

Online Contracts:

Book Publishing in the Age of the Internet

By: Howard G. Zaharoff
May 15, 2001



This article appeared in Writer's Digest Special Issue Publishing Success, May 2001

If you're an author wondering about e-books, let's start with the bad news: Most people won't read long text from computer screens, and dedicated e-book readers (like the Gemstar REB series) are costly (\$300-\$700) and few. So unless you're Stephen King (and perhaps even if you are), you won't make big bucks overnight as an e-book author.

But there's good news, too: The potential market for electronic books is huge. Experts believe that, within five years, the market will be hundreds of millions or billions of dollars.

And for authors, the really good news is that the contracts used by click-and-order publishers often offer favorable terms and opportunities unavailable from brick-and-mortar publishers.

Still, writers must be wary when reviewing e-publishing contracts. This article will discuss five key issues writers should consider when evaluating their e-publisher's standard terms.

Due Diligence

But first, an important aside: Just as you wouldn't judge a book by its cover, you shouldn't judge a publisher entirely by its contracts. Of course, contracts are important, suggesting how the publisher will treat you in the long haul from manuscript submission to Oprah appearances. But don't just read a publisher's contracts and promotional materials, ask the following questions.

- *What kind of e-publisher is this?* Is it a true publisher of original works, an electronic distributor of previously published books, or just a subsidy press allowing all comers an electronic outlet for their works?
- *What is the publisher's reputation in the world at large?* Is it known for original books of a quality equal to traditional presses? Or, no matter what it claims to be, is it considered a vanity press, streaming over the Internet anything that gullible authors will pay to have published?
- *What is its reputation among its authors?* Do they generally rave about the publisher's responsiveness and sensitivity? Or do they rail against its indifference and irresponsibility?
- *How does it combine technology and aesthetics?* Prefer e-publishers whose web sites and products are attractive, user-friendly and secure.

How do its books sell? It's great if a publisher offers a 70% royalty on e-books; but if its typical author only sells 50 books per year, that fantastic rate will yield little income.

Some fine publishers have horrible contracts, while some undesirable publishers have wonderful forms. So make contract review part of, but not the whole of, your due diligence.

Money Matters

There's good news for writers on the money side of e-publishing. To appreciate how good, consider the traditional book deal: The author pays nothing; may get an advance that ranges from one or two thousand to \$20,000, \$40,000 or more; earns royalties that range from 5% (low paperback range) to 15% (high hardcover range); and is typically paid twice each year. (Beware: the rate should be a percentage of the list price; but some publishers pay on "net" price or amount received, which may reduce the amount paid the author by 40-60%).

The relatively low (5-15%) royalty rate results from the high cost of traditional publishing — print, binding, storing, shipping and returns are expensive, as are editing and promotion. The semiannual payments can mean that, for a book sold in January, the author won't get paid until late September.

Many e-publishers turn the above approach on its head. On the negative side, most e-publishers offer little or no advance. Indeed, often the writer must pay to start the project. For example, Booklocker.com (which bills itself as an online bookseller, *not* a publisher) publishes books electronically for free, but charges \$99 to set up a book for print-on-demand (POD) publishing. 1stBooks (at 1stBooks.com) charges a \$159 setup fee plus a \$300 deposit that gets returned only if 1stBooks sells 1,000 copies. It does offer promotional services, but charges anywhere from \$300 (Standard Promotion) to \$750 (Special Expanded Promotion).

On the plus side, many e-publishers apply a substantially higher royalty rate. For example, 1stBooks pays 100% of the first \$300 in sales, 40% of purchase price thereafter, and 30% for POD. Booklocker.com pays a whopping 70% of list price for books priced over \$8.95 and 50% for other electronic books, while offering 35% of list for POD books. Perhaps most significant, last fall Random House became the first major publisher to offer its authors a 50/50 split on proceeds from electronic sales. (But beware: e-books may be priced significantly cheaper than printed books, so the significantly higher rate may not yield a significantly higher payment.)

Finally, e-publishers usually pay more frequently (as all publishers should!). MightyWords.com pays writers a quarterly royalty (which is common), while Booklocker.com pays its authors on a monthly basis. eNovel.com, on the other hand, like traditional publishers, pays semiannually.

So what should a writer look for regarding payment?

- e-publishers may charge a modest fee for setup, particularly for POD; but if you're paying hundreds of dollars for the privilege of being published, you're probably paying too much. (Many authors' advocates vehemently oppose authors paying publishers any money at all.)
- The royalty offered should be substantially higher than traditional publishing, generally in the 25-50% (or higher) range. But remember
 - Royalties paid on list price are more valuable than royalties paid on the publisher's net gain after deducting expenses.
 - Price matters: If your book is too costly it won't sell; if it's too cheap, high rates won't yield much money per book. Will you have control, or at least a voice, in pricing decisions?
 - Royalties should be paid frequently. A monthly schedule is best; anything less than quarterly is a rip-off.
 - Royalties can't be judged in a vacuum: if you'll be getting substantial services (editing, cover art, promotion), expect a smaller royalty.

Rights Granted

In the good old days publishers asked mainly for the right to publish your book, sometimes in

multiple formats and languages. Now many publishers demand broader rights, often including motion picture and electronic rights. Though some authors and agents have the clout to keep various rights, the trend is for publishers to want them all.

Into this lopsided environment steps today's e-publishers, seeking mainly electronic text rights. Still, there are big differences among e-publishers. For example, under the iUniversity Press Publishing Agreement (visit iuniverse.com) the author grants an exclusive license "to publish the WORK in print and in all electronic media" and "to exercise or sell all the print and electronic subsidiary rights," but excludes "theater, film, and television rights, which the AUTHOR retains."

In contrast, eNovel.com acquires only electronic rights, including electronic books, POD, online services, and interactive and multimedia technologies; while under the MightyWords.com contract the "Content Provider" grants only a "non-exclusive worldwide license to create, market, sell, display, transmit and distribute digital reproductions."

So what should a writer look for regarding rights?

- The less you give up, the more you can do yourself or license others to do; so try to give up only those rights your e-publisher is qualified to exercise.
- In most cases this means granting only electronic book rights. If the e-publisher wants more, such as rights to create interactive products, be sure they have capability, experience and ideally some success in exploiting such rights.
- Try granting only *non-exclusive* rights so if your e-publisher is awful, you can still exploit these rights elsewhere. This may be hard to achieve for electronic book rights – many e-publishers want those exclusively – but should be negotiable for other rights.

Time Together

Traditional publishers generally retain publishing rights only for as long as the book remains "in print." This generally means that, if the book is no longer available from any source, the author may notify the publisher and, if the publisher doesn't make the book available within 3-6 months, the book is officially out-of-print and the author recovers the rights.

POD wreaks havoc on that traditional approach: If a book is always "available" – which POD makes possible – it may never be "out-of-print" even if the publisher doesn't advertise it and hasn't sold a copy in ages.

Some e-publishers and distributors are responding to this concern. For example, the iUniversity Press contract runs for 3 years, then renews automatically for one-year terms unless either gives the other 90 days notice of termination. (That's stated in Section 3, but beware: Section 19 also allows iUniversity to terminate publication at any time on 30 days' notice.) MightyWords.com's contract allows either party to terminate "at any time with or without cause upon 30 day notice." Booklocker.com allows either party to terminate "immediately by e-mailed request."

Not all publishers provide an easy exit. For example, eNovel.com allows rights to revert if "the Work is no longer available for consumers to download from the Publisher's web site" and, within 3 months after the author's request, the Publisher does not offer the Work from its web site. The ease of making a work available for download means that eNovel.com needn't lose any book it wants to keep, no matter how poor a job it's doing.

So what should a writer look for regarding the term?

- Given the uncertainties about e-publishing and e-publishers, shorter is probably better. As bad as it could be for your publisher to cancel before you've recouped your investment, it's usually worse to be stuck indefinitely with a publisher who doesn't perform.

- Look for short fixed terms (1-3 years) or for rights to terminate on 30-90 days notice. If you're paying money, don't allow your publisher an instant out.
- If possible, avoid granting rights that you can't terminate until the book is unavailable or "out-of-print" – that gives the publisher too much control.

Services Offered

Traditional publishers generally provide editing, cover design, promotion, and sales fulfillment, all without extra cost (that's why they keep 85-95%). E-publishers are all over the lot, some offering these services without charge, others offering them for a fee, still others not offering them at all.

For example, regarding what many consider the publisher's penultimate duty – to edit – eNovel.com, like a traditional press, includes among its Free Standard Publishing Services "editing services provided by the eNovel.com Editing Staff."

In contrast, most of the above publishers claim they're only vehicles for self-publishing. Thus, the MightyWords.com contract states: "All copies ... shall faithfully reproduce the content, layout, pagination, and covers specified in the Material provided by Content Provider." Similarly, 1stBooks proudly trumpets: "No one edits your manuscript and you retain all rights and control of content."

Edit-less publishing is fine if you write flawlessly or need an electronic outlet for a previously published book. But it's not fine if you're an ordinary writer trying to publish a new book: No offense, but few writers can get by without serious editing.

Editing is only one service real publishers offer. Two other important services are presentation and promotion. For example, eNovel.com's free services include standard cover and interior templates, while Booklocker.com offers to use author-provided art, provide a free "attractive generic cover," or design a cover for \$95.

Regarding promotion, eNovel.com offers to list books on Internet retail sites, such as Amazon.com and BarnesandNoble.com, and to publish a synopsis, author bio and photo, and excerpts for public sampling. Meanwhile, 1stBooks advertises "an entire department dedicated to helping promote your book," and its contract promises "reasonable efforts to electronically market and sell the WORK." On the other hand, iUniversity Press merely states that it "may post and publish pertinent information regarding AUTHOR or WORK." Pretty loose, that.

So what should a writer look for regarding support?

- Decide what types of services you need, such as editing, document presentation and promotion.
- Seek out publishers who provide these services or, if not, can help you find them elsewhere at reasonable cost.

Security Priorities

Many authors avoid e-publishing out of fear that, once digital copies of their works enter the market, thousands of pirated copies will quickly follow. What good is a 70% royalty rate if 90% of your readers get their copy of your book free from a buddy over the Internet?

But security technologies are increasingly available: just be sure you deal with e-publishers who are sensitive to that issue. For example, MightyWords.com advertises that it uses a lock-and-key encryption process that ties each copy of your work permanently to one computer. Indeed, a recent federal law makes it illegal to break security features, which could help deter the rampant

copyright abuse that has plagued the Net in its early years.

The above issues are not the only ones that matter when evaluating your e-publishing options. For example, can the publisher amend the contract at will (Booklocker.com can)? Are you subject to suit in far off places (Booklocker.com forces you to sue in Bangor, Maine, while iUniversity requires arbitration in San Jose, California)? Are you restricted by noncompetition or option clauses? Are you assuming significant liability? No contract review is complete without evaluating all the terms.

So what is the final message? Mainly, deal with reputable publishers who demand nothing unreasonable and offer what you need, and be sure you can escape the contract if things turn out differently than you expect — as they usually will.

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