

Guidelines for Publishers in their dealings with Authors as agreed by CLÉ and the Irish Writers Union 2001

A constructive and co-operative relationship between authors (and the agents and representatives acting for them) and their publishers is vital to successful publishing. In the great majority of cases this relationship undoubtedly exists. Nevertheless, there can be dissatisfaction, perhaps because the title is not the success the author and publisher hoped for but also because of misunderstandings of the publishing contract, uncertainties and poor drafting and 'customs of the trade' unappreciated by the author.

The Committee of CLÉ — The Irish Book Publishers' Association believes that everything possible should be done to ensure a satisfactory relationship and avoid disputes. It has therefore adopted the Code of Practice for book publishers set out below, which it recommends to members in their dealings with authors. This Code gives guidance only. It cannot deal with every variable. In general, however, CLÉ encourages its members to abide by this Code of Practice to regard its provisions as best practice for book publishing.

Book publishing is so varied in its scope that contracts are likely to contain many variations between, for example, different types of book with different markets, different degrees of editorial involvement by the publisher, and established or relatively new authors. Total uniformity of contract or practice is therefore impracticable. In particular, some academic, educational, reference books and works based on a variety of contributions may be subject to special considerations, though the necessity to follow the general principles of this Code remains.

It is recommended that, without exception, the relationship between publisher and author should be subject of a written agreement, which may take the simple form of an exchange of letters or email, but in most instances should be a formal contract.

1 - the publishing contract must be clear, unambiguous and comprehensive, and must be honoured in both the letter and the spirit by both parties

Matters which particularly need to be defined in the contract include:

- a title which identifies the work or (for incomplete works) the nature and agreed length and scope of the work;
- the nature of the rights conferred, the ownership of the copyright (an assignment or an exclusive licence), whether all volume rights (or part of the volume rights or more than volume rights), and the territories and languages covered;
- the time scale for delivery of the manuscript and for publication;
- the payments, royalties and advances (if any) to be paid, what they are in respect of, and when they are due;
- the provisions for sub-licensing;
- the responsibility for preparing the supporting materials (e.g. indexes, illustrations, etc. in which the author holds the copyright, and for obtaining permissions and paying for the supporting materials in which the copyright is held by third parties;
- the termination and reversion provisions of the contract

Should the parties subsequently agree changes to the contract, these should be recorded in writing between them.

2 - the author should retain ownership of the copyright, unless there are good reasons otherwise

An exclusive licence should be sufficient to enable the publisher to exploit and protect most works effectively. In particular fields of publishing (e.g. encyclopaedic and reference works, certain types of academic works, publishers' compilations edited from many outside contributions, some translations and works particularly vulnerable to copyright infringement because of their extensive international sale) it may be appropriate for the copyright to be vested in the publisher.

3 - the publisher should ensure that the author who is not professionally represented has a proper opportunity for explanation of the terms of the contract and the reasons for each provision

The writer must be allowed to seek professional representation at any stage of negotiations including assigning responsibility for such matters to a literary agent

4 - the contract must set out reasonable and precise terms for the reversion of rights

When a publisher has invested in the development of an author's work on the market, and the work is a contribution to the store of literature and knowledge, and the publisher expects to market the work actively for many years, it is reasonable to acquire volume rights for the full term of copyright, on condition that there are safeguards providing for reversion in appropriate circumstances.

The circumstances under which the grant of rights acquired by the publisher will revert to the author (e.g. fundamental breach of contract by the publisher, or when a title has been out of print or has not been available on the market for a stipulated time) should form a part of the formal contract. In addition, a reversion of particular rights that either have never been successfully exploited by the publisher or which are not subject to any current (or immediately anticipated) licence or edition, may, after a reasonable period from their first acquisition and after proper notice, be returned on request to the author, provided that such partial reversions do not adversely affect other retained rights (e.g. the absence of an English language edition should not affect the licensing publisher's interest in a translated edition still in print) and provided that payments made by the publisher to or on behalf of the author have been earned.

In the case of books intended to be as a series such an intention should be included in the contracts and any option rights be confined to this series. In the event of the publisher deciding to discontinue the series the right of the already published books should revert to the writer provided that the book already published has been out of print for three months or more.

5 - the publisher must give the author a proper opportunity to share in the success of the work

In general, the publishing contract should seek to achieve a fair balance of reward for author and publisher. On occasion it may be appropriate, when the publisher is taking an exceptional risk in publishing a work, or the origination costs are unusually high, for the author to assist the publication of the work by accepting initially a low royalty return. In such cases, it is acknowledged that it is best industry practice for an increased rate of royalty to be agreed when a specified number of copies have been sold.

If under the contract the author receives an outright or single payment, but retains ownership of the copyright, the publisher should be prepared to share with the author any income derived from a use of the work not within the reasonable contemplation of the parties at the time of the contract and that terms for such usage be negotiated and agreed upon before any deals are struck with other parties.

6 - the publisher must handle manuscripts promptly, and keep the author informed of progress

All manuscripts and synopses received by the publisher, whether solicited or unsolicited, should be acknowledged as soon as possible. However, senders of unsolicited material in particular should understand that the constant pressures of time on the staffs of publishing houses may make an

immediate response impracticable. In general, however, publishers should use their best endeavours to reply with reasonable promptness even in the case of unsolicited material. The author may be told at that time when to expect to hear further, but in the absence of any such indication at least a progress report should be sent by the publisher to the author within six weeks of receipt. A longer time may be required in the case of certain works, e.g. those requiring a detailed assessment, particularly in cases where the opinion of specialist readers may not be readily available, and in planned co-editions, but the author should be informed of a likely date when a report may be expected. It is important, however, for the publisher to know if the manuscript or synopsis is being simultaneously submitted to any other publisher.

7 - the publisher must not cancel a contract without good and proper reason

It is not easy to define objectively what constitutes unsuitability for publication of a commissioned manuscript or proper cause for the cancellation of a contract, since these may depend on a variety of circumstances. (In the case of non-fiction works, it may be helpful to both sides to state as clearly as possible in the contract what the nature, treatment and scope of the book is intended to be.) In all such cases, however, the publisher must give the author sufficiently detailed reasons for rejection.

When a publisher requires changes in a commissioned manuscript as a condition of publication, these should be clearly set out in writing. In the case of unsolicited manuscripts or synopses, the publisher is under no obligation to give reasons for rejection, and is entitled to ask the author for return postage.

Time

If an author fails to deliver a completed manuscript according to the contract or within the contracted period, the publisher may be entitled (inter alia) to a refund of monies advanced on account. However, it is commonly accepted that (except where time is of the essence) monies advanced are not reclaimable until the publisher has given proper notice of intent to cancel the contract within a reasonable period from the date of such notice. Where the advance is not reclaimed after the period of notice has expired, it is reasonable for the publisher to retain an option to publish the work. Where the advance has not been repaid by the writer after the period of notice has expired, it is reasonable for the publisher to retain an option to publish the work.

Defamation or Illegality

The publisher is under no obligation to publish a work that there is reason to believe is defamatory or otherwise illegal.

Change of Circumstance

A change in the publisher's circumstances or policies is not always a sufficient reason for declining to publish a commissioned work without compensation.

Compensation

Depending on the grounds for rejection,

- 1 - the publisher may be liable for further advances due and an additional sum may be agreed to compensate the author, or
- 2 - the author may be liable to repay the advances received

In the former case, the agreement for compensation may include an obligation on the author to return advances and compensation paid (or part of them) if the work is subsequently placed elsewhere.

Resolution of Disputes

Ideally, terms will be agreed privately between the parties, but in cases of dispute the matter should be put to a mutually agreed informal procedure (such as that available from the Publishers Association or the Irish Writers Union) or, if this cannot be agreed, to arbitration or normal legal procedures.

8 - the contract must set out the anticipated timetable for publication

The formal contract must make clear the time scale within which the author undertakes to deliver the complete manuscript, and within which the publisher undertakes to publish it. It should be recognised that in particular cases there may be valid reasons for diverging from these stated times, or for not determining strict time scales and each party should be willing to submit detailed reasons for the agreement of the other party, if these should occur.

9 - the publisher should be willing to share precautions against legal risks not arising from carelessness by the author

For example: libel. While it remains the primary responsibility of the author to ensure that the work is not libellous, the publisher will almost certainly be joined to any action brought by a plaintiff. Libel therefore demands the closest co-operation between authors and publishers, in particular in sharing the costs of reading for libel or of any insurance considered to be desirable by the parties.

10 - the publisher should consider assisting the author by funding additional costs involved in preparing the work for publication

If under the contract the author is liable to pay for supporting materials, e.g. for permissions to use other copyright material, for the making and use of illustrations and maps, for costs of indexing, etc. the publisher may be willing to fund such expenses, to an agreed ceiling, that could reasonably be recovered against any such monies as may subsequently become due to the author.

11 - the publisher must ensure that the author receives a regular and clear account of sales made and monies due

The period during which sales are to be accounted for should be defined in the contract and should be followed, after a period also to be laid down in the contract, by a royalty statement and a remittance of monies due. Publishers should always observe these dates and obligations scrupulously. Accounts should be rendered at least annually, more commonly twice yearly.

The publisher should pay the author on request the appropriate share of any substantial advances received from major sub-licensing agreements by the end of the month following the month of receipt (providing monies already advanced have been earned, and proper allowance made for returned stock; allowance may also need to be made if very substantial advances have been outstanding for an extended period of time).

All sublicensing agreements should be agreed between writer and publisher before any such agreements are finalised. The publisher should be prepared, on request, to disclose details of the number of copies printed, on condition that the author (and the agent) agree not to disclose the information to any other party.

Publishers should be prepared to give authors indications of sales to date, which must be realistic bearing in mind either unsold stock which may be returned by booksellers or stock supplied on consignment.

12 - the publisher must ensure that the author can clearly ascertain how any payments due from sub-licensed agreements will be calculated

Agreements under which the calculation of the author's share of any earnings is dependent on the publisher's allocation of direct costs and overheads can result in dissatisfaction unless the system of accounting is clearly defined.

13 - the publisher should keep the author informed of important design, promotion, marketing and sub-licensing decisions

Under the contract, final responsibility for decisions on the design, promotion and marketing of a book is normally vested in the publisher. Nevertheless, the fullest reasonable consultation with the author on such matters is generally desirable, both as a courtesy and in the interests of the success of the book itself. In particular the author should, if interested and available, be consulted about the proposed jacket, jacket copy and major promotional and review activities, be informed in advance of the publication date, and receive advance copies by that date. When time permits, the publisher should consult the author about the disposition of major sub-leases, and let the author have a copy of the agreement on request.

14 - the integrity of the author's work should always be protected

The author is entitled to ensure that the editorial integrity of the work is maintained. No significant alterations to the work (i.e. alterations other than those which could not reasonably be objected to) should be made without the author's consent, particularly where the author has retained the copyright. The author who has retained the ownership of the copyright is entitled also to be credited with the authorship of the work.

The publisher should inform the author clearly about opportunities for amendment of the work in the course of production. The economics of printing make the incorporation of authors' textual revisions after the book has been set extremely expensive. Publishers should always make it clear to authors, before a manuscript is put in hand, whether proofs are to be provided or not, on whom the responsibility for reading them rests and what scale of author's revisions would be acceptable to the publisher. If proofs are not being provided, the author should have the right to make final corrections to the copy-edited typescript, and the publisher should take responsibility for accurately reproducing this corrected text in type.

15 - it is essential that both the publisher and the author have a clear common understanding of the significance attaching to the option clause in a publishing contract

The option on an author's work can be of great importance to both parties. Options should be carefully negotiated, and the obligations that they impose should be clearly stated and understood on both sides. Option clauses covering more than one work may be undesirable, and should only be entered into with particular care.

16 - the publisher should recognise that the remaindering of stock may effectively end the author's expectation of earnings

Before a title is remaindered, the publisher should inform the author and offer all or part of the stock to the author on the terms expected from the remainder dealer. Whether any royalty, related to the price received on such sales, should be paid is a matter to be determined by the publisher and the author at the time of the contract.

17 - the publisher should endeavour to keep the author informed of changes in the ownership of the publishing rights and of any changes in the imprint under which a work appears

Most publishers will expect to sign their contracts on behalf of their successors and assigns, just as authors will sign on behalf of their executors, administrators and assigns. But if changes in rights ownership or of publishing imprint subsequently occur, a publisher should certainly inform and, if at all possible, accommodate an author in these new circumstances.

18 - the publisher should be willing to help the author and the author's estate in the administration of literary affairs

For example, the publisher should agree to act as an expert witness in questions relating to the valuation of a literary estate.

19 - above all, the publisher must recognise the importance of cooperation with the author in an enterprise in which both are essential

This relationship can be fulfilled only in an atmosphere of confidence, in which authors get the fullest possible credit for their work and achievements. Equally, publishers can reasonably expect authors to reciprocate in kind by adhering to agreed extents and delivery dates, by dealing with proofs and other editorial in the time agreed and by using their best endeavours in such matters as picture research.

20 - right to reproduce in other formats

Notably

- photographic(microfilm)
- computer versions (punch cards, disk, hard disk, tape)
- optical (optic disk)
- digital (CD, CD-I, CD-ROM, DAT...)
- view data

Translation rights

Public communication of the work

Right to remuneration of private copies

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