

Getting What You're Worth

Find out what to expect and how to get the best deal you can, using this lawyer's guide to publishing contracts.

BY AMY COOK

"No one's ever questioned this before."

"That's our standard contract."

"Our lawyers won't let us change that."

Sound familiar? If you've ever negotiated a publishing contract, you've surely heard at least one of the above lines. But are they true? The first one: highly doubtful. The second: perhaps true, but don't let that dissuade you from proposing a better deal. And the third? Well, yes, it's probably true.

Editors, like hotel clerks, don't always offer you the best they've got right off the bat—you must politely keep asking if they can do better. Publications usually have a range of contracts. To get a good one, you must persevere and know the industry. Consider joining organizations such as The Author's Guild (www.authorsguild.org), National Writer's Union (www.nwu.org) and American Society of Journalists and Authors (www.asja.org). The ASJA, in particular, is an excellent source for contract information through its Web site or free e-mail subscription. And, of course, you'll want to keep your subscription to *Writer's Digest* current. The following are key points for negotiating publishing contracts and getting the best deal, no matter what you write.

Magazines and newspapers

Rights. It's best to sell "first serial" to a periodical. Selling only first rights allows you to retain the copyright and the ability to resell the piece. Some publications may try a rights grab by proposing work-for-hire or an all-rights contract, figuring it's just easier to own the work outright. If so, ask questions. Why do they need all rights? If they want to use the piece on a Web site, negotiate that separately. If they plan to reprint it in another company publication or an anthology, again, get this spelled out and determine how you'll be paid.

Some publications take all rights for only a limited time. Carolyn Kovaleski, the copyright, trademark and contract manager for The Taunton Press (which publishes magazines such as *Fine Gardening*, *Fine Cooking*, and *Fine Homebuilding*), says her company obtains all rights so the material is available for its Web site, promotions, direct mail or to license to third parties. But, she says, "Ninety days after we publish, writers are free to do with the text whatever they want."

Payment. Many writers are afraid to rock the boat, but it never hurts to ask for more money. Be businesslike and state why your experience or the marketability of the piece deserves more than the original offer. There's no magic formula for how to set your fee. It depends on factors such as the article's length, its importance to the publication, your stature as a writer and the value of your time.

Request to be paid on acceptance of the work or, even better, when you sign the contract. Kovaleski says that Taunton pays upon contract, although by that point, most articles have been well developed by the writer and editor. Don't agree to be paid upon publication. You have no control over when that'll happen, and you could be waiting a long time for compensation after you've completed your end of the bargain.

Acceptance and kill fee. Spell out as specifically as possible a description of the article, approximate length, whom you'll interview (if relevant) and deadline. Develop an objective standard for judging a completed assignment. Doing so makes it more difficult for an editor to reject an article because it didn't meet expectations. Even with a detailed description of the assignment, however, publishers may not end up using the article. Some writing organizations believe a contributor who competently completes the work should be paid in full whether or not the article sees print, and the contract should spell that out. While that's ideal, you may have to settle for a kill fee (commonly around 25 percent of the original fee). Be sure

the contract indicates that all rights revert to you if the article doesn't run within a certain time frame—say 18 months or sooner—if the information is timely.

Books

If you aren't working with an agent, be sure to have a contract adviser from a writing organization, an attorney or an experienced, published friend review the contract for you. Remember, though, that even if a professional handles this for you, it's still your responsibility to know what you're signing.

Grant of rights. Which rights are you granting? More than likely, the first version of the contract will enumerate every right the publisher's lawyers can think of. Your book's about the Black Plague? No matter. They'll want coloring and comic book rights. You've created *101 Sweet Potato Recipes*? The contract seeks theatrical and movie rights. Discuss which rights the publisher may actually use and limit the contract to those.

Warranties and indemnities. You'll be expected to warrant that the book is your original work, you own the copyright, it's not in the public domain, it won't libel anyone, it won't infringe on anyone else's copyright or rights of privacy or publicity, and so on. If you break any of these promises, you'll cover the publisher's legal fees if it gets sued. These clauses tend to strike terror in authors, but they're standard in most contracts. You could ask to be added to the publisher's insurance policy or to limit your liability. Deborah Werksman, an acquisition editor at Sourcebooks, points out, "The authors are the experts in their fields. We can't check sources of their work. If an author is uncomfortable with that clause, we'd prefer not to publish the book." She stresses, however, that suits against publishers and authors are very rare.

Advance and royalty rates. Publishers know that you know this is negotiable, so be prepared to counteroffer. The Author's Guild notes that most publishers are willing to pay—but not initially offer—an advance based on a formula that projects the book's first-year profits. The guild urges writers to bargain for the largest advance possible. Your proposal should take into consideration the size of the publishing house, your past sales (if applicable) and the marketability of this book. As for royalty rates, ask that they be based on retail price (not on net proceeds) and try to bump up those figures a few notches, too.

Expect resistance from the publisher. Sourcebooks' Werksman says she doesn't play games over advances and royalties. "I make a fair offer first off," she insists, adding that she doesn't low-ball with the assumption it will go up. "As an acquisitions editor, I have a sense of the appropriate terms for a project, and I also have constraints from the publisher."

Does the advance indicate how much the house wants a book? "I pursue only books I really want," Werksman says. "If we're lukewarm, we don't make an offer." The extent to which Sourcebooks will negotiate reflects the book's market potential.

Option on next book. Many contracts include clauses giving the publisher exclusive rights to your next book. From an author's perspective, the worst of these options stipulates the same terms and conditions as the current deal. But what if the original book becomes a bestseller? That would greatly increase your bargaining power on the next one.

Option clauses are generally negotiable. Best: Ask for the clause to be deleted altogether. Acceptable: If the publisher balks at that, restrict the option to only the next book of the same genre (nonfiction, history or travel guide, for instance). You'd still be free to sell your novel or memoir elsewhere. Bad: Don't let the current publisher have a right of last refusal (this requires you to wait for your original publisher to decline your new book, even if another publisher has offered you a contract). The situation is unfair to you and to the new publisher that's invested time and resources into trying to acquire your book.

Note carefully when the option period starts. Many contracts give a publisher 60 days to decide if it wants your next book, but that time period doesn't begin until after publication of the current book. This can be dangerous to your writing career. What if the book takes two years to release? Your book-writing career is stalled. Some publishers will allow the option period to start after they've accepted the current book. Finally, be sure you have to submit only a proposal or outline of the next book and, at most, one sample chapter, rather than the entire manuscript.

These tips should help you negotiate a better agreement with your publisher. Most important, be sure you fully understand the contract before signing. Even then, there may be times when you simply can't reach an acceptable deal. The wise writer must know when to walk away and know when to run ... to another publisher. **WD**

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