

This document, an annotation of the Amazon Kindle contract as it was [posted on Amazon's Web site](#) (downloaded in February, 2008), has been compiled by the SFWA Contracts Committee, solely as an educational service to SFWA members. It is not legal advice and may not be relied on as such.

Our annotations consist of yellow-highlighting particular passages, then describing issues raised by the passage (using blue indented text). In a few cases we present new language (in blue highlight) that is relevant to an issue we raise.

We welcome comments or suggestions, particularly if Amazon amends the Kindle contract.

-- SFWA's Contracts Committee, March 28, 2008

DIGITAL PUBLICATION DISTRIBUTION AGREEMENT

This Digital Publication Distribution Agreement (the "Agreement") is made as part of an online application (the "Application") for participation in a digital self-publication and distribution program ("Program") from Amazon Digital Services, Inc. ("Amazon" and, together with Amazon's affiliates, "we or "us"). **This Agreement is a binding agreement between Amazon and the individual or entity identified as the Publisher in the Application ("you" or "Publisher").**

The Agreement makes the author the Publisher, and never specifically assigns a role to Amazon. In effect, therefore, Amazon makes itself merely a display outlet, or a store in which you as Publisher sell your work. Amazon thus neatly sidesteps the duties and risks of being a publisher, and leaves them with you.

Now, however, suppose that you have already sold a print publisher ("Print Publisher") the electronic rights represented in this Kindle contract. Then your Print Publisher will be providing this permission based on its current contract with you. This means that if you see anything in this Kindle contract – as presented by Amazon – to which you take exception, then you should make sure your print contracts prohibit the Print Publisher from selling these rights under any circumstances.

The Agreement contains the complete terms and conditions that apply to your participation in the Program.

As used in this Agreement, Amazon "affiliates" means any entity that directly or indirectly controls, is controlled by, or is under common control with Amazon. If the Publisher is an entity, "Authorized Representative" means the individual person identified as Authorized Representative in the Application who is accepting this Agreement on behalf of Publisher and, by accepting the Agreement in accordance with the instructions on our website, Authorized Representative hereby represents and warrants that:

- Authorized Representative is entitled to enter this Agreement as an authorized representative of Publisher and to bind Publisher to the terms of this Agreement.
- The information provided for Publisher in the Application is accurate, and states, without limitation, the real name, address and e-mail address of Publisher and Authorized Representative.

1. Amendment. **We reserve the right to change the terms of this Agreement on thirty (30) days' advance notice.**

There is no corresponding provision allowing the author (that is, the "Publisher") to change the Agreement.

Further, an unacceptable clause cannot be negotiated or clarified; it's 'accept' or 'terminate.'

We will notify you of changes to this Agreement by sending you an e-mail to the e-mail address registered for you in the Application.

Notification is effective even if you never get it. If you change email address, and you fail to advise Amazon, that's your problem, not Amazon's.

If you do not agree to the changes, you will be entitled to terminate the Agreement effective on thirty (30) days' advance notice by providing us written notice (in the manner provided in Section 15) of termination due to the changes within seven (7) days of our notice to you.

This is a very short response window.

IF YOU DO NOT GIVE US NOTICE OF TERMINATION, YOUR CONTINUED PARTICIPATION IN THE PROGRAM FOLLOWING OUR NOTICE TO YOU WILL CONSTITUTE YOUR ACCEPTANCE OF THE CHANGES.

Left unclear is whether, upon your failure to object to a change, you can object later, or terminate the Agreement under Section 9. **Warning:** Section 9 is counterintuitive and questionable.

2. Titles; Digital Books. This agreement covers each individual content file (a "Title") that you submit to us in accordance with our Submission Requirements for the Program. The Program allows customers to purchase your Titles in the form of digital files that customers can download and access online ("Digital Books").

Because it's used elsewhere (see in particular, Section 8), it's important whether Digital Book means, in effect, just what you wrote, or adaptations, extensions, and treatments thereof. The Agreement could be construed broadly to include them; most authors probably want it narrowly construed.

3. Digital Books; Marketing and Promotion. You agree that we may market and promote your Digital Books by making chapters or portions of your Titles available to prospective customers without charge,

There is no cap on how much of your work can be posted free in this way. Nor do you have any control over how any abridgement or excerpt gets done. We suggest that the new language proposed below in blue highlight be added to the sentence's end:

, in both cases up to an "Excerpt Limit equal to the least of (x) 7,500 words, (y) 10% of any Title, or (z) five pages of graphic material, any such excerpt being approved by the Author before its use.

and permitting prospective customers to see excerpts of the Digital Book in response to search queries

Considering that it's likely 'prospective buyers' (meaning anybody on the Web) will have access similar to what Amazon provides via its 'Search Inside' feature, it's important once again to define how and how much of the work will be viewable by Kindle owners before they buy.

This is particularly important in non-fiction or reference works where a Search Inside may obviate the need for buying the work in Kindle, particularly as Kindle is little more than a 'Search Inside' applied to an entire work. Further, these are not discrete and finite excerpts in the normal

sense, since an enterprising viewer might be able to read the whole book through a series of keyword searches, one after another.

Amazon will not owe you any fees for the marketing and promotional efforts described above. The Program may include features that allow users to print one or more pages of your Titles

We recommend adding the following blue-highlighted terminal clause:

, up to the Excerpt Limit.

4. Pricing and Program Terms. As part of your Application, you will provide us with a suggested retail price for each Title ("Suggested Retail Price" or "SRP").

The author tells Amazon a Suggested Retail Price. Since the Author's payments in Section 5 below are a percentage of the SRP, it behooves the Author to set the highest SRP defensible, and not to agree to any other SRP.

The Suggested Retail Price you provide to Amazon must be consistent with the SRP you have provided to other retailers and wholesalers.

'Consistent' – for printed books? For paperbacks? For audio books? This is a slippery concept, and since the SRP derives your payments, you and Amazon have contrary objections.

The clause becomes more troubling to a typical SFWA author when one realizes that this agreement may be signed by your Print Publisher, not you, if you have given the Print Publisher the rights to enter into it.

However, we have sole and complete discretion to set the retail price to our customers for Digital Books.

... Amazon may discount the Suggested Retail Price as much as it wishes. So if electronic books take off, Amazon can control the price of your wares, and you have no say over heavy discounting.

Further, what you receive from each sale is unrelated to Amazon's price; see Section 5.

We are solely responsible for all promotions and solicitations to be used in connection with the marketing and sale of your Digital Books, and for processing payments, payment collection, requests for refunds and related customer service, and we will have sole ownership and control of all data obtained from customers and prospective customers in connection with the Program.

You acknowledge that we have no obligation to market, distribute, or offer for sale any Digital Book or part thereof, or to continuing marketing, distributing or selling a Digital Book after we have commenced doing so.

This Agreement does not compel Amazon to undertake anything.

5. Royalties. Provided you are not in breach of your obligations under this Agreement, we will pay you, for each Digital Book we sell, a royalty equal to thirty-five percent (35%) of the applicable Suggested Retail Price for such Digital Book,

Your fee is 35% of SRP per book, regardless of what Amazon sells it for. If Amazon sells it for SRP, they get 65%; if they sell it for 50% of SRP, they get 15%.

net of refunds, bad debt, and any taxes charged to a customer (including without limitation sales taxes) (a "Royalty").

Although the term 'royalties' is by now embedded in author-publisher nomenclature, it is a misnomer, one that is relevant here as it contributes to a misapprehension about roles. The author (who, as we have seen, is the 'publisher' under this contract) is *licensing* a certain use of his or her work.

6. Payment Terms. We will pay Royalties approximately sixty (60) days following the end of the calendar month during which applicable sales of Digital Books occur. We will, concurrently with payment, provide statements providing detail regarding sales of Digital Books and corresponding Royalties.

Statements should include details of sales, including retailer outlets, and at what discounts from SRP. Remember, Amazon's reach and market clout could well result in their 'discount' price drowning your SRP for all media.

All payments will be made in U.S. dollars via Electronic Funds Transfer ("EFT") payments. You will not be permitted to register for the Program without providing a valid U.S. bank account number to receive EFT payments. We will accrue and withhold payments until the total amount due is at least \$10, provided, however, that we may make a payout of all accrued amounts at any time in our discretion.

All statements shall be conclusive, final and binding, unless Publisher gives Amazon written notice stating the specific basis for objection within six (6) months after the date rendered.

It's not unreasonable for Amazon to have a provision closing out past statements unless you object, but notice that if you find an irregularity in (say) the 2011 statement, you have no ability to reopen previous statements. Six months is too short; as the normal contract statute of limitations is three years, that should be the period here, particularly as this contract may have been piggybacked on a normal Print contract, where there is a three-year lookback.

You shall not maintain any action or proceeding against us in respect of any such statement

Does this include auditing the statement? Does an audit keep the six-month window open?

unless you commence that action or suit within six (6) months following the date that you provide Amazon with the written notice referred to in the immediately preceding sentence.

As to six months, see previous comment.

Any such action or proceeding

Does this phrase (regarding 'such action or proceeding') mean the sentence is to be read as limiting litigation only that pertains to payment statement, or to any litigation? The ambiguity here is bad for authors.

shall be limited to a determination of the amount of monies, if any, payable by Amazon to you for the accounting periods in question, and your sole remedy shall be the recovery of those monies with no interest thereon.

This sentence provides that you cannot sue Amazon (regarding statements? or more broadly?) for bad faith, unfair dealing, deceptive practices, breach of the posting rules (under Section 3 or Section 8), broader breach of this Agreement, or anything other than an argument about how

much you are owed under this Agreement. The committee finds this clause unacceptable and recommends that the yellow highlighted language be struck out.

7. Taxes. We are responsible for collecting and remitting any and all taxes imposed on our sale of Digital Books to customers. You are responsible for any income or other taxes due and payable resulting from amounts owed to you by us under this Agreement. Accordingly, unless otherwise stated, the amounts due to you hereunder are inclusive of any taxes that may apply to such payments. **We maintain the right, however, to deduct or withhold any and all applicable taxes from such amounts,** and the amounts due, as reduced by such deductions or withholdings, will constitute full payment and settlement to you.

While a right of setoff is understandable, you have no contractual standing to dispute Amazon's judgment about what constitutes 'any and all applicable taxes' (except to the extent that such are disclosed on the payment statements, and even then only within a six-month window) and you cannot sue Amazon (Section 6) challenging these determinations.

8. Rights Granted. You hereby grant to us, throughout the term of this Agreement, a nonexclusive, irrevocable, worldwide right and license to distribute Digital Books as described herein, such right to include, without limitation, the right to:

- (a) reproduce and store Titles on one or more computer facilities, and reformat, convert and encode Titles as Digital Books;
- (b) **display, market, transmit, distribute, and otherwise digitally make available all or any portion of Digital Books through Amazon Properties (as defined below),** for customers and prospective customers to download, access, copy and paste, print, annotate and/or view online, including on Portable Devices;

Are these 8(b) downloads sales with the meaning of Section 5 (payment to you), or promotions within the meaning of Section 3 (no payment to you)? Context strongly implies they are promotions, in which case the phrase 'any portion' (which could mean 100%) becomes ominous. This section is extremely questionable.

- (c) permit customers to "store" Digital Books that they have purchased from us on Amazon's servers ("Virtual Storage") and to re-download such Digital Books from Virtual Storage from time to time;
- (d) display and distribute
 - i. your trademarks and logos in the form you provide them to us as part of your Application or within Titles (with such modifications as are necessary to optimize their viewing on Portable Devices), and
 - ii. **other limited portions of Titles, in each case on and through any Amazon Properties and solely for the purposes of marketing, soliciting and selling Digital Books;**

Since 'limited portions' is not defined, it's subject to the same problem described in Section 3 above.

- (e) **use, reproduce, adapt, modify, and create derivative works of any metadata that you submit as part of your Application for the purpose of improving categorization, recommendations, personalization features and other features of any Amazon Properties; and**

It seems clear that the *intent* of this section is benign – to add "if you liked this, you'll like that" searches – *but* phrases like 'personalization features and other features' are awfully open-ended. Suppose somebody downloads your book, photoshops the images, and writes offensive but wildly

popular slash fiction using your characters. Can that person do so? Can you sue said person?
Can you prevent yourself from being sued by a libeled third party?

- (f) transmit, reproduce and otherwise use (or cause the reformatting, transmission, reproduction, and/or other use of) Titles as mere technological incidents to and for the limited purpose of technically enabling the foregoing (e.g., caching to enable display).

In addition, you agree that Amazon may permit its affiliates and independent contractors, and its affiliates' independent contractors, to exercise the rights that you grant to us in this Agreement. "Amazon Properties" means the website with the primary home page identified by the URL <http://www.amazon.com/>, together with any successor or replacement thereto (the "Amazon Site"), and any other web site or online point of presence, on any platform, that is owned or operated by or under license by Amazon or co-branded with Amazon (such as <http://www.borders.com/>, <http://www.waldenbooks.com/>, and <http://www.target.com/>), and any web site or online point of presence through which any Amazon Properties or products available for sale thereon are syndicated, offered, merchandised, advertised or described.

Since these rights go on and on in a kind of 'electricity' game, it will be practically impossible for you to police misuse by affiliates and contractors.

Allowing Amazon's affiliates, who reach around the globe, to sell Kindle rights wipes out any concept of territoriality of rights (as exists with print contracts).

Further, since you have waived the right to sue Amazon (Section 6), you will have difficulty suing anyone further down the chain of use because they will say they are only exercising rights you granted Amazon, so you can have no beef with them.

The committee recommends striking the entire paragraph; if Amazon wants your Work for Kindle, they get rights only for Kindle in the US.

"Portable Device" means any portable device that is capable of supporting the electronic purchase, display and/or management of digital text, graphics, audio, or video and/or other content.

9. Term and Termination. This Agreement will remain in effect unless and until terminated by either party in accordance with this Section. Amazon shall have the right, in its sole discretion, to terminate this Agreement without cause upon not less than sixty (60) days' advance notice to you.

Left unclear is whether, upon your failure to object to a change, you can object later, or terminate the Agreement. Also, the sixty-day interval in this section is illusory, since Amazon has granted itself the power unilaterally to amend the agreement on thirty days' notice (Section 1).

Symmetry and reciprocity can be achieved by adding the following sentence (shown in blue highlight):

You shall have the right, in your sole discretion, to terminate this Agreement without cause upon not less than thirty (30) days' advance notice to Amazon.

Left unclear is whether, upon your failure to object to a change, you can object later, or terminate the Agreement. That should be explicit, with the following sentence added:

All rights to Digital Books acquired by customers prior to termination shall survive termination, and Amazon shall be entitled to retain archival copies of the Licensed Digital Content after termination in order to provide re-downloads to customers who have purchase Digital Books prior to termination.

The following provisions of this Agreement will survive termination: Section 4, Sections 5-7 (but only to the extent of any payments that are accrued but unpaid at termination), Sections 9-15, and any provisions that define capitalized terms in the foregoing sections.

Note that the two critical provisions that *do* terminate are Sections 2 (sales), 3 (promotion), and 8 (derivative affiliate and contractor use). Phew.

10. Technology. You acknowledge that we will be entitled to utilize DRM technology in connection with the distribution of Digital Books but are not obligated to do so. Accordingly, there may be no technology or other limitation imposed by us on copying or transfer of any Digital Book we distribute.

Translation: "If Amazon gives someone a copyable version of your Digital Book, and that person copies it a million times and floods the internet with free versions, don't come crying to Amazon. By the way, if we thought it was a good idea, we could strip the DRM without your consent."

11. Ownership and Control of Amazon Properties. Subject to the authorizations granted to us hereunder, as between us and you, you retain all ownership rights in and to the copyrights and all other rights and interest in and to the Titles. We retain all ownership rights in and to the copyrights and all other rights and interests in and to the Program and the Amazon Properties. We are solely responsible for, and shall have full discretion with respect to the design and operation of the Program and the Amazon Properties and the marketing therefor, provided that Amazon's use of the Titles pursuant to the rights granted herein shall be subject to the terms of this Agreement. In the event that you elect to provide suggestions, ideas, or other feedback to Amazon or any of its affiliates in connection with the Amazon Properties or the Program ("Feedback"), Amazon and its affiliates shall be free to use and exploit the same in any manner without restriction and without any need to compensate you therefor.

This sentence appears to be sloppy drafting written by someone worried about an author later claiming that an exploitation idea derived from something the author suggested to Amazon, and hence said author deserves a royalty. It also means that if, for example, you blurb someone else's work, Amazon now owns that blurb.

12. Clearances. With respect to all Titles, you shall obtain and pay for any and all necessary clearances and licenses for the Titles to permit our exercise of the rights granted hereunder without any further payment obligation by us, including, without limitation, all royalties and other income due to any copyright owner.

13. Representations, Warranties and Indemnities. Publisher represents and warrants that:

Remember, Publisher is *you*.

- (i) it is a corporation or other entity or a sole proprietorship or person domiciled in the United States and that the information provided for Publisher in the Application is accurate

You are representing that you may properly be served with legal process in the US.

- (ii) it has the full right, power and authority to enter into and fully perform this Agreement and shall comply with the terms of this Agreement;

- (iii) prior to Publisher's or its designee's delivery of any content, it shall have obtained all rights that are necessary for Amazon or its affiliates to exercise the rights granted hereunder;

You are representing that you are the sole copyright holder of the material – to which the question then arises, *including the covert art or design?*

- (iv) neither the exercise of the rights authorized hereunder nor any materials embodied in the content nor its sale or distribution as authorized herein will violate or infringe upon the intellectual property,

You are representing that you are not using anyone else's intellectual property – by implication, of any jurisdiction.

proprietary or other rights of any person or entity, including, without limitation, contractual rights, copyrights, trademarks, common law rights, rights of publicity, or privacy, or moral rights, or contain defamatory material or violate any laws or regulations of any jurisdiction;

This last seeming throwaway is much more ominous than it sounds, given that there is now litigation, *Ehrenfeld v. Bin Mahfouz*, where a British court enjoined British publication of an American author's book, and awarded 'substantial damages' for alleged harm done by the US publication.

- (v) it will ensure that all Titles delivered to Amazon hereunder comply with the technical delivery specifications provided by us; and
- (vi) it is and shall be solely responsible for accounting and paying any co-owners or co-administrators of any Title or portion thereof any royalties with respect to the uses of the content and their respective shares, if any, of any monies payable hereunder.

Publisher shall indemnify, defend and hold Amazon, its officers, directors, employees, affiliates, subcontractors and assigns harmless from and against any loss, claim, liability, damage, action or cause of action (including reasonable attorneys' fees) that arises from any breach of Publisher's representations or warranties set forth herein. We shall be entitled, at our expense, to participate in the defense and settlement of the claim or action with counsel of our own choosing.

14. Limitation of Liability. EXCEPT WITH RESPECT TO OUR CONFIDENTIALITY OBLIGATIONS UNDER SECTION 15.1, WE WILL IN NO EVENT BE LIABLE FOR ANY LOSS OF DATA, LOSS OF PROFITS, COST OF COVER OR OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY OR RELIANCE DAMAGES ARISING FROM OR IN RELATION TO THIS AGREEMENT, OR FOR ANY EQUITABLE REMEDY OF DISGORGEMENT OR OTHERWISE, HOWEVER CAUSED AND REGARDLESS OF THEORY OF LIABILITY.

IN NO EVENT SHALL OUR LIABILITY HEREUNDER EXCEED THE AMOUNT OF FEES DUE AND PAYABLE BY AMAZON UNDER THIS AGREEMENT FOR THE TWELVE-MONTH PERIOD PRECEDING SUCH CLAIM.

All you can ever collect, under any theory, is what they have paid you over the last twelve months. In other words, Amazon is uncollectible.

This means that *your sole practical remedy under this contract is termination.*

The committee again points you to our opening comment – what if this agreement is being signed on your behalf by your Print Publisher who believes it has the rights in question?

WE SPECIFICALLY DISCLAIM, WITH RESPECT TO ALL SERVICES, SOFTWARE, CONTENT OR PRODUCTS PROVIDED BY OR ON BEHALF OF US IN CONNECTION WITH THIS AGREEMENT, ALL WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. PUBLISHER ACKNOWLEDGES AND AGREES THAT AMAZON CANNOT ENSURE

THAT TITLES SUBMITTED BY OR ON BEHALF OF PUBLISHER WILL BE PROTECTED FROM THEFT OR MISUSE OR THAT SUBSCRIBERS WILL COMPLY WITH ANY CONTENT USAGE RULES AMAZON MAY MAKE APPLICABLE IN CONNECTION WITH USE OF DIGITAL BOOKS, AND AMAZON WILL HAVE NO LIABILITY ARISING FROM A FAILURE OF SECURITY SYSTEM OR PROCEDURE OR OF ANY CUSTOMER TO COMPLY WITH ANY SUCH CONTENT USAGE RULES.

Just in case the foregoing disclaimer does not work, Amazon here gets you to confirm you understand that bad people may steal your Digital Book, and it's not Amazon's problem if they do.

15. Miscellaneous. This Agreement may not be amended, except in writing signed by both parties or as provided in Section 1 above. In the event that any provision of this Agreement is held invalid by a court with jurisdiction over the parties to this Agreement, such provision shall be deemed to be restated to reflect as nearly as possible the original intentions of the parties in accordance with applicable law, and the remainder of this Agreement shall remain in full force and effect. The parties to this Agreement are independent contractors. Each party shall bear its own costs and expenses in performing this Agreement.

Amazon will send all notices and other communications to you at the e-mail address or the mailing address that you provide in connection with your Application. You must send all notices and other communication relating to this Agreement to Amazon in accordance with the instructions available here - <http://dtpforums.amazon.com/dtpforums/entry.jspa?externalID=34&categoryID=12>.

See comments to Section 1 above.

Neither party may assign any of its rights or obligations under this Agreement, whether by operation of law or otherwise, without the prior written consent of the other, except that (i) Amazon may assign any of its rights and obligations under this Agreement without consent and (ii) you may assign all of you [sic: your] rights and obligations under this Agreement to any corporation or other entity domiciled in the United States without consent in connection with the sale of all or substantially all of the assets of a Title; provided that you shall give Amazon written notice of any such assignment no later than ten (10) business days following such assignment. Subject to the foregoing limitation, this Agreement will be binding upon, inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

Amazon can sell this contract – indeed, the whole Digital Books business – to anybody it wants, and your contract rides along with the sale. We revert to the essential necessity for you to be able to terminate this Agreement any time you want under the blue highlighted language in Section 9.

THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE OF WASHINGTON, WITHOUT REFERENCE TO RULES GOVERNING CHOICE OF LAWS OR THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. CONTENT PROVIDER HEREBY IRREVOCABLY CONSENTS AND WAIVES ANY OBJECTION TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS LOCATED AT KING COUNTY, WASHINGTON WITH RESPECT TO ANY CLAIMS, SUITS OR PROCEEDINGS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

If you want to enforce rights under this Agreement, you have to go to Seattle.

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, supersedes any and all prior or contemporaneous agreements between the parties with respect to the subject matter hereof and does not confer upon any other person other than the parties any rights or remedies hereunder.