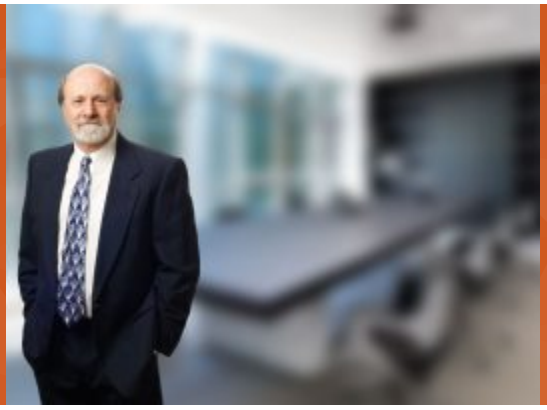
Book Publishing Contracts

Checklist of Deal Terms

By:Howard G. Zaharoff
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The path to publication generally requires authors to sign a "publishing contract" that covers such topics as: manuscript delivery and acceptance, copyright ownership and grants; royalty advances, rates and payment; author warranties and indemnities; contract duration and rights reversion (out-of-print); options on new works; and limitations on competing works. But if you're an author who can't find, wait for, or afford a lawyer, how do you know what terms are standard, reasonable or fair?

The following is not meant as legal advice, but rather as a checklist and guide to the issues typically covered, and the terms publishers typically offer, so you can identify issues to consider and possibly address and thereby make the time spent with your lawyer or other advisor more efficient.

1. Rights granted (Form, Language, Market, Time):

A. Copyright ownership: Who will own and control the bundle of copyrights, in what media, and in what geographic regions (see below)?

- Author should own the copyright (though academic publishers often demand an assignment of the copyright); ideally it should state that rights not specifically granted are *reserved to Author*.
- If you can't avoid "work made for hire" or express assignment to Publisher, be sure to address the termination of the grant/contract and *reversion of rights to Author* (see "out of print" below at 9.F and 15.E).
- Publisher ideally should agree to register copyright in Author's name (or at least allow the Author to do so – avoid registering copyright in Publisher's name).

B. Territories (EC & Australia considerations): Where can the rights be exercised? Some publishers will seek worldwide rights; but industry customs favor a more nuanced approach, given that translation rights are implicated. So, consider which territories it makes sense for your publisher to control and start from there.

C. Subsidiary rights: first serial (exclusive right to be first periodical to print story, article, excerpt, etc.), second serial (nonexclusive right to publish after first publication by another periodical), reprint (essentially same as second serial), British Commonwealth (publication in any of over 50 countries, mostly former British colonies), other foreign territories, translation, motion picture, TV, dramatic, audio, electronic, multimedia, podcast, commercial and merchandising – which of these rights are reserved or granted? Consider: how well placed is Publisher to sell such rights, and how successful historically? Here are other issues to address:

- Proportion in which proceeds shared (standard: 90% first serial, 75/80% UK and foreign,

50-66% other).

- Author or agent approval of sub rights licenses controlled by Publisher.
- Pass-through (after advance is repaid, ideally the royalties owed for sub rights – typically ½ of what Publisher receives – should flow through to Author 30-60 days after receipt).
- Hard/soft deal vs. Hard/soft separate.
- Author ideally retains dramatic, film, TV, radio, merchandising (today's standard publishing agreement often retains these for Publisher; but consider arguing that these should remain with Author unless Publisher has affiliates, proven success or special expertise to do these things).
- Author ideally retains rights to characters, settings, title (if fiction with series prospects).
- Preserving and allocating electronic, audio, and video rights and rights in new technologies (ideally no right to add music or sound effects without Author approval).
- Book club rights – be sure royalties are fair (don't become a free or low-cost giveaway).
- If Publisher takes subsidiary rights you care about, press to have any rights that Publisher has failed to exploit within a reasonable period (e.g., 2 –3 years after book published) revert to Author.
- Include general reservation of rights clause: any rights not expressly granted to Publisher remain with Author.

2. Advance and Royalties: Amount and Schedule

A. Advances – Ideally these should be nonrefundable; at worst, if manuscript rejected, Publisher may only recover from "first proceeds" under next contract for the same work

- Ideal: 1/2 on signing, 1/4 on delivery of half MS, 1/4 on final acceptance.
- Avoid "payment on publication" (though that's what many Publishers offer).

B. Royalty Rate (but (i) understand base against which rate applied: ideally it would be cover or list price, but it may be net of freight pass-through ("invoice" price), or simply – and less favorably – net receipts, and (ii) if based on net receipts, ask what discount applies to their normal channels and what percent of their sales is at a deeper discount)

- Hard cover: 5,000 – 10%; 10,000 – 12 1/2%; 15,000 – 15%
- Mass market paper: 6/8% (on first 50-150,000), increasing to 10%
- Trade paperback: 6/7 1/2% (on first 25,000), increasing to 9/10% (often on "net price" or "amount received," which is typically 1/3 – 1/4 off list)
- E-books: highest print rate; 20-50% net (35% increasingly common)
- Audiobooks: 10-25% net for physical copies, 25-50% for digital copies
- Academic and scholarly texts, including textbooks: 6-15% net

C. Bonus payments or increased payments in the event of:

- Book club sales
- Bestseller list appearance (identify which lists count, e.g., *New York Times*, *Publishers Weekly*, Amazon Charts)

- Award winner: Pulitzer, NBA, etc.
- Motion picture or TV development
- Earn-out advance

D. Discount Schedule: consider distinguishing premium sales to business from bulk sales to specialty stores, and request sharing "costs" of deep discounts.

E. Royalty reductions may be proposed for: deep discounts, special sales, mail order, premium sales, small print runs (typically 50% of standard rates or a flat low rate, e.g., 5%).

- If the royalty is lower for deeper discounts, learn what percentage of their books are sold at what discount levels.

F. If the book includes advertising or other third-party content (other than excerpts from other works published by Publisher), Author gets 50% of fees paid to Publisher.

G. Authors and Illustrators of children's books generally share revenue 50/50, unless either hires other to do work.

H. Grants: Authors of textbooks and nonfiction may require grant funds to cover extra expenses, such as travel, research assistance or special artwork.

3. Delivery Issues

A. Reasonable deadline.

B. Format for delivery – e.g. number of paper copies; disk or CD (Word format); emailed.

C. If illustrations, photos, charts or tables are required, when must Author submit? Who pays for these?

D. When must Author submit permissions and releases? Who pays for these?

4. Manuscript Acceptance

A. Define work

- Fiction vs. nonfiction
- Reading level: adult, college level, YA, middle reader, picture book
- Attach proposal and sample chapters (or sample illustrations)
- Word count (range)

B. Publisher must comment – accept or reject — as submitted (periodic review).

C. Standard: fit for publication vs. satisfactory to publisher v. no major editorial deficiencies.

D. Author's right to revise in response to *detailed* rejection.

E. Editing

- Author may perform (consider requesting extra compensation/advance beyond specified effort [as protection against unreasonable or mercurial editor]).

- If on reviewing, galleys Author desires changes, no charge unless cost exceeds 10% of composition cost (chargeable against royalties only) and no charge for changes required to fix printer's or Publisher's error.

5. Traveling Clause: Exclusive commitment to particular editor (rare)

A. If editor removed or moves, Publisher and Author will select new editor.

B. If no agreement, Author may terminate (perhaps subject to "first proceeds" – see 2.A).

6. Editing

A. Contract should require Publisher to provide written editorial guidance, line-editing and proof-reading.

B. In recent years, Publishers' failures to provide detailed editing has become a familiar complaint by authors.

7. Publication Details

A. Require firm publication date (6-18 mos.)

B. Print run (e.g., first printing of 2500-5000 copies)

C. Publisher shall not insert any ads or third party material without Author's consent (and potentially sharing revenue).

8. Author Approvals

A. Author must approve edits and final work.

B. Author must approve, or at least be consulted regarding, title, jacket, layout, artwork, and catalogue copy, including manner, wording, order and prominence *of Author or co-author credit.*

C. Author must approve, or at least be consulted regarding advertising, promotion, and use of Author's likeness.

9. Advertising and Promotion: To what will Publisher commit?

A. Publicity tour (rare)

B. Publicist (rare)

C. Advertising and marketing budget (rare)

D. Catalogue inclusion

E. Complimentary copies of work for purposes of promotion and obtaining third party reviews (in addition to 20-30 free copies – see Section 17).

F. Publisher won't allow work to go out-of-print for 2 years (rare) (needs definition of "out-of-print" – see Section 15).

10. Costs: permissions, illustrations, photographs

A. Identify any "extras" required and specify who obtains/creates and/or who pays (e.g., for artwork, photos, maps, index).

B. Permissions may be costly: ideally, Publisher gets and pays for them; alt: Author gets, Publisher pays; alt: Author pays *up to* $ [set reasonable amount].

C. Index – if Author creates, consider asking for more money (bigger advance?).

11. Accounting and Payment

A. Publisher keeps accurate records (of copies printed, sold, returned, and given away).

B. Author may inspect (*Audit right*): at Author's cost unless audit discovers errors of more than 5-10%; Publisher promptly pays any deficiency with interest.

C. Quarterly (at least semiannual) payments, accompanied by detailed accounting (most Publishers still provide for semiannual statements within 3 months after semiannual reporting period ends).

D. Advocate a net 30-60-day *pass-through* for subsidiary rights payments exceeding some reasonable base, such as $1000 (since these aren't calculated in the same manner as book sales, they shouldn't wait for semiannual book sale accounting).

E. Reserve against returns — 6 months/25% maximum (alt: after 1st two royalty periods, adjust reserve to reflect actual return rate).

F. Agent — all paid to agent vs. Publisher pays agent its fee and pay balance to Author: ideally you shouldn't wait for royalties to flow through agent; have right to require separate payments (i) after lapse of time (3-5 years) and/or (ii) after Author-Agent contract terminates.

G. Individual vs. joint accountings (if multiple book contract)

H. No deductions from "other agreements;" ideally account for each separate book with same Publisher separately.

12. Warranties, Indemnities and Liabilities

A. Warranties based on work *as submitted by Author*: no indemnity for Publisher's changes or contributions.

B. Author warrants no infringement (preferably to Author's "best knowledge").

C. Author warrants no libel or invasion of privacy (but in tricky situations consider requiring Publisher to assume responsibility: Publisher and its lawyers are generally more familiar with applicable libel law than Author so better positioned to assess and assume the risk).

D. Author warrants no errors in formulae, instructions or recipes (if feasible, make Publisher test before publication and assume risk).

E. If Author indemnifies, consider (i) pushing for right to hire lawyer and control defense – certainly *no settlement without Author's consent*, and (ii) limiting to final determination of breach rather than mere allegations of breach (Author is not an insurer and cost to defend baseless or frivolous suits should be the Publisher's cost of doing business) – in short, Author only indemnifies for actual *breaches*, not just *claims*.

F. Ideally, limit indemnity to fixed amount (e.g. lesser of royalties received or $5,000) or 50% of final judgment.

G. Author should not be liable for incidental or consequential damages, including lost profits.

H. If Author wins, Publisher bears costs above $____ (or 50/50 split).

I. Publisher may propose withholding royalties if claim made; ideally limit this so Author can use royalties to pay defense costs; require any amounts withheld to be segregated in interest-bearing account, and state when and how money released.

J. Neither may sue third parties for infringement etc. without consulting other.

K. Insurance protection: Request publisher to extend publisher's coverage to Author as an additional insured. (What is the deductible?)

L. Example: A prominent Publisher had authors pay *up to 20% of advance* for infringement and libel damages and attorney fees; 50% of legal fees if successfully defended.

13. Remaindering

A. No overstock sale for 18/24 mos.

B. Publisher pays at least 10% of net (unless sold below cost).

C. No remainder sale without offering Author right to purchase at cost.

D. No destruction of overstock without notice to Author, who may obtain by paying shipping costs (but no more than actual cost plus shipping).

14. Revisions

A. Generally applies only to nonfiction books including textbooks; except for textbooks in rapidly changing field, limit frequency (e.g., no more than once every 2-3 years).

B. If Publisher wants revision, Author is asked first (right of refusal); If Author refuses, Publisher may allow another to prepare.

C. If Author completes, the royalty should stay the same (vs. revert to base) (many publishing contracts increase royalties as sales reach higher levels; you don't want to be reset to the original lowest level just because it's a newly revised edition).

D. If third party revises, limit chargeback of costs (fee to reviser) to 25-50% of royalties otherwise due Author for the first revision and 50-75% for second revision (no payments to reviser should be deducted from monies due Author under *other* agreements).

E. If third party hired, require "work made for hire" treatment, prominent retention of Author's name for at least first two revisions, and identification of Author as original author in all future editions.

F. Limit frequency of revisions (e.g., once every 2-3 years).

15. Reversion, Termination and Out-of-Print Clauses

A. All rights revert to Author on termination of the agreement (subject to ongoing third party licenses) or if Publisher fails to publish (or otherwise exercise its rights) within 2 years.

- Consider requiring subsidiary rights that aren't exercised within 2-3 years after publication to expire and revert to Author.

B. Advances kept by Author (or repayment only from "first proceeds" received within the next 12-18 months).

C. Photos, drawings and other physical materials (and original manuscript, if it matters) returned to Author.

D. Author has a right to terminate and have rights revert if –

- no copies available for sale in the U.S. through normal retail channels or through major chains;
- not available in *trade* hardcover, *trade* paperback or mass market edition (availability only through book clubs or mail order only should not provide perpetual rights);
- not listed in Publishers [printed vs. online] catalogs; or
- Publisher sells fewer than X copies in single year.

E. After Author notifies Publisher that work is not in-print (as required), Publisher often has 3-6 months to get it back into print and avoid reversion.

F. Try not to let out-of-print reversion be defeated by electronic availability (including *print-on-demand*), as that may prevent reversion even if the Publisher does no promotion and has no sales.

16. Assignment of Rights/Obligations

A. Author may assign payments.

B. Publisher cannot assign publishing rights, except perhaps on merger or acquisition, or can only assign them to equally reputable publisher.

C. Consider treatment of rights in bankruptcy; consider seeking reversion.

17. Free Copies

A. Ideally 20-30 per edition (ideally the same for co-authors).

B. Author may purchase additional copies at 50% of list or at lowest discount price available (often no royalties on those purchases).

18. Option on Next Work

A. Author should be free to submit his/her next work anywhere, but many Publishers insist on a *right of first refusal* ("ROFR") (i.e., Publisher has option to match best offer); a preferred alternative is an *option to negotiate* over the next work ("Option"), rather than match competing offers (hard to tell second publisher that you can't accept its offer without first allowing your original Publisher to match it).

B. Option/ROFR should apply to Author's *next work*, not all succeeding works, and to works of *comparable type* (e.g. next SF novel, next work featuring same character, next college-level microeconomics text), not to all Author productions (but note: broader application may accelerate extinction of Publisher's rights on works the Publisher wouldn't want; it also may force Publisher to pay attention to a wider range of submissions).

C. Ideally activated by Author submitting to Publisher proposal and perhaps sample chapter, not completed manuscript.

D. If Publisher doesn't exercise ROFR within 10 days, or if parties don't reach agreement on Option submission within 30 days, Publisher has no further rights. (Avoid letting Publisher have right to delay responding to Option submission until 30/60 days *after first book published*: at worst, Publisher must respond after final manuscript of first book *accepted*).

E. Exceptions: Ideally this right will not apply to collaborations/joint works or where another Publisher approached Author with proposal.

19. Conflicting Publications

A. Prohibiting Author to publish on "same subject" is too restrictive, especially for academics and experts.

B. Should apply only to "substantially similar" works of same type: same subject, same audience (e.g., targeting children, for practicing professionals), similar length (e.g., book-length).

C. Should apply only for a reasonable time limit (e.g., for the three years following first publication of work).

D. For certain types of works (e.g., heavily researched textbooks) it may be fair to ask *Publisher* to agree not to publish a directly competing work itself.

21. Mediation/Arbitration/Governing Law and Venue

A. Litigation is costly; propose a non-litigious method ("alternative dispute resolution") to resolve disputes.

B. Mediation is a preferred first step, rather than mandatory resolution by a third party; but arbitration is a fair alternative after good faith negotiation (and/or formal mediation) have failed.

C. You will not convince the Publisher that the contract should be governed by the law of your home state (rather than the Publisher's jurisdiction); but it is worth proposing that proceedings take place in a more favorable or neutral forum (if not your home state, then perhaps in the city nearest the person against whom the claim is brought).

If you would like to discuss book publishing contract issues, please contact **Howard G. Zaharoff**.