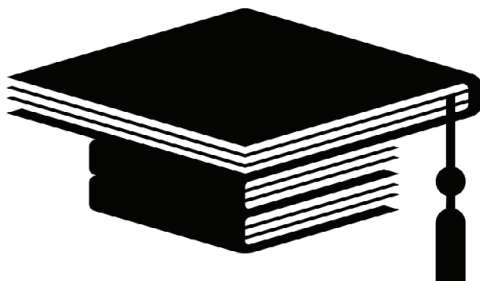


A close-up photograph of two people shaking hands over a wooden desk. The person on the left is wearing a light-colored, patterned shirt, and the person on the right is wearing a dark suit jacket over a white shirt. On the desk, there is a silver calculator, a pen, a notepad, and some papers. A window with a view of greenery is in the background.

**EXISLE
ACADEMY**

**LEGAL
CLARITY**





Legal Clarity

- Understand the ins and outs of publishing contracts, how to negotiate with a publisher, and what you should get as an author.
- Stay in control of the process so you negotiate from a strong footing, with professional-level insight into how the publishing industry actually works.

DISCLAIMER

This document contains general, not specific, advice. Because some people can be litigious, this disclaimer makes clear that we accept no responsibility and that you should always seek professional legal advice, which we are not giving here. It's quite possible that we are spouting total nonsense — you have been warned.

CONTRACTS

LICENCE TO PUBLISH

A normal principle in publishing contracts is that you own the copyright in the work you provide and licence to it to the publisher under the terms and conditions spelled out in the contract. The publisher will supply their contract, usually one that has evolved with the passage of time.

The contract will require you to grant the publisher a licence with exclusive rights, for forms of your work in specified territories, for a specific period. Often a publisher will seek world rights for all forms of your book. This means that they can publish it in any format, anywhere in the world, either directly or through sub-licence and translation deals in other languages. You cannot make those arrangements yourself.

So, what if you want your book published in a particular country and your publisher isn't sure if they can arrange that? Your options are to withhold the rights to that country/territory or give the publisher a period of time to arrange for the rights to be sold in that territory at the end of which those rights will revert to you. The publisher will hold copyright of the book in its published form, so other publishers will incur the cost of creating the book themselves from scratch unless they deal with your publisher. Generally, withholding territorial rights is not a good idea unless you know what you are doing in this market space. But asking specific questions about how rights will be sold and translations arranged is a good idea, as it creates a conversation you can continue to raise with the publisher and can prompt action from them.

LICENCE TERM

Your publisher's contract should specify the period of time for which they will hold the licence. Given that the sale of books can continue over ever longer periods of time as print-on-demand and reprints become easier and cheaper, your publisher is going to seek a long term. You might not want this. We have seen terms that range from five years in total to the legal term of copyright throughout the world. What do you want and why? You want to give your publisher enough time to get the book established in all the markets it's capable of, but not so much that they might forget about it and not put any effort into it after too short a time period. The less subject your book is to the vagaries of fashion and trends, the more this is important to you. So, if you have the definitive book on the flute and it's not going to go out of date, you will sensibly be more interested in keeping it alive than would the unknown author of another pretty book of cake recipes.

HOW MUCH CAN YOU NEGOTIATE?

Publishers' contracts generally following a standard template. You can negotiate a few things, but the more you want to negotiate, the more the publisher will ask whether your book is worth the hassle. How much does your publisher want the book? Who has the real power here? Best-selling authors obviously negotiate better terms than ordinary ones.

The worst outcome for authors can occur when a 'lawyer friend' is consulted about the contract. Usually, this is someone without experience in publishing who doesn't understand the industry and who therefore produces a long list of suggestions and requests. These lists tend to get binned by publishers. Focus on what really matters to you. Explain why. Some publishers are more flexible than others. Contract terms are generally not set by the person you are likely to be dealing with, so they either have to work within the constraints of their company's rules or seek exceptions from their management, which is not something many people like to do. Some clauses in contracts are more negotiable than others. Delivery dates are one example. A publisher would rather set a manuscript delivery date that they know you can meet rather than impose one they would prefer but which you will struggle to achieve. Your running late would cause more problems down the track. So, as we go through some normal clauses below the level of publisher's negotiability will be mentioned.

WARRANTIES AND COPYRIGHT

Somewhere in the contract you will need to sign off that it is original, e.g. not plagiarised at all, not libellous or scandalous, and that any instructions or recipes are safe. If your contract doesn't include phrases such as 'not willingly' or 'not knowingly' or 'to the best of your knowledge', you should make sure they're inserted. The key thing here is that your intentions are decent and that you have exercised all due diligence.

You can ensure that your book also contains a disclaimer, although most people will continue regardless. After all, you are still reading this document so saying that it's possibly total nonsense didn't put you off! You should consult in good faith on this matter.

A publisher will want you to indemnify them against copyright libel and scandalous charges and that indemnification will continue after the contract's life. There are numerous plagiarism checkers available on line these days, so it is very easy for a publisher to spot check your manuscript to see whether it is indeed original to you. If you are providing step-by-step instructions or recipes, you need to ensure that these have been tested by someone other than yourself so that you are confident that the instructions you have written are complete, easy to follow and deliver the required outcome.

You cannot hide important information from a publisher and act in bad faith. Similarly, a publisher should defend you in the case of litigation, and how the costs and profits of legal action are to be split should be made clear in the contract.

WHAT YOU PROVIDE WHEN

Your contract will include a delivery date by when you need to hand over your finished text (and illustrations if applicable). The publisher will give themselves the option to ask you to do more work on the manuscript, if they think it is necessary, before they officially accept it. Publishers very rarely reject contracted manuscripts. Usually this will only occur when, in their experience or opinion, the author has not consulted the publisher during the writing process and has strayed from the initial brief or concept, or ignored the publisher's suggestions and requests. To avoid finding yourself in this position, it's good policy to keep in touch with your editor during the writing process. Many editors will keep in touch with you, but you can also initiate this. Each publisher will have a specific house style they may ask you to write to; other publishers will handle this as part of the editing process once the manuscript has been accepted.

A surprisingly common new author error is to not take full notice of the agreed word length. If you have strayed from this by even a few thousand words, it can affect the production costs of the book and possibly its format. So if you want to change the agreed upon word count, make sure you consult with your publisher first so that they don't get a nasty shock. If you don't, you run the risk of your manuscript being rejected and, if an advance was paid, you will probably have to return it.

If you don't keep in touch and don't meet your delivery dates, publishers' contracts often allow for them to either get someone else to finish the job, with you paying for this out of the royalties your book is going to earn, or to cancel it altogether.

A good author-publisher relationship will ensure that any difficulties surrounding the delivery clause are ironed out with good will. Remember also that you do not have to take in all the publisher's editorial suggestions, but if you do not agree with them you should at least discuss it. Both you and your publisher want the best for your book.

CONTROL OVER PUBLICATION

How the book is designed, jacketed, printed and produced is the publisher's prerogative, especially if they are incurring all the costs as is the norm. But you should ensure that your contract gives you at least the right to be consulted. Good publishers work hard with their authors to get the design elements right and you should have an early conversation with them about how you and they envisage the book. If you had a luxurious hardback in mind and they thought it was going to be a paperback you clearly need to talk more.

ROYALTIES

HOW MUCH ARE YOU GOING TO MAKE?

It's an exceedingly small proportion of authors that makes anything approaching a reasonable living from their books. The returns most make when looked at from an hourly rate point of view are minimal. Like it or not, most nonfiction books are implicitly subsidised by their authors. For example, if someone's hobby was collecting cutlery, they might write and provide pictures for a book called *THE CHANGING FORK: A guide to cutlery through the ages*. This might have 344 author written/illustrated pages and retail for \$70. Say each page took about two days to get to the final stage, that equates to roughly 680 days. And now say that these were seven-hour days. That's closing in on 5000 hours of work in total. If the book does very well it might sell 5000 copies (although much less is more likely). An average discount would be 50% off the retail price, and let's say the author receives a (nowadays generous) royalty of 15% of what was invoiced to the retailer, i.e. they make around \$5 a copy. That's 5000 books x \$5 = \$25,000. This is a pretty good amount of money for a specialist book, but works out to an hourly rate of \$5. It's more likely that the royalty rate will be lower, and sales lower too. So, the author clearly shouldn't have written the book for the money!

However, if the author wants to lecture on the subject and charge speaker's fees and become a paid adviser to museums, and a TV and radio commentator on the subject of cutlery, his reputation as an expert will undoubtedly be secured by having the book published. Books are a very useful part of any expert's career building. A shrewd author would also purchase copies to on-sell at his lectures, thereby further enhancing his earnings (and these copies would be purchased at a large discount from his publisher).

Have a candid conversation with your publisher so you have similar levels of expectation about money. As you know, publishing is an extremely competitive activity and most publishers depend on just a few authors whose brand power sells lots of copies. The fact of the matter is that when you buy a book you are effectively paying for all the books you did not buy!

Publishers do in some circumstances pay advances, but this is less common than it used to be. Royalty clauses vary by publisher, but normally what you earn per sale depends on the markets involved. So, export sales are going to earn you less per copy than sales to bookshops in your own country. High-discount sales to anyone are going to earn everyone much less per copy. Other rights such as translation, or audio or ebook are all subject to varying royalty rates. It's reasonable to ask the publisher to explain why the percentages they state are set at the levels they are. Normally there is not much room for negotiation, unless you are a proven commodity in hot demand!

A good principle is to negotiate that the more your book sells in your core home market of bookstores — both bricks and mortar and online — the higher your royalty percentage can be. Publisher's costs are largely defrayed with the first few thousand copies sold (you will remember that most of their costs are fixed; design, editing and layout are all one-time-only costs). Putting a book through a printing press is not in itself that expensive — often around 1/10th of the published price. So if you ask for an improvement in your royalty rate after sales have reached say 5000 copies, you may well get somewhere. You are also more likely to receive this if you have a decent relationship with your editor and are actively engaged in sales and marketing efforts yourself.

YOUR OWN COPIES

Most contracts will supply you with around 10 free copies of your book upon publication. You can also ensure that you receive a good discount — 40 percent or more — on books that you buy. You may well be able to offset against your royalty account the amounts you owe your publisher for books you purchase. This should all be agreed at contract stage. Publishers are generally happy for you to sell your books yourself, as long as it's not to places they are already supplying. Be clear that they will incur the costs involved in shipping the books to you.

ACCOUNTING

Publishers pay either annually or twice a year. If your earnings are too low, under \$100 perhaps, to justify the cost incurred in getting payment to you, they may hold the payment over to a future royalty period or until the amount reaches the payment threshold. Your contract may well include a 'provision for returns' clause. Book are supplied to bookstores on a 'sale or return' basis.

This means that within one year of purchase the bookseller can return the books to the publisher and receive a full credit. Publishers budget for up to 30 percent of books to be returned in this manner. The 'provision for returns' clause basically enables them to withhold royalty payments for books they think are going to be returned anyway, effectively cancelling the sale upon which your royalty would have been based.

PUBLICITY

Publishers do not have any magic fairy dust to ensure that books sell well. Your book is also just one of many that their publicists will be working on at any one time. So, if the contract asks you to be available for publicity but you insist on just a few hours and little media contact, where do you the publicist's attention will go? It's therefore in your interest to read the publicity clause thoroughly and also ask for the publisher's expectations to be clarified. Ask what you can do what to help promote your book. Proactive authors build mutually beneficial relationships with their publisher.

If you are required to travel to promote your book, it's normal for the publisher to reimburse you the costs of this but be sure to clarify expectations. If you are envisaging a business class return air fare and the Hyatt Hotel and they are thinking of a one-way bus ticket and a room in a pub with a shared bathroom you will have some negotiating to do. A good clause specifies that travel and accommodation costs will be agreed by the publisher ahead of them being incurred.

OPTION CLAUSE

This clause requires you to offer the publisher your next — sometimes the next similar — book to them on similar terms to the one in the contract. There have been cases when this has been tested in court and the publisher has lost. Narrow it down so that you do indeed offer your next book to the publisher, but avoid exclusivity and express it on terms to be agreed. Publishers do not like to lose good authors and if the relationship works for you it's in your best interests to stay with the publisher. Chopping and changing publishers is a common strategic mistake that authors make. Booksellers often assume that the first publisher rejected the next book and so may not even stock the next one. Sales and publicity people who have worked to get your name established will not be there to help, and the new ones will have to start from scratch as there is no way your old publisher is going to assist the new one. So, consider the clause with care: give yourself the room to exit but be wise.

FALLING OUT, TERMINATION AND REMEDIES

Good business relationships do of course have a contract underpinning them but they are rarely referred to. To be successful, you need to help your publisher. You need to realise that you are competing with their other authors for their time and sales energy, so keep in touch and stay on top of your own book. Do not mentally hand over all responsibility to them.



You can try to specify that if the book is not available for more than six months, in the form most sales have been achieved in, all rights will revert to you if the situation is not remedied within six months of your written request. This effectively puts the book out of print. Publishers will be reluctant to do this, but if they really care they will remedy the situation so be persistent.

Your contract should also include clauses about what will happen if the publisher goes out of business or sells out to another business, and what happens to sub-licences such as translations if the rights are reverted to you. This can appear —and at times, is — complicated, but the simple truth is that if your book is making money for your publisher they will do what they can to keep you. Of course, the reverse is also true, so always keep communication channels open with your publisher.