Here are the basic things you need to know about contracts and contract terminology.

by Donald Maass

Even if you have an agent to negotiate your contracts, it’s important for you to understand the document to which you’re putting your signature. It’s a legally binding and enforceable agreement.

Furthermore, publishing contacts are ever evolving. What are the new wrinkles in old contract clauses, and the newfangled provisions currently making their debut? This hits some important highlights.

ETERNAL CONTRACT ISSUES

Territory: The grant of rights in your contract allows your publisher to turn your “Work” (the novel you’ve written) into various consumer products, principally a book. But how far, geographically speaking, do your publisher’s rights extend? Three shorthand terms are used commonly: North America, World English, and World. What do they mean?

A grant of North American rights allows your publisher to make and sell a book in the United States, Canada, and U.S. territories like the Philippines. World English rights extend that grant to the rest of the English-speaking world—that is, Britain and the Commonwealth countries, such as Australia and New Zealand. World rights expand that grant into all other languages, meaning that your publisher can license translation rights anywhere they can be sold.

The Open Market is another term you’ll see. That refers to places where English-language editions can be sold that are in neither North America nor the British Commonwealth (say English bookshops in Paris or the Amsterdam airport). In London, publishing houses and literary agencies sometime call this Open Market simply “Europe.”

In most cases, the right to sell your book in the Open Market is nonexclusive, forcing your American and British publisher to compete. Naturally enough, publishers hate that. British publishers try to lock up Europe exclusively when then can, and some American publishers try to hold back British publication to get into Europe first. Do those things really matter? When you are a best-selling author, they matter mightily and
can be the subject of fierce negotiation.

Canada is an interesting case. Most American agents routinely grant Canadian rights along with U.S. rights, in the process accepting a significantly lower royalty rate in our sizeable neighbor to the north. That's aggravating for Canadian authors, who sell disproportionately well in their home country.

On top of that, Canadian publishing has grown in sophistication and reach. Now, it's increasingly common to do separate deals with U.S. and Canadian publishers, particularly for British and internationally popular authors. J.K. Rowling’s Harry Potter series was done that way, and I’m sure the higher royalties paid were not mere pocket change.

Advances: This is the contract term with which it seems every author is familiar. Everyone wants one, if not a big one. The key thing to remember is that an advance is not a paycheck, but simply an estimate (nonreturnable, it must be said) of the royalties that your novel eventually will earn by delighting readers. It's nice to get a lump sum up front, but in many cases that's all you’ll get. May I make a suggestion? Try to write a book that will exceed your publisher’s estimated advance, however big that might be. If you do, it’s a pretty good bet that your future advances will go up.

Payout: This is the way in which that advance is carved up and parcelled out. Back in the day, a two-part payout was the norm; half the advance came on signing of the contract, the other half on delivery of an acceptable manuscript. Nowadays, advances often are sliced up into more pieces. An advance paid on publication is common. In really big deals, the advance can be spread out so that portions are paid on paperback publication too, or maybe even at intervals after that. Winning a big advance doesn’t mean you’ll get rich all at once.

There's also a new game in town: publishing deals in which no advance is paid. In exchange for that, the author gets a higher royalty share (sometimes a split of profits) and usually the promise of more dollars spent on promotion. Is that a good deal? Some big-name writers think so, though I haven’t yet seen convincing evidence that all that extra promotion yields measurably higher sales. As you might have picked up, I suspect the main factor in strong sales is strong novels.

Royalties: This, too, is a term that most authors think they understand. It's the percentage of the book's price that you, the author, get every time a copy is sold—right? Not necessarily. The way royalties are calculated can vary.

The key difference is whether royalties are calculated on the cover price (sometimes the catalogue price) or on the publisher’s net receipts.
What’s the difference? If the publisher should sell a book directly to a consumer at full price, there’s no difference. However, most books are sold instead to bookstores, which get a discount. How big a discount? Typically, it’s a tad less than 50 percent. That, in turn, means the publisher’s net on a given copy is not the full price, but half that. Your royalty, thus, is also half the money that you may expect. In other words, 10 percent may be plain old 10 percent or, if based on net receipts, may feel closer to 5. Read the fine print. The terms are critical.

Joint Accounting: This unhappy idea applies to multiple-book contracts. For a three-book contract, for example, it means that until the advance for all three titles has earned out then no additional royalties or sub-rights income will be paid.

Back in the day, joint accounting (sometimes called basket accounting) was a way for publishers to mitigate the risk of gambling on a large advance for an unproven author. Today, joint accounting is simply a way to delay payment of royalties to authors and help publishers’ cash flow. Joint accounting is demanded on even dinky deals. Whenever possible, I avoid joint accounting for my clients. (Sadly, it isn’t always possible.)

Pay-Through: Novelists who’ve been in the game for a couple of decades may remember when subsidiary rights income (say, the advance from a sale of book club rights) was paid through to the author as soon as it was received by the publisher. Those days are over. It’s possible to negotiate pay-through for certain high-earning authors, but even so, it’s likely for publishers to require that advances first be earned out.

Bonuses: Ah, you’re going to make me wax nostalgic. Once upon a time, publishing deals sometimes included an accelerated payment of royalties in the form of bonus advances, paid when certain markers were met, such as appearance of a novel on The New York Times best-seller list or other lists. Bonus payments could be quaintly optimistic for instance, stipulating higher bonuses depending on list position or number of weeks on the list. Ah, the good old days.

Bonuses still are negotiated—and sometimes even paid—but, are far less common than they once were. They are a little more often seen in the young adult field, where winning awards such as the Caldecott Medal can trigger a bonus advance.

Subsidiary Rights: No doubt about it, the income from audio books, book club editions, large-print editions, a paperback reprint, and the like are welcome additions to an author’s income stream. But how do you get that money? How much does the publisher keep? Luckily, there’s a bit of good news.

Increasingly, publishers are creating their own audio books, large-
print editions, and paperbacks. Indeed, today it’s rare for paperback rights to be sold by a hardcover-only house to a separate paperback publisher. That’s good news because 100 percent of the income from the sale of those products goes straight to the author’s royalty statement.

If licensed by the publisher to an outside company, the publisher takes a cut. How big a cut? If publishers get their way, it’s fifty percent, but in many cases agents can negotiate a more favorable split for the author.

What if you should sell World rights to your publisher? Does your publisher take a cut of translation revenues? You bet—50 percent if they can get away with it, 25 percent (sometimes 20 in Britain) if not. After your agent’s commission comes out, what flows to you is less than it could be. For that reason, agents prefer to handle foreign rights themselves. The author then only pays a twenty 20 overseas commission, and keeps more in his or her pocket.

It should be said that certain subsidiary rights are almost universally granted to publishers. Those include book club, paperback reprint, and certain other forms of the printed book. Audio, large print, limited edition (think leather bindings and slipcases), and other rights can be carved out and reserved to the author. In some cases, it’s also worth paying attention to who controls rights like graphic novel and game adaptation. Movie and TV rights are never granted to publishers, except by wily agents who want to jack up advances and make themselves look godlike to clueless authors.

Delivery, Revision, Acceptance: When you promise to write a novel for your publisher, you must actually deliver it. If you fail to do so, the contract ends, and you must repay any advances received to that point. Seems fair enough, right?

Somewhat trickier is the situation in which you deliver a novel that your publisher doesn’t like. Now, most authors expect an editorial letter and are happy to revise. Is the publisher obligated to give you a chance to do so? Only if that’s specifically written into the contract.

Nowadays, especially with second novels on pricey two-book deals potentially turning into sure-fire money losers, publishers have been known to deem any delivered manuscript “unacceptable.” Wise agents therefore require a revision opportunity, and even stipulate that detailed suggestions for revision be given in writing. The time frame of the publisher’s acceptance (or not) of the revised manuscript is also important. If you are waiting anxiously for your acceptance advance (oops, you quit your day job?), but your novel isn’t scheduled or due to production and your editor is sitting on it … well, in such situations, my phone rings daily.
Require that your publisher get back to you within sixty days.

What if everything falls apart and, despite your best efforts, a contract ends and you’re required to pay back your advance? What if you also unwisely quit your day job, you have no savings, and the money is spent? What happens? Sell your children. Kidding! Seriously, publishers know that authors are terrible with money. They usually will grant a grace period of a year and allow you to repay your advance out of first proceeds from the sale of your novel to another publisher. But ask. First proceeds is not a given.

Option: It amazes me that there’s still confusion about option clauses. Option clauses in most cases do not obligate you to sell your next novel to your current publisher. They do, however, obligate you to show it (or sample chapters and an outline) to your current publisher before anyone else and give them a chance to offer for it. Typically, there also is a matching provision, which means that you cannot sell that novel elsewhere for less than you were offered.

The anxiety over option clauses is somewhat misplaced. In fact, most of the time you want your publisher to buy your next novel. Heck, you want them to buy thirty in a row and, on top of that, keep them all in print and looking alike. Best of all is when your publisher phones your agent to offer for your next three novels before they have to do so. That means that things are going well. How do you get into that strong position? Oddly enough, it starts with strong fiction.

NEWFANGED CONTRACT ISSUES

E-books are changing the publishing landscape, though less than you may think. Still, it is changing things, and that is reflected in contracts. Let’s start with something at the end of the contract—indeed, at the end of a book’s lifespan.

When a novel goes out of print and is no longer on sale, it’s fair to say that the publisher has quit. That publisher is no longer holding up their half of the bargain, and so the contract ought to end and your publishing rights should return to you. Uh-huh. That was in the old days. In our times, your novel can be kept alive as an e-book or perhaps be printed in small quantities (maybe even as small as one copy) by means of print-on-demand technology. In a way that’s cool, but what does it mean for your publishing rights?

What it means is that if there’s an e-book or if your novel is made available via print-on-demand, then it will never go “out of print.” Your publisher will retain rights even if they sell zero copies in a month, year, or decade. How long can that situation continue? Since publishing con-
tracts in the U.S. endure (so long as no one breaks their promises) for the life of the copyright, it means that your publisher can hang on to your rights until seventy years after your death. They can do so without selling a single damn copy.

Is that fair? Well, no. For that reason, it’s important that the definition of when a book is “in print” be changed. Luckily, agents have already fought this out with publishers and nowadays if you ask, you can get in your contract something called a sales threshold. That means your publisher must sell a minimum number of copies (or sometimes collect a certain number of dollars) in order for your book to be deemed “in print.” Again, you have to ask. It’s not automatic.

What about e-books, then? Is your publisher even obligated to create them? Nope, but then neither are they required (unless the contract says otherwise) to print your novel in any particular format like hardcover, trade paperback, mass market, or toilet paper roll. Still, most publishers are trying to get on board with e-books and will create them.

But how quickly? And at what price? Ah, now we’re getting to the heart of a currently heated debate. As I write, a war continues between e-retailers and publishers over who will control the release and pricing of e-books. E-retailers like Amazon want e-books right away, and also want to sell them at steep discounts. (Why? To sell more Kindles.) Publishers want to delay e-book releases and sell them for the maximum price. So fierce is this warfare that you would think that the public is snapping up e-books like lottery tickets.

True enough, e-book sales are growing as new readers come on the market and screen technology improves. Even so, it’s still—and, in my opinion, will remain—a minor share of the retail pie. (Don’t tell me that the next generation will only read electronically. Kids read physical books.) Anyway, for better or for worse, e-books today are part of the picture.

So, who sets the release date and the price? What kind of royalties do you get? What I’m about to write may be obsolete by the time you read it, but as of now, the release of your e-book and its price will be set by your publisher. E-retailers will take a cut under a system that confusingly is called the agency model. You get royalties based not on the consumer price, but on the net sum that flows back to your publisher. Thus, if your e-royalty rate is 25 percent of the publisher’s net receipts, it could actually mean 25 percent of 70 percent. Do you follow that?

Whatever. In the screwy calculus of e-retailing, it may sometimes be that your e-royalty will be higher than the royalty for your printed book. Or the reverse. Or some sliding scale based on what consumers are will-
ing to pay may be tried. Like I say, everyone is guessing. For now, agents are trying to build into contracts a chance to renegotiate.

Rights Reserved: Given the changes that can creep up on us in perplexing ways, it’s more important than ever that your book contracts stipulate exactly what rights you are giving to your publisher and, as important, what you are not granting.

The chief means for doing that is actually a trusty old piece of contract language that says that any right not specifically granted is reserved to the author. That old stalwart, though, may no longer be enough. In some recent contract revisions, certain publishers have concocted grant language that is so long, dense, vague, and obfuscating that its interpretation is unclear and, I suspect, meant to be unclear.

Here’s what’s going on: Publishers have realized that they cannot predict what kinds of new technology will come along, but when they do come along, they want to be able to use them. So tortured is this thinking that one publisher, Random House, tried to claim in a lawsuit against an e-publisher that their right in old contracts to create a “book” meant whatever they deemed a book to be. A federal court shot them down, but that has not stopped publishers from trying to create a cloud of confusion in contract language so that, in fact, in the future a “book” will be whatever they discover it can be.

Authors and agents need to resist this effort for a couple of reasons. First of all, all the separate forms that a novel can take (book, audio book, book club edition, paperback, French edition, Reader’s Digest abridgement, and so on) are historically separate rights to be negotiated separately. Who’s to say that your print publisher also is your best audio publisher or, for that matter, e-publisher? For authors to stay in control, the separate rights must be separately defined. The idea of “book” certainly must not be open to a publisher’s exclusive future interpretation, wouldn’t you agree?

Advertising Revenue: Here’s a wacky one. Popping up in contracts nowadays is language allowing publishers to collect advertising revenue and keep a share of it. What the heck—?

In another strange twist of the digital age, Google has begun to scan all books ever printed and make them available for searching. In a way, it’s a cool idea, but it also impinges on authors’ copyrights and is the subject of a massive lawsuit and a vastly complex and highly contentious settlement (still not finalized as of this writing) between Google and authors. Whatever the outcome, it’s clear that Google is going forward with its universal online library idea and is planning to profit from it in different ways. One of the main ways will be selling advertising on web pages you
What happens to that advertising revenue is one of the features of the Google Book Settlement (Google it and get ready for some mind-numbing reading), and so it has crept into contract language. Basically, Google’s going to pay 70 percent of its advertising revenue to authors or, in the case of books still in print, to their publishers. When publishers get that dough, they’ll keep some of it—for now, 50 percent. You can limit or stop any of that from happening, but you must opt out, not opt in, and you have to register your titles at a special website. (Don’t freak, it’s pretty easy.)

Are you still with me? Isn’t the new digital age fun?

WORK FOR HIRE
There’s another type of publishing opportunity, and yet another whole set of thorny contract issues, called work for hire. Think novels based on TV shows and video games, movie novelizations, and young adult series created by packagers.

Many authors see work for hire as a quickie income fix or as an easy way to get going and build an audience. Both notions are dangerously naive. Work for hire has a time and a place, but it can turn into a trap. Think carefully before you dive in.

The good part of work for hire is playing in a universe already created by others and writing about characters you may already love. Early in my career when I was supporting myself writing fiction, I wrote (for hire) several novels featuring a famous girl detective. It was nostalgic fun. I was also paid a flat fee. That part wasn’t so fun.

What you need to know is that work for hire is a concept in copyright law that covers works especially commissioned and created by many hands. The writer is technically an employee working at the direction of the copyright holder. Works that may be copyrighted to a corporation, say, are things like magazines, encyclopedias, travel guides, and even screenplays. Fiction cannot be work-for-hire as it is the work of a single author. That hasn’t stopped publishers and packagers from writing work-for-hire contracts.

The first thing to understand is that contrary to the spirit of the law, under a work for hire agreement, you will not become an employee. You will waive away benefits, workers’ rights, and the employer’s contribution to Social Security and Medicare taxes. Furthermore, contrary to the spirit of the law, you will probably not be working at the publisher’s “direction.” They probably won’t give you an outline or do a single scrap of writing. You’ll do it all, just get paid less.
You’ll also do it under tight deadlines and be expected to revise on demand without limit or additional compensation. Under the law, work for hire pays writers for their time. In publishing practice, work for hire pays per manuscript. There have been grotesque abuses. None of it is legal, strictly speaking, but it’s been going on for years.

Here are some things that you need to get in a work-for-hire contract. These provisions should apply whether the agreement comes from a publisher, a packager, a game company, or anyone else:

- If you will be writing about characters in other media, a publisher must guarantee that their licensing agreement with any third party is complete.

- The publisher must guarantee, if needed, that any third party has approved you to write this novel.

- You will be working from a preapproved outline, and any revisions you’re required to make cannot go beyond the scope of that outline.

- You will not begin writing until your contract is signed, your first payment is received, and your outline is approved.

- You must have a defined minimum period of time in which to complete your manuscript, irrespective of contract deadlines and irrespective of when third parties may approve your outline.

- Your publisher will pay you when you finish your job. If your manuscript must be approved by a third party, the publisher still must pay you within thirty days of delivery (understanding that you will reasonably revise when asked to do so later).

- Packagers must make any payments due when they’re due irrespective of whether they’re waiting for money from someone else.

- If your contract is canceled while you’re working, you will in respect of your time spent and work time lost get paid a prorata share of your entire compensation based on what you’ve completed—at minimum 50 percent.

- If your manuscript is wholly disapproved, it will be returned to you, and no further use of your writing will be made.

- If another writer is hired to rewrite your manuscript and the final published novel is 50 percent or more your work, you will nevertheless be paid 50 percent (or more) of the author’s fees.
• You will have the right, with reasonable notification, to remove your name from the published book if it’s been rewritten or altered.

• You will be cross-indemnified from legal jeopardy and expenses by the publisher, packager, and third parties for anything they supplied to you or any changes they made to your work.

• You will receive royalties (even if reduced) and a share of subsidiary rights income.

• If the work goes out of print and later the copyright holder re-licenses publication rights, you will be paid whatever royalties and rights income you were due under your original contract.

As you probably can guess, that list of work-for-hire contract provisions comes from real-world disasters that have befallen work-for-hire authors. Having handled a number of work for hire contracts, I can tell you that certain things are likely to happen to you. You may well find yourself delivering a manuscript even before you’ve signed a contract or been paid. You probably will wait for payment longer than you thought. I can guarantee you that your work-for-hire contract will not provide you sufficient income to allow you to work on your own stuff. Forget that.

You will get just enough money to cover the time you spent writing. In all likelihood, you will then be begging for the next work-for-hire contract, and so on and so on, until you’re forgotten what it’s like to write your own fiction, your bad writing habits are permanent, and your creative growth is stunted because for years you haven’t had to build characters from the ground up or construct complex plots. Can you tell how I feel about work-for-hire?

There are, of course, a few authors who write best when they’re playing in someone else’s universe. There are times when a work-for-hire deal can be a lifesaver. But beware: Work-for-hire can be an addiction and a trap. A few exceptions notwithstanding, work-for-hire writing will not make you rich. You will be working to make someone else rich.

Collaborations and Ghostwriting
Collaboration can be fun and rewarding, but also vexing and a waste. Most collaborations arise naturally and go smoothly, but there are a couple of things you should consider before you dive in.

First of all, collaborating on a novel does not mean half the amount of work. It’s just as much work, takes just as long, and has the additional requirement of constant compromise. That said, the job can go more easily if areas of responsibility and realms of final authority are decided
ahead of time.

Try to do an equal share of the work, and plan to split all revenues precisely in half. That’s the best plan. When everyone works equally hard and gets paid exactly the same, there’s less room for resentment and feelings of unfairness. Keep loose not only creatively, but also with your time and in your expectations. Treat your writing partner with the respect and understanding you want in return.

Ending collaborations and negotiating ownership and completion of unfinished manuscripts can become sore points, so try to settle on something fair in advance and get it into your written collaboration agreement. Too many agreements don’t cover those possibilities. You don’t want to lose a friend and partner over something that you could have avoided. Life’s too short.

Ghostwriting and co-authoring (with or without credit) may come up in your career. If so, much of the same common sense stuff applies: Know what you’re going to do, who’s going to contribute what, what you will get paid by whom, and, most important, get it in writing. Realize that if you are writing for someone else, there will come a time in the process when you feel like you are the only one working hard and that you deserve 100 percent of the rewards. In practice, ghostwriters and co-writers usually get 50 percent.

If you are ghosting or co-writing for a celebrity, be aware that getting their time and attention may be the most difficult part. The process and requirements of good fiction may not be understood. Try to compel reasonable access in your contract, keeping in mind that contracts and reality do differ. Also take care with approvals and appoint someone to rule in disputes.

Here’s a final piece of advice for contracts of all types: Remember that a contract is not a road map of what will really happen. It’s a fallback to refer to when things go wrong. Indeed, in breach-of-contract lawsuits, it’s the authority that lets you file. Contracts make promises and say what everyone intends. Good ones strike a balance between parties and solidify a bargain that all feel fine about.

Once the ink is dry, what happens in reality is up to you. No matter what a contract says, nothing can substitute for writing well, keeping your word, communicating clearly, compromising when needed, and generally being a good egg. Be a solid partner in whatever arrangements you undertake. Even if the other guy isn’t always an angel, you’ll always feel good about yourself.