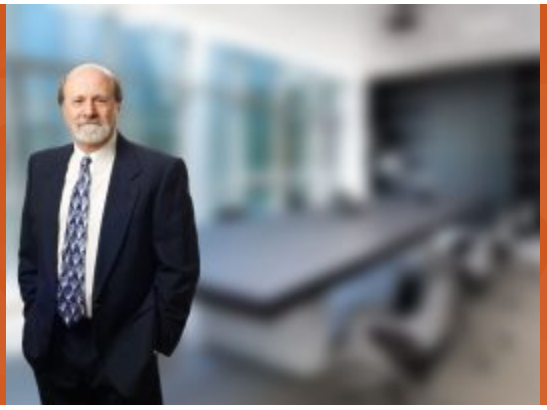
The Nuts and Bolts of Publishing Contracts

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May 05, 2006



For Harvard Medical School CME, May 5, 2006

I. Background Factors: Copyrights and a Changing Industry

A. Copyright Overview – Federal Law (Title 17, U.S. Code)

1. Subject Matter: Original "works of authorship" fixed in tangible form, including
   - Literary (including detailed plots and well-delineated characters)
   - Pictorial
   - Musical
   - Audiovisual
   - Other, e.g.: dramatic, choreographic, architectural, sound recordings, computer programs
2. Scope:
   - Reproduction
   - Adaptation
   - Distribution (first sale)
   - Public Performance
   - Public Display
3. Limitations:
   - Original creation of similar work (i.e., no copying)
   - Use of ideas, facts or principles
   - "Fair use" of copyrighted expression
   - Merger and scenes a faire (necessary or stock elements)
4. Duration:
   - Life of author plus 70 years
   - For works make for hire and pseudonymous and anonymous works: 95 years from publication or 120 years from creation
5. Ownership:
   - Author/artist (actual creator) owns unless:

- created within scope of employment
- creator signs work-made-for-hire or assignment agreement

6. Formalities:
   - Notice: Use proper notice on published copies, e.g.
   - Copyright © 2006 Howard Zaharoff
   - Registration:
     - Voluntary, but precondition to suit
     - Registration before infringement provides better remedies
     - Minimal cost – $30 plus deposit of "best edition" (2 copies published, 1 copy unpublished)

B. Book Publishing in Flux

1. Consolidation
   - fewer traditional markets
   - offset somewhat by new nontraditional markets
2. Globalization: New media, markets, and channels
   - One World: increasing importance of foreign markets
   - Internet distribution
3. MTV Nation (Age of Rapid Fire Images and Sounds)
   - publishers want movie and television rights
   - also want to be compensated like partner rather than agent
4. Digitization: Reproduction/Adaptation Technologies
   - xerography
   - digitization = flawless copying, easy modification/manipulation
   - email and the Internet
   - e-books and print-on-demand
5. Sample Problems
   - Electronic rights – defining scope and reasonable payment
   - Movie rights – should your Publisher benefit? How much and for how long?
   - When is a work out-of-print?

II. Book Publishing Contracts: Specific Clauses

NB. *Always start with due diligence* (A rotten contract with a great publisher trumps a great contract with a rotten publisher.)

A. Rights Granted

1. License, not sale: author owns copyright (except in academia); Publisher receives exclusive grant; Author reserves all rights not granted; rights revert on termination (generally when work out-of-print)
2. Avoid granting rights in medium, territory, or language Publisher can't exploit readily

itself or through affiliates

3. Big Issues:
   - movie/TV
   - electronic/new tech (distinguish ebook from interactive media)
   - reversion when "out of print" (beware of "print-on demand" and electronic availability)
4. Strategies:
   - Denial, approval rights, specific limitations – e.g., on scope, compensation and duration, including "use it or lose it" approach
   - where technology reduces costs, Author should also benefit
   - where Publisher is acting as agent, compensate it as such
   - accelerate payment of "licensing" royalties (if above minimum)

B. Satisfactory Manuscript: Author's Primary Responsibility

1. Be clear on topic/genre, age, length, deadline and (if possible) style
2. Avoid "satisfactory to Publisher"
3. Strategies:
   - substantive
     - "fit for publication" or "consistent with approach and style of proposal" or "reasonable satisfaction"
   - procedural
     - Editor edits and comments
     - Author has time to correct

C. Options & Noncompetes

1. Noncompetition clauses
   - narrowly define competition — e.g., no directly competitive book-length work on same subject for defined period
   - don't surrender Author's expertise
   - specify this does not apply to sequels or companion volumes
2. Options
   - limit class, e.g. next book-length work of fiction for middle readers
   - limit what's submitted, e.g., proposal and 2 chapters, not entire manuscript
   - option to negotiate, not right of refusal on "same terms"
   - short-term: e.g. 30-60 days after *submission* (not *publication*)
3. Benefit of Option: requires Publisher to consider your next book

D. Publisher's Duties: Prepare, Publish, Promote and Pay

1. Prepare
   - Publisher should provide editorial guidance and line editing during writing (preferably as chapters submitted)

- Minimum: Publisher can't just reject, must give detailed comments and chance to revise

2. Publish
   - Specify date (usually 6-18 months after submission/acceptance)
   - Specify printing (e.g., 2,500-5,000 first printing)
3. Promote
   - Ideal:
     - Publicity manager
     - Decent budget
     - National campaign (e.g. PW and NYT ads, front of catalog)
   - Minimum:
     - Included in catalogue and seasonal listings
     - use best/reasonable efforts to promote
   - Ask what the Publisher intends to do and, if possible, get it in writing
4. Pay
   - Seek Advance
     - reflects Publisher's capabilities and commitment
     - generally payable 50% on signing, 50% on acceptance (avoid payment on publication)
     - no refund unless fail to deliver entirely (or fail to deliver minimally competent draft)
     - First proceeds (advance refunded out of nextPublisher's advances/payments)
   - Royalty: Rates
     - hardcover – 10%, 12½% at 5K, 15% at 10K
     - trade paperback – 6/7½% to 25K, increasing to 9/10%
     - mass market – 5/8%, increasing to 10/15% at 50 -150K
     - e-books –

– traditional press: at least highest print rate
– e-book publisher: 20 – 50% net receipts
– e-book vanity press: 35% – 70% list/sales price

- academic & scholarly texts: 6 – 15% net receipts

- Royalty: Base (don't ignore!)
  - List (cover) vs. invoice (list less freight pass-through) vs. net price
  - Does rate or base vary with discount level or type of sale?
  - What percentage of this Publisher's books are sold at that discount or are "special" sales
  - Beware of publishers that customarily sell at deep discounts

- Royalties on Subsidiary Rights
  - UK/Foreign – Author gets 75/80%
  - First Serial – Author gets 90%
  - Other – usually 50/50
  - Electronic – see above (or "then-current standards"?)
- Bonuses, e.g., for NYT or PW bestseller; BOTM or Literary Guild selection; Pulitzer Prize or National Book Award; earns out advance in first year.
- Grants, e.g., for special travel or research expenses
- Publishers of scholarly works may require subsidy
- Audit Rights
  - Publisher agrees to maintain accurate records
  - Publisher provides semiannual statement of book sales
  - Publisher provides notice of licensing/sub-rights sales
  - Author can audit (if underpaid, get interest and costs)

E. Termination and Reversion

1. Contract endures for term of copyright, until work is "out of print"
2. (Copyright Act allows termination of grants after 35 years)
3. Publishers define "out of print" narrowly, e.g., book unavailable in any edition (and no licenses in effect) for 6 months, Author notifies Publisher, and Publisher fails to put back in print within 3-6 months.
4. Licensing, e-rights and print-on-demand mean books rarely out of print.
5. Redefine out of print as "book not available in ordinary trade channels in U.S." and/or sales/royalties for any 2 successive periods below minimum (e.g., 5 years after publication not selling 100 copies).

F. Representations and Warranties

1. 1. Standard Author Reps:
   - original and non-infringing
   - doesn't defame or invade privacy
   - doesn't violate any other rights (try to avoid – ask, what rights do you mean?; limit to U.S.)
2. Remedies:
   - defend Publisher or pay defense
   - reimburse for damages and costs, including attorneys fees
3. Strategies (Author isn't insurer):
   - Limit to work "as submitted"
   - Limit reps to "best knowledge"
   - Limit reimbursement to damages "finally awarded" by court based on finding of breach (not for nuisance suits)
   - Limit to U.S. laws and rights

- Limit indemnity to Publisher's direct losses; exclude consequential damage and lost profits
- Limit to portion (e.g. 50%) of award/costs ("we're partners")
- Limit to amount Author was paid (refund right)
- Limit withholding of royalties (allow Author to use proceeds to pay defense)
- Extend Publisher's insurance coverage (but beware of large deductibles)
- Consider Author insurance policy

III. Issue for Authors of Shorter Works

A. Scope of Rights: Avoid work-for-hire, limit electronic rights

B. Exclusivity (first serial rights) tied to publication by certain date

C. Avoid/limit liabilities and indemnities (promise originality only)

D. Electronic aggregation (inclusion in online and electronic databases)

1. Aggregation requires specific permission, unless Publisher owns "all rights" – see Tasini v. New York Times
2. If work posted previously, request payment for this use
3. Require adequate compensation for new uses (see ASJA recommendations)
4. Limit duration of aggregation rights (e.g., 1-2 years)

IV. Dealing with Agents: Get It in Writing

A. Appoint as "exclusive" agent *for identified works*, perhaps limited to certain rights (e.g., literary vs. motion picture); do not include "next work"

B. Author must approve publishing contracts (perhaps with minor exceptions)

C. Compensation based only on *Author's revenues derived from rights placed by Agent* (10-15% generally, up to 20% for foreign sales where Agent compensates subagents)

D. Control reimbursable expenses: invoiced and capped, approval of extraordinary expenses

E. Publisher pays Agent vs. Author (Agent should segregate funds and pay Author promptly)

F. Termination at will, on reasonable notice (e.g., 30 days to conclude publishing contracts in process) after reasonable trial (limit to 1 year)

G. Author's warranties limited to (1) authorized to enter agreement and (2) originality of covered works

H. No right to assign

V. Collaboration and Ghost-Writing Contracts

A. Clearly delineate rights (including who owns copyright – generally owned by main figure or co-owned – and creative control) and responsibilities

B. Clearly delineate compensation and credit (often a trade off)

C. Unwinding the collaboration: If the collaboration ends prematurely via death or disagreement,

who does what, who can do what and who owns what?

Keys to Successful Negotiation

A. Validation. Accept that negotiation is proper.

B. Knowledge. Understand –

1. 1. The legal and business environment
2. The Publisher's needs and interests
3. Your needs and interests.

C. Win/Win Philosophy. Seek solutions that meet both parties' needs and, as much as possible, desires.

D. Nonconfrontational Techniques

1. Plan how to identify problems, ask questions and make your points.
2. State your position, not your demands.
3. Don't overreact or cave in too quickly.
4. If it's more comfortable, communicate in writing.

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

Appendix A: Sources of Information

I. Books

Harper, Timothy, ed. 2003. The ASJA Guide to Freelance Writing. St. Martin's Griffin

Kopelman, Alexander and Judith Lavine. 1995. National Writers Union Guide to Freelance Rates and Standard Practice. Betterway Books.

Kozak, Ellen M. 2004. Every Writer's Guide to Copyright and Publishing Law (3rd Ed.). Henry Holt and Company (An Owl Book).

Perle and Williams on Publishing Law (3rd Ed.), Aspen Law & Business 2000 (updated through 2004).

Waller, James. 2000. National Writers Union Freelance Writers Guide.

II. Periodicals

Folio: The Magazine for Magazine Management (Cowles Media)

Publishers Weekly (Cahners)

Writer's Digest (F&W Publications)

The Writer (Kalmbach Publishing)

III. Web Sites

www.asja.org. Site of the American Society of Journalists and Authors. Contains articles, contracts watch and other materials.

www.authorsguild.org. Site of the Authors Guild. Contains database of case digests, position paper on electronic publishing rights and other useful information, including "Improving Your Book Contract: Negotiation Tips for Nine Typical Clauses."

www.foliomag.com. Site for Folio: magazine. Contains articles on magazine publishing trade.

www.ivanhoffman.com. Site of lawyer Ivan Hoffman. Excellent collection of articles on publishing and contract matters, for writers and publishers.

www.nwu.org. Site of the National Writers Union. Contains useful information for writers, including grievances newsletter, job listings and resource links (the most useful information, including guides on book contracts, agents agreements and collaborations, are for "members only").

www.publaw.com. Site of publishing Lawyer Lloyd L. Rich. Contains useful, readable legal articles on many topics, including Internet law, copyright, trademarks, publishing contracts, fair use, privacy and publicity rights.

www.sa2.info. Site of Society of Academic Authors. Contains how-to advice on textbook publishing, negotiation points, contract alerts, and citations to legal cases

www.sfwa.org. Site of Science Fiction and Fantasy Writers of America, Inc. Contains writing basics, Q&A, model contracts and "Writer Beware."

www.taaonline.net. Site of Text and Academic Authors Association. Contains organization information, industry news and members only section.

www.writersdigest.com. Site for Writer's Digest, a monthly writer trade magazine. Contains tips and Q&A on craft and business of writing.

VII. Trade Groups

American Society of Journalists and Authors

Authors Guild

The Copyright Society of the U.S.A.

National Writers Union

Science Fiction and Fantasy Writers of America

Society of Children's Book Writers & Illustrators

Text and Academic Authors Association