GUIDANCE ON
PUBLISHING CONTRACTS

THE SOCIETY OF AUTHORS

Members of the SoA are entitled – and encouraged – to receive (without additional charge) detailed advice on specific contracts. Every project is different and contracts vary massively; this guide is intended to serve only as background to the SoA's customised advice.

Every reasonable effort has been made to ensure that the information provided in this Guide is reasonably comprehensive, accurate and clear and up to date as at the date stated in the Guide. However, the information provided is necessarily general and should not be relied on as specific legal or professional advice. If you have any specific queries, contact our advisers or a suitably qualified lawyer or professional. If you think you may have noticed any error or omission, please let us know.

The main things to consider whenever you are offered a publishing deal are: the range of rights, the duration of the licence, and the share of any income being taken by the publisher: are they a fair return for the rights you are giving up and the work you will have to put in? A publisher paying a fat advance and investing in a print run of 25,000 copies from the outset is justified in taking rather more in return than a publisher offering no advance and intending to produce the work only as ebook and print-on-demand/ultra-short-run printing. Always weigh up what added value the publisher is bringing and consider how the proposal compares with self-publishing. Remember: you can self-publish as an ebook or print-on-demand for small outlay, thereby retaining all control and 100% of any income – so you need to be confident that the added value brought to the venture by your publisher justifies how long it is seeking to control the rights in your work and on what terms. And always check for the fire exit: is the contract clear and reasonable about the grounds on which you can terminate?

C.R.E.A.T.O.R

We believe that all creator contracts should comply with certain minimum requirements. They are embodied in the C.R.E.A.T.O.R acronym:

C - **Clearer** contracts, including written contracts which set out the exact scope of the rights granted.

R - fair **Remuneration**. Equitable and unwaivable remuneration for all forms of exploitation, to include bestseller clauses so if a work does far better than expected the creator shares in its success even if copyright was assigned.

E - an obligation of **Exploitation** for each mode of exploitation. Also known as the 'use it or lose it' Clause. This is the French model.

A - fair, understandable and proper **Accounting** terms.

T - **Term**. Reasonable and limited contract terms and regular reviews to take into account new forms of exploitation.

O - **Ownership**. Authors, including illustrators and translators, should be appropriately credited for all uses of their work and moral rights should be unwaivable.

R - All other clauses be subject to a general test of **Reasonableness.**

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1. THE PREAMBLE

This should give the date of the contract, the name and address of the parties signing the contract, and the title (or provisional title) of the work (or works) concerned.

If the author and the rights holder are different entities (e.g. if you have assigned your copyrights to a limited company, or are representing a deceased author's estate), the contract should where relevant identify when the rights and responsibilities are those of the rights holder ('Proprietor' or similar term) and when they are those of the Author. If there are joint authors and/or illustrators; authors plus volume editor; ghost writer and 'subject'; a named person representing an estate and the beneficiaries: whatever the combination, it is important that it is clear about who are the signatories to the agreement and which of them it is addressing (to whom royalties will be sent, the order of names on the cover, who will be sent proofs for checking, who is responsible for delivering what...).

2. THE WORK

At the outset author and publisher should agree, in writing, the relevant details about the work (word count, subject matter, target readership; the nature and number of illustrations, tables, diagrams; and what end-matter such as an index or bibliography is required/permitted by the publisher).

3. ACCEPTANCE

a) The publisher will want the right to reject the work and reclaim any monies it has so far paid, if the author fails to do what they undertook to do, by the agreed deadline. So it is very important to ensure that the detailed specifications are clear and precise, that the publisher has if possible seen a sample of your work and that the delivery date is realistic.

b) It should be clear what happens if the publisher wishes to cancel the agreement before the work is published for any reason other than the author's failure to do what you promised to do. Generally in such instances the author should be entitled to 100% of the advance (or a fee agreed at the outset) to reflect the time and work expended at the publisher's request. If the advance is low you may wish to specify additional damages for failure to publish to reflect the time you have spent and the loss of the opportunity to enhance your reputation. High-risk areas include educational materials, and highly illustrated works (which for financial reasons, are often dependent on the support of foreign publishers). Another risk area is ghost written works - on which see our Guide to Ghost Writing and Company Histories

c) When writing high-risk works, ensure also that it is clear that should you be asked to do substantial extra work, beyond that agreed in the original brief – e.g. to reflect changes in the curriculum or to fit with the requirements of a foreign publisher – such additional use of your time and skills will be separately paid for. Also check that it will be the publishers, and not you, who is expected to pay if extra authors or editors have to be brought in because additional work is required at a late stage (rather than because you failed to meet the original brief).

4. THE RIGHTS/LICENCE

a) **General rights**

What rights it is appropriate for the publisher to take depends on a vast range of factors, and members are encouraged to consult the SoA on a case by case basis. An established, experienced publishing house offering you a decent advance, with experienced and proactive editorial and rights departments, and with enough faith in the book to invest in a substantial initial print-run, will probably want a wide range of rights, for a long time – and most authors would consider that entirely reasonable (as long as the royalty and termination clauses are satisfactory – see points 14 and 26). An academic publisher with a high reputation in its subject area and a rigorous peer review policy will (even if the terms are poor) be more appealing for a scholarly work than one which cannot meet those criteria. If you are being offered no advance or only a token sum, or the work will be produced only in a very short print run, as print-on-demand and/or as an ebook from the outset, you should be

granting a considerably more limited range of rights. Remember: you can self-publish an ebook or print-on-demand for a small outlay, thereby retaining all control and 100% of any income - so you need to be confident that the added value brought to the venture by your publisher justifies how long it is seeking to control the rights in your work and on what terms.

The publisher will generally want various exclusive rights. The exclusive licence you grant should be defined to clarify the following:

(i): **Territory**: e.g. the UK; the world; the world excluding the USA.

(ii): **Language**: e.g. English; all languages.

(iii): **Formats and media**: e.g. to publish in volume form as a printed book and verbatim ebook (with or without undramatised audio rights); to publish, and possibly also to sub-license, a specified range of rights (see point 15); to publish in all forms and media.

If the publisher is making little upfront investment in the work, or is a company without an established reputation for handling subsidiary rights, we would suggest that you simply grant English language volume form publication rights, not wider rights or the right to sub-license to third parties; and if any further rights are requested, ask how the publisher aims to exploit them and ask for a detailed marketing plan in relation to them.

(iv): **Duration**: how long the publisher takes rights for should depend on how much it is investing in the work. Clearly a publisher paying a large advance and incurring high production costs will want enough time to recoup its outlay and make a profit, and, ideally, that publisher is committed to investing in you as an author long-term (not just for a single book). But traditionally print licences were in the region of 10-20 years and we believe that should be the case now. Where a publisher is making little upfront investment, 3-5 years may be more appropriate. In practice, many traditional contracts still seek rights for the duration of copyright (your lifetime plus 70 years). That is one of the reasons why, whatever the length of the licence, there should also be provision for rights to revert to the author sooner in specific circumstances – see point 26.

b) Rights in discrete items

(i) It may not be unreasonable for the publisher to insist on taking exclusive rights to new, commissioned artwork, e.g. for an illustrated children's book. However, with pre-existing artwork and other discrete items (individual poems, recipes, tables or diagrams), it may be more appropriate for you to grant only a non-exclusive licence for the publisher to include such items in the proposed work, while leaving you free to reproduce them elsewhere., or it might suit both parties for the publisher to have exclusive rights in an item (e.g. a poem) for, say, 12 months from first publication and a non-exclusive right to include that item in the proposed work after that point. In other words after the 12 months is up, you are at liberty to reproduce that individual poem elsewhere.

(ii) If the publisher can reuse your images, or their redrawn versions (they own the copyright in their version but it will be dependent on your copyright in the original), get guarantees that you will be paid for each use and that you will always be credited as author with due prominence.

c) Assigning copyright

(i) Publishers sometimes insist on taking copyright, e.g. for a non-fiction work containing short entries by a large number of different contributors, or if you are updating an already-existing reference work or textbook.

The implications of assigning copyright (and, they often go hand-in-hand, waiving your moral rights) are given here. Depending on the nature of the work and your role, getting contractual assurances about these points can be important damage-limitation from the impact of assigning copyright:

- you have no automatic right to be credited wherever all or parts of your work are reproduced;
- you have no control over what changes, additions, deletions, alterations may be made to your text;
- you have no automatic right to be involved in revising or adapting the work for new editions;

- whether or not your material is exploited in any other way, e.g. reproduced in an entirely different book, you have no right to approve the reuse, to be credited or in many cases even to be paid more;
- the copyright assignment will happen even if you are not paid;
- in no event, even if the publisher goes bankrupt, will the copyright automatically revert to you.

To repeat: depending on the nature of the work and your role, contractual commitments on many if not all the above points can often be secured.

(ii) If you are assigning copyright for a one-off fee, see also the SoA's Guide to Fee-Based Assignments.

(iii) Even if you are assigning copyright do ask for the right to receive PLR and collecting society receipts: see 15 (c).

5. DELIVERY AND PUBLICATION SCHEDULE

a) The publishers should undertake to publish the work within a specified time. The initial format(s) and ideally the approximate published price and initial print run should be specified.

b) If you know or fear the work will be produced only as ebook and/or POD, get confirmation from the publishers as to whether they will make the work available through Amazon and also in a version which has an ISBN (meaning it can also be sold by retailers other than Amazon).

c) Publication schedules are prepared well in advance, and the late delivery of a book can have serious consequences – especially if the publisher has given guaranteed deadlines to other publishers overseas. So take the delivery date seriously; and if, through unforeseen circumstances, you are running late, tell the publishers as soon as possible, explaining the problem and asking whether the deadline can be postponed.

d) Types of work

(i) Work done on spec: if the publisher is not proposing to make any payment on signature of the contract, generally do not commit to a contract until the work is fully written.

(ii) Commissioned work: insist on the contract being agreed and some part of your advance/fee being paid before you start work.

6. PRODUCTION

a) The publisher will insist that all details as to the manner of production are under its control, but it should – and most will – undertake to consult the author fully about the blurb and not to change the title without your consent. (Authors paying for production should demand a much stronger say and possibly a veto on all matters relating to production.)

b) Submit a typescript which is as near perfect as possible; what a publisher charges for proof corrections may well be out of all proportion to the original setting costs. If the publisher has freedom to edit, secure a guarantee that you will be sent a copy of the edited typescript for approval before the work is set in proof.

c) It is normal for the author to undertake to correct and return proofs within a specified time (generally seven to 14 days) and to bear the cost of proof corrections, other than printers' errors, above a specified allowance (e.g. 10% of the cost of composition).

d) If it could be relevant, agree that you will not be charged for proof changes made at the request of the publisher e.g. rejigging text to accommodate picture layout.

e) Even if work is supplied in digitised form, or where the text is scanned from an earlier printed edition, glitches can arise. Be sure there is an undertaking to send you proofs (if the publisher refuses, that may be because the intention is to publish only on Amazon).

7. PUBLICITY

a) The publisher should welcome publicity suggestions, such as suitable recipients for review copies. However, the reality is that most books receive very little by way of publicity and marketing from the publisher; and those for which the publisher has not laid out any significant sum get the least. Be wary of mistaking vague undertakings from a publisher for promises, and expect to be your book's best, and main, champion. These days publishers expect you to do a great deal of the publicity for the work. Do ask for a marketing plan and, in appropriate cases, a guaranteed marketing spend.

b) Contracts often stipulate that the author will, if asked, participate in a certain amount of promotional work, in which case the publisher should pay your reasonable travel expenses for any appearances. Try to ensure that obligations about the amount of blogging or other social-media activity you are expected to do fit with your abilities and are for a finite period of time around first publication, and beware requirements that you write promotional articles and web-copy for no payment (you will want to do your best for your own book – don't end up being contractually obliged to do things, for free, which are outside your comfort zone, which make unreasonable demands on your time, or which should be undertaken or paid for by the publisher).

Remember also, if the author photo you supply was taken by someone else (not a selfie), to clear rights with the photographer- and to credit them.

c) It is easy for educational writers, in particular, to find themselves committed to countless promotional trips. If you feel that too much is being asked of you, agree to e.g. two weeks of promotional work after which you reserve the right to charge a specified fee per day. If you are being paid only a fee (no royalties), or have written only a component of a multi-contributor work, you should be paid a day-rate plus expenses for any time spent at the publisher's request on promotional activities. Also beware of your publisher volunteering you to speak at festivals without payment. We believe that the author should be paid wherever the public pays for tickets. For further information on this see our Festivals Guide.

d) Data protection law means you must be very careful how you deal with any contact data (e.g. email addresses) – you cannot use it in ways with which the individual concerned has not consented – especially beware of cold-calling mail-shots.

8. ORIGINAL ARTWORK

a) Be clear about the nature and number of illustrations required; the form in which they should be delivered (it can be costly if further work is required to get your illustrations ready for the printers); and the intended form of reproduction (a multi-coloured graph or map can be unintelligible if it is reproduced in black and white).

b) If the publisher is supplying the illustrations, do you have any say in their selection?

c) Clarify what rights you are granting in your illustrations (see point 4b).

d) Lavishly-illustrated books are often published on an international co-edition basis – the originating publisher supplying the illustrations (which for some books may involve you in photo shoots). If the artwork has to be specially prepared, and/or the project has been originated by the publisher, the normal arrangement is for the publisher to foot the bill and own the rights, but if such artwork features you and/or your creations or techniques, the publisher should agree not to reproduce those images other than in your book(s) without your agreement.

e) If you are required to attend photo shoots, or incur direct costs (e.g. cooking recipes to be photographed for a cook-book), clarify the extent to which the publisher will pay your expenses.

f) images are generally now delivered in high-resolution digitised form. Try never to send original artwork – if you must, be sure that you or the publisher has it fully insured and that there is a deadline by when, and method by which, it will be returned to you. Make sure, also, that you retain ownership of the original artwork unless there is persuasive reason to agree otherwise.

9. QUOTATIONS AND ILLUSTRATIONS FROM OTHER SOURCES

a) Many contracts make the author responsible for obtaining permission for the use of any material from other sources, and for paying permission fees. For details about when you need to secure permission, and how to do so, see our Guide to Copyright and Permissions.

Permission fees can be extremely costly, but publishers can often be persuaded either to pay the entire cost or to share it with the author; or you may be able to arrange for the publisher to pay your share in the first instance and deduct a corresponding sum from the royalties.

b) If you are preparing a work in which quotations are an integral part (e.g. a study guide or anthology), or supplying copy for a commissioned non-fiction work, or if you are being paid on a fee-only basis, the publisher should pay all permission fees. And if you are expected to do extensive picture research for a publisher-originated book, remember that a freelance picture researcher would charge an hourly or daily fee for doing so.

c) Permission fees will be higher the more rights you seek - so ensure that the rights you are granting your publisher (i.e. for which you need to clear permissions) are as limited as possible.

d) Give yourself as much time as possible when clearing permissions because rights holders (especially publishers' permissions departments) can take a very long time to respond to requests. Beware contracts which ask you to have cleared all permissions by the delivery date and, if necessary, discuss with the publisher what happens if that is not possible for reasons outside your control.

e) In their capacity as owners, some picture libraries and galleries charge for the loan of artwork plus a fee for reproduction - quite separately from and in addition to whether you also need to obtain consent from and pay the copyright holder.

f) As well as a fee, rights holders may request a voucher copy of the book – confirm whether such copies will be at your expense or your publisher's.

10. INDEX AND OTHER END-MATTER

Many contracts make the author responsible for supplying or paying for the index. Engaging a professional indexer can be costly. Publishers should either pay the entire cost (at least for scientific or professional books) or share it with the author. If you are being paid only a fee, the publisher should be supplying and paying for the index.

Authors are increasingly also asked to supply word-lists or chapter keywords, which will be used to ensure that digitised versions will be visible to search engines.

At the outset clarify what other end-matter there might be (introduction, footnotes, appendices, bibliography) and whether or not such items are included in or additional to the word-count for the work.

11. WARRANTY AND INDEMNIFICATION

a) The author has traditionally been expected to give warranties and to indemnify the publisher against the risks of libel, invasion of privacy, breach of confidence, and infringement of copyright (also, e.g. for medical works, patient consents). Publishers tend to be inflexible about such clauses,

claiming that they are bound by their insurers to use certain wording. However this is usually not quite true. It is much more likely that they are simply obliged by insurers to behave as a 'prudent uninsured' person would but the wording can be negotiated. The warranty should cover 'any breach by the Author (unknown to the Publisher)'. The inclusion of the phrase 'unknown to the Publisher' could be important, especially with works of non-fiction e.g. biographies of celebrities/misery memoirs. If the publisher knows that the book contains prima facie libellous passages, it should not expect the author to indemnify it if successful libel proceedings are brought. You should indemnify only against actual breaches - not against claims.

b) Publishers often insist on the right to alter the text to remove any material which they consider, or are advised by their lawyers, might be actionable. You may wish to add a provision that, should the publisher so alter your work, the final text shall be subject to your approval.

c) The need for total frankness, confidence and co-operation between all the authors involved and the publisher over libel risks and the danger of infringing the growing right of privacy cannot be emphasised too strongly. If you or your publisher feels there is cause for anxiety, the book, or at least the potentially dangerous passage(s), should be read by a specialist lawyer. Publishers are often prepared to pay, or share the cost, of getting a legal vetting.

d) If you are concerned that there may be a risk of a claim ask your publisher to arrange for you to be covered under the publisher's own insurance policy. This is usually possible at little or no cost to the publisher. In a very rare case where the subject is particularly contentious and the publisher knows this you may ask for a reverse indemnity whereby the publisher covers you in case of any claims.

e) If you are co-writing, or ghosting, ensure that the other parties give you a warranty and indemnification that the material/information they supply shall not be in any way unlawful, and you should give them a similar warranty and indemnification in connection with content originated by you. You also need to take great care to ensure that any warranties and indemnifications agreed between the co-authors in a collaboration agreement are reflected in the same way in the publishing contract. For more see our Guide to Collaboration/Ghosting Agreements.

f) If you are writing on professional, specialist non-fiction (e.g. sports books, or cookbooks) or technical subjects beware of the generally slight risk of an action claiming negligent misstatement. The SoA can supply further information on request, and many professional bodies (e.g. in the medical sector) have their own guidelines and insurance policies.

12. THE ADVANCE

a) Although publishers deny it, the more they spend up-front, the more effort they are likely to make to sell the book in order to recoup their money plus make a profit. The most usual arrangement is that part of the advance is paid on signature of the contract, a part on delivery of the manuscript and sometimes a final part on publication. You should try to negotiate that as much of the advance (or fee) should be paid on signature as possible, with as much of the rest as possible on delivery (rather than only on publication).

b) The advance is usually on account of all monies accruing to the author under the contract. It should be paid in full and be non-returnable except only in the event of the contract being cancelled because the author fails to deliver the agreed work by the agreed deadline.

c) For commissioned books which may never finally be published – for instance an educational work which is subject to changes in the National Curriculum, or a highly-illustrated work which is dependent on the publishers securing co-edition deals to make it financially viable – it is important to agree at the outset what you will be paid if the project has to be abandoned for reasons beyond your control (generally you should be paid the entire advance or fee).

d) For some types of writing, advances are likely to be very low or non-existent, e.g. academic and medical works. Authors in this sector usually have other reasons to want to be published, and their

concerns will be more about the publisher's professional reputation, and its ability to penetrate the work's specialist market. But keep an eye on what costs you might incur – e.g. copyright permission fees. It is enough of an insult to be paid no advance, without the added injury of being actively out of pocket. Editors of multi-author works also need to beware a tendency for contributors' fees to be a first charge against the editor's royalties.

e) Educational writers should be wary of being paid an advance, plus royalties on only some of the items they are creating. If you are not paid a discrete fee for any non-royalty-generating items, you are actually doing that work – and the publisher is getting it – for free.

f) With many ebook/POD-only proposals, no advance is offered. It means you are handing over rights to the publisher in return for no obligations on the publisher's side (there being no guarantee that any copies will ever be sold). Think very carefully about whether this is really a better alternative than self-publishing.

g) Where a publisher has paid an advance in excess of realistic sales expectations for a book (e.g. to outbid other interested publishers, or on a speculative hunch), such expenditure is made at the publisher's informed, commercial risk. Any suggestion (unknown in the UK but occasionally seen in US contracts) that any part of the advance be refunded as a condition of termination should be flatly rejected.

13. AUTHOR PAYS

a) Some contracts ask the author to subsidise the cost of publishing, with the publisher taking a range of rights and a share of the resulting income. Generally your payment will not mean that you own any copies of the work; the contracts are often carefully worded and therefore misleading to the unwary; and very many authors who sign such deals report getting little but disappointment in return for all they are giving to the publisher. For more, see our Guide to *What sort of deal are you being offered*.

b) Crowd-funding in essence means that the author drums up sponsors to help finance the cost of publication.

14. ROYALTIES

a) Royalty terms can go on for many sub-clauses – and the one which will apply to the majority of sales may not be that which is listed first. If in doubt, ask the publisher to indicate which royalty clause it anticipates applying to the majority of sales.

b) Royalties for printed books:

(i) Royalties are ideally a percentage of the retail price (RRP) and sometimes a percentage of net receipts (NR). 'Net receipts' should be defined as a percentage of the money received by the publisher from sales of the work (the monies received from the retailer) minus any local taxes which might apply, but without any other deductions. Be very wary of any attempt to base royalties on 'profits' or to deduct production or other costs - such items are often impossible to quantify, even harder to verify, and in any case should be met by the publisher in return for its (substantial) share of any sales income.

(ii) The discount demanded by many retailers is likely to be in the region of 50% or more. With RRP-based royalties, you will almost certainly find that when copies are sold at discounts of more than e.g. 52% (preferably 56%), your royalty will be four-fifths of the full RRP royalty, say, or fall from a percentage of the RRP to the same percentage of NR.

(iii) We strongly believe that the royalties should rise (e.g. by 2.5%) after an agreed number of copies have been sold, to reflect the fact that many of the costs incurred by publishers are start-up rather than run-on costs.

(iv) What constitutes a fair royalty will vary substantially from project to project, and also depends on the nature and extent of the publisher's initial investment in the work, and what clear

added value it is bringing (you also want to consider how the offer compares with the pros and cons of self-publishing). Advice should be sought on a case by case basis.

(v) If both author and illustrator are getting a share of the royalty, clarify whether that share varies if text only is used (e.g. for an audiobook) or images only are used (e.g. for merchandising).

c) Royalties for ebooks and audiobooks:

(i) Ebook royalties are based on net receipts (exclusive of VAT which applies only to sales of ebooks). Again, advice on the size of the proposed royalty should be taken on a case by case basis.

(ii) Traditional publishers argue that many of the up-front costs of taking on a book are the same regardless of the formats in which it is sold. However, many of the run-on costs associated with print publishing (manufacturing, warehousing and distributing hard copies, the burden of unsold copies and returns), do not apply to ebooks and audiobooks. And if at any point the work becomes available only as an ebook (and POD), given that an author can self-publish in such formats with ease, we would expect the publisher's share of the income to be much smaller - in effect an agency commission – unless there is persuasive reason otherwise.

(iii) There is an increasing tendency for ebooks to be made available bundled with audio versions. Even where audiobooks are sold separately, we would expect the terms for download audio to match those for ebooks.

d) In academic, scholarly, educational and scientific publishing, there is a growing pressure on institutions to make materials free to the end-user, and the consequence is that increasingly sales of your work are likely to be as part of a digitised bundle of content supplied to the institution by an intermediary hosting website. The hosting site pays e.g. an annual fee to the publisher concerned and the publisher pays a small royalty, pro-rated between the authors concerned. We believe such forms of access tend to be at the chapter/article level and can result in substantial downloads, but will significantly undermine traditional sales.

Academics also need to be mindful of Open Access requirements imposed by funding bodies and parent institutions. This is a complex area and members are advised to consult the SoA for more detailed advice.

15. SPECIAL SALES, CHEAP EDITIONS AND REMAINDERING

a) If the work is to be remaindered, the publishers should pay you royalties on all copies sold at above cost, and give you first refusal to purchase stock at the remainder price. If the publishers wish to pulp surplus stock, they should give you first refusal to obtain copies at no charge (other than delivery).

b) Sales in bulk at very high discounts can be damaging if the work is still selling well at full price – not only do they undermine such full-priced sales, but they do so twice over as such copies tend rapidly to re-emerge as cheap second-hand ones on Amazon.

c) There should be no sales at cost price or less, and no 'cheap editions', within at least one year from first publication (and ideally not within, say, six months from publication of a different edition – e.g. remaindering the hardback just as the paperback is published) without your consent.

d) Under our Seven Steps we believe that Publishers should give the author a right of approval over every special sales deal (even if the current contract does not include such a right). Discounting is sometimes a valid strategy and publishers risk losing as much as the author if deals cannibalise conventional sales. But an author usually only has a handful of books from which to earn, while publishers have many, so an author is more at risk if the strategy does not work. Authors may also have more than one publisher so have a broader view of the overall sales picture. A publisher should always explain the reasons why it wants to do a deal, the likely receipts for the publisher and author,

and the likely impact on traditional sales. All such deals should be considered carefully and publishers should not supply books at an ultra- high discount, unless the author and the publisher agree that the deal is worth it.

e) If the author's royalties are based on net receipts the percentage rate payable should not be reduced when the discount increases.

f) (i) When it comes to highly illustrated works, bulk sales to another company can be an important part of the deal and such sales tend to be at extremely high discounts - quite possibly 80% or more. And the author's royalty is calculated after that very high discount has been deducted. This could include bulk sales to a bookclub, a supermarket, a mail order company, 'cover-mounts' (copies given away/sold cheap by a magazine or newspaper) or even another UK publisher. In contracts it might just come under 'high discount', or more usually e.g. 'special', 'premium', 'sales to non-traditional outlets' (or other expressions). We again advise that there be no such sales (at least in the home market) without the author's consent, at any time - or at least in the first year.

f)(ii) For some works, the publisher may say that without such deals signed up from the start, the work is not viable at all. But it should be willing and able to give you some idea of whether this is likely to be pertinent and how it's likely to affect your anticipated royalty income.

16. US EDITIONS

It is wise to discuss how US rights are to be handled. Any of the following arrangements could apply:

a) If you have an agent, or are in a strong position to license such rights on your own, ideally the licence granted to the UK publisher should exclude the USA (and, often, Canada) from the territories you are granting.

b) Ideally your publisher will (as an agent would) license a US publisher to produce a separate edition. The US publisher will pay the UK publisher an advance and royalties, and you should receive at least 80% of these (preferably 85%).

c) Some British firms operate through allied or subsidiary companies in the US or have their own distribution arrangements there. If so, you should ideally be paid royalties similar to those for home sales but based the US company's receipts (or, even better, calculated on the US published price) – rather than being paid royalties on the money paid by the US division to its UK counterpart.

d) The UK publisher may ship bound or unbound copies (sheets) to a US firm for distribution. The US company may well insist on a very high discount and also that the price it pays includes your remuneration. You may well receive only e.g. 10% of the British publisher's receipts. Since the price paid by the US company may well be little more than the manufacturing cost, a deal of this kind is a poor one and should be resisted unless (as, alas, is too often the case) it seems to be the only feasible way of selling to the US market.

17. SUBSIDIARY RIGHTS

a) Most publishers will want to take as many rights as they can. You should aim to give them only those rights they clearly need and which you are confident they have the ability and skill to exploit. What is appropriate will vary considerably. The appropriate division of the income between publisher and author from the licensing of rights also varies according to the nature of the deal, and members should take advice on a case by case basis, and bearing in mind how it compares with the commission an agent would take if it were licensing those rights.

b) If you use an agent, some/many rights will probably be excluded from the publishing contract and be marketed by the agent. If no agent is involved, an established, experienced publisher is probably in a better position than you to market certain rights (e.g. foreign editions) effectively. For highly

illustrated works, the publisher may require publishing rights in all languages and territories (indeed the work may not be viable otherwise).

It would be potentially misleading to give a list, here, of what rights it might be appropriate to grant the publisher, because there are so many variables. However, other than in exceptional circumstances:

(i) Where such rights are controlled by the publisher, we would expect the following sub-licensing to need the author's consent:

- Home market reprint rights;
- US territory rights and translation rights;
- Rental and lending of the work;
- Digitised/electronic rights (ebook, e-version and download audio);
- Print-on-demand rights.

(ii) You should retain the following other than where there is persuasive reason otherwise:

- Dramatisation and documentary rights for audio, internet, stage, radio, TV and/or film;
- Merchandising (spin-offs like toys and cards);
- Strip cartoon and graphic rights.

c) You should always retain PLR (Public Lending Right) and the right to the author's share of the income from collecting societies. You should ask for this even if you are only being paid a fee or are assigning copyright as such rights are of no value to the publisher but may provide a small but significant income to you.

d) If you are dealing with a publisher which pays nothing up-front (or which asks you to pay), consider very carefully before granting them the right to issue any sub-licences at all, or allowing them to take rights wider than English language print and/or ebook rights (and only for a short period).

e) We would expect contracts now to include a 'use it or lose it' clause – see point 26b.

18. CO-EDITIONS

a) Co-editions are the way in which many highly illustrated works tend to be published. Production costs are high so the publisher secures the commitment of co-edition partners at the outset. The fully laid-out work is printed by the original publisher, leaving the text sections blank for new text (in translation, or American-English) to be slotted in. Conventional publishers doing a deal with a bookclub, direct mail company or supermarket will likewise often manufacture the copies for that third party to rebrand and sell.

b) You will almost invariably be paid a royalty based on the original company's receipts. Those receipts are likely to be very modest (though the print-runs will probably be large and the copies are sold 'firm' rather than on sale-or-return, so all the payment is received up-front). Your publisher will probably sell the copies for an all-in price (known as a 'royalty inclusive' deal) or – less likely – the deal may be on a royalty basis (known as a 'royalty exclusive' deal).

On royalty inclusive sales (both hardback and paperback), the author should normally receive at least 10% of the original publisher's receipts. On royalty exclusive sales, the author should receive at least 50% of the original publisher's receipts. The discounts insisted on by the co-edition publisher tend to be very high, so the monies paid to your own publisher will be small and your royalty income therefore yet smaller, so it is important to ensure that your advance is fair reward for the work you are doing – it may well, in practice, be all you are paid.

c) Packagers (manufacture works for other publishers to sell), frequently pay one-off fees rather than royalties and take an assignment of copyright, which means they can regurgitate your material in many 'new' books and permutations in perpetuity. If you feel such a deal is nevertheless worth it, ensure that the fee is a fair payment for the work you are doing, try for a further fee e.g. per 10,000 copies sold; and a further fee for any edition in a new format or in a new language, and be very clear about whether or not your name will be included on the first and possibly many future variations of work, especially if you have no control over how it may be edited or altered.

19. COLLECTIVE LICENSING

For practical reasons, some rights (e.g. photocopying in schools and universities) can only be handled on a collective basis. The organisation handling such rights for authors is the Authors' Licensing and Collecting Society (SoA members have free membership of ALCS, but you need to complete an ALCS mandate), for illustrators there is also DACS. Your contract should include a clause granting any authorised collecting society the licence to handle appropriate rights. If rental and lending rights are mentioned in your contract, it should be clear that will likewise be subject to any relevant collective licence. Public Lending Right (PLR) goes by law 100% to the author.

20. ACCOUNTING AND PAYMENTS

a) Whether the contract provides for royalty statements to be sent to the author twice yearly or only once – twice is usual – the monies due should be paid within three months of the date to which accounts are made up. Any threshold below which monies will not be paid but will be held over should be no more than £30-£50, at least where payments are made by electronic transfer.

b) Once the advance has been earned, money from sub-licences (over a certain sum e.g. £100) should be paid to the author within, say, 28 days of receipt.

c) There should be a clause giving you the right upon written request to examine the publisher's books of account, at your own cost unless errors exceeding, say, £50 or 5% are found in which case the reasonable costs should be paid by the publisher.

d) If you are registered for VAT, it is very important that you give the publisher your VAT registration number.

e) If you have assigned your copyrights to a limited company, it is very important that you make that clear to the publisher (and the contract would need to discriminate between the company as rights holder and you as author).

f) If there is a 'reserve against returns' (i.e. holding back a percentage of the royalties due to an author in anticipation of unsold copies of the work being returned by booksellers), it should be limited, e.g. not more than 25% of the royalties due at that accounting date, and there should be no reserve against sales of ebooks or POD copies. The publisher should be entitled to withhold any reserve at the first accounting date following publication or reissue of the work, and the balance should be repaid to the author not more than 12 months later.

g) The publisher should be entitled to offset any unearned part of the advance, or any sum owing in respect of returns, only against income generated by the book in question. References to 'any other agreement' should be deleted or modified to this effect.

h) If you and the publisher pay tax in different countries, you will need to check with your local tax office about double-taxation formalities.

21. COPYRIGHT AND MORAL RIGHTS

a) The publisher should undertake to print a copyright notice in all copies of the book in the form '© [author's name] [year of first publication]'. If you have assigned your copyrights to a limited company you might still prefer the copyright notice to be in your own name and most publishers will agree to this although it is technically incorrect.

b) The moral right of integrity is the author's right not to have the work subjected to 'derogatory treatment'. Some publishers ask for a partial waiver of the right of integrity. This is not unreasonable if the waiver extends only to changes necessary for the work to be adapted for other formats e.g. an

audio adaptation. There should not be a blanket waiver of your right of integrity without very good reason.

c) The moral right of paternity is the right to be identified as the author of the work. Unlike the right to integrity, it has to be 'asserted in writing' and it is sensible for a statement to that effect to be given in the publishing contract and also included in the book, under the copyright line. The precise wording is unlikely to be critical. Asserting moral rights and ensuring a credit on the title page (if not also the cover) is particularly important for translators and illustrators, on its own account and because it can affect your entitlement to money from collecting societies and PLR.

d) Moral rights do not apply to work published in a newspaper, magazine or similar periodical, or to contributions in an encyclopaedia, dictionary, yearbook or other collective work of reference. But you will still want to check whether or not you have a right to be credited and to approve changes to your material.

22. AUTHOR COPIES

a) Publishers almost invariably undertake to supply the author with at least six free copies of a hardback and ten of a paperback. Many will increase this (if asked), plus a copy of any sub-licensed or other edition.

b) It should also be clear that the author can buy further copies at a discount. Many publishers now offer a discount of 35-50%, if payment is sent with the order. Negotiate separately if you want to be able to buy copies in bulk for resale e.g. at speaking events (and you may well be able to get a better discount on such copies).

c) In reality it may not be practicable to expect a free copy of an ebook version (the publisher is generally not in control of the creation and supply of such copies).

23. COPYRIGHT INFRINGEMENT

It is usual for contracts to include a clause empowering the publisher to institute proceedings for infringement of copyright. The publisher should indemnify you against any costs, and it should be clear that monies recovered from such proceedings will be divided equally between publisher and you, after deduction of costs incurred.

24. REVISED EDITIONS

a) If such a clause is not relevant to your particular book, or if you are in a strong enough position to insist that that any decision to produce a revised or adapted edition (and on what terms) remains with you, any clause allowing the publisher to produce revised editions should be deleted.

b) In the case of works requiring extensive revisions, publishers will generally insist on having the right to decide if and when to publish revised editions (even potentially long after your death).

(i) It should be clear that you will be entitled to a new advance or fee (to be negotiated at that time) to reflect the extra work that you will be doing.

(ii) For some sorts of work it is not unusual or unreasonable for there to be a clause to the effect that if you are unable or unwilling to revise it yourself, the publisher may procure someone else to do so, and divide the royalties on that new edition between you. Some contracts add that once the book has gone through two or three new editions since you were last directly involved, you will receive no royalties on later editions. This may be the only feasible way of ensuring that writers who are revising the work can get a fair royalty.

(iii) If you have assigned copyright to the publisher, you do not have an automatic right to be invited to revise or adapt the work for new editions (the publisher could unilaterally appoint someone else instead) unless there is a clear undertaking in the contract that you will have first refusal.

(iv) If you created the first edition of a major work, it may be appropriate to insist on being paid a modest 'concept' royalty on future editions even where you are no longer directly involved. It may also be fitting to insist on a guarantee that you will be credited as the originating author on all future editions. And you might want to try for a right to be consulted about who is chosen to replace you.

(v) For regular revising/updating of an accompanying website or similar, an annual or monthly fee might be the most appropriate form of remuneration.

(vi) Where appropriate – notably ELT – you might want to try for first refusal to adapt the material for derivative versions (also for market-specific adaptations, though often local authors will be required for such work), subject to the payment of an agreed advance; or at least a right to comment on the revised text.

(vii) If you have created a distinctive course or series, it is important to clarify with the publisher at the outset who owns what rights in the development of that course or series, including the series title; and whether you have first refusal (or, where appropriate, the sole right) to write other components, levels, derivatives, or further works in the series or featuring the same characters.

25. COMPETING WORKS

a) It is only reasonable that publishers should be able to prevent non-fiction authors from publishing a book with another firm which is virtually an abridged or expanded version of the work covered by the contract. The difficulty is to phrase any such clause so as to leave the author free to publish books on his/her particular subject. It is sometimes possible to get such clauses deleted – which is what we would recommend: in our view publishers are adequately protected by their exclusive licence. If the publisher insists on a non-compete clause:

(i) It should be time-limited, lapsing after, say, one year from first publication or three years from signature of the contract, whichever is the sooner;

(ii) Especially if the period of restriction is more than a couple of years, it should also lapse if the author's earnings from sales of the work in the previous 12 months fall below an agreed threshold;

(iii) Where appropriate we would expect there to be a further description of what constitutes a directly competing work e.g. the intended principal target markets, age group etc., and the nature of the author's role (main author, consultant, series editor);

(iv) ELT publishers should recognise that when an author signs up for a market-specific (or global) version of a work, they generally have to give that publisher the unfettered right in the future to produce other market-specific adaptations. So any non-compete restriction cannot apply to such future adaptations – the author has no control over what if any such further versions may be created by the publisher, and often receives very little by way of remuneration from them.

(b) An author being paid only a one-off fee does not benefit from sales of the work however successful it may be, so there should be no non-compete provision or, at worst, it should be for a very limited period of time and the restriction it puts on the author's ability to work elsewhere during that time must be reflected in the size of their fee.

26. GROUNDS FOR TERMINATING

a) It must be clear that the contract can be terminated in certain situations. Precise wording will vary depending on e.g. whether the author is being paid an advance. The SoA can advise members further on a case by case basis but the key grounds for termination should be:

(i) At the end of the contractual licence period;

(ii) If either party is in breach of contract and does not remedy the breach following (e.g. one month's) written notice by the other party;

(iii) If the publisher goes out of business;

(iv) If the work is unavailable and/or sales have dwindled below an agreed level; and/or if the work is being kept available only as print-on-demand/ebook.

b) The SoA believes publishers should agree that if they control a range of rights and formats and fails to exploit any particular right or format (e.g. German language rights) within an agreed time, or to match rights proposed to the author by some other company to do so, those rights will revert to the author.

c) We would expect it to be clear that the publisher cannot grant fresh sub-licences after it has received notice of termination.

d) We would expect the publisher to undertake to inform the ISBN agency and the suppliers of any versions of the work which are in ebook or print-on-demand form, that the contract has terminated and should no longer be advertised as being in print/available.

27. THE CONSEQUENCES OF TERMINATION

a) Existing sub-licences will continue to be valid and the publisher will continue to be entitled to its share of the income from them. However, we would expect it to be clear that if the contract is terminated because of the publisher's default or because it has ceased trading, all future income from the licensee will be paid in full to the author.

b) The publisher will be entitled to sell any stock in existence at termination but is still bound to pay the author royalties on those sales.

c) An author should still have the right to pursue monies owed (or, if relevant, damages).

d) If you assign copyright, unless there is a statement that your copyright reverts to you in the event of termination, the publisher will still own the copyright.

e) Many reference works and textbooks live on in the form of revised editions long after the original authors are still directly involved. For such works, it may be hard to secure 'out of print' termination provisions and the vital thing is to ensure you are not unreasonably restricted by any non-compete restriction – see point 25.

f) If the author has paid towards the cost of publication, the contract should clarify who has what rights to any stock still in existence at the date of termination and to what, if any, refund of their payment the author may be entitled.

28. DISPUTES RESOLUTION

a) Clauses about formal arbitration should be deleted. It is now generally accepted that arbitration tends to be slower, more expensive, than litigation – and it is often an inappropriate way of trying to resolve disputes. (Most problems can be resolved, sometimes with the intervention of the SoA if appropriate, without recourse to either arbitration or litigation.)

b) If a disputes clause is included, we recommend that, if your publisher is a member of the Publishers Association, the appropriate procedure should be the Informal Disputes Settlement Scheme run by the Publishers Association. Otherwise we would suggest wording along the following lines: 'Any dispute or difference arising between the parties relating to the interpretation of this Agreement may be submitted in the first instance to an informal disputes resolution tribunal to be agreed between the Author and the Publisher. Failing agreement on such terms, or on the terms of such submission, the parties agree to and submit to the jurisdiction of the English/Scottish courts.'

29. OPTION ON YOUR NEXT WORK

a) Some contracts are for multi-book deals, and pay advances on all the titles covered. However, some contracts contain a clause giving the publisher first refusal on your next book(s). If you are not

being paid an advance, and/or your book will be published only as POD/ebook, do not agree to any option. If your publisher is clearly investing heavily in you and your work from the outset, we would still advise that you agree to an option only after careful consideration. You may find yourself under a moral and possibly a legal obligation which you subsequently regret.

b) If you give your publisher an option, limit it to first refusal on only one book, on terms to be agreed (not 'on the same terms' or including the 'same rights and territories'), and with the publisher being required to come to a decision within, say, six weeks of delivery of the complete work or of a synopsis and specimen chapter. Specify the type of work covered, e.g. your next work of adult non-fiction, or the next book featuring the same characters. Exclude works you may be invited to write for a series published by another firm, and ideally specify a time-limit after which any option lapses.

c) The contract should make clear that any option right automatically lapses if/when the contract is terminated.

30. ASSIGNING THE BENEFIT OF THE CONTRACT

It is advisable for a clause to be included stating that the publisher may not assign the rights granted to it in the contract or the benefit of the contract (other than in the event of the entire company being taken over) without the author's written consent. Ideally the publisher should not in any circumstances be entitled to assign your rights – even as part of a complete takeover - to a company based in a different legal jurisdiction without your consent.

31. WHAT LAW APPLIES

a) The contract should clarify that it is governed by the laws of England/Scotland.

b) Be aware that if the contract is governed by the law of some other country, and/or your publisher is based in another country, if things were to go wrong seeking legal redress may well be prohibitively expensive if indeed it is possible at all. Try to work with foreign publishers only where you are confident that they have an established good reputation, and try to secure as large an up-front payment as possible.

c) In addition, be mindful that US law, in particular, differs from UK law in a number of respects which can affect what if any rights you can recover (in the work in question or derivative works) once your contract with a US publisher or US agent is terminated.

Guidance on Publishing Contracts v.5.1 September 2018
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