Stake Out Your Publishing Contract

MAKE SURE YOUR AGREEMENT PROTECTS YOU—AND YOUR BOOK.

So you've signed with an agent, and he's landed you an offer from a publishing house. He can take it from here, right?

Wrong. You've heard that publishing agreements should not be entered into lightly—but what exactly are those elusive points your agent negotiates on your behalf, anyway? And do you really need to know?

As both an agent and an attorney, I can tell you that most publishing contracts you'll be offered will contain language that can come back to haunt you. It's important to address these issues before signing—and just because your agent is the one dealing with the publishing house doesn't mean you can sit back and let him handle it. Being informed about the business you're now in will go a long way in enhancing your writing career. At the very least, you need to have a basic understanding of what questions you should be asking.

Here are some of the most important things to examine, in the order in which they typically appear in most publishing agreements.

DESCRIPTION OF THE "WORK"
This might seem obvious, but it can be surprisingly easy to overlook. Be sure the "work" described in the publishing agreement accurately and completely describes the book you wrote (or are being contracted to write). In the event of an unfortunate agent/editor miscommunication or some other oversight, getting this wrong could result in a bad "surprise" when you deliver your manuscript to your editor.

RIGHTS
Rights are described in terms of media, length of time ("term") and territory. Fairly standard rights for authors to grant publishers include the right to publish the book in printed form in hardcover and/or softcover—that is, trade paperback (the types of books you see in bookstores) and/or mass-market paperback (those sold at grocery stores, pharmacies, etc.)—along with associated rights, such as audiobook and e-book rights. A royalty should be specified for each different media. Beware of catchphrases like "including but not limited to" and "media now known or hereafter devised." They can signal loopholes your publisher could use to its benefit.

You should not grant a publisher rights it's not in the business of exploiting. For example, if the house publishes English-language books in the United States only, it doesn't
make sense to grant it international publication rights—but the publisher might try to get them anyway (you know, just in case they come in handy in the unforeseeable future).

Give publishers only specific rights they’ll actually use, and reserve all rights not specifically granted. If you need to compromise, grant specific rights for a fairly short period of time (say, two years) in a territory not normally “used” by the publisher. Then, if the publisher “sells” your book in that territory within that time frame, great—but if not, your agent can attempt to do so. Otherwise, the term for the grant of rights is typically for the life of the copyright (usually the life of the author plus 70 years) in the version of the work being produced (e.g., the hardcover book).

**SUBSIDIARY RIGHTS**

The same principle applies to subsidiary rights, where the income the publisher receives from a third party that exploits them is split with the author (usually 50/50, but in the case of first serialization rights, 90/10, in the author’s favor): Don’t grant the publisher a right it won’t “lay off” on a third party. Do grant a publisher rights related to the sale of the book itself, such as book-club or large-print rights. Don’t grant a publisher tangential rights, such as motion picture and TV rights.

It is your agent who can most effectively advocate for you in selling dramatic rights for your book to a studio or network. There’s no reason for the publisher to receive any money from the sale of these rights. (It will still benefit, after all, when the movie drives sales of the book!)

Rights can be granted exclusively, so no one but the grantee can exploit them, or nonexclusively, so you can grant the same right to more than one grantee. If the publisher insists on having dramatic rights (often arguing that if it wasn’t for the book, there would be no movie), you can compromise by granting them nonexclusively. Then, if the publisher finds the buyer for the movie rights to your book, it can share in the income resulting from its efforts. If, however, (as is much more typically the case) your agent finds the buyer and negotiates the deal, the publisher does not share in the profits.

**ROYALTIES**

Most publishing agreements contain language—usually buried at the end of a long section describing the royalties the publisher will pay for each type of book it publishes—similar to the following: “If the book is sold at other than our usual and customary discount, the above referenced royalties will be reduced by one half.”

This means if the publisher sells the book to a wholesaler (Costco, for example) at a fee other than its “usual and customary discount”—say, 51 percent off the cover price, rather than the “usual and customary” 50 percent—the publisher will pay the author one half of the royalties it would otherwise pay. You and your agent should advocate for more specific language, like, “If the book is sold at more than 55 percent off the list price, then...”

Speaking of price, all royalties should be specified as a percentage of the “cover” or Suggested Retail List Price (SRLP) of the book. If the contract has royalties based on “publisher’s net receipts” or a similar amorphous phrase, push to change it. And when evaluating two different offers, be sure you’re comparing apples to apples; royalties should be a percentage of the same thing. If the publisher insists on basing royalties on “publisher’s net receipts,” a good rule of thumb is to cut the royalty offered in half, because publishers sell books to retailers at roughly 50 percent off the list price. Thus, 20 percent of a publisher’s net receipts is roughly equivalent to 10 percent of the cover price.

**ADVANCES**

Beware of language stating the publisher pays the first part of the advance “upon execution.” If given license to do so, the publisher may wait an intolerable length of time after you sign the agreement to countersign so it doesn’t have to send your agent that first check. Negotiate that the advance be payable as soon as the publisher receives the contract signed by you, or require the publisher to countersign and issue the check within so many days after receiving the contract.

**COPYRIGHT**

Typically, most contracts provide that “upon publication” the publisher will register the book for copyright in the name of the author. All this means is that the publisher will fill in the copyright registration form and pay the fee (currently $35–50, depending on how the information is submitted) to register the book for copyright. To get the full benefit of all the provisions of copyright law (including statutory damages and attorney’s fees, should you have to sue someone for copyright infringement), make sure your contract requires your publisher to register your book for copyright within 90 days of publication. [WD]

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