from publishing another work that the publisher thinks would directly compete with its edition. Some non-competition clauses are written so broadly that they could undermine an author's writing career.

If non-competition clauses are going to be used at all for electronic books, they should be written as narrowly as possible, i.e. they should only bar the publication of another work on the exact same subject using the same materials, and for a specific time period that is essential for the success of the original work. In addition, such clauses should not inhibit the right of the author to publish the same material in formats the rights to which have not been granted to the publisher.

X. ARBITRATION. The cost and time involved in filing a lawsuit often prevents print authors from challenging contract violations on the part of their publishers. Arbitration helps to level the playing field by making cheaper and speedier justice possible. Electronic publishers should acknowledge the fairness of arbitration and make it a standard feature of their contracts with authors.

XI. AFFORDABILITY & ACCESS. Although issues of pricing and affordability of books have not traditionally been addressed in print book contracts, these are matters that should be of concern to both writers and publishers in the electronic book industry.

As electronic books begin to replace printed ones, discs should not be priced so high that they are affordable only to a small, relatively affluent portion of the population. As various forms of electronic publishing reduce the cost per unit of manufacturing and delivering book-length works, a share of those cost savings should be passed on to consumers in the form of lower prices. Electronic books, like their print counterparts, will become an essential component of civilization, so they should be as accessible as possible to everyone. Lower prices will also help to make electronic book publishing into the mass market ultimately needed for economic viability.

Lower prices alone will not ensure universal access. Many people cannot afford even the computers and CD-ROM drives needed to read electronic books. The electronic book publishing industry, in partnership with writers and other creators, should take steps to expand free access to their products through libraries and other non-profit institutions.

For more information, contact the National Writers Union