

# **An Introduction to Publishing Contracts**

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## About the Presenters

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# Introduction

Publishing contracts are, as a rule, neither well organized nor well written. Related, but critical, provisions are often scattered in provisions from the front to the back, and a provision on page six will often negate or vastly modify a provision on page two. Further, there is no such thing as a “standard” contract that cuts across publishers, across types of books, or across much of anything.

We have organized this presentation thematically, rather than trying to perform a paragraph-by-paragraph dissection of a contract that may bear little resemblance to either a preexisting contract you might encounter or your (or your clients’) particular needs. In the appendices, you’ll find two representative publishing contracts. Materials from the morning session include more publishing contracts and clauses, and comparing all of the materials should be educational—if all too often frustrating.

## I. Rights

A publishing contract is, in essence, about exchanging some (or all) of an author’s rights for compensation (and, of course, publication).<sup>1</sup> A substantial part of any publishing contract concerns the rights transfers. Similarly, a substantial part of unique industry vocabulary and assumptions also concerns the rights transfers.

### A. *Scope of Rights*

A publishing agreement must, at its core, transfer some rights to the publisher. Under the Copyright Act,<sup>2</sup> the author of a work has the exclusive right to create, or allow others to create, copies of an original work. Practice is seldom that simple. Publishing contracts establish the publisher’s authorization to copy in one of four ways:

- Treating the work as a **work for hire**. A work for hire is treated for all copyright purposes as if the “author” is the “hiring party”—that is, it is a return to medieval and Renaissance patronage systems. To qualify as a work for hire, a work must either be written by an employee within the scope of that employee’s duties or fulfill *all* of the following conditions:<sup>3</sup>
  - The work must be specially ordered or commissioned “for use as—
  - “a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional

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<sup>1</sup> For the purposes of this presentation, we are treating all works as if created by freelance authors, not employees. *Cf.* 17 U.S.C. § 201(b) (for purposes of the Copyright Act, a work for hire is treated as if its author is the hiring party, not the actual creator of the work).

<sup>2</sup> 17 U.S.C. § 101 *et seq.*

<sup>3</sup> 17 U.S.C. § 101.

text, as a test, as answer material for a test, or as an atlas”;  
and

- The contract must explicitly state that “the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”
- The contract may **transfer the copyright** to the publisher. This remains particularly common in academic publishing. Leaving aside the publishers’ economic rationale for getting as much as they can from the contract, some form of this transfer was mandatory in the US under the 1909 Copyright Act under the concept of “indivisible copyright.” (This is one reason so many pulp-era short stories have the publisher listed as the initial copyright holder.)
- The contract may leave the copyright with the author, but **transfer “all rights”** to the publisher. This generally keeps the author from creating derivative works or otherwise exploiting the work.
- Most commonly in trade publishing, the contract will leave the copyright with the author, and will **transfer only a limited subset of rights** to the publisher. At minimum, the rights transfer must include the right to publish the work as is. (There is further discussion of these rights later in the presentation.)

Other rights that may be of interest to authors, but are seldom discussed in publishing contracts, include:

- Moral rights (*droit d’auteur*)
- Trademark rights resulting from the manuscript and/or its context<sup>4</sup>

### B. Duration of Rights

Three kinds of duration clauses are common.

- First rights, particularly for periodicals
- “Term of copyright”
- A limited period of time, usually two or three years (periodicals) or three to ten years (books)

Actually determining the duration of these rights is less easy than simply reading the contract language, because copyright law gets in the way.

- The continuing extension of copyright terms may well upset the parties’ settled expectations. A contract signed in 1973 in the US would reasonably have contemplated a maximum duration of 56 years; a contract signed today with a young author extends for at least 70 years and possibly over 150 years.
- Foreign copyright terms are frequently different from US terms, which can be a major stumbling block when world rights are at issue.
- When all else is finished, US authors may nonetheless terminate the contract under certain conditions.<sup>5</sup> These rights can be

<sup>4</sup> Cf. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2004).

<sup>5</sup> 17 U.S.C. § 304(c) for works first published before 01 January 1978; 17 U.S.C. § 203 for works first published after 01 January 1978.

extremely valuable, and frequently result in substantial litigation.<sup>6</sup> These rights are inalienable, and a contract that purports to keep a party in possession of those rights from exercising them is not enforceable.

### C. *Nature of Rights*

Under modern copyright law, and certainly in modern publishing practice, one does more than deliver a handwritten copy of one's broadsheet to a member of the Company of Stationers to be printed and distributed. Instead, we now have a complex and interlocking set of restrictions on the main exercise of rights and of subsidiary ("derivative") rights to other forms, versions, and means of publishing an original work.

#### (1) *Territories*

Territorial rights vary depending upon whether the publisher is being granted exclusive or non-exclusive rights.

|               |   |
|---------------|---|
| Exclusive     | Territories granted to the publisher for its sole use. Common exclusive territory grants are: <ul style="list-style-type: none"><li>• World rights ("<i>throughout the World</i>")</li><li>• North American rights ("<i>in the United States, its territories and possessions, the Philippine Islands and Canada</i>")</li><li>• U.S. rights ("<i>in the United States, its territories and possessions, and the Philippine Islands</i>")</li></ul> |
| Non-exclusive | Territories granted to both the publisher and author for shared exploitation. Standard non-exclusive territory grants are referred to as Open Market rights (" <i>throughout the rest of the World as an Open Market, excluding the British Commonwealth and countries specified on the Schedule of Territories attached hereto</i> ") (see sample in Appendix 3 at page 30).   |
| Reserved      | Territories withheld by the author, which are often licensed by the author to other publishers.   |

Territorial rights, however, continue to evolve with the proliferation of trading zones. In the European Union, for example, it is unlikely that exclusive territorial rights within the EU can be enforced.<sup>7</sup> NAFTA presents similar problems within North America.

#### (2) *Languages*

The language rights granted to the publisher are generally considered in combination with the territory. Standard language grants include:

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<sup>6</sup> *E.g., Marvel Chars., Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002) (attempt to terminate transfer of Captain America); *Steinbeck et al. v. McIntosh & Otis, Inc., et al.*, No. 04-CV-6795 (S.D.N.Y.) (Owens, J.) (ongoing dispute including termination rights and privileges for works by John Ernst Steinbeck). N.B. Mr. Petit is counsel to an intervenor in *Steinbeck*.

<sup>7</sup> *Cf. JCB Serv., Ltd. v. European Commission*, No. T-67/01 (Eur. Ct. First Instance 2004). However, this should not prevent authors from selling distinct *language* rights, as noted in the next section.

|                            |   |
|----------------------------|---|
| All languages              | Right to publish in any language, and usually granted in combination with World rights.   |
| All languages except _____ | Right to publish in any language, except specific languages reserved by the author, generally when the author has personal fluency and/or has an existing relationship with a publisher in a language specific territory (e.g., Japan). |
| English only               | May be worldwide, or limited to North America or U.S. only.   |

Keep in mind that each translation is an independent copyrighted work derived from the source work. A work may, on occasion, be translated into the same language more than once in combination with territorial rights; for example, one might find a Canadian French-language edition and a Belgian French-language edition.

### (3) *Forms and Formats*

The specific forms and formats of publication, whether print or electronic, should be clearly defined. Standard print editions include:

|               |  |
|---------------|--|
| Volume rights | The right to publish in any traditional print format, including any of those defined here, and which may be granted individually or in various combinations.   |
| Hardcover     | Any of a number of formats bound with a durable cover of board wrapped in either cloth or paper, and generally stitched together. Hardcover editions may include standard trade sizes, “cheap” hardcover editions, leather-bound editions, deluxe editions, or market specific editions (e.g., coffee table books, picture books, pop-up books, etc.). Also called “casebound,” particularly in educational markets. |
| Paperback     | Any of a number of formats bound with heavy paper, generally glued (rather than sewn) together. Paperback editions may include trade paperback (approximately the same size as a standard hardcover edition), or “rack-sized” or mass-market paperback (approximately 2/3 the size of a standard hardcover edition).   |

Standard electronic editions include:

|                    |  |
|--------------------|--|
| Electronic display | The exact reproduction of the text of the work in electronic form without the addition of any multimedia elements. Authors will generally grant this right to publishers, with specific contract language limiting these rights. |
| Multimedia         | The right to adapt the work electronically, with the addition of sound, video and/or online features. Authors will generally reserve this right to themselves.   |

#### (4) *Subsequent Editions and Options*

The publisher will generally desire to have the right to publish revised editions of the work, normally with the cooperation of the author or the author's estate (Appendix 1, ¶ 13).<sup>8</sup> These rights apply more often to works of non-fiction than fiction.

An option grants the publisher certain rights, normally within a limited period of time, toward obtaining the author's next work. The author's next work may be defined specifically as "next work of non-fiction", "next science fiction novel", "next work written in collaboration with X" or any other manner agreeable to the parties.

Options may be granted in several types:

- |                        |   |
|------------------------|---|
| First (or First Look): | Gives the publisher the opportunity to consider the work prior to any other publisher.  |
| Matching               | Permits the publisher, if the parties cannot come to terms in initial negotiations, to obtain the rights in the next work by matching the best offer the author receives for the work.  |
| Topping                | Permits the publisher, if the parties cannot come to terms in initial negotiations, to obtain the rights in the next work by paying an agreed upon percentage more than the best offer the author receives for the next work. |

## II. Responsibilities

### A. *Manuscript*

Many, if not most, contracts for book-length manuscripts are entered into before the complete manuscript exists. (First novels are the obvious exception.) This leads, in turn, to several considerations.

- Timely completion of the manuscript. Although publishers all too frequently use this as an excuse to rescind contracts, publishing industry practices are so lax that virtually no claim that time is of the essence for a particular manuscript holds water, unless the contract itself so provides.
- Form of manuscript submission. Most publishers actually prefer to get the final manuscript in electronic form, making choices of typefaces and margins vastly less important for contracted manuscripts than they used to be.

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<sup>8</sup> Not everything that publishers might consider a "revised edition" is, though. See *New York Times, Inc. v. Tasini*, 533 U.S. 483 (2001) (electronic databases are not a "revision" or "revised edition" under 17 U.S.C. § 201); *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001) (a 1960s publishing contract's use of the word "book" does not contemplate electronic books, which therefore are not included in the grant of rights).

- Acceptability of the manuscript. Sometimes the submitted manuscript is, indeed, less than acceptable, whether incomplete or just bad.

Breaching these conditions can lead to rescission of the publishing contract. The critical language is that the manuscript must be “in form and content acceptable to the publisher,” although there are many variations on this. The notorious Joan Collins matter, in which the contract was not clear enough to convince the jury that the publisher need not pay the \$3 million remaining on an advance after the author submitted an (objectively!) unacceptable manuscript, is one example.

Unfortunately, “unacceptable” sometimes means “oops—we paid too much!”, not that the manuscript didn’t meet the contract’s terms.<sup>9</sup> This is an increasingly common situation, and it is far from unique to celebrity-authored fiction.<sup>10</sup> For this reason, it can be helpful to ensure that the “publisher’s sole discretion” language that frequently appears in contracts is limited to reasonable exercises of discretion... if only to reduce litigation costs later.

### B. Editorial duties

Virtually no manuscript is ready to go to the printer as turned in by the author. The editorial process between the manuscript and the printer is supposed to enhance the marketability of the book, article, or story.<sup>11</sup> These editorial steps may include, generally in this order:

- Developmental editing, which is far more common in nonfiction than in fiction. Developmental editing considers not just the words on the page and the arguments made, but all of the other considerations that go into a nonfiction work—illustrations, adequacy of documentation, tabular material, development of ancillary works (such as study guides for textbooks), and recommended revisions for consistency with other works by other authors.
- Line editing, in which an editor (ordinarily in-house) goes through the manuscript line by line, making specific comments intended to

<sup>9</sup> See *Doubleday & Co., Inc. v. Curtis*, 763 F.2d 495 (2d Cir. 1985). This principle—that a contract containing a “satisfaction clause” may be terminated only as a result of honest dissatisfaction—would seem especially appropriate in construing publishing agreements. To shield from scrutiny the already chimerical process of evaluating literary value would render the “satisfaction” clause an illusory promise, and place authors at the unbridled mercy of their editors.

Ironically, this case involves the same agent—Irving Lazar—as would the later Joan Collins matter. See also *Random House, Inc. v. Gold*, 464 F. Supp. 1306 (S.D.N.Y. 1979).

<sup>10</sup> *Chodos v. West Publ. Co., Inc.*, 292 F.3d 992 (9th Cir. 2002).

<sup>11</sup> Courts consistently find only that editorial duties must be performed in good faith; they need not be performed well or “skilfully.” See, e.g., *Curtis*. However, when the contract was signed on the basis of a detailed outline, the publisher’s good-faith obligation to offer substantial assistance to the author in making the manuscript acceptable is somewhat greater. E.g., *Dell Publishing Co. v. Whedon*, 577 F. Supp. 1459 (S.D.N.Y. 1984).

improve the manuscript. These comments can include both large and small issues of substance and of style.

- Copyediting, in which an editor (either in-house or, increasingly, freelance) goes through the manuscript largely making changes for grammatical and stylistic consistency, especially with a “house style.” For example, some publishers demand that manuscripts always use the serial comma; others try to avoid the serial comma at almost any cost. Title capitalization, footnote format, and other small matters that most readers will barely notice consume an inordinate proportion of a copyeditor’s time! Although a copyeditor will not ignore issues of substance that he or she notes, such attention is not ordinarily a major part of the expected job.
- Proofreading, in which an editor (either in-house or freelance) or, increasingly, editorial assistant checks to ensure that all changes were actually made, all requests for clarification received a response, and so on.

Along with these obvious editorial roles, a publisher has two additional practical duties that may or may not appear in the publishing contract.

- The publisher must design the interior of the book for effective and saleable printing. This is much more than a matter of choosing a favorite typeface, especially for works that include significant nonnarrative elements. Further, sometimes material that the author submits in a narrative form may be better presented in a different manner without changing the actual expression.
- Although the presence (or absence) of a ghostwriter might seem more related to the rights transfer discussed in part I or the manuscript delivery in part II.A, in reality many decisions to hire a ghostwriter are made during the editorial process (particularly in nonfiction and celebrity-authored works other than memoirs). Ghostwriters tremendously complicate every aspect of the publishing process, as there is ordinarily a separate contract for ghostwriting services.

The contract ordinarily requires the author to timely—usually, in authors’ opinions, excessively quickly!—respond to editorial input from the publisher. In practice, by the time these changes are coming to the author for approval or response, the publishing schedule has become of inordinate importance to the publisher, leading to frustration and inflexibility all around.

### *C. Publication and marketing*

**Timeliness:** As much as the publisher will expect the author to be timely in the delivery of the manuscript for the work, the author should also expect that the publisher will publish the work in a timely fashion. Allowing for the publisher’s normal schedules, and marketing concerns (including seasonal issues), contract terms should define how much time after delivery and acceptance the publisher will have to publish the work, as well as cures for any failure to publish.

**Author approvals:** An author is likely to be concerned with certain aspects of the publication of his/her book. In such instances, they may expect to have approval of (or be consulted on) some matters, within the scope of their own experience and ability to provide constructive feedback.

Areas where author approval or consultation may be appropriate:

- Jacket design and/or artwork
- Cover copy
- Interior illustrations
- Marketing materials (including author biographies and photographs)
- Author appearances and tour scheduling
- Editorial changes
- Licensing of certain rights to third parties

**Typical scope of marketing:** The publisher's marketing efforts may range from minimal with little author involvement for the majority of authors, to extensive with travel and media opportunities for the biggest authors. Most marketing will occur in the month before and after initial publication. Thereafter, it is likely that the publisher will refer all requests for personal appearances and interviews directly to the author for handling at author's sole expense.

Some examples of publisher marketing (in ascending order of importance):

- Cooperative advertising with bookstores
- Print advertising (magazines, newspapers, transit posters, etc.)
- Media interviews (print, television, radio)
- Radio and television advertising
- Author tour

**Cover process:** The cover design process will be guided by several factors, including format of the work; the design of previous works by the author; house, series or genre standards; and budget considerations. In designing the cover of the work, the publisher may choose to (a) commission original artwork; (b) license stock photographs or illustrations; or (c) forego artwork and use a text-only design (often called a "graphic solution").

#### *D. Warranties and indemnities*

Things do go wrong in the publishing relationship; often, these become apparent only when asserted by third parties. The warranties and indemnities clauses in a contract usually form the most dangerous parts of a contract to an author except for—and not always except for!—the grant of rights. Unfortunately, neither publishers nor authors seem to have a very firm grip on the meaning of these provisions.

##### *(1) Necessary warranties*

Some warranties are necessary to any publishing contract. Although they are probably implied elsewhere in the agreement, and even by the very

existence of the agreement, these warranties probably present no difficulty to the (honest) author.

- The work is original
- The work has not been previously published
- The work is not in the public domain
- The author has the right to transfer the rights granted in the contract to the publisher (for example, there is no dispute over copyright ownership, or exclusivity or nondisclosure agreement from a previous employer, etc.)
- The author has obtained and documented the appropriate permissions for use of third parties' copyrighted (or otherwise protected) material<sup>12</sup>

### *(2) Additional warranties*

Other warranties are not so benign, or required, particularly in this day of Internet publication and international distribution.

- The work is not libellous
- The work does not infringe any copyright
- The work does not invade any privacy right
- The work does not infringe any publicity right
- The work does not infringe any other intellectual property right (trademark, trade secret, or in rare cases patent)
- The work does not unfairly compete with any other work
- The work does not contain any harmful instructions
- The work does not advocate or provide instructions for any unlawful act or breach of the peace
- The work contains no untrue factual statements
- The work does not infringe on the "civil rights" of any third party

The major problem with these warranties is that they are usually stated as absolute warranties. That is not reasonable, and may not be enforceable if not reasonably foreseeable. A better solution is to make these "additional" warranties conditional, subject to the author's best knowledge after reasonable investigation.

### *(3) Indemnification*

Nobody likes to pay for claims. Thus, the pointy end of the warranty stick: indemnification. The publisher typically demands indemnification "for any claim" made implicating a breach of warranty. This leads to two, nonexclusive alternatives for authors, both of which are also more-accurate descriptions of what the publisher can expect to enforce in any event:

- Including the author on the publisher's E&O policy as an additional insured
- Delaying indemnification until the claim is "finally sustained"

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<sup>12</sup> Particularly in serious nonfiction and educational-market works, the publisher will provide for reimbursement to the author for these permissions or handle the permissions process itself.

### III. Compensation

#### A. Flat-fee contracts

A substantial minority of book publishing contracts compensate the author with a flat fee.<sup>13</sup> Flat fees (and, for that matter, advances) usually are *not* paid in a single lump sum at signing. Some or all of the following “milestones” may be used to divide the fee into two or more not-necessarily-equal parts.

- Signing date
- Outline approval
- Submission/acceptance of first draft
- Submission/acceptance of editorial changes
- Submission/acceptance of ancillary materials (e.g., workbooks to accompany a textbook)
- Submission/acceptance of graphical materials to be provided by the author
- Submission of permissions paperwork for use of third parties’ material
- Release to printer
- Actual publication
- Actual shipment of copies

Flat-fee agreements are most common in the following book-publishing situations:

- For the ghostwriter of a book-length manuscript
- For the author of a chapter (or more than one chapter) of a book for which that author is not credited as an editor<sup>14</sup>
- Certain educational-market works, such as ancillary materials to accompany a textbook
- Specialty nonfiction works
- Media tie-in works, including fiction, gaming, and nonfiction works
- Other works depending upon a license from a third party, such as a hypothetical exercise-equipment guide published by arrangement with, but not by, the equipment manufacturer

#### B. Royalty contracts

Most authors prefer to obtain a royalty-and-advance contract whenever possible. This allows the author to participate in the (hoped-for) long-term success of the book while not tying either the publisher or the author to overspecific expectations. Trade fiction publishing is ordinarily, with a few category exceptions, on a royalty-and-advance basis; somewhat more than half of trade nonfiction is, too. (See also Appendix 4 at page 31.)

<sup>13</sup> Some of these contracts are not literally “flat fees,” but will offer additional compensation for exercise of certain subsidiary rights, as discussed in part III.C *infra*. A “flat fee” contract is generally one that does not increase author compensation (or potentially do so) based on actual sales figures.

<sup>14</sup> For example, Charles E. Petit, *Form Over Substances: The Legal Context of Performance-Enhancing Substances*, in *PERFORMANCE-ENHANCING SUBSTANCES IN SPORT AND EXERCISE* (Michael S. Bahrke & Charles E. Yesalis eds., 2002).

## (1) *Advances*

An advance is essentially a (almost) nonreturnable prepayment of anticipated royalties. Most trade book publishing agreements, and a substantial proportion of nontrade book commercial publishing agreements, are based on the royalty-and-advance structure.<sup>15</sup>

A standard publishing contract will be structured so that any advances and/or royalties from the sale of subsidiary or ancillary rights will not be paid to the author until the original advance for the book has fully earned out. Subrights monies will then be paid with the regular semi-annual accountings. Authors may be able to negotiate exceptions to this provision (time periods and dollar amounts may be further negotiable).

- Flow-through: “The Author’s share of any subsidiary rights income received by the Publisher shall be paid to the Author within thirty (30) days of the Publisher’s receipt of such income provided the Publisher has fully recouped the advance specified herein and provided such share amounts to \$1,000 or more.”
- Pass-through: “The Author’s share of any subsidiary rights income received by the Publisher shall be paid to the Author within thirty (30) days of the Publisher’s receipt of such income, provided such share amounts to \$1,000 or more.”

## (2) *Royalty basis and calculation*

Royalties are typically calculated on each copy sold.

- Traditionally, this has been based on a percentage of the sales (cover) price of a given edition of the book. The percentage varies based on the nature of the edition, the format, and prior sales of the book. Typical royalty percentages for trade casebound fiction range between 10 and 15 percent of the sales price.
- Increasingly, publishers attempt to base the royalty on a percentage of the net sales price (sometimes, inaccurately, called “net receipts”). Publishers claim that the traditional “long discount” offered to bookstores has become distorted by the rise of non-trade distribution channels for books, particularly warehouse clubs and discount retailers, who demand greater discounts than traditional in the book trade.

Actually calculating royalties, though, is far from simple. Exceptions to a simple mathematical exercise include:

- Sales through non-trade channels, such as book clubs, direct mail, export, educational group sales, and a variety of other exceptions
- Sales at high discounts
- Remainders
- Sales directly to the author

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<sup>15</sup> Contrary to popular belief (and publishing-industry assertions), “earning out” the advance is seldom necessary for a book to be profitable for the publisher—especially if the publisher properly allocates overhead and related expenses on a pro rata (rather than the industry-standard per capita) basis and includes certain income not credited toward the author’s royalties, such as payment received through the remainders process.

- Review and publicity copies
- Basket accounting with other works by that author, either under the same or a different contract

Finally, there is the question of royalty reporting. Unless covered in detail in the contract, royalty reports tend to mask or completely fail to disclose information critical to ensuring accurate payments.

### (3) *Reserves*

Books on bookstore shelves are not owned by the bookstore, but by the publisher. In substance, the shipment to the bookstore is a consignment, because trade books are fully returnable for credit. Typically, this return period extends for several years, until the book goes out of print. This creates a substantial risk that the publisher will credit the author with a sale and pay (or credit) royalties on that sale, only for the book to be returned. The industry has responded to this with the reserve against returns.

The reserve is a proportion of total sales that is held back against potential returns. In theory, as a higher and higher proportion of the books shipped has been sold, the reserve should be released. Even calculating the reserve, however, is a matter shrouded in mystery that few, if any, publishing people can explain...and varies from publisher to publisher, and even imprint to imprint within the same publisher.

Publishers typically establish (or release) reserves based on some combination of the following factors:

- Initial print run
- Prior sell-through of that author's books
- Estimated sell-through of competitive and comparable books
- Sales to date
- Returns to date
- Anticipated needs for updated editions, changes in cover prices, etc.
- Seasonality
- The size of the advance, and earn-out status

### (4) *Scheduling and timeliness*

Unlike almost any other industry, and certainly unlike any industry that operates under the UCC, there is usually an extended delay between any sale and recognition of income by the publisher, let alone payment (or credit) of the author's share. This comes from a combination of three factors:

- The reserves-and-returns system just discussed;
- The extended period of time allowed for payment from stores on *actual* sales to the publisher, often extending to 120 days for educational markets, and as high as 90 days for trade books; and
- The industry standard of semiannual royalty accounting (although many smaller publishers use quarterly accounting, and a few use annual accounting)

On top of these factors that delay recognition of income, publishers ordinarily allow themselves quite a bit of time after the close of a royalty reporting period to pay—as much as 120 additional days. Too, this

assumes that the publisher will actually pay on time, which is not necessarily the case. One major publisher, since absorbed into the empire of a foreign-controlled publishing conglomerate, was notorious during the 1960s for being *on average* four months late with its royalty statements and payments. Unfortunately, the conglomerate seems to have readopted this attitude of late.

This can become a serious impediment to authors, and sometimes to the publishers, for several reasons.

- Negotiations for later books will proceed from an information asymmetry and out of date sales and sell-through information
- Many contracts limit the reach-back of a request for an audit. The later the statements are issued, the greater the chance that source documents may have been archived or destroyed as no longer needed, and the closer the period in question may be to the publisher's preferred twelve-month limit on audit scope.
- Late payments and credits can change the dynamic and incentives concerning basket accounting in future contract negotiations, which is almost always to the author's detriment.

### C. *Subsidiary rights*

Subsidiary rights are any rights ancillary to the actual publication of the work by the acquiring publisher. Subsidiary rights are licensed to third parties in exchange for compensation in the form of advances and royalties, or a share of net proceeds. Subsidiary rights income is split in predetermined proportions between the author and publisher. (see Clause 5(a)(10) of Appendix 1).

|               |  |
|---------------|--|
| Reprint       | Publication of the entire work in hardcover (including leatherbound or deluxe) editions or paperback editions. Also includes omnibus compilations  |
| Abridgement   | Publication of a condensed version of the work.  |
| Large Print   | Publication of all or part of the work in fonts bigger than 16 point for the visually impaired.  |
| Book Club     | Publication of the work through subscription clubs (e.g., Literary Guild, Book of the Month Club, etc.) and school book fairs (e.g., Scholastic, Trumpet, Troll, etc.).  |
| Serial Rights | Publication of serializations, condensations, excerpts, etc., in print and/or electronic media editions of periodicals or newspapers, in one or more installments. Exercise of these rights before publication in book form is known as " <i>First Serial</i> ". Exercise of these rights after publication in book form is known as " <i>Second Serial</i> ". |
| Permissions   | Publication of excerpts in print and/or electronic media editions of other books, including textbooks, reference books, anthologies and as epigrams.   |
| Electronic    | Publication of the work in various electronic formats. Exercise of these rights to display only the text (or a static reproduction of the printed page) of the work is   |

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|               | known as “ <i>Electronic Display</i> ”. Exercise of these rights to display the text, or adapt it with the inclusion of audio, video, graphics or interactive components is known as “ <i>Multimedia Rights</i> ”.                      |
| British       | Publication of English language editions of the work within the British Commonwealth.   |
| Translation   | Publication of foreign language editions of the Work.   |
| Audio         | Non-dramatic readings of all or any portion of the Work (including condensed, adapted and abridged versions), whether in the form of records, tape recordings, sound cassettes, compact discs, electronic media or other technologies). |
| Performance   | Adaptation of the work for stage (dramatic or musical), radio, television and motion pictures.  |
| Merchandising | The use of the work (including characters) or the Author’s name in connection with merchandise or services.   |

## IV. Miscellany

### A. *Agent of record*

Many publishing contracts, particularly those for works of fiction and that form part of a single-author series, include a clause that designates an agent of record. These are intended to protect the interests of the agent who initially negotiates a contract if the author later changes agent. For example,

The Agent of Record for this Agreement shall be the Jarndyce Agency, 1 St. Andrews Plaza, New York, New York. All communications from the publisher to the author concerning royalties and other payments, subsidiary rights, options, termination, breach, warranty, and/or indemnity, including without limitation payment of any sums due author, shall be through the Agent of Record, and shall be deemed received by Author on the date received by the Agent of Record. This designation of Agent of Record shall survive termination of this Agreement for any reason.

This kind of clause, although perhaps useful for overseas authors, authors concerned with maintaining privacy, and in certain other circumstances, presents two potential difficulties that counsel against its use.

- The non-amicable “firing” of an agent by the author (or vice versa)
- Fraud, carelessness, or breach of fiduciary duty by the agent

### B. *Ipsa facto*

Many older publishing contracts include an *ipso facto* clause that purports to return rights to the author if the publisher files for bankruptcy. For example, the clause might provide:

If a petition in bankruptcy shall be filed by or against the Publisher, or if it shall be adjudged insolvent by any court, or if a Trustee or a Receiver of any property of the Publisher shall be appointed in any suit or proceeding by or against the Publisher, or if the Publisher shall make an assignment for the benefit of creditors or shall take the benefit of any bankruptcy or insolvency Act, or if the Publisher shall liquidate its

business for any cause whatsoever, this agreement shall terminate automatically without notice, and such termination shall be effective as of date of the filing of such petition, adjudication, appointment, assignment or declaration or commencement of reorganization or liquidation proceedings, and all rights granted hereunder shall thereupon revert to the Author. As a condition of the making of this agreement the Author hereby acquires the right, upon such termination, to purchase at his option the plates, remaining copies and sheets as provided in Article *x* hereof.

(Another example appears in Appendix 1, ¶ 17).

Such clauses are unenforceable at best, as they violate the automatic stay imposed under the Bankruptcy Code.<sup>16</sup> Advances in technology and changes in publishing industry business practices have also rendered this clause of dubious value, even for older publishing contracts. Except for certain four-color, highly illustrated books, the plates no longer have a great deal of value; it is more expensive to transport and store them than to create new ones, particularly if a prospective new printer uses presses from a different manufacturer. Instead, authors should obtain the electronic files used to compose the book. Then, too, publishers now tend to outsource printing to companies that specialize in printing,<sup>17</sup> meaning that bankruptcy of the publisher probably might not change the ownership or location of the plates in any event.

### *C. Dispute resolution*

Unfortunately, sometimes publishers and authors get involved in disputes. This may be a direct dispute, such as an allegation of underpayment of royalties or failure to deliver a satisfactory manuscript, or it may involve indemnification for a third party's claims. Resolving publisher-author disputes has three dimensions:

- **What law** will be used to resolve the dispute. Some contracts are silent on this, but most contracts specify a jurisdiction's law as controlling (and all contracts probably should). This is most often New York law, particularly in book publishing, as New York state law is the most-developed due to the publishing industry's heavy presence. Since a publishing contract is a business-to-business transaction, the (allegedly) sophisticated businesspeople's choice of a jurisdiction's law will generally be respected by a court or arbitrator. Typically, the publisher selects the law, and the author has to live with that choice. This can create significant differences, although not nearly as extreme as during the middle of the twentieth century.
- **Where** (geographically) a dispute will be resolved. Again, this is virtually always imposed by the publisher and not negotiable. However, courts are somewhat more likely to reject what they

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<sup>16</sup> 11 U.S.C. § 362.

<sup>17</sup> For example, all five Harry Potter books have been printed in the US not by Scholastic, the publisher, but by various plants owned and operated by R.R. Donnelly, the Chicago-based printing conglomerate better known for printing telephone books. Given the length of the most-recent installment, this makes some sense.

perceive as unfair choice-of-forum provisions.<sup>18</sup> In many ways, this is a far more outcome-determinative term than is the choice of law.

- **What kind of hearing** will be used to resolve the dispute. The contemporary trend is to impose arbitration clauses. These have both advantages and disadvantages for both parties.
  - The overall cost of an arbitration proceeding is generally limited, but the minimum cost is generally higher due to high filing fees.
  - The relaxed procedures make it possible—but not necessarily a good idea—to dispense with lawyers.
  - The arbitrator is more likely to be familiar with industry practices; this can cut both ways, but usually cuts against the outsider.
  - The process is ordinarily much faster than going through courts.

Unfortunately, the author is most greatly disadvantaged in the least-predictable circumstances.

#### *D. Auditing and examination*

After publication, an author should be prepared to review the publisher's royalty statements for errors, with as much attention as toward balancing their own checkbook. The publishing contract should permit the author to audit the publisher's records, and specify which party shall pay for the audit based on the outcome of the audit.

Upon thirty (30) days written notice Author may cause to be examined through an independent Certified Public Accountant the books of account of Publisher insofar as they relate to the sale or the licensing of the Work at his own expense unless errors amounting to five percent (5%) or more of the total sums earned by Author pursuant to this Agreement shall be found to the Author's disadvantage, in which case the cost shall be borne by Publisher and payment of the amount due shall be made within thirty (30) days thereafter. Audits shall occur no more than once a year during the normal working hours of Publisher. Publisher shall not be required to retain supporting records for a period of more than two years after the rendition of any statement, such statement being deemed conclusive for all purposes after the elapse of such two year period.

Another common cost-shift provision provides that an error "of greater than 10% to the author's disadvantage on any statement." Although this is not exceptionally clear, one court that interpreted the phrase held (in

<sup>18</sup> Cf. *M/V Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See also *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 567 N.Y.S.2d 731 (N.Y. App. Div. 1991):

In order to set aside [a forum-selection] clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.

*But see Scarcella v. America On-Line, Inc.*, 2004 N.Y. Slip Op. 51021(U) (N.Y. Cty. Sep. 8, 2004) (denying forum selection clause on ground of arguably deceptive inducement).

an unreported minute order) that it meant an error in the total credit for a given reporting period, not either 10% of the total paid or 10% of any given figure.

### *E. Author courtesies*

**Galleys** are sets of typeset pages of a book (either bound or unbound), showing the page layout and typography of the finished book. Authors will usually receive a set of unbound galleys (“first pass page proofs”) in order to proof-read the work prior to printing. Depending on scheduling concerns, either this first pass version, or a second pass containing the revisions requested during the first pass, will be bound and sent to reviewers and bookstore accounts. Authors should determine whether they will require copies of the bound galleys to use in their own pre-publication publicity or efforts to sell reserved rights. **Bound galleys** are printed in small print runs, and are therefore more expensive to print per copy than the actual finished book. Publishers will be unwilling to supply more than a bare minimum of these galleys to authors.

The contract should permit the author to receive a set number of **complimentary copies** of all editions of the book. Standard quantities will vary from publisher to publisher, but are rarely less than 10 free copies from a trade publisher or five free copies from a nontrade publisher, except for certain very-high-priced works (such as law books). These quantities are generally negotiable, and should apply to any editions published by the publisher, not only the first edition. Authors will also want to ensure that they are to receive some smaller quantity of any sublicensed editions, particularly foreign editions.

The clause specifying the number of complimentary copies should also specify that the author may purchase additional quantities at a set discount from the cover price. Discounts may range from 40% to 50%, and are rarely negotiable. These copies are usually specified as (a) not for resale, and (b) not earning any royalty. Some clauses will permit authors to order discounted copies of any of the publisher’s titles, not just the author’s own.

The author may desire copies of the cover of the book (“**cover flats**”) for publicity or personal purposes. Quantities and publishers’ willingness to provide cover flats will vary; requests for up to fifty are generally honored, as a trade publisher itself will ordinarily obtain at least twice that many. Cover flats may be printed with or without accompanying sales copy on the reverse or on an additional flap. Authors may also request copies of cover art for making bookmarks, brochures, and similar handouts on their own, but need to ensure that permission for such use has been cleared with the artist or cover designer.

On occasion, the contract will specify arrangements for an **author tour**. Although this is usually considered a “marketing” issue handled as the need arises, the exact arrangements may well be specified in the contract for authors who have limited availability (certain celebrities) or special needs (security for ex-Presidents).

## Appendices

### Appendix 1: Sample Commercial Publishing Agreement (Book)

|                             |                   |
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| 3 Publication               | II.C              |
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| 5 Royalties                 | III.B, III.C      |
| 6 Accounting                | IV.D              |
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| 8 Competing Works           | I.A               |
| 9 Remainder Copies          | IV.E, III.B       |
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| 11 Title of the Work        | II.C, I.A         |
| 12 Author's Property        | I.A, I.C, IV.E    |
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| signatures                  | IV.C              |

### Appendix 2: Sample Commercial Publishing Agreement (Periodical Short Fiction)

### Appendix 3: Sample Schedule of British Commonwealth Countries

### Appendix 4: Royalty Reports

# Appendix 1

## Sample Commercial Publishing Agreement (Book)

This sample agreement has been sanitized and assembled from a number of contracts dated after January 2002. It is *not* a “model contract” intended for general use. It contains a number of provisions that will be absent from some (and perhaps many) contracts; on the other hand, some provisions critical to certain kinds of books are missing.

The contract is presented in a two-column format for ease of reference. The right-hand column is a cross-reference to coverage of that subject in the remainder of these materials.

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| <p>AGREEMENT made this ____ day of __ 20__, between ____, of ____ (the “Author”) and Publisher, Inc., 86 Chambers Street, New York, NY (the “Publisher”) with respect to a Work tentatively titled: ____ (the “Work”). The Publisher and the Author wish to work together to achieve the professional standards and success that they each desire from the Work, and agree as follows:</p>   | <p>IV.C</p> |
| <p>1. RIGHTS. The Author hereby grants to the Publisher during the full term of copyright and all extensions thereof the full and exclusive rights comprised in the copyright in the Work, including any “Supplementary Materials” (as defined in Paragraph 2(a) below) and any revised editions, including but not limited to the right, in whole or in any part thereof, by itself or with others, throughout the world, to print, publish, republish, distribute and transmit the Work and to prepare, publish, distribute and transmit derivative works based thereon, in English and in other languages, in all media of expression now known or later developed, and to license or permit others to do so. The Publisher’s rights include but shall not be limited to:</p> <ul style="list-style-type: none"> <li>(a) The exclusive right to publish and sell the Work in the English language in North America (the United States, its possessions and territories, Canada and Mexico), the Philippines, the British Commonwealth and the Republics of Ireland and South Africa, Europe and all other countries (the “Territory”);</li> <li>(b) Foreign-language rights throughout the world;</li> <li>(c) Periodical or newspaper rights prior to or following book publication, including syndication rights throughout the world;</li> <li>(d) Non-dramatic audio recording rights throughout the world;</li> <li>(e) Motion picture, television, radio, stage dramatic and musical rights throughout the world;</li> <li>(f) Commercial and merchandising rights throughout the world.</li> </ul> | <p>I</p>    |
| <p>2. MANUSCRIPT.</p> <ul style="list-style-type: none"> <li>(a) The Author agrees to prepare and submit the final manuscript of the Work, to consist of approximately _____ words not later than _____, unless the Publisher has agreed to extend the time in writing (the “Due Date”). The Author shall submit the first half of the manuscript three months before the Due Date. The Author shall also submit sample chapters from time to time as the Publisher may reasonably request. The final manuscript shall be submitted in computer disk format or other electronic format specified by the Publisher together with two printouts double-spaced</li> </ul>   | <p>II.A</p> |

on 8½" by 11" white paper printed on one side only with pages numbered consecutively, complete and satisfactory to the Publisher in organization, form, content, and style, accompanied by appropriate illustrative material, a table of contents and any additional material listed below (individually and collectively the "Supplementary Materials"), which shall be considered part of the Work:

Material

Due Date (if different from above)

If the Author fails to supply any Supplementary Materials or illustrative material on or before the Due Date, or to supply suitable copy for a final index when the proofs are returned, the Publisher shall have the right, but not the obligation, to obtain them and charge the reasonable cost against any sums due to the Author.

Illustrative material submitted as part of the final manuscript shall be in the form of black and white drawings, photographs or high resolution computer renderings in a form suitable for direct use without redrawing, lettering or retouching by the Publisher.

The Author shall, at the Author's expense, submit with the final manuscript of the Work, written permissions, on a form approved by the Publisher, to use any copyrighted material which the Author incorporates in the Work.

(b) If the Author delivers the final manuscript on or before the Due Date, the Publisher shall, within 90 days after such delivery, notify the Author whether the manuscript is, in the Publisher's judgment, complete and satisfactory and, if it is not, request changes that would make the manuscript satisfactory to the Publisher. If the Author does not make the changes requested by the Publisher within 30 days after receipt of such request, or if, notwithstanding such changes the manuscript is not, in the Publisher's judgment, complete and satisfactory, the Publisher may terminate this Agreement pursuant to Paragraph 19 below or make such other arrangements as the Publisher deems advisable to make the manuscript complete and satisfactory, in which event the reasonable costs of such arrangements may be charged against any sums due to the Author. In the event the Publisher determines that the necessary revisions would be so extensive and fundamental that a satisfactory and timely revision would not be feasible, the Publisher shall have the right to deem the manuscript unsatisfactory without requesting changes and to terminate the Agreement pursuant to Paragraph 19 below.

(c) If the Author does not receive the above notice from the Publisher within the prescribed period after timely delivery of the manuscript, the Author may request the Publisher in writing to notify the Author whether the manuscript is complete and satisfactory to the Publisher and, if it is not, to indicate what changes would make it complete and satisfactory. If the Publisher does not respond to the Author's request within 30 days after receipt of such request, the Author may terminate this Agreement pursuant to Paragraph 17 below.

(d) The Author shall promptly correct and return proofs delivered to the Author for that purpose and provides suitable copy for a final index from the

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| <p>proofs. If Author's Alterations are made to the proofs, the costs incurred as a result thereof shall be borne by the Publisher to the extent of 15% of the cost of composition for the proofs originally submitted to the Author, and the excess, if any, shall be charged against any sums due to the Author. Author's Alterations are defined as deletions, additions, and other revisions made by the Author to the proofs, including any revisions made in the illustrations, other than to correct compositor's and/or proofreader's errors.</p>   |              |
| <p>3. PUBLICATION.</p> <p>(a) Subject to the terms and conditions contained herein, the Publisher shall publish the Work in such style and manner as the Publisher deems appropriate, within twenty-four (24) months from the date of the Publisher's acceptance of the final manuscript. Notwithstanding the foregoing, in the event either (i) the Work is significantly longer or shorter than specified in Paragraph 2(a) above; (ii) after the manuscript is accepted for publication, changes to the manuscript are made by the Author with the Publisher's consent, revision of the manuscript is required due to unforeseen events or developments, technical errors require correction, or the Author for any reason does not meet the Publisher's schedule for returning materials; (iii) delays result from acts or conditions beyond the control of the Publisher or its suppliers or contractors, including, but not limited to, war, terrorism, fire, flood, labor disputes, governmental action, shortages of material, riots, civil commotions or other similar causes; or (iv) publication must be delayed to accommodate first serial or book club use, then the Publisher shall publish the Work as soon as the Publisher deems practical.</p> <p>(b) The Publisher shall promote and sell the Work in such manner and at such prices as it deems appropriate, and make any and all other arrangements it deems appropriate with respect to the Work and the rights thereto granted to it herein.</p> | II.C         |
| <p>4. COPYRIGHT NOTICE. The Publisher shall include in each copy of the Work published by it a notice of copyright in the Author's name in conformity with the United States Copyright Act and the Universal Copyright Convention and require its licensees to do the same. The Publisher shall have the right to register the copyright in the Work with the United States Copyright Office. Any textual or illustrative material prepared for the Work by the Publisher at its expense may be copyrighted separately in the Publisher's name.</p>  | I.A          |
| <p>5. ROYALTIES.</p> <p>(a) The Publisher shall pay to the Author, as a royalty, the following percentages of the Publisher's "dollar receipts" (as defined below) from sales or licenses of the Work:</p> <p>(1) from sales of a hardcover edition in the United States, its possessions and territories, and Canada: ___%</p> <p>(2) (i) from sales of a trade paperback or other soft-cover edition (except for a mass-market paperback edition) in the United States, its possessions and territories, and Canada: ___%</p> <p>(ii) from sales of a mass-market paperback edition in the United States, its possessions and territories, and Canada: 7½%</p> <p>(3) from sales of a hardcover edition elsewhere: 10%</p>   | III.B, III.C |

(4) from sales of a trade paperback or other softcover edition (including a mass-market paperback edition) elsewhere: 7½%

(5) from sales or licenses of the Work or materials from the Work in electronic form, whether directly by the Publisher or indirectly through or with others: \_\_\_%

(6) From sales of any edition through direct-to-consumer marketing (including, for example, direct mail, but not including sales made via the Publisher's Website): 10%

(7) from sales of the Work at discounts of more than 50% from list price or sold in bulk for premium or promotional use, or special sales outside the ordinary channels of trade: 10%

(8) from sales of the Work produced "on demand" when it is not feasible to maintain a normal inventory: 5%

(9) from sales of non-dramatic audio recording and audio/video adaptations: 7½%

(10) From sales or licenses by the Publisher of the following subsidiary rights in the Work to third parties: reprint (50%); book club (50%); foreign language (50%); first serial (50%); second serial (50%); condensations (50%); motion picture (50%); non-dramatic audio recording and audio/ video adaptation rights (50%); dramatic and ancillary rights (50%); commercial and merchandising rights (50%); public performance rights (50%); and in any media, permissions for quotations of short excerpts and photocopies (50%); in each case after deduction of the Publisher's out-of-pocket costs, if any, incurred in connection with such licenses.

(11) should Publisher undertake, either alone or with others, the activities described in (10): 7½%

(12) from sales or licenses of other, adaptations and other derivative works not specified above: 7½%

(13) from use of all or a part of the Work in conjunction collectively with other work(s), a fraction of the applicable royalty rate equal to the proportion that the part of the Work so used bears to the entire collective work: pro rata

(b) As an advance against all royalties and all proceeds due to the Author pursuant to this Agreement or any other agreement between the Author and the Publisher, the Publisher will pay the Author the following: \_\_\_\_\_. This advance shall be nonrefundable except as set forth in Paragraph 19 below.

(c) "Dollar receipts" are defined as United States Dollars earned and received by the Publisher less any discounts, taxes, bad debts, customer returns, allowances and credits and excluding any sums charged separately to the customer for shipping.

(d) Royalties shall not be due on any revenues earned abroad, where any foreign government blocks the conversion or transmittal of such monies to the United States, until such revenues can be transmitted.

(e) No royalties shall be paid in connection with:

(1) fees received for the use of illustrative material, if any, prepared by the Publisher or at the Publisher's request, plates, negatives, type, tape or other property of the Publisher;

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| <p>(2) any grant of rights by the Publisher at no charge for transcription into Braille, large type publication or otherwise for use by persons with disabilities;</p> <p>(3) remainder copies and other copies sold below or at cost including expenses incurred, or furnished free to the Author, or for review, advertising, sample or similar purposes which may benefit the sale of the Work;</p> <p>(4) copies donated to charity.</p>  |             |
| <p>6. ACCOUNTING. Payments to the Author shall be made semiannually, on or before the last day of April and October of each year for royalties due for the preceding half-year ending the last day of February and August respectively and shall be accompanied by an appropriate Statement of Account. The Publisher may take credit for any returns for which royalties have been previously paid. If the balance due the Author for any royalty period is less than \$10, no payment shall be due until the next royalty period at the end of which the cumulative balance has reached \$10. The Publisher may retain a 20% reserve for future returns for three royalty periods, provided the accounting statements indicate the amount of the reserve and how it has been applied. Any offsets against royalties or sums owed by the Author to the Publisher under this Agreement or any other agreement between the Author and the Publisher may be deducted from any payments due the Author under this Agreement or any other agreement between the Author and the Publisher.</p> | IV.D        |
| <p>7. AUTHOR'S COPIES. Upon publication the Publisher shall give ten (10) free copies of the Work to the Author, who may purchase, for personal use only, additional copies of the Work at a discount of 40% from the then current United States catalog list price.</p>  | IV.E        |
| <p>8. COMPETING WORKS. The Author, without the Publisher's prior written consent, shall not publish or permit any third party to publish the Work or any portion thereof or any other version, revision or derivative work based thereon in any media now known or later developed. The Author may, however, draw on and refer to material contained in the Work in preparing articles for publication in scholarly and professional journals and papers for delivery at professional meetings, provided that credit is given to the Work and the Publisher.</p> <p>The Work shall be the Author's next manuscript for the Author's next book-length work whether under the Author's name or in collaboration with any other author.</p> <p>The Author shall not, without the Publisher's prior written consent, prepare or assist in the preparation of any other work on the same subject as the Work that might, in the Publisher's reasonable judgment, be directly competitive with the Work.</p>  | I.A         |
| <p>9. REMAINDER COPIES. When the Publisher determines that the demand for the Work is not sufficient to warrant its continued manufacture and sale, the Publisher may discontinue maintaining an inventory of the Work and may remainder all bound copies and sheet stock.</p>  | IV.E, III.B |
| <p>10. NAME/LIKENESS. The Publisher shall have the right to use the name, likeness and biographical data of the Author on any edition of the</p>  | II.C        |

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| <p>Work or on any derivative work thereof, and in advertising, publicity or promotion related thereto and may grant such rights in connection with the license of any subsidiary rights in the Work. The Author shall provide in a timely manner any information reasonably requested by the Publisher for use in promoting and advertising the Work.</p>  |                |
| <p>11. TITLE OF THE WORK. The rights in the title of the Work, and any series titles used on or in connection with the Work, including without limitation any trademark, service mark or trade dress rights shall belong solely to the Publisher, and the Author hereby transfers and assigns to the Publisher in perpetuity any rights the Author may have in such titles and trade dress.</p>  | II.C, I.A      |
| <p>12. AUTHOR'S PROPERTY. The Author shall retain a copy of the manuscript of the Work, including any illustrative material. The Publisher may, after publication of the Work, dispose of the original manuscripts, illustrative material and proofs. The Publisher will, however, on written request made prior to publication, make reasonable efforts to return any original illustrative material supplied by the Author. The Publisher shall not be responsible for loss of or damage to any property of the Author.</p>  | I.A, I.C, IV.E |
| <p>13. REVISED EDITIONS. If the Publisher determines that a revision of the Work is desirable, the Publisher shall, unless the Author is deceased, request the Author to prepare the revised edition and the Author shall advise the Publisher within 60 days whether the Author will do so in accordance with the schedule set forth by the Publisher. If the Author advises the Publisher that the Author will prepare the revised edition, the Author shall diligently proceed with the revision, keep the Publisher advised of the Author's progress, and deliver the complete manuscript to the Publisher on the scheduled due date.</p> <p>If the Author does not participate in the revision, or if the Author does not diligently proceed with the revision, the Publisher shall have the right to arrange with others for the preparation of the revised edition. In such case, the Publisher shall have the right to deduct from the Author's royalties any fees or royalties paid to the reviser(s) provided that the Author's royalties shall not be reduced by more than 50% for the first such revised edition. No royalties shall be paid to the Author with respect to further revised editions not prepared by the Author. The revised editions may be published under the same title and may refer to the Author by name, but credit may be given to the reviser(s) in the revised edition(s) and in advertising and promotional material with respect thereto.</p> <p>Except as otherwise provided herein, the provisions of this Agreement, including royalty terms (but excluding the advance provided herein), shall apply to each successive revised edition as though it were the first edition.</p> | II.B, II.A     |
| <p>14. OPTION. The Author shall submit to the Publisher a book proposal with a table of contents or a complete manuscript for the Author's next book-length work (the "Next Book") before offering rights to the Next Book to any other publisher. The Publisher shall notify the Author within 60 days after receipt of such proposal or manuscript, or within 60 days following the Publisher's first publication of the Work, whichever is later, whether it desires to publish the Next Book. If the Publisher, within such period,</p>  | I.A            |

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| <p>notifies the Author that it does wish to publish the Next Book, the parties shall negotiate in good faith with respect to the terms of such publication. If within 30 days thereafter, the Author and the Publisher are unable to agree on such terms, the Author may offer rights to the Next Book to other publishers. If thereafter the Author receives a bona fide offer for the Next Book from any third party, the Author shall submit the terms of such offer to the Publisher in writing and the Publisher shall have 5 business days thereafter to advise the Author whether it will publish the Next Book on such terms. If the Publisher does so, the Author shall enter into a contract with the Publisher incorporating such terms but otherwise in the form of this Agreement.</p>   |             |
| <p>15. WARRANTY. The Author represents and warrants that: the Work is original except for material for which written third party permissions have been obtained; it has not previously been published and is not in the public domain; the Author has the right to enter into this Agreement and owns and can convey the rights granted to the Publisher; the Work contains no libelous or unlawful material or instructions that may cause harm or injury; it does not infringe upon or violate any copyright, trademark, trade secret or other right or the privacy of others; and statements in the Work asserted as fact are true or based upon generally accepted professional research practices. The Author will hold the Publisher and its distributors and licensees harmless against all liability, including expenses and reasonable counsel fees, from any claim which if sustained would constitute a breach of the foregoing warranties. Each party will give prompt notice to the other if any claim is made and the Author will cooperate with the Publisher, who will direct the defense thereof. Pending any settlement, final resolution or clear abandonment of a claim, the Publisher may engage counsel of its choice and may withhold in a reasonable amount sums due the Author under this or any other agreement between the parties. The provisions of this paragraph will survive termination of this Agreement.</p> | II.D        |
| <p>16. INFRINGEMENT. If the copyright in the Work or in any derivative work is infringed, the Publisher shall have the right, but not the obligation, to pursue a claim for infringement in such manner as it deems appropriate. If it does so, the Publisher shall recoup the expenses incurred from any recovery, and the balance of the proceeds, if any, shall be divided equally between the Author and the Publisher. If the Publisher does not pursue such a claim after the Author's request to do so, the Author, at the Author's expense, shall have the right to prosecute an action, and any recovery shall belong solely to the Author.</p>  | II.D        |
| <p>17. TERMINATION BY AUTHOR.</p> <p>(a) The Author may terminate this Agreement by written notice to the Publisher if the Publisher does not reply to the Author's request for required changes pursuant to Paragraph 2(c) above, or if the Publisher does not publish the Work within the time specified in Paragraph 3(a) above, for reasons other than as specified therein.</p> <p>(b) The Author may terminate this Agreement prior to publication by written notice to the Publisher if a voluntary petition in bankruptcy under Title 11, United States Code is filed by the Publisher or an involuntary</p>  | II.C, III.B |

|   |                             |
|---|-----------------------------|
| <p>petition under Title 11, United States Code is filed against the Publisher and an order for relief is entered.</p> <p>(c) Upon termination of this Agreement by the Author pursuant to subparagraph (a) or (b) above, the Publisher agrees to revert to the Author all rights herein granted and the Author shall retain as liquidated damages in lieu of any other damages or remedies, any payments received by the Author from the Publisher with respect to the Work.</p>  |                             |
| <p>18. AVAILABLE FOR PURCHASE. If the Publisher, in its sole discretion decides that sales of the Work are not sufficiently profitable to keep it “available for purchase” and the Publisher does not, within six months after receipt of a written request from the Author make it available for purchase or contract to make it available for purchase within a reasonable time, all rights granted to the Publisher shall, at the end of the six-month period revert to the Author, subject however, to any option, license, or contract granted to third parties prior to the date of the reversion, and further subject to the Publisher’s right to continue to publish and sell any then-existing derivative work based on the Work, all subject to the rights of the Author and the Publisher to their respective shares of the proceeds from such license or use under this Agreement. The Work shall be deemed to be “available for purchase” for this purpose if any English language edition of the Work is on sale or is otherwise available or is under option or contract for publication under the Publisher’s or any other imprint, or if the Publisher or its licensee offers for sale copies of the Work to be produced, manufactured or electronically transmitted, upon receipt of orders therefor.</p> | <p>II.C, I.B,<br/>III.B</p> |
| <p>19. TERMINATION BY PUBLISHER.</p> <p>(a) The Publisher may terminate this Agreement prior to publication if:</p> <p>(1) the Author fails to deliver a complete and satisfactory manuscript pursuant to Paragraph 2(a) above by the Due Date or fails or refuses to make the changes requested by the Publisher pursuant to Paragraph 2(b) above; or</p> <p>(2) publication may result in legal liability unacceptable to the Publisher in its reasonable judgment.</p> <p>(b) Upon termination of this Agreement by the Publisher pursuant to subparagraph (a) above, the Author shall promptly repay to the Publisher any advances or other payments made to the Author hereunder. Upon receipt of such repayment, the Publisher shall revert to the Author all rights herein granted, and the Publisher shall have no further obligation or liability hereunder.</p>   | <p>II.A, II.D</p>           |
| <p>20. GENERAL.</p> <p>(a) The engagement of the Author is personal and the rights hereunder granted to the Author are not assignable nor may the obligations imposed be delegated without the prior written consent of the Publisher; provided however, that the Author may assign any sums due to the Author hereunder without the Publisher’s consent.</p> <p>(b) Except as provided in the preceding subparagraph, this Agreement shall inure to the benefit of the heirs, successors, administrators, and permitted assigns of the Author and the subsidiaries, successors, and assigns of the Publisher.</p>  | <p>IV</p>                   |



## Appendix 2

### A Sample Commercial Publishing Agreement (Periodical Short Fiction)

This sample agreement has been slightly adapted from the current (at this writing) basic contract of *The Magazine of Fantasy and Science Fiction*. It has been reproduced here with permission of the publisher, Spilogale, Inc. It is *not* a “model contract” intended for general use, and it contains a number of provisions that will be absent from some contracts.

The contract is presented in a two-column format for ease of reference. The right-hand column is a cross-reference to coverage of that subject in the remainder of these materials.

|  |                      |
|--|----------------------|
| <p>January 9, 2004<br/>         [author’s name]<br/>         [author’s address]<br/>         [city, state, zip]</p>  |                      |
| <p>We enclose herewith our check for \$xxx.xx in payment of the original, unpublished material entitled: [story title] by [author’s byline], agent [agent, if used].</p>   | III.A, I.A, II.C     |
| <p>You hereby sell, transfer and assign to SPILOGALE, Inc., its successors and assigns, the first North American serial rights and non-exclusive foreign rights therein. You further agree not to sell this story at any time to any other magazine directly competitive with The Magazine of Fantasy &amp; Science Fiction without the written permission of SPILOGALE, Inc. It is understood that in any future use of this story, you will make your best efforts to arrange that a credit be given to The Magazine of Fantasy &amp; Science Fiction. It is agreed that all rights not specified in this agreement remain the property of the author.</p> | I.A, I.B, I.C        |
| <p>You grant to SPILOGALE, Inc., its successors and assigns, an option on first anthology rights which, when exercised, will be paid for as follows: \$xx.xx for the original edition, \$xx.xx for reprint editions, and a pro rata share of 50% of any foreign anthology or book club royalties received by us. You grant to SPILOGALE, Inc. the non-exclusive right to license audio and nondramatic reproduction of the verbatim text only as part of the edition of the magazine in electronic or audio form. SPILOGALE, Inc. shall pay to author 50% of net revenue received from such use.</p>   | I.A, I.B, I.C, III.C |
| <p>SPILOGALE, Inc. reserves the right to publish the story in microform. SPILOGALE, Inc. will copyright the story in its own name as part of the copyright of the magazine. It is understood that four months after publication, SPILOGALE, Inc., upon request, will assign to the author the copyright of the above story, subject to all the rights and privileges of SPILOGALE, Inc., herein provided for.</p>  | I.A, II.C            |
| <p>SPILOGALE, Inc. shall publish this material within three years from the date of this agreement, and if not, shall revert the rights to the author upon written request.</p>   | II.C                 |
| <p>Your acceptance of this check will constitute your acceptance of this agreement.</p>  | IV.C                 |
| <p>SPILOGALE, Inc.<br/>         By_____</p>  | IV.C                 |

## Appendix 3

### *Sample Schedule of British Commonwealth Territories*

|   |  |  |
|---|--|--|
| Antigua   | Irish Republic   | St. Vincent  |
| Ascension   | Jamaica  | Seychelles   |
| Australia and territories administered by Australia | Jordan   | Sierra Leone   |
| Bahamas   | Kenya  | Singapore  |
| Bangladesh  | Kiribati   | Solomon Islands                                      |
| Barbados  | Kuwait   | Somalia  |
| Belize  | Leeward and Windward Islands                           | South Africa   |
| Bermuda   | Lesotho  | Sri Lanka  |
| Bhutan  | Malawi   | Sudan  |
| Botswana  | Malaysia   | Swaziland  |
| British Indian Ocean Territory                      | Maldives   | Tanzania   |
| Brunei  | Malta  | Tonga  |
| Burma   | Mauritius  | Trinidad & Tobago                                    |
| Cayman Islands                                      | Monserrat  | Tristan da Cunha                                     |
| Cyprus  | Namibia  | Turks and Caicos Islands                             |
| Dominica  | Nauru  | Tuvalu   |
| Falkland Islands and Dependencies                   | New Zealand and its administered or associated islands | Uganda   |
| Fiji  | Nigeria  | United Kingdom of Great Britain and Northern Ireland |
| Gambia  | Pakistan   | Vanuatu  |
| Ghana   | Papua New Guinea                                       | Western Samoa  |
| Gibraltar   | Pitcairn Island  | Yemen  |
| Grenada   | Rodrigues  | Zambia   |
| Guyana  | St. Helena   | Zimbabwe   |
| India   | St. Kitts-Nevis-Anguilla                               |  |
| Iraq  | St. Lucia  |  |

## Appendix 4

### Royalty Reports

Book publishing, with very rare exceptions, compensates authors one of two ways. Particularly in educational, tie-in, and specialty nonfiction publishing, many books earn only a flat one-time fee. Authors, however, would prefer to participate in unexpected successes, and often choose the other traditional means of compensation: the royalty (and ordinarily advance).

**Definitions:**

- Flat fee**            A one-time fee paid to an author for the publication rights, and sometimes for the copyright in, a manuscript. This may range from a nominal sum to the low six figures. It is most common in educational works (typically from \$2,000-\$5,000), tie-in fiction and ancillaries (typically from \$2,000-\$15,000), and speciality nonfiction (typically from \$3,000-\$10,000). Although outside the scope of this session, ghostwriters are also typically compensated on a flat-fee basis.
- Royalty**            Per-copy compensation to the author based upon the number of sales of a book and the price of those sales (discussed below). *Although royalties are usually reported on Form 1099-MISC in block 2 (royalties), they may not be royalties under the Internal Revenue Code.*
- Advance**            Essentially a down-payment by the publisher against the expected royalties; typical offers are approximately 80% of the publisher's expected royalty payout over the first 18 months (or so) after publication.
- Sales price**        The publishing equivalent of the "sticker price," and the traditional basis for calculating royalties.
- Net sales**          The actual price received by the publisher for a given sale. Particularly for publishing agreements related to books largely sold outside book-retailing channels, publishers are increasingly attempting to impose a net-sales basis instead of a sales-price basis for calculation of royalties.
- Escalator**          Changes in royalty percentages based upon previous sales.

At current market rates, royalty payments tend to fall into distinct categories. Here are a few examples of common "royalty splits" at late 2004/early 2005 rates.

| <i>Form</i>           | Novel, major publisher | Novel, small press            | Trade nonfiction | Serious nonfiction |
|-----------------------|------------------------|-------------------------------|------------------|--------------------|
| Hardback              | 10(5)/12½(15)/15       | 10(10)/12½(10)/15             | 10(15)/15        | 8(5)/10(5)/12      |
| Trade Paperback       | 8(10)/10(20)/12        | 8(10)/10(10)/12               | 6(10)/8(20)/10   | 6(10)/8            |
| Mass-Market Paperback | 6(20)/8(20)/10         | 5(20)/6½(20)/8<br>(very rare) | 5(25)/7(25)/9    | no data            |

Explanation of table: For a hardback novel from a major publisher, the royalty is 10% on the first 5,000 copies, 12½% on the next 15,000 copies, and 15% thereafter.

The most problematic aspect of royalty payments and accounting is the reserve against returns. This is an artifact of the way books have traditionally been sold. A book that you see on a bookstore shelf is not owned by the bookstore, regardless of the terms used in the various agreements; it is owned by the publisher, and is in the bookstore on a consignment with advance (and very long payment terms). Books are fully returnable for

credit. Hardbacks and trade paperbacks return the entire book, which must be in saleable condition for full credit; mass-market paperbacks strip the cover off the book and pulp the body (although some bookstores will try, in violation of industry standards and their contracts, to sell the stripped copies to used bookstores), returning only the cover to the publisher. To account for this returnability, publishers impose a reserve against returns on royalties. The mechanism is somewhat obscure and almost always abused.

What follows is a sanitized royalty report page.<sup>19</sup> The complete royalty report for this title runs eight pages.

| ROYALTY STATEMENT                             |   |               |                          |             |           |           |                      |           |            |          |
|---|---|---------------|--------------------------|-------------|-----------|-----------|----------------------|-----------|------------|----------|
| PUBLISHING DIVISION: CHILDREN'S BOOK DIVISION |   |               |                          |             |           |           |                      |           |            | PAGE 206 |
| PERIOD ENDING: SEPTEMBER, 200X — SEMI-ANNUAL  |   |               |                          |             |           |           |                      |           |            |          |
| TITLE   | DRACULA, FRANKENSTEIN, AND THE WOLF MAN MEET THE PROSECUTOR |               |                          |             |           |           |                      |           |            |          |
| PROPRIETOR                                    | ARTHUR AUTHOR   | AUTHOR        | IMA PSEUDONYM            |             |           |           |                      |           |            |          |
| IMPRINT                                       | EVIL EMPIRE   |               |                          |             |           |           |                      |           |            |          |
| INIT. ISBN                                    | 0-888-77777-6   | TO            | MAX EASTMAN              |             |           |           |                      |           |            |          |
| INIT. RELEASE                                 | 03/89   |               | LITERARY AGENCY          |             |           |           |                      |           |            |          |
| CONTRACT#                                     | 000056789   |               | 1 ST. ANDREW'S PLAZA     |             |           |           |                      |           |            |          |
| PAYEE ID#                                     | C00001234   |               | NEW YORK, NY             |             |           |           |                      |           |            |          |
| PROPRIETOR ID#                                | C00098765   |               | 10007                    |             |           |           |                      |           |            |          |
|   | PROP. SPLIT   | 100%          |                          |             |           |           |                      |           |            |          |
|   | PAYEE SPLIT   | 100%          |                          |             |           |           |                      |           |            |          |
| =====PRIOR=====                               |   |               | =====CURRENT PERIOD===== |             |           |           | =====CUMULATIVE===== |           |            |          |
| NET UNITS                                     | EARN \$   | ISBN          | RCVD \$                  | GROSS UNITS | RET UNITS | NET UNITS | EARN \$              | NET UNITS | EARN \$    |          |
|   |   | 0-9999-8888-7 |                          |             |           |           |                      |           |            |          |
|   |   | RELEASE       | 04/02                    |             |           |           |                      |           |            |          |
|   |   | PRICE         | 5.99                     |             |           |           |                      |           |            |          |
| 0   | 0.00  | REGULAR       | 10%                      | 17634       | (3406)    | 14228     | 8,522.57             | 14228     | 8,522.57   |          |
| 0   | 0.00  | CANADA        | 5%                       | 4,875.06    | 1721 (65) | 1656      | 243.60               | 1656      | 243.60     |          |
| 0   | 0.00  | EXPORT        | 5%                       | 1,232.80    | 652 0     | 652       | 61.64                | 652       | 61.64      |          |
| 0   | 0.00  | MAIL          | 5%                       | 5.99        | 1 0       | 1         | .30                  | 1         | .30        |          |
| 0   | 0.00  | SPECIAL       | 5%                       | 31.15       | 15 (2)    | 13        | 1.56                 | 13        | 1.56       |          |
| 0   | 0.00  | SUBTOTAL      |                          | 20023       | (3473)    | 16550     | 8,829.67             | 16550     | 8,829.67   |          |
|   |   | ISBN          | 0-999-88888-7            |             |           |           |                      |           |            |          |
|   |   | RELEASE       | 08/02                    |             |           |           |                      |           |            |          |
|   |   | PRICE         | 5.99                     |             |           |           |                      |           |            |          |
| 0   | 0.00  | REGULAR       | 10%                      | 3724        | (101)     | 3623      | 2,170.18             | 3623      | 2,170.18   |          |
| 0   | 0.00  | CANADA        | 5%                       | 1,895.86    | 600 0     | 600       | 94.79                | 600       | 94.79      |          |
| 0   | 0.00  | EXPORT        | 5%                       | 1,081.07    | 620 0     | 620       | 54.05                | 620       | 54.05      |          |
| 0   | 0.00  | SUBTOTAL      |                          | 4944        | (101)     | 4843      | 2,319.02             | 4843      | 2,319.02   |          |
| 835024  | 263,983.13  | PG TOTAL      |                          | 24968       | (4013)    | 20955     | 10,944.42            | 855979    | 274,927.55 |          |

This, though, is just the top half—the equivalent of comparing a self-employed individual's gross income with a salaried employee, which neglects the effect of the self-employment tax. Each of the "earnings" figures *excludes* the reserve against returns. That looks like this:

<sup>19</sup> This page has been reproduced with the client's permission. All identifying information has been changed to protect the guilty. This is an unusually detailed royalty statement, both in general and from the specific publisher in question, because the author's agent specifically negotiated such a breakdown into the publishing contract.

| =====PRIOR===== |            |                                | =====CURRENT PERIOD===== |                |              |              | ====CUMULATIVE==== |              |            |
|-----------------|------------|--------------------------------|--------------------------|----------------|--------------|--------------|--------------------|--------------|------------|
| NET<br>UNITS    | EARN \$    |                                | NET<br>RCVD \$           | GROSS<br>UNITS | RET<br>UNITS | NET<br>UNITS | EARN \$            | NET<br>UNITS | EARN \$    |
| (17234)         | (8,690.47) | PRIOR RESERVES HELD            |                          |                |              |              |                    |              |            |
|                 |            | PRIOR RESERVES RELEASED        |                          |                |              | 17234        | 8,690.47           |              |            |
|                 |            | CURRENT RESERVES HELD          |                          |                |              | (1526)       | (914.07)           | (1526)       | (914.07)   |
| (17234)         | (8,690.47) | NET RESERVES ACTIVITY          |                          |                |              | 15708        | 7,776.40           | (1526)       | (914.07)   |
| 817790          | 255,292.66 | TOTAL ROYALTY UNITS & EARNINGS |                          |                |              |              | 18,720.83          | 854453       | 274,013.48 |

These are not the only issues that concern authors, publishers, agents, and attorneys. Other issues, many of which should be (but all too often are not) resolved at contract time, include:

- Basket accounting
- Cross-rights accounting
- Release of reserves
- Lookback period for challenges
- Auditing rights

Last, and far from least, a short word on the timing of payments in the publishing industry. Historically, royalties are reported twice a year. Typically, a royalty report for a given six-month period, and any money due, is issued between 60 and 120 days after the close of the period. For example, the statement above, for a period ending on 30 September, was issued in January of the following year. On top of this delay, the bookstores have 60 to 120 days to pay on accounts. Thus, on the date a royalty statement is received, it is as much as seven months behind reality, and may be paying for sales actually made to readers a year or more previously.