CHAPTER 4

The Publishing Agreement, the Author Questionnaire, and Working with an Editor

If your query letter and, in the case of a book, your proposal, had the desired effect, you will receive an offer to publish your work (assuming you sent your material to an editor; if you sent everything to a literary agent, he or she will offer to represent you). In many cases, the initial offer will be verbal and will contain only basic details, such as how much you are going to be paid and when your article is due (if you're going to write an article), the rate at which your royalties will be calculated and the size of your advance (if you're going to write a book), or how they'll help you sell your writing and how you'll be charged (if the offer is from an agent). The initial offer will then be followed by a detailed written contract known as a publishing agreement (provided the offer was made by an editor—if the offer came from an agent, you'll receive an author–agent agreement instead; then, when the agent sells your work, you'll receive a publishing agreement as well).

Many first-time authors are so excited that someone wants to publish their work that they don't pay a lot of attention to the terms and conditions outlined in this agreement. Instead, they skim it, sign it, and send it back, without giving it a second thought. However, once an agreement is signed, it becomes a legally binding document, and some of the terms and conditions they have agreed to can, and usually do, have long-lasting consequences.

Signing a publishing agreement does more than legally obligate you to fulfill the requirements outlined in it. It's also the first step you take toward building a working relationship with your publisher. Shortly after returning a signed agreement, if you're planning to write a book, you'll probably be asked to complete and return an author questionnaire as well. And, you'll be expected to work very closely with an editor as you develop the manuscript for your article or book; he or she will be able to answer any questions you may have about preparing your material for publication, and it's their job to help you move your completed manuscript through the publication process.

This chapter is designed to help you understand some of the terminology that's found in most publishing agreements, to show you some of the questions you're likely to encounter on an author questionnaire, and to provide some basic guidelines that, when followed, can help you build a strong working relationship with an editor. It begins by taking you through the basic structure of a typical publishing agreement and introducing you to many of the terms and conditions that are commonly found in this important document. (Recommendations on ways to make many of these terms and conditions more favorable to you are also presented.) Then, it describes the purpose of the author questionnaire, and it shows you the types of information you might be expected to provide if you're asked to complete and return one to your publisher. Finally, it concludes with a discussion on things you can do when working with an editor to ensure that, together, the two of you will create an article or book that's the best that it can possibly be.

The Publishing Agreement

In their book, *The Writer's Legal Companion*, authors Brad Bunnin and Peter Beren state, "The author has the power to sell or not to sell [the right to publish his or her work]. The publisher has the money to pay for the author's exercise of that power. The publishing contract is the legal means by which power and money change hands." But, publishing agreements are much more than just instruments that are used to exchange money for power. They also provide the framework upon which most author–publisher business relationships are built. At the very least, they supply answers to the following questions:

- When does the agreement (and by extension, the author-publisher relationship) take effect?

- Who is legally bound by the terms and conditions of the agreement?
- How will the author's work be prepared for publication, and when will it be delivered?
- How and when will the author's work be published?
- Who will have final approval over the published work's format and appearance?
- Who will own the copyright to the published work?
- What rights to the author's work are to be granted to the publisher?
- How much and when will the author be paid in exchange for these rights?
- How long will these rights be tied up?
- What promises and guarantees is the author required to make?
- What happens if someone claims the author did something wrong (for example, infringed someone else's copyright)?
- What are the consequences if either the author or the publisher fails to comply with the terms of the agreement?
- When does the agreement (and consequently, the author–publisher relationship) end?

And, although authors and publishers rarely have serious disagreements, if a difference of opinion does arise, the publishing agreement forms the basis for resolving any and all disputes.

Given that they've been designed to provide the answers to these and other questions, publishing agreements tend to be lengthy and complex (most are typically ten to fifteen pages long, single-spaced). And reading one can be an exercise in boredom and frustration—particularly if you're unfamiliar with most of the terminology used. Nonetheless, it's imperative that you take the time to carefully examine any agreement you receive, and more importantly, that you understand the immediate and long-term ramifications of each provision it contains *before* you sign and return it. Because once an agreement is signed, you're legally obligated to deliver on the promises you've made in it—and for the price you have agreed to.

You're far more likely to end up with an offer you are satisfied with if you have a basic understanding of the key provisions that are almost always found in a publishing agreement—and if you know how many of these provisions can be altered to make them more favorable to you. Therefore, it's to your advantage to familiarize yourself with the basic structure, terms, and tenets that most publishing agreements employ.

And the remainder of this section is designed to help you do just that. But, in this case, it's also a good idea to heed the warning that "a little knowledge is a dangerous thing." The publishing agreement you sign can have a significant impact on your creative and financial future. Therefore, it's strongly recommended that you seek competent advice—either from an agent or from an attorney who specializes in copyrights and publishing agreements—before you sign a publishing agreement of any kind.

The Structure of a Typical Publishing Agreement for a Book

Although the wording in publishing agreements can vary (primarily because the writing styles of the lawyers that draft them differ), most adhere to a similar format. Typically, they begin with the title "Publishing Agreement," "Publishing Contract," or "Agreement" and continue with a preamble, in which the names and geographical locations of the parties involved are provided and the book to be published is briefly described. The term *party* is a lawyer's term that's used to identify the persons or businesses that are legally bound by a contract; the geographical location of each party is required because where the parties live and work often determines which state's laws will apply should a dispute between the parties arise. For convenience, many publishing agreements identify each party by name in the preamble and then refer to them as the "Author" and the "Publisher" throughout the rest of the document. Similarly, the book is often identified by its tentative title and referred to thereafter as the "Work."

The preamble is followed by a series of numbered paragraphs, referred to as "clauses," that spell out the specific terms of the agreement. Most publishing agreements contain anywhere from fourteen to twenty clauses, and some of these clauses contain multiple subclauses. The more common clauses found in a publishing agreement include:

The Manuscript Preparation and Delivery Clause

As the name implies, the *manuscript preparation and delivery clause* identifies what the author will prepare for the publisher and how it is to be delivered. This clause typically contains, at a minimum, three important subclauses:

1. *A description of what the author is expected to prepare and deliver to the publisher.*
   Most manuscript preparation and delivery clauses begin with a sentence or two that identifies how long the completed work will be in terms of number of words

or page count (or both) and how many illustrations, sample programs, and so forth will be in the finished book.

Check these numbers carefully and verify that they are accurate estimations—you will be expected to deliver a manuscript that, when made into pages, will result in a book that is very similar, in terms of page count and number of elements used (illustrations, sample programs, and so forth) to the book that has been promised. Keep in mind that factors such as book dimensions, margins, fonts used, and image resolution will determine the actual number of words that will fit on a printed page. So, if you're expected to deliver a specific number of pages, make sure you know the average number of words your publisher expects to see on a page so you can deliver a manuscript for a book that contains the agreed-upon page count.

If you plan to incorporate material in your manuscript that was written by someone else, you must also provide the publisher with the proper documentation that shows the owner of the material has given you his or her permission to use it. Generally, permission must be obtained before you use any material that's still under copyright protection, although occasionally you may be able to use short excerpts from someone else's work without permission, if the usage falls under what is known as the fair use doctrine. (More information about the fair use doctrine can be found in Chapter 7, Staying Out of Trouble.)

Most publishers have a form they expect you to use to obtain any permissions needed and usually those forms require a handwritten signature from the copyright holder. (Keep in mind that you'll first have to determine who the copyright holder is—which is not always an easy task—before you'll be able to get the signature required. So, the sooner you can start trying to get any permissions needed, the better.)

Note:

More often than not, permission to use copyrighted material is given in exchange for payment of some type of fee. The size of the fee is entirely up to the copyright holder, but is often determined by the amount of material being copied and the way in which the material will be used. In most cases, you will be expected to cover any costs associated with obtaining permission to use copyrighted material. So,

it's usually in your best interests to avoid using someone else's work unless it's absolutely necessary.

If you know in advance that you're going to use someone else's copyrighted material in your work, you may want to consult with a copyright attorney *before* you attempt to acquire the necessary permission. A good attorney may be able to help you bring the use of that material within the guidelines of the "fair use" doctrine so that permission and any associated fees is not required.

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2. *The date the author is expected to deliver all appropriate material.*
   The manuscript delivery date is extremely important to both the publisher and the author. From a publisher's perspective, there are catalogs to print, promotion and advertising campaigns to launch, work schedules to devise, and pre-sales obligations to be honored. If you fail to meet your deadline, some or all of this work will have to be rescheduled—a major undertaking that is likely to add to the cost of publishing your book. Furthermore, if your delivery date is based on the date of a major event, such as a conference or a software product release, and you fail to meet your deadline, you run the risk of missing an important sales opportunity. Because of this, many publishing agreements stipulate that if the author is unable to deliver the manuscript on time, the publisher has the right to terminate the agreement and insist that the author return any advances that have already been paid.

Note:

Some publishers are willing to extend the contracted delivery date if there is a good reason to do so (for example, because of illness, an accident, or a death in the family). But you can't count on this. If you know you're going to miss your delivery date, notify your editor as soon as possible; if he or she agrees to a new delivery date, get it in writing, as a modification to your publishing agreement. (If you can't get a new delivery date, look closely at the terms of your agreement. You may

be better off delivering a very rough manuscript on time rather than forfeiting an advance because you missed your due date.)

When agreeing to a delivery date, be realistic. Your book may take more time to write than you imagine; even with a lot of hard work, your first book may take twice as long to complete as you anticipate. Never sign an agreement with a delivery date you know you cannot meet—you'll only be setting yourself up for failure.

3. *A statement of what will happen if the author fails to deliver the appropriate material on time, or to the publisher's satisfaction.*
When a publisher signs an agreement to publish a book, the manuscript for the book often does not yet exist. Furthermore, a completed manuscript most likely will not be available for several months. Therefore, because the publisher has no guarantee that the author will produce a manuscript that's publishable, most publishing agreements specify that the author must deliver a manuscript that is "acceptable (or satisfactory) to the publisher in both form and content." This gives the publisher a way to terminate the agreement if, at a later date, it is decided that the author hasn't done his or her job, or that the book, no matter how well written, is no longer marketable.

A publisher can reject a manuscript for any number of reasons of "good faith"—such reasons include a belief that the manuscript is poorly written and would cost too much or take too long to revise into something publishable; that publication of the manuscript could subject the publisher to a lawsuit (for example, because it defames a company); or that there's something else, maybe not as well defined, that legitimately causes the publisher not to want to publish the book.

To ensure your publisher doesn't decide your completed manuscript is unfit for publication when it's delivered, correspond with your editor regularly and send him or her copies of individual chapters as they are completed. Ask for feedback on the quality and marketability of your work and, if problems are pointed out, ask for guidance on how to make the necessary corrections. Make sure your writing does not contain biased language or libelous statements, and that it neither plagiarizes nor infringes on someone else's copyright.

More importantly, make sure the manuscript preparation and delivery clause of your publishing agreement contains a provision stating that if your manuscript is deemed unacceptable for publication, your publisher must provide specific reasons as to why it was rejected. This provision should also give you an opportunity to make the appropriate corrections and resubmit the manuscript within a reasonable period of time. (Many publishing agreements already contain such a provision; if yours does not, insist on having it added.)

The Front Matter and Back Matter Clause

Front matter is a term that publishers use to describe everything that comes before the main body of text in a book; elements commonly found in the front matter include a title page, a copyright page, the table of contents, and a preface or introduction. *Back matter*, on the other hand, refers to material that appears at the end of a book, which can be one or more appendices, a glossary, a bibliography, and an index. (Front matter and back matter are covered in great detail in Chapter 10, Last Steps.)

Normally, the publisher is responsible for producing the title page and the copyright page, and many will generate the table of contents as part of the page makeup process. However, in most cases, the author is expected to provide the introduction and anything else that's needed for the front matter, as well as all of the elements that make up the back matter. And, often, the fact that the author must provide this material as part of a completed manuscript is stated in a subclause of the manuscript preparation and delivery clause—if it's not presented there, it can usually be found in a separate clause known as the *front matter and back matter clause*.

It stands to reason that the author should be the one to write the introduction to his or her book. After all, who better to explain why a book is important to its audience than the individual who wrote it? And, since most of the elements found in the back matter consist of information that is used to supplement the main text, the author is usually the most qualified to supply this material as well. However, when it comes to creating indexes, many authors prefer to let the publisher arrange to have a professional indexer do this job for them. But, this work does not come cheap. A professional indexer can charge hundreds of dollars to prepare an index for a book-length manuscript. And, unless the publishing agreement states otherwise, the associated costs may be passed on to the author in the form of charges against future royalties.

What can you do to make the terms of the front matter and back matter clause more appealing? First, decide up front whether you're going to do the indexing yourself or you are going to want the publisher to hire someone to do this work for you. If do you decide that you're going to create the index, bear in mind that the index for a book is normally prepared after the manuscript has been edited and page makeup has been performed, but before the book goes to the printer. Therefore, only a very short period of time, often less than two weeks, is available for index preparation. If you don't have the time and inclination to perform the work required within this period of time, have the wording of this clause changed to say that the publisher (not the author) will provide the index *at their expense*. This requires the publisher to both provide the index for your book *and* pay all expenses associated with index preparation, instead of passing the costs on to you.

Tip:

If you prefer not to do the indexing yourself and your publisher is unwilling to bear the costs of hiring a professional indexer to do this work for you, you may be able to require that the publisher purchase and retain a copy of the software you will be using to prepare the manuscript, so that you can use its indexing feature (assuming such a feature exists) to generate the index for your book. This will allow you to create the index as you write; then you can update the page numbers later, before the book goes to the printer. If you decide to create the index using this approach, you should also add a provision to your agreement that requires the publisher to supply you with a PDF file containing the final manuscript so you can quickly locate the appropriate page references that are needed to complete the index.

The Rights-Conveyed Clause

Ownership of a literary work is controlled through a bundle of rights which, collectively, are referred to as the work's *copyright*. The basic set of rights provided by a copyright include the right to reproduce the work, the right to create derivative works that are based on the work, the right to display the work in public, the right to perform the work in public, and the right to distribute copies of the work to the public. These basic rights may

be further divided in an almost infinite number of ways, according to format, language, territory, and term.

Initially, the author of a written work owns all of the rights to that work. However, he or she may transfer any number of those rights to someone else; the *rights-conveyed clause* (also referred to as the *grant of rights clause*) is where the author transfers or *grants* one or more rights to his or her work to the publisher.

Essentially, two types of rights can be granted in a book publishing agreement: *primary rights* and *subsidiary rights* (or *sub rights,* for short). Primary rights typically consist of only those rights that the publisher actually intends to use. For example, in the United States, primary rights normally include just those rights that are needed to publish a work in hard or soft cover, within the United States, its possessions and territories, and in the English language. Subsidiary rights, on the other hand, usually consist of the following:

- **First serial rights.** The right to publish all or part of the book in a serial publication (such as a newspaper or magazine) *before* the book is published. First serial rights are sometimes called *first periodical rights***.**
- **Second serial rights.** The right to publish all or part of the book in a serial publication (such as a newspaper or magazine) *after* the book is published.
- **Newspaper syndication rights.** The right to allow publication of all or part of the book in multiple newspapers, usually by way of a syndication service.
- **One-time rights.** The right to publish all or part of the book one time only. (Often used after the first serial rights have been sold.)
- **Reprint rights.** Usually, the right to allow another publisher to publish an edition of the book that differs in quality and price from the original version. However, in academic publishing, reprint rights may refer to the right to sell reprints of an article or parts of a book for classroom or similar use. (If this right is explicitly mentioned in your publishing agreement, make sure it's meaning is defined.)
- **Translation and foreign rights.** The right to publish or allow another publisher to publish the book in a language and/or country that is different from the language and country in which the book was originally published.
- **Book club rights**. The right to sell the book directly to book clubs or to allow book clubs to publish their own edition of the book. (Money usually isn't the publisher's motivation for selling a book to a book club. Instead, such a sell is

often made for the endorsements and free publicity the book will get in book club ads.)

- **Direct mail or direct sale rights.** The right to sell the book directly to customers without going through a bookstore. (The method of sell is typically by means of a coupon in a magazine, newspaper, brochure, or an advertisement in another book produced by the publisher.)
- **Condensation, digest, and abridgement rights.** The right to publish or allow another publisher to publish an abbreviated or condensed version of the book. (*Reader's Digest* is an example of an organization that might purchase these rights.)
- **Anthology rights.** The right to publish or allow another publisher to publish all or part of the book in an anthology. (An anthology is a book or other collection of selected writings by the same or a variety of authors, usually on the same subject.)
- **Bundled sales rights.** The right to sell the book as part of a "bundle" of products, typically over the Internet. (This right allows a publisher to make your book part of an electronic aggregate that most likely will include works by other authors and possibly even an entire library of books.)
- **Large print rights.** The right to publish or allow another publisher to publish the book in a large type size.
- **Braille or talking book rights.** The right to publish or allow another to publish the book in a format that benefits those whose sight or hearing is impaired. (The United States Library of Congress, as an act of generosity, usually exercises this right without paying the publisher or author.)
- **Special edition rights.** The right to publish a special edition of the book, which is typically used by schools, universities, and libraries.
- **Dramatization, motion picture, and broadcast rights.** The right to create a motion picture or television program based on the book (sometimes called *performance rights*).
- **Sound reproduction and recording rights.** The right to record a nondramatic reading of the book. (Recording rights are required to produce a book on tape, CD, or MP3.)
- **Merchandising rights.** The right to license characters, or other discernible aspects of the book, for use on or with other products. (Merchandising rights are frequently used with children's books and juvenile fiction.)

- **Premium and commercial usage rights.** The right to license an edition or adaptation of the book to promote or enhance another product.
- **Computer and electronic media rights.** The right to sell and distribute the book in electronic format. For example, this could be the right to sell and distribute the book as an electronic document on CDs or DVDs, to store the book in a database that can be accessed on demand, to publish the book in a format that can be downloaded to an electronic reading device like Amazon's Kindle and Barnes & Noble's Nook, or the right to publish or archive the book on the Internet.

Note:

Since technology is rapidly changing, it's not possible to provide a precise definition of computer and electronic media rights. Because of this, many publishing agreements contain a "future technology" provision that grants the publisher the right to exploit the book in "all forms of electronic media including those not yet known but later discovered." The purpose of this provision is to try to ensure that electronic rights include the right to create a derivative work in a technology that may not have been developed or even contemplated at the time the parties signed the publishing agreement. Often, however, such provisions aren't limited to electronic media; instead, they grant the publisher the right to exploit the book "in all media now known or hereafter developed."

An important issue in any publishing agreement is whether the grant of rights to the publisher is to be complete and exclusive (which means only one licensee at a time can own and exercise them) or limited in one or more ways. The length of time for which rights will be granted, the territory in which the publisher may exercise the granted rights, and the publisher's ability to grant the rights to others are also issues that must be taken into consideration.

Most publishers will ask for full and exclusive rights to print, publish, republish, distribute, display, and transmit the book in whole or in part, throughout the world, in English and in other languages, in all media of expression now known or later

developed, for the full term of the copyright. They will also ask to be able to grant those rights to others.

Although it's usually not in your best interest to give up all rights without negotiation, when it comes to technical books, the publisher is often in a better position than you to exploit many of the subsidiary rights to your work. However, you may be able to retain some control by asking for the right to review and approve the publisher's exercise of subsidiary rights, or by asking that all or select rights revert back to you if the publisher doesn't exercise them within a stated period of time, say one to two years after publication.

If you think there is a possibility that, at some point in the near future, you might use some of the material in your book to develop a magazine article or series of articles, you may want to hold onto second serial rights. It's also a good idea to specify that, if the publisher decides that demand for your book no longer warrants its publication (or if the amount of royalties you are paid drop below a certain value), all rights granted will revert back you.

The Author's Warranty and Indemnity Clause

From a legal perspective, a *warranty* is a promise made by one party to another that certain facts or conditions are true. An *indemnity*, on the other hand, guarantees that a party will be compensated should they suffer harm or loss as a result of an invalid warranty, or suffer other harm caused by the other party. Thus, the *author's warranty and indemnity clause* of a publishing agreement frequently starts out with the author making a promise to the publisher that the following statements are true:

- That he or she has full power and authority to enter into an agreement with the publisher.
- That he or she owns all rights to the work and has the full power and authority to grant any or all of those rights to the publisher.
- That, aside from any material that was (or will be) taken from the public domain or from other sources for which he or she has been given (or will acquire) permission to use, the work is original.
- That he or she has obtained (or will obtain) any written permissions needed to publish the work.
- That the work has not yet been published and is not in the public domain.
- That the work does not (or will not) contain libelous or obscene material.

- That the work does not (or will not) contain formulas, recipes, or instructions that, if followed, could cause injury or harm.
- That the work does not (or will not) infringe on any trade name, trademark, or copyright.
- That the work does not (or will not) violate any right of privacy, any personal or proprietary right, or any common law or statutory right.
- That all statements made in the work that are declared to be true are indeed true.

This is usually followed by an indemnity statement that says the author will hold the publisher, as well as its agents (anyone who works for the publisher) and its licensees (anyone who has been granted rights associated with the work by the publisher), harmless from any loss, injury, liability, and/or expense that might result from a claim that the author failed to uphold one or more provisions of the warranty.

In other words, if a claim is made that the author violated the warranty (say, for example, someone claims the author's work contains material that infringes on their copyright), the author agrees to bear the full financial burden associated with defending or resolving the claim. And, because the indemnity provision often leaves control of legal defense or settlement negotiation to the publisher, the author can wind up owing the amount of a court judgment or negotiated settlement, even if he or she doesn't agree with the defense strategy used. Worse, the author may also be responsible for the cost of defending obviously fraudulent claims. Furthermore, in many cases, the publisher has the right to withhold the author's royalty earnings until a claim has been resolved, regardless of whether or not the claim is valid.

So, what can you do to negotiate a more equitable author's warranty and indemnity clause? First, limit the scope of your warranty by adding the qualifier "to the best of the Author's knowledge" to the author's warranty statement. Publishers will often accept this change because it makes such obvious sense. They may, however, require you to warrant that the work is original (because that is something you ought to know), while allowing you to make the other warranties "to the best of your knowledge."

Second, ask for a contract provision that limits financial liability to only those claims that are determined to be valid, either by a final court judgment or by a settlement agreement to which you have given consent. If a claim is nothing more than a frivolous lawsuit, you should not have to bear the costs of defending it. (And the publisher should be in a position to insure against false claims.)

Finally, ask for a provision that specifies that the publisher is only allowed to withhold royalties for an amount that is reasonably sufficient to satisfy a claim that is likely to be found valid. If possible, try to limit your potential liability to the amount of your advance; on a book for which you received an $8,000 advance, your potential liability should be $8,000—not the roof over your head. Also try to limit the withholdings to earnings from the sale of the book that is the subject of the claim only; some agreements give the publisher the right to withhold earnings from the sale of *any* books that an author has written for them. If you end up writing more than one book for the same publisher, this prevents a claim against one book from affecting your earnings from the sales of other books.

Important:
Publishers often buy defamation and liability insurance to protect themselves against lawsuits. It's called *publisher's special perils insurance*, and it's expensive—most authors can't afford it. However, in 1982, a major New York publishing house started covering authors under their policy, and other publishers have since followed suit. If your publisher has this insurance, ask to have your name added as an *additional insured*. Publishers that carry the insurance can often provide coverage to their authors, through a rider attached to the publishing agreement. Although the protection this insurance offers isn't perfect, it does protect against the possibility of ruinous judgments or settlements. So, ask for it, even if you think no chance of a claim against your book exists.

The Publication Clause

Although publishers might be under an "implied good faith" obligation to publish and promote a manuscript they have accepted, they may not be legally required to do so unless they have agreed to honor this obligation in a legally binding agreement. (Different courts have reached different decisions on this point.) Consequently, most publishing agreements contain a *publication clause* that obligates the publisher to publish and promote an author's work, within a reasonable period of time and at the publisher's expense, once a publishable manuscript has been received.

A "reasonable period of time" can be anywhere from three to eighteen months and depends upon the size and editorial requirements of the manuscript, the size of the publisher's editorial staff, and where the completed book fits in the publisher's preplanned release schedule. (Small publishers are usually far more flexible about release schedules than large publishing houses; larger publishers often plan their book lists over a year in advance.)

It's important to note that changes in typesetting and printing technology have made it easier for publishers to get a book out within a few months (and in extreme cases, within a few weeks) after an acceptable manuscript has been received. Generally, a manuscript is considered "acceptable" if it's well written, submitted on time, is neither significantly shorter nor longer than originally planned, and doesn't contain material that can potentially subject the publisher to a lawsuit.

Ideally, the publication clause should include a deadline by which a manuscript is to be published once it has been accepted (say nine to twelve months). Having a deadline gives the author the opportunity to rescue a stalled book—most publication clauses stipulate that if the publisher fails to publish the manuscript within a reasonable time limit, it must either publish the work as soon as it is deemed practical or pay the author any advance monies due, revert all rights back to the author, and terminate the publishing agreement.

Important:
Some publication clauses contain wording that states that if the publisher decides not to publish the manuscript and terminates the publishing agreement, and the author then finds someone else to publish his or her work, any monies already received must be repaid. If the publication clause in your publishing agreement contains this type of wording, it's in your best interest to either have this provision removed, or to limit the time frame to which this provision applies (say, to three months after the agreement has been terminated).

The Copyright Notice Clause

Copyright is a form of protection provided by the laws of the United States (and other countries) that prohibits others from copying original literary, dramatic, musical,

artistic, and other creative works without the express permission of the copyright owner. Copyright protection is secured automatically whenever a work is created; publication or registration is not required. However, for a work to be considered "created," it must be fixed in a tangible form of expression (such as a book or DVD) that can be readily exchanged with others.

The *copyright notice clause* of a publishing agreement is where the publisher promises to include a notice in the printed book that states that all text and illustrations contained in the book are protected by copyright law. In most cases, this is also where the publisher agrees to register the author's work with the U.S. Copyright Office (although some copyright notice clauses merely give the publisher the right to register the work without requiring them to do so).

Even though registration is not required for copyright protection, there are certain advantages to registering a work created in the United States with the U.S. Copyright Office. For example:

- Registration establishes a public record of a copyright claim.
- If made before or within the first five years of publication, registration will establish *prima facie* (self-evident) evidence in court of the validity of a copyright claim and of the facts stated in the copyright registration certificate.
- If made within the first three months after publication or prior to an infringement of the work, registration will allow the copyright owner to seek statutory damages and attorney's fees in U.S. court actions. Otherwise, U.S. courts can only award actual damages and profits to the copyright owner.
- Copyright registration can be recorded with the U.S. Customs Service to protect the copyright owner against the importation of infringing copies.

Works of U.S. origin *must* be registered with the U.S. Copyright Office before a copyright infringement suit can be filed in court. Therefore, most publishers will file the paperwork necessary to register a new book either shortly before or just after it is published.

Although no hard and fast rule dictates who should own the copyright to a published work, most publishers prefer to register the copyright in their name. But, since all a publisher needs to publish a book is the legal right to do so (which they get by way of the rights-conveyed clause), there's no reason why the copyright for your book shouldn't be registered in your name instead. If the copyright is registered in

your name, your name will appear on the copyright page instead of the publisher's, even though you've transferred the right to publish your book to them. And, if your book goes out of print or the publisher's right to publish the book ends (for example, because the publishing agreement is terminated), it can sometimes be much easier to have the rights reverted back to you if the copyright registration certificate shows that you owned them originally.

More importantly, by having the copyright registered in your name, you retain ownership of your work. If you give the copyright to the publisher (as opposed to just granting them the right to publish your material), you transfer ownership of your work to the publisher *for the life of the copyright*. This means that, as a matter of copyright law, the publisher could alter, adapt, license, sell, or do practically anything else they wanted to your work without consulting you first, compensating you, or even giving you proper credit. (Such action might still be restricted by provisions of the publishing agreement, which means that any objection on your part would have to be addressed under contract law, which can be harder to enforce than copyright law and in many cases doesn't result in repayment of your attorneys' fees.) And, because you gave up the copyright, even if only temporarily, you would be limited to claims under breach of contract, with no legal recourse under copyright law to regain control over your work.

Important:
The issue of copyright ownership is often addressed in both the rights-conveyed clause and the copyright notice clause. Therefore, if you want to retain copyright ownership of your work, you must change the copyright notice clause *and* remove any copyright conveyance provision from the rights-conveyed clause.

The Royalties Clause

A *royalty* is a payment that's made to the owner of a right, in exchange for the use of that right. And since the author of a written work almost always owns the rights to that work (at least, initially), it has long been a tradition for publishers to pay authors royalties for the right to publish their work. Consequently, most publishing agreements contain a *royalties clause* that specifies how the author is to be compensated for the rights that were granted to the publisher under the rights-conveyed clause of the

agreement. (Occasionally, an author will sell the rights to his or her work for a one-time fee, in which case royalties will not be paid. But, that's more common with articles than it is with books.)

Usually, royalties are based on a percentage of the income (not the profits) the publisher receives from the sale of the author's work. In most cases, this percentage, known as the *author's royalty rate*, will vary depending upon whether the work was published as a trade book (a hardback or paperback book sold through bookstores and online booksellers) or a mass-market book (a 4 × 7-inch paperback sold primarily at newsstands and in grocery stores, drugstores, superstores, and the like).

For example, author royalty rates for trade hardcover books typically start at 10 percent of the cover price (also referred to as *list price* or *suggested retail price*), whereas rates for trade paperbacks are usually lower, with some publishers offering as little as 5 to 7 percent and others offering up to 12 percent or more if they really want to publish the book. Rates for mass-market paperbacks typically begin at 5 percent of the cover price, although some publishers may pay as little as 4 percent and others may pay up to 10 percent if the book is a mass-market original.

Royalties for technical books and textbooks, on the other hand, often start somewhere between 10 and 15 percent of the publisher's *net* (or *gross*) dollar receipts, which is the actual dollar amount the publisher receives when a single book is sold. (Net dollar receipts for textbooks can be anywhere from 60 to 80 percent of the book's cover price; for technical books, it's usually 50 percent of the cover price.) It's also common for publishers to define one or two steps at which royalty rates will increase. For example, a trade hardcover book might have a royalty rate of 10 percent for the first 5,000 copies sold, 12½ percent for the next 5,000 copies sold, and 15 percent for all copies sold thereafter. (With a trade paperback, the royalty rate may start at 6 percent and climb to 10 percent at similar 5,000-copy intervals.) This pattern of increasing royalty rates is known as *escalation*.

To determine the amount of royalties an author should be paid, publishers typically multiply the author's royalty rate by the book's cover price or net dollar receipts. The results are then multiplied by the number of books sold within an accounting period to yield the dollar amount the author should be paid. In mathematical terms, the calculations used look like this:

(Royalty rate × Cover price) × Number of books sold = Author's royalty

or

(Royalty rate × Net dollar receipts) × Number of books sold = Author's royalty

Thus, if the cover price of a technical book is $70.00 US and the author's royalty rate is 12 percent, the author will receive $4.20 for each book sold ($70.00 × .50 = $35.00 net; $35.00 × .12 = $4.20). And, if 320 books are sold within a single accounting period, theoretically, the author will receive $1,344.00 US in royalties for that period (320 × $4.20 = $1,344.00). In reality, however, the amount of royalties actually paid will differ considerably from the value obtained by performing this simple calculation. That's because the royalty rate used can vary greatly depending upon how the books were sold. The amount paid can also vary depending on what deductions the publisher is allowed to take when performing the calculation. When royalties are calculated based on cover price, the publisher is usually allowed to decrease the total sales by the amount of returns predicted (see the discussion on reserve for returns under the "Accounting clause.") On the other hand, when royalties are calculated based on net income, the publisher may deduct shipping costs and taxes.

Trade book publishers assign each book a retail price, but normally they sell books to wholesalers and booksellers at a discounted rate. For example, if a book has a cover price of $29.95 US, a publisher may sell it to a bookseller like Barnes & Noble at a discount of 45 percent (or for $13.48). Such discounts can range from 20 percent for very small orders (typically, one to five books), to as much as 40 to 50 percent for larger purchases. In addition, most publishers allow buyers to mix titles when placing an order, making it easy for them to purchase enough books to qualify for the largest discount available. Consequently, the majority of sales to wholesalers and booksellers are made at a discount of 40 to 50 percent of the cover price.

In most cases, the royalty rate promised in the royalties clause refers to the rate at which the author is to be paid for all "sales of a trade edition in the United States, its possessions and territories, and Canada" that were purchased at retail price, or at a *normal* discount rate. In other words, books that are sold through a bookstore or online book retailer. Currently, this royalty rate is also used to calculate royalties for books that are sold for electronic reading devices like Amazon's Kindle and Barnes & Noble's Nook; however, this most likely will change as the e-book market continues to evolve.

The royalty rate for books that are sold as mass-market editions or at a larger than normal discount (referred to as an *excess discount*) is usually much lower—typically 5 or 7½ percent of the cover price or net receipts. Such discount sales occur when a publisher uses a wholesaler to distribute its inventory, when books are sold through direct marketing channels, or when buyers like book clubs and membership warehouse clubs (Sam's Club, Costco, BJ's, to name a few) purchase large quantities of books at discounts of 56 percent or more. In most cases, royalty rates are also much lower for books that are sold through a subscription service like Books24x7 and Safari Books Online. Consequently, in extreme cases, more than half of a book's total sales can be comprised of discounted sales.

For this reason, most royalties clauses consist of a set of subclauses that define how royalties are to be calculated when books are sold through various channels and at different discount rates. Often, one or more of these subclauses will also specify how the author is to be compensated if the publisher sells or licenses any subsidiary rights to the author's work. (For technical books, all net receipts collected from the sale of subsidiary rights are usually divided equally between the author and the publisher.)

Most publishers are reluctant to offer higher royalty rates for books sold at excessive discounts because their profits from these types of sales is diminished. However, the royalty rate for books sold at retail price or normal discount rates is almost always negotiable. Therefore, it's in your best interests to ask for the highest royalty rate allowed for these types of sales. (The best rate that most authors can hope for is 15 percent of the cover price for trade books and 18 to 20 percent of net dollar receipts for technical books and textbooks. A somewhat higher royalty rate may be available for books published in electronic format only since the publisher's costs will be lower.)

If your publisher is unable or unwilling to give you the royalty rate you desire, suggest having a royalties escalation clause added to your agreement that will allow you to receive the royalty rate you're seeking once a significant number of books have been sold. Most publishers will agree to pay a larger royalty rate after they have recouped their initial investment, provided book sales are strong.

Important:

If the publisher is permitted to sell or allow sales of a book as part of a "bundle" of electronic products, there may be a subclause that states that the royalty will be discounted based upon how big a part

of the total bundle consists of the book. Exactly "how big" may be determined by length, importance, or some other method. Therefore, if you grant the publisher bundled sales rights, you should discuss how this determination will be made and consider whether you ought to be guaranteed some minimum income for these rights before you allow such bundling to occur. Most publishers will not insist on being granted bundled sales rights if you bring up the issue and require it to be addressed in the royalty provision.

The Advance Clause

Some authors need money to live on while they write; others need an incentive to keep writing when the going gets tough (and it will get tough). Fortunately, many publishers realize this and are willing to pay an author an advance against any future royalties earned *before* a completed manuscript is delivered. Such payments are known as *advances* and, if the publisher agrees to pay an advance, the *advance clause* will specify how much money the author is to receive, as well as describe when and how that money is to be paid. More often than not, advances are paid in installments. For example, an author might receive half of an advance when the publishing agreement is signed and the remainder when a satisfactory manuscript has been delivered. Or, he or she might be paid one-third after signing an agreement, one-third upon acceptance of a completed manuscript, and the remaining third after publication.

In most cases, if an author fails to deliver a suitable manuscript in a timely manner, or if the publishing agreement is terminated prematurely, any monies received in the form of an advance must be repaid. On the other hand, if the author meets his or her contractual obligations, the entire advance promised must be paid and that money is the author's to keep, regardless of how many books are eventually sold. In other words, if the book fails to earn back its advance, the publisher absorbs the loss; the author is not billed for the difference. However, the author will not receive any additional monies until the advance has been *earned out*, meaning that earnings from royalties or the sale of subsidiary rights equal the amount of the full advance paid. Thus, if an author receives a $10,000 advance and his or her royalty rate is 10 percent of the $19.99 wholesale price of a book, the book must sell 5,003 copies before he or she can expect to receive any additional payments from the publisher.

When it comes to negotiating an advance, keep in mind that a large one is almost always better than a small one. For one thing, it's money in hand now, instead of a promise of future payment. More importantly, a large advance increases the publisher's risk and may motivate them to make a substantial initial investment in the promotion and marketing of your book. And, that can be the difference between a book that does relatively well and one whose sales are mediocre, at best.

Tip:

If you need to purchase one or two items before you'll be able to develop the manuscript for your book, for example, a word processing software package that the publisher prefers you use or a graphics design and illustration software package such as Adobe Illustrator or CorelDRAW, you may be able to get your publisher to cover the cost of these items in the form of a *grant*. Unlike an advance, a grant does not have to be repaid with earnings from royalties or the sale of subsidiary rights.

Grants typically do not exceed $1,200 and are almost always payable only upon receipt of a proper invoice that shows that the items the grant was provided for were, in fact, purchased. (Thus, you cannot request a grant simply to increase the amount of money you receive from your publisher up front. Nor, in most cases, can you request one to buy a top-of-the-line computer loaded with the latest versions of your favorite software.) Obviously, if your publisher agrees to pay you a grant, get it in writing, as a modification to your publishing agreement.

The Accounting Clause

In a perfect world, a publisher would automatically deposit money earned from royalties and the sale of subsidiary rights into an author's bank account at the end of the week (and send them a royalty statement for the one-week period)—much like some companies pay their employees, on a weekly basis, by way of direct deposit. Unfortunately, this approach does not lend itself well to the publishing industry, primarily because a significant amount of time can pass between when a publisher sells books to a bookstore and when the bookstore actually pays for books it has received.