A LEGAL GUIDE FOR WRITERS

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ALIS

ARTISTS' LEGAL INFORMATION SOCIETY

Artists' Legal Information Society (ALIS) is a not-for-profit society which provides artists with legal resources and information.
Our goal is to help all artists understand their legal problems and to provide a framework for navigating obstacles.
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Legal Guide for Writers

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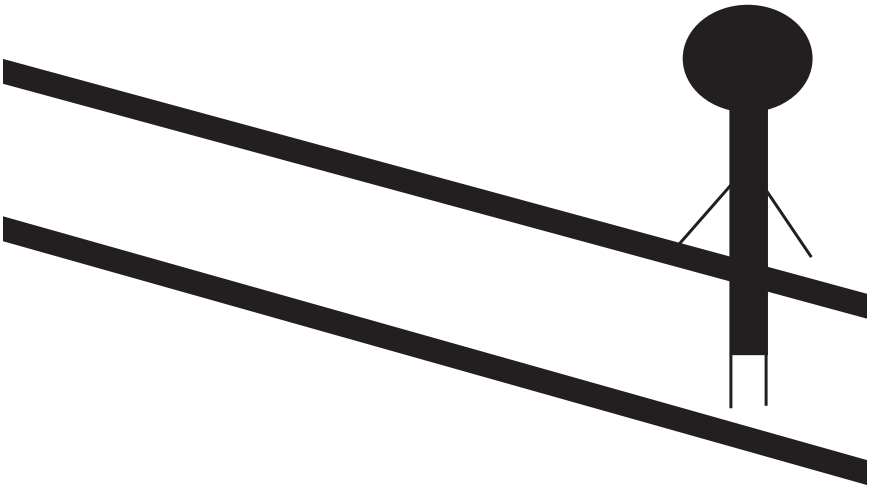
This guide is intended for legal information purposes only. If you need legal advice, please seek assistance from a lawyer.

CHAPTER 1
PATH TO PUBLICATION

You've written a book, short story, poem, or any other awesome piece of writing that you'd like to share with the world.

So now what?



Find a literary agent
↓
Sign a contract with your literary agent
↓
Your literary agent finds a publisher
↓
Sign a contract with your publisher
↓
Publication!

Find a publisher
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Sign a contract with your publisher
↓
Publication!

Find a printer
↓
Sign a contract with your printer
↓
Publication!

As you can see, there are a number of paths to publication. While the above flow charts greatly simplify the process, you'll need to come to various agreements with other parties to share your writing with the world. No matter which route you take, it is very important to know your rights. It is your responsibility as a writer to understand what you're agreeing to do, and what you're allowing the other party to the contract to do, with your work.

This guide can help steer you in the right direction with by explaining the basic concepts of copyright and contracts you may encounter.

CHAPTER 2
COPYRIGHT

What is copyright?
Copyright is the right to copy. This right prevents others from copying your work without your consent. It is a limited term monopoly right, which means the holder(s) of copyright have exclusivity over a work.

Generally, copyright lasts for the life of the author(s) plus 50 years after their death(s).[1] These rights are all protected by the *Copyright Act* (the "Act"), and they apply to literary, dramatic, or musical work.

Section 3 of the *Act* says that copyright is the sole right to produce or reproduce the work, or any substantial part in any material form, and includes the sole right to produce, reproduce and publish the work. It also protects the right of the author to authorize production.

The law of copyright serves a dual purpose: to promote the public interest and to ensure that authors are rewarded for their work. The goal of copyright protection is to strike a balance between these two separate interests.[2]

The law exists to protect original literary works created by authors.[3] Copyright protects works that are original and have been expressed in some material form by an author.

Legal requirements to have copyright
1) Skill and judgment
2) Expressed in tangible form

What is covered under copyright?

Copyright prohibits unauthorized copying and specific uses of protected works. Copyright protection also exists when the work is unpublished. Copyright refers to economic and moral rights.

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[1] Section 6 of the *Copyright Act*, RSC 1985, c C-42.

[2] *Théberge v Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34.

[3] Section 5 of the *Copyright Act*.

Economic rights are the ability of the copyright owner to profit from the work. This includes the already mentioned right to produce or reproduce the work in any form. This category also includes the right to sell, license, or assign certain aspects of the copyright to other people.

Moral rights protect the unique relationship between an author and their work. These rights prevent others from distorting or modifying the work in a way that prejudices the author. These rights are the exclusive domain of the author and they cannot be sold or licensed; they can, however, be waived.[4]

Who has copyright?

Under copyright law, the author and the owner of the work are two different concepts. The author is the person who created the work. They get moral rights in the work; these rights cannot be sold or licensed. The owner is the person who holds the economic rights in the work.

Employer Ownership

As a general rule, the author is the first owner of the copyright.[5] However, there is a significant exception to this rule. Employees who create works in the course of their employment do not get first ownership of the copyright in these works.[6] For example, if you work as a staff writer for a newspaper publisher, the publisher is the owner of the articles written for the newspaper during your employment. This exception only extends to the works employees create in their regular duties.

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[4] Sections 14.1 and 14.2 of the *Copyright Act*.

[5] Section 13 of the *Copyright Act*.

[6] Section 13(3) of the *Copyright Act*.

For disputes, the issue is whether the author completed the work as an employee or an independent contractor. The test is:

1) Who owned the tools used to create the work?
2) Who controlled or directed the creation of the work?
3) Who assumed the financial risk in creating the work?
4) How significant is the author's role as an employee?

Imagine a newspaper editor telling a staff photographer to take a picture using a company owned camera. The company would own the copyright in the picture but the photographer would be the author.

Section 13(2) of the Act covers circumstances where a work is commissioned. In that scenario, the copyright is the property of the party who commissioned the work.

Joint Ownership
If there is more than one author for your work, each person has equal ownership of the copyright in the work. There is still only one copyright in the work, but it is held jointly by all of the authors. Each author's contribution to the work does not need to be equal in terms of quantity or quality for joint ownership. Each contribution has to be substantial; minor input or editing does not qualify for authorship. All of the authors' contributions must have a common design in order for joint ownership to exist.

Ownership for Collective Works
In a collective work, several authors create a work together, but each author has a distinct part within the final work. For example, encyclopaedias and dictionaries can be collective works.[7] Each author owns copyright in their individual contribution to the collective work. However, the person who arranges the collection has copyright in the entire collection.

[7] Sections 2 and 14(2) of the *Copyright Act*.

How is copyright infringed?

Copyright infringement is unauthorized use of the protected original expression. Section 27 of the *Copyright Act* describes the following activities as copyright infringements:

1) Sell or rent out work without authorization
2) Distribute to such an extent as to affect prejudicially the owner of the copyright
3) Expose or offer for sale or rental, exhibit in public, or distribute by way of trade
4) Possess for the purpose of doing anything referred to in the three previous points
5) Import to Canada with the purpose of doing anything referred to in 1) to 3)

The most common method of infringing copyright is by unauthorized reproduction and or distribution of the work. An example of this is the illegal copying and distribution of copyrighted material on the Internet.

In order to show that copyright has been infringed, the owner must show that they own the copyright, that there is sufficient similarity between their work and the infringer's work, and that the infringer had access to the copyrighted work. Access is presumed if the copyrighted work was widely distributed (i.e. posted online). The reproduction must be of a substantial part of the work.

Copyright law exists to maintain a balance between the author's rights and the users' rights. It is in the public's interest to encourage a person to create a work and to protect this work and permit access to it. It is also in the public's interest for an author to have control over the work and to gain an economic advantage from the work itself – this allows authors to go on creating works.

When are the exceptions to infringement?

The main defence to infringement is fair dealing. Fair dealing is a user's right that gives anyone the ability to utilize copyrighted material provided the use if fair and for a valid purpose.

The *Copyright Act* states that there are seven broad categories of valid fair use purposes:

- research
- private study
- criticism
- review
- news reporting
- education
- parody or satire[8]

Even if the use falls within one of these categories, it could still be deemed unfair, depending on a number of criteria.

In the Supreme Court of Canada decision *CCH Canadian Ltd. v. Law Society of Upper Canada*[9], the Court clarified the six criteria used in evaluating fair dealing.

1) The purpose of the dealing
   Does the purpose fit into one of the categories in Section 29 of the Act?
2) The character of the dealing
   This includes the number ofcopies made and how the copies were distributed (i.e. whether distributed in large area or small group of people)
3) The amount of the dealing
   How much of the work is used?

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[8] As of 2012, Section 29 of the *Copyright Act* was amended and the fair use sections were expanded to include education, parody, and satire.

[9] Sections 29.3, 29.4, and 29.5 of the *Copyright Act*.

4) Alternatives to the dealing
   Was the dealing reasonably necessary to achieve the goals of the person using the material and was it possible to use non-copyrighted material to achieve that goal?
5) The nature of the work
   Was the original work published or unpublished; if unpublished or confidential, the use is more likely to be considered unfair?
6) The effect of the dealing on the work
   How does the unauthorized use affect the market of the original work?

There are additional exceptions to infringement covered within the *Copyright Act*. The Act provides exceptions in which copyrighted works are used without a motive of financial gain. These include the use of copyrighted works by educational institutions, libraries and archives.[10] However, the use of the work must fall within one of the broad categories of valid fair use.

[10] Sections 29.3, 29.4, and 29.5 of the *Copyright Act*.

How do I register my work for copyright?

No formal registration is needed for copyright protection.

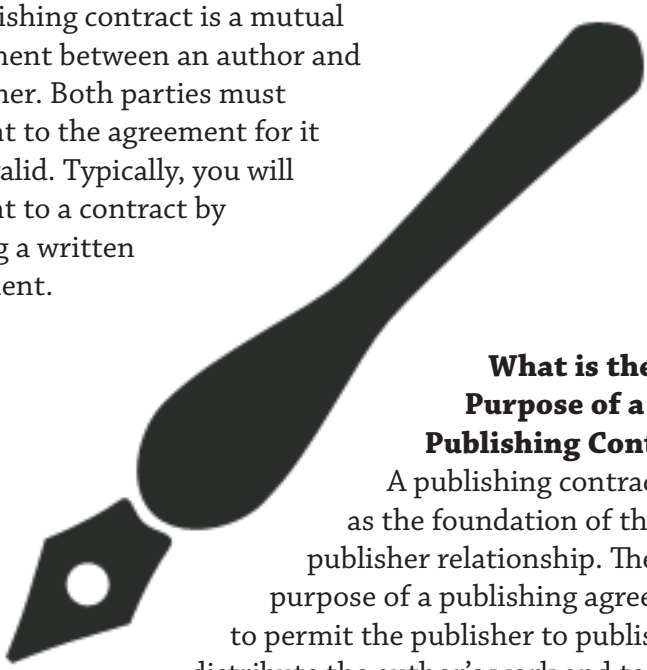
The Canadian Intellectual Property Office (CIPO) offers a copyright registration service. Registration costs range from $50 to $100.

Once registered with the CIPO, the copyright will be added to the official database of copyrighted works in order to assist those seeking permission to use the work. Additionally, the registrant will be provided with a certificate of registration.

For more information and to fill out an application form, visit the CIPO website:
http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/Home?OpenDocument

CHAPTER 3
SIGNING A CONTRACT

What is a Contract?
A publishing contract is a mutual agreement between an author and publisher. Both parties must consent to the agreement for it to be valid. Typically, you will consent to a contract by signing a written document.



What is the Purpose of a Publishing Contract?
A publishing contract serves as the foundation of the author/publisher relationship. The basic purpose of a publishing agreement is to permit the publisher to publish and distribute the author's work and to provide the author with payment.

Why Sign a Publishing Contract?

1. Prevents and resolve disputes.
2. Details the nature of the work to be published, editing, and pre-publication process.
3. Establishes the rights and obligations of the author and publisher.
4. Ensures each party's expectations are met.
5. Provides legal protection to author's rights.
6. Details comprehensive schedule regarding the author's compensation (typically royalties).

Obligations of Author and Publisher

The following table explains the general obligations of both publisher and author in a publishing agreement.

Party to Agreement	Rights	Obligations
Publisher	- Printing - Distribution - Reprint in cheaper editions - Arrange serials and reproduction	- Publish the work - Pay royalties - Account for profits
Author	- Knowledge about the publisher's efforts to publish - Royalties - Have profits accounted for	- Responsible for libel - Provide original work - Proofreading (optional) - Modify manuscript for subsequent editions

Types of Publishing Agreements

Single Form Agreements
The most common form of agreement is a single written document. The author will be compensated for his or her artistic efforts through royalties based upon the percentage of retail book sales (see Royalties section for more details).

Author Contributing Financially to Publication
Some author/publisher relationships may require the author to contribute financially to the printing and distribution process. The author can later recover his or her financial contribution through extended royalties or profit sharing agreements. The memorandum agreement will include some additional clauses saying that the author will contribute financially to publication.

When negotiating this clause, be sure that it is clear to each party how much the author is contributing to publication. Include a clause stating that the author will be reimbursed for his/her publication expenses through royalties or profit-sharing.

Profit Sharing Agreements
Profit sharing agreements can take many forms. The purpose of this agreement is to consolidate a joint venture in regards to the publication and marketing of the author's work. The key is that the work is still created by the author. However, the risks associated with marketing and publications are shared by both publisher and author. What are the rights and obligations of each party in this arrangement?

> Author: The author writes the manuscript and receives a portion of the books sales.
>
> Publisher: The publisher assumes all the publishing costs and receives repayment through profits.

Profit sharing agreements create fiduciary relationships between authors and publishers. A fiduciary relationship is a relationship of mutual trust; both parties are obliged to conduct their business with each other in good faith. Each party is also prohibited from placing themselves in a conflict of interest and must be open with their business activities, including all other book dealings.

Joint Authorship
When two authors contribute to one work, they can enter into a royalty sharing agreement based on each author's contribution to the manuscript. Keep in mind that publishers are not contractually bound to recognize inter-author royalty sharing agreements.

A royalty sharing agreement can be negotiated into a publication contract from the outset. If it is included in the contract, the publisher will be forced to recognize it.

Additionally, if a publisher fails to recognize a joint author's contribution to a work (i.e. including the joint author's name in the work), the joint author can prohibit the publisher from distribution until their name is added. Also, an unacknowledged author can go to court to receive royalties based on the joint author arrangement, even if the shared royalty agreement was not included in the publication agreement.

Sale of work for lump sum payment
An author can sell his/her work to a publisher for one lump sum. In doing so, the author is giving up all rights (including rights to royalties) for their artistic work. The author is selling his/her copyright to the publisher; this is called assignment of copyright.

Licenses
A license to publish is an authorization by the author, given to the publisher, to print and distribute the manuscript within a specific territory and time period. In this case, the author is not assigning copyright to the publisher. All rights concerning copyright stay

with the author. Licensing is similar to leasing your home. You can have tenants living in your home but you keep ownership of the house.

A license can convey the right of sole publication to one publisher. If the licensing contract has an exclusivity clause, the author is free to license his or her work to multiple publishers. Keep in mind that some licensing agreements may not have an exclusivity clause. Read the contract carefully so that a conflict of interest does not arise.

Subsidiary Publishing Agreements
A subsidiary publishing agreement may be a profit sharing agreement, a partnership, or a joint venture. This type of agreement includes publishing the work in different languages and/or publishing in different countries. The publisher of your work may sub-license your work to another publisher through a subsidiary agreement. In each of these arrangements the author will be entitled to a greater share of the book profits, depending on the relationship between the parties.

Cross Letters Sent Between Author and Publisher
Regardless of the method parties use to come to an agreement, the cross-letters sent prior to the enactment of the agreement could be part of the contractual arrangement. Cross-letters are letters and email sent back forth between author and publisher during the negotiating process. In the past, Canadian courts have considered agreements made in correspondence to be legally binding.

However, this is usually only applicable when the publication contract fails to clearly express the essential terms of the contract such as assignment of copyright, the nature of publication, the schedule of royalties, publication dates, etc. As a result, only in cases where parties fail to articulate their rights clearly will cross-letters have an impact.

How do I protect my rights without a contract?

A verbal agreement between an author and a publisher can be a legally binding contract. A basic verbal contract between author and publisher would include publishing an original work from the author in exchange for payment from the publisher.

Verbal agreements have the same legal protection as a written contract as long as the basic components of a contract are present. There is no legal requirement that agreements must be in writing in order to be enforceable in court.[11]

However, problems can arise when agreements are partly reduced to writing, while other terms and conditions are verbally agreed upon. It all depends on the parties' intentions. If the parties intended that the written document would encompass all the terms of their agreement, a court will not recognize additional terms verbally agreed upon.

Alternatively, where the parties intend that the written agreement will only be a part of the whole agreement, courts will enforce the verbal terms in addition to, or even in place of, the written terms.[12]

The real difficulties arise where one party claims an agreement is entirely contained within the written document and the other party claims there are additional or contradictory terms that the parties agreed upon verbally.

Canadian courts have used two different approaches in dealing with this unique problem. First, under the traditional approach,

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[11] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), p. 160-161.

[12] *Ibid*, p. 195.

only the terms in writing are enforceable, unless there was evidence that the written agreement was incomplete.

The second approach is that there must be evidence that the parties intended their agreement to be expressed exclusively through the written document before any other evidence will be excluded. In other words, the courts would consider promises made verbally. The second approach is popular in Canadian courts and is the approach used in the United States and the United Kingdom.[13]

Tips on Protecting Your Rights

Get a formal, written contract signed before doing any work on behalf of a publisher. Despite the flexibility seen in some recent court decisions, it is always advisable to operate with a formal contract that clearly defines every aspect of your agreement.

Document everything! Any communications with a publishing company should be recorded and kept as evidence of the dealings between the parties. This includes emails, text messages or any other electronic communications. Keep records of your conversations with your editors so that you have evidence of the verbal agreement.

If any terms are agreed to orally, ask for the terms to be put in writing. Make clear that you expect any verbally-agreed-upon terms to be included in the overall agreement, even if they are not in the written document. Create a written document expressing this intention and have your editor or one of the companies' representatives sign it. Protect yourself by being proactive.

[13] John D. McCamus, *supra*, pp. 203-206.

Commonly Used Clauses

Royalty and warranty clauses are highlighted in this section. Be mindful that standard form contracts include many other clauses.

Royalties

Royalties are the primary instrument publishers use to pay authors. This is the first clause you should look at when reading your contract. If you are not happy with your royalty agreement, you will not be happy with your publishing contract. Royalties are an author's primary means of compensation.

According to The Writers' Union of Canada, the standard royalty rates are 10 percent of the retail (ie. cover or list) price for the first 5,000 copies sold, followed by 12.5 percent for the next 2,500 copies sold and 15 percent on all subsequent copies sold.

In your agreement, set out a schedule of royalty payments based on or varying with the number of copies sold and the nature of the edition distributed. Royalties are often a percentage of the retail selling price of the book up to a certain amount of copies with an increment in percentage points as the number of copies sold increases. This may also vary with the edition, e.g. copies sold at a clearance price or where the work is sold in sheets or there is a cheaper edition.

Royalties may be excluded on the copies given to the author, editors, reviewers, lost or damaged copies and copies not sold. If the author requires complimentary copies, the number of copies required and when complimentary copies will be given may be drafted as a clause in the agreement.

Advances

Advances are compensation for the manuscript given before the manuscript is completed. Make sure the clause says that the advance is non-returnable unless the manuscript is not published because you fail to complete and deliver it on time. The typical

advance payment schedule is one-third payment on signing the contract, one-third payment no more than 30 days after delivery of the manuscript, and one-third on delivery of the revised manuscript if the publisher requests revisions.

Advances against Royalties
Advances against royalties are cash advances to the author before royalties are earned. The publisher will advance money to the author and withhold royalty payments until the initial cash advance is offset through book sales. Advances against royalties can be one lump sum, paid in installments or installment payments trigged by specific events such as submission of the manuscript or on the publication date.

The following is an example of a lump sum advance against royalties payment:

An author sells a license to a publisher, to publish her work in return for 10% royalties on sales of the book. Additionally, the publisher grants the author a $10,000 advance against the 10% royalties. In this instance, the author would immediately receive the $10,000. However, royalty payments would be withheld until the publisher earns $10,000 worth of book sales. After, the 10% royalty would be paid on any additional sales to the author.

Warranties
Warranties refer to a term in a contract which does not go to the heart of the agreement between the parties. Instead, a warranty describes a lesser obligation between parties.

In addition to the main agreement, each party can make smaller agreements within the contract. While breach of a smaller agreement cannot terminate the contract, the party claiming breach can sue the other party.

Author Warranties
Generally, publishers require authors to guarantee a long list of warranties in the publishing agreement. In court, these warranties usually offer the publisher little protection. The following is a list of the most common warranties found in a publishing agreement.

- The work submitted to the publisher is original (not plagiarized or stolen)
- The author is the proprietor and creator of the work and has full legal power to enter into a publication contract.
- The publication will not infringe a proprietary right or copyright of another party.
- The work has not already been published in book form.
- The work contains no material which is libellous, obscene, or otherwise contrary to law.

The author will be required to compensate the publisher for all court fees incurred while defending the publication. For example, an author and publisher sign a publishing agreement. Later, a third party sues the publisher because the publication contains libellous material. Even if the charges are proven false, the author may be required to cover the court costs the publisher incurred defending the publication.

Indemnities
Indemnity is security against any damages or losses as a result of a breach in the contract. Indemnity clauses allow for the publisher and the writer to receive compensation for losses under the contract. Do not agree to indemnify (compensate) the publisher for any cost that does not result from your breach of your warranties. Also, negotiate how costs will be split in the event of a lawsuit.

Subsidiary Rights
Consider carefully whether you want to give your publisher the right to sub-license your work. Make sure the publisher has the

ability to publish in other countries or languages successfully. Consider requesting the right to approve any subsidiary rights grants. The typical rate for author royalties is 60 to 90 percent.

Terms You Need in a Contract

Negotiating a publishing contract can seem like a daunting task. However, with the correct information, patience, and the right attitude you can land a satisfying agreement. This process need not be stressful if you are informed. The following is some general tips and information to help navigate the negotiation process.

Include a Rights Retention Clause

It would be wise to include a clause which states "all rights not specifically granted to the publisher are retained by the author." This way there can be no ambiguity as to who owns what. If there is a dispute, this clause can help resolve it in your favour.

Negotiate a Bankruptcy Clause

The most important reason to retain your copyright is that in certain situations, you will be able to regain full rights in your copyright. One thing to consider is what happens if your publisher goes bankrupt. It is in your best interest to negotiate a clause that allows your copyright to revert back to you if your publisher no longer exists. This is not an unusual clause; do not be afraid to ask for it.

If expenses have been incurred by the bankrupt publisher and if your work has been in type set, even in part, you may only recover your copyright once you have paid off the debt to the publisher. Thus, if you are in the mid-publication process, even a bankruptcy clause may not protect you. Be wary of this when signing with a publisher on questionable financial ground.

Clarify Publication Dates
Be sure to clarify when your book will be published. Surprisingly, many publishing contracts are silent on publication dates. Some contracts may imply a publication date, but this leaves you in a vague position. Ensure your contract includes a publication date.

No Assignment Clauses
If possible, try to ensure that your contract has a no assignment clause. This will be helpful in the event that your publisher tries to sell your contract to another publisher. The clause should clearly state that the publisher is prohibited from assigning your copyright to another publisher without your express permission.

Be sure to ensure that another publisher is not forced upon you. In this scenario, you may not like the publisher that is "selected" for you.

Out of Print Clauses
Concrete standards should be set so that the event of a work being out of print is clearly understood in the physical and electronic format. Define the out of print clause in the contract in the traditional format such as a minimum number sold within a certain period of time. This gives the author the right to license the reproduction rights to other publishing companies or print on-demand companies when the original publisher is no longer printing hard copies.

Overstock Clause
This clause covers what happens with excess inventory. Try to have a clause where you are notified when the publisher plans to destroy any remaining inventory.

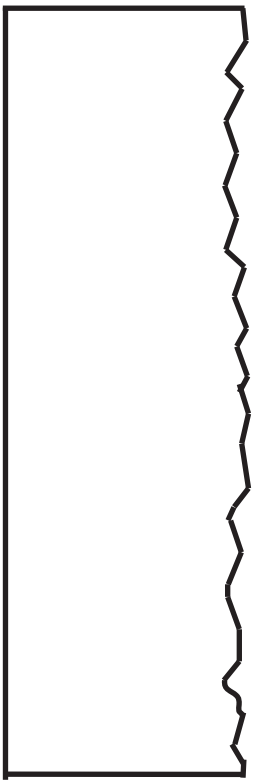
Avoid Reasonable Edit Clauses and Arbitrary Rejection
If your contract gives the publisher the right to reject or edit an unsatisfactory manuscript, there should be safeguards to protect you from arbitrary rejection. Your contract should state that a

publisher must give you written reasons for a manuscript's rejection. Also, the contract should provide for reasonable time to edit the manuscript to meet your publisher's expectations.

Non-Competition Clauses
Non-competition clauses are a form of restraint on the future activities of the author. Essentially, the author agrees not use the material in the work (under contract with the publisher) as a basis for another publication. The author may be prohibited from publishing similar works with another publisher or may be prohibited from publishing any similar works including the current publisher. The purpose of this clause is to prevent other works from competing in the market place with the author's work.

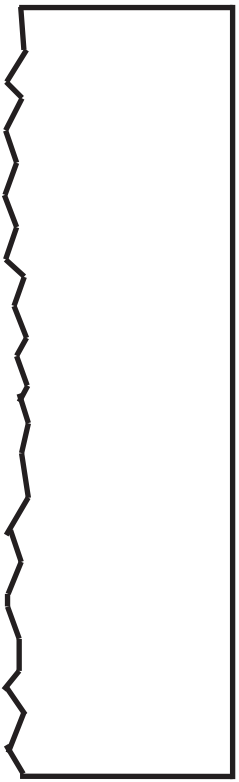
These can be very restrictive clauses. If an author specializes in one genre, the clause could restrict him/her from publishing at all. If possible try and avoid this clause or have it written in a clear manner.

CHAPTER 4
BREAKING A CONTRACT



Breaking a Contract

A party may break a contract at any time. There is no penalty (with certain exceptions) above and beyond those awarded under normal contract law principles. When breaking a contract, the court may give damages (i.e. money) to the other party.



What Are The Consequences?

Compensatory Damages: A party may break a contract at any time with the general expectation that compensatory damages will be paid. In other words, you are free to break the contract as long as you compensate the other party for what they stood to gain or reasonably expected to gain if the contract had been performed. These types of damages can be quite high if the term of the contract is lengthy and associated with high costs.

Reliance Damages: Courts have in limited circumstances awarded damages to a party for out-of-pocket expenses stemming from their reliance on the contract. For example, a publisher may spend money on extra paper in anticipation of printing numerous copies of your book. These reliance damages seek to return the party to the position they would have been if the contract never existed.

Restitutionary Damages: Where the party in breach of the contract has received some benefit from the partial performance of the contract by the non-breaching party, the court may order that benefit to be returned. Part performance includes the publisher paying an advance fee. Restitutionary damages seek to compensate the non-breaching party for their part performance of the contract.

Specific Performance: Besides damages, a party may seek to enforce the performance of the contract as agreed between the parties through an award of specific performance. Specific performance is a court order where the party in breach is directed to perform the acts agreed upon in the contract. This order is generally only available where the court feels that the usual award of damages is unsatisfactory.

Injunction: A contract may order that a party refrain from doing a particular act. Upon breach of the contract, the non-breaching party may seek an injunction, which is a court order requiring that the party in breach cease from doing the act.

Exceptions
There are a number of ways in which a contract may be broken by one of the parties without having to pay compensatory damages.

1) Misrepresentation: where one party convinces another to enter into a contract using fraudulent, false or misleading information, the misled party should be allowed to rescind or break the contract, as long as the parties can return to their pre-contractual positions (i.e. by giving back any benefits received).

2) Duress: where someone makes an agreement as a result of threats, which may or may not be of a physical nature. The threats may be expressed or implied.

3) Undue influence: where one of the parties abuses a position of trust and confidence to promote an agreement.

4) Mistake: if a party is mistaken regarding the terms of an agreement or the motivations of the parties in forming the agreement, that party may seek two different remedies. The party may seek to avoid performance of the contract or have the terms of the agreement revised to reflect their actual understanding. Courts will consider whether a meeting of the minds ever occurred in the first place, which would determine whether a valid contract exists.

5) Illegality: where the contract is contrary to the public interest or is prohibited under law, the contract may be considered terminated. No court will enforce an illegal contract.

Enforcing a Contract

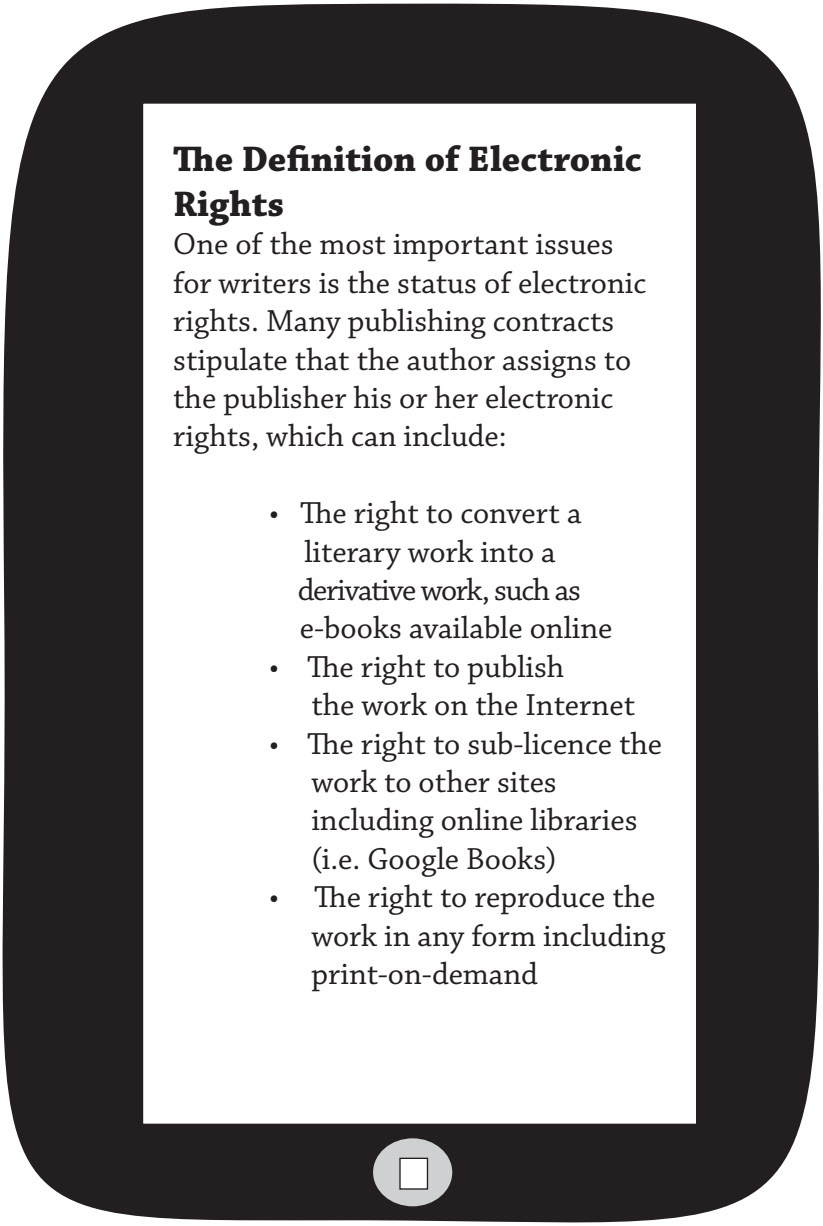
Whenever a dispute arises over a contract, it is always wise to seek the advice of a lawyer. Depending on the nature of the dispute, there may be a number of potential remedies which may be sought in court, such as damages, specific performance or an injunction, as well as a number of defences.

The Small Claims Court provides for disputes to be resolved in an informal setting. Claims under $25,000 can be filed with the Court and legal representation is not required. Defamation (libel and slander) cannot be claimed in Small Claims Court.

Claimants fill out an application with the court detailing the dispute. Defendants will receive documents and each party will have an opportunity to present evidence. For more information, visit the Nova Scotia Small Claims Court website, http://www.courts.ns.ca/smallclaims/index_claims.htm.

For claims of more than $25,000 or claims of defamation, claims will be filed with the Supreme Court of Nova Scotia. Orders can be made by the court. For these types of disputes, seek legal assistance.

CHAPTER 5
ELECTRONIC RIGHTS



The Definition of Electronic Rights

One of the most important issues for writers is the status of electronic rights. Many publishing contracts stipulate that the author assigns to the publisher his or her electronic rights, which can include:

- The right to convert a literary work into a derivative work, such as e-books available online
- The right to publish the work on the Internet
- The right to sub-licence the work to other sites including online libraries (i.e. Google Books)
- The right to reproduce the work in any form including print-on-demand

Be mindful of the ways in which technology can be used to promote and sell your work. Ensure that there is a mutual understanding for what electronic rights means and be specific. Have an idea of what electronic rights you would like to retain, and make it clear that these are not to be included within any assignment of electronic rights.

Understand exactly what the publisher is permitted to do in terms of derivative works. Make this list as specific as possible. Understand whether the right to derivative works includes the right to put your work in electronic form, and if so, in what electronic format. Try to limit these electronic forms as much as possible. This will allow you to potentially exploit new technologies or mediums that weren't expressly covered in the publishing agreement.

If the work is going to be online, find out where. Understand whether the publisher or the licensee is going to have access to the distribution of your work.

Avoid exclusive licenses where possible. If the grant of rights is non-exclusive, you will keep certain rights with respect to your work. This may include the right to post your work on your own site or licensing your work to a print on-demand company.

Types of Electronic Rights

Third Party Licenses

Definition:

Literary works often make reference to other third party copyrighted works within their content, and licenses to do so must be obtained by you. What do these licenses have to say about electronic rights?

Licenses should include the right to use the work electronically. To avoid future disputes, these third party rights should be considered.[14]

Things To Do:

Get permission! Make sure to get permission from any third party copyright holder referenced in your work. Request a form from the publisher to have the third party sign an agreement to license the work.

Out of Print Clauses

Definition:

Many publishing contracts contain provisions where the copyright in the work reverts back to the author once the work is out of print. Out of print could have several different meanings. It could encompass pre-made hard copies or include online availability in print-on-demand databases.

The old standards of measuring when a work is out of print will not likely work in the electronic realm and the publishing contract should be clear on this point.[15]

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[14]Ivan Hoffman, "Electronic Issues in Publishing Contracts" (2000). http://www.ivanhoffman.com/electronic.html

[15] Ivan Hoffman, "On Demand Printing Contract Provisions" (2000). http://www.ivanhoffman.com/demand.html

Things To Do:
Concrete standards should be set so that the event of a work being out of print is clearly understood in the physical and electronic format.

Define the out of print clause in the contract in the traditional format such as the number of hard copies falling below a particular number. This gives the author the right to license the reproduction rights to other publishing companies or print on-demand companies when the original publisher is no longer printing hard copies. Otherwise, the publisher could simply make the work available for print indefinitely, extending the term of the license far longer than was intended.

A common way to establish out of print status in the electronic format is by connecting the clause to the revenue received by the author within a given accounting period (i.e. when the author's revenue falls below $1,000 dollars over 2 years).

On-Demand Printing
Definition:
On-demand printing is a new and fast growing business model. The print on-demand business model is based on obtaining licenses to print numerous works and printing single copies when an order is received. The ordering may be done in person or on-line. Having your work distributed through an on-demand printer presents its own unique challenges. The various issues with on-demand printing include:

- Whether rights for works available online or off-line ordering process (i.e. ordering book from bookstore)
- Whether sub-license rights to other websites is available
- Ownership of derivative work

Things To Do:
Clarify these issues in the contract. If the service is online, try to avoid exclusive licenses for long terms. This will enable licensing to multiple on-demand printing companies simultaneously, increasing the overall market for the work. Because technology is always changing, try to avoid long term licenses so that changing or newly emerging markets can be exploited.

Be mindful of rights to derivative works. Retaining rights in derivative works could provide new sources of revenue through licenses and royalties. Discuss advertising revenue and various profit-sharing schemes.

Tips on Royalties

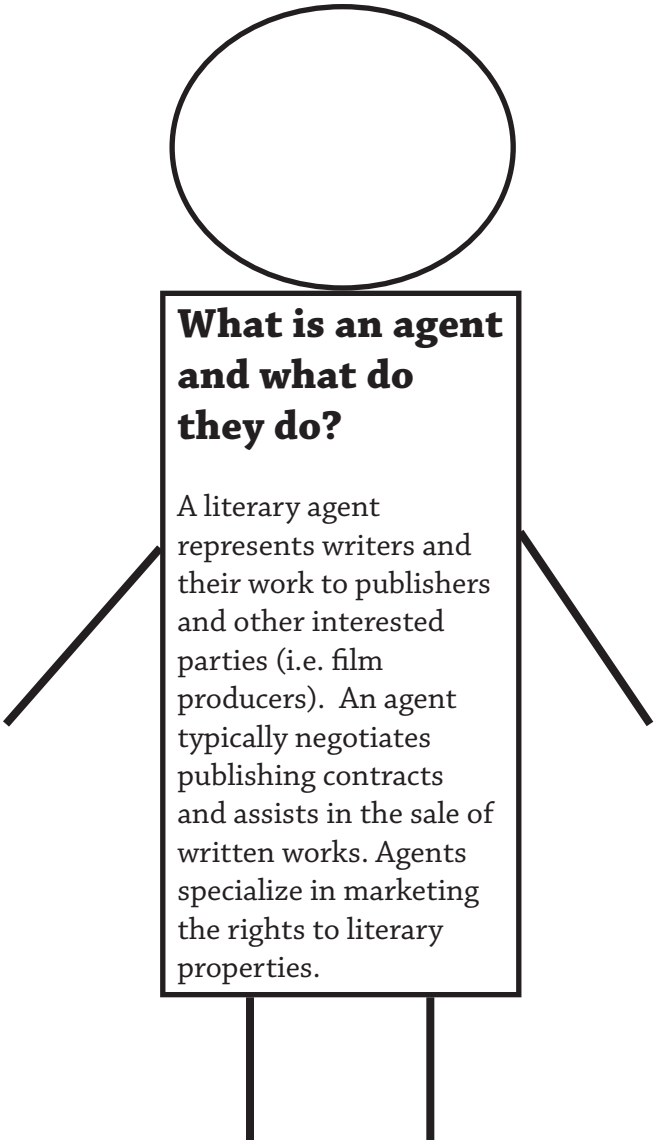
Be clear on how royalties are calculated, especially given the different costs of production for electronic content. Remember, the costs to the publisher for printing, storage, and shipping are greatly diminished in electronic form so this should be reflected in greater revenue sharing.

Currently the cost of making an electronic version of a book can be expensive, and the publisher may use costs to their advantage to reduce royalty payments.

According to The Writers' Union of Canada (TWUC), royalties should be at 25 percent of the publisher net receipts. The Writers' Union of Canada's model contract specifies a royalty of 30 percent of publisher net receipts and recently recommended 50 percent of publisher net receipts. TWUC also cautions writers to beware of clauses that reduce the royalty rate excessively if the discount to the retailer exceeds 55 percent.

Similar principles apply to print on-demand deals. The availability of advertising revenue should be discussed. Get a breakdown of the costs associated with printing on-demand so that you have an informed opinion of whether your royalties are fair.

CHAPTER 6
LITERARY AGENTS



What is an agent and what do they do?

A literary agent represents writers and their work to publishers and other interested parties (i.e. film producers). An agent typically negotiates publishing contracts and assists in the sale of written works. Agents specialize in marketing the rights to literary properties.

Duties of a Literary Agent

- Provides an assessment of quality of work and potential marketability
- Editorial guidance
- Strategies for securing publication
- The negotiation of publishing contracts
- Advice about trends, market conditions, contractual terms, etc.
- Establish contacts with firms and persons acquiring rights to appropriate types of literary material – act as a 'buffer' between authors and publishing houses
- Review royalty statements and inform author on financial matters[16]

Typical remuneration for a literary agent is 15% commission of sales made. A good agent works to find publishers for their clients' work, has a deep understanding of contract law, insider knowledge of the publishing industry, and will devote time and energy into securing the highest rates and chasing down outstanding payments.[17]

Writers who want to find a good literary agent must be cautious. Although agents are required to follow ethical guidelines within the profession, there are many who operate without the best interests of their clients at heart. A writer who wishes to secure a literary agent should be educated about the industry. Currently, there are 30 literary agencies in Canada. For a complete list and more information on agents, visit The Writers' Union of Canada website at http://www.writersunion.ca/content/literary-agents.

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[16] Association of Author's Representatives, online: http://aaronline.org/FAQ.

[17] "How Publishing Really Works," online: http://howpublishingreallyworks.com/?page_id=166.

What are the contract terms with an agent?

Scope of Representation
This provision outlines the powers and responsibilities of the agent and the author which include exclusivity, representation and negotiation of sale, lease, license or other disposition of the rights' to the author's work. Include in the provision that any offers for sale of rights be subject to the author's approval. See "Signing a Contract" chapter for further details on terms.

Term of Representation
This provision states the term of the representation of the author by the agent. This will be subject to a separate termination clause and will usually contain instructions for renewal.

Commission
This provision authorizes the agent to deduct and retain 15% of gross revenue payable to the author in connection with any disposition of rights (sales, etc.) in the author's works.

Disbursements
This provision authorizes the agent to collect and receive, on the author's behalf, all payments due to the author in connection with the contract. The provision also includes instructions for the agent to pay over these collections, minus commission, to the author, within a specified amount of time.

Communication and Statements
This provision ensures adequate communication between the parties to the contract, particularly any legal notices pertaining to the contract and any important communications from publishers.

Powers
This provision requires that the author provide written approval for the agent to execute any agreement or grant any rights with respect to the author's works.

Termination
This provision allows either party to end the agreement at any time upon a certain notice period, usually 30 days. Often, this provision will include a clause allowing the author to terminate the agreement without the notice period in the event of bankruptcy of the agent.[18]

The contract governs the relationship between the author and the agent and must cover all aspects of that relationship: the author's basic rights, the agent's responsibilities, remuneration, deadlines, and expectations. Contracts should be reviewed very carefully before signing.

[18] "Agency Agreement," Publish Lawyer, online: http://www.publishlawyer.com/agency.pdf

CHAPTER 7
DEFAMATION

What is defamation?

Defamation law is concerned with the concept of reputation. The law protects your reputation against false statements. Defamation refers to false statements that are spoken and libel refers to false statements that are written, published, or broadcast.[18]

Defamatory statements must be made to third parties and must be about an identifiable individual(s). The statements must be false and damaging to the individual's reputation. False statements that are not damaging and true statements that are damaging are not defamatory. A false statement about a large, unidentifiable group of people cannot be defamatory.[19]

The law only protects damaged reputations, not hurt feelings. Insults and pride-injuring remarks are not defamatory. For example, disparaging remarks about personal hygiene or attractiveness do not fall under the protection of defamation law. However, making untrue statements about a persons' trustworthiness or business capabilities can be damaging to their reputation.[20]

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[18] "Defamation: Libel and Slander," Canadian Bar Association, http://www.cba.org/bc/public_media/rights/240.aspx.

[19] Gil Zvulony, "What is the Definition of Defamation Law in Ontario Law," online: http://zvulony.ca/2010/articles/defamation-articles/definition-defamation/.

[20] Supra note 18.

How is the law applied?

Defamation is a cause of action that allows people to protect their reputation against false statements. Defamation law exists in civil law, criminal law and can be a human rights violation. Section 300 of the Criminal Code makes defamatory libel an indictable offence which can be punished with a prison sentence of up to five years.[21] If you sue your defamer in civil court, you can be awarded damages (money), whereas if you press charges against your defamer in criminal court, your defamer can face prison time.

Defamation is strict liability which means that the intentions of the defamer do not matter. If the statements harm a person's reputation, it is irrelevant whether or not the defamer had those intentions in mind.

The test to determine whether a statement is actually damaging to one's reputation is whether or not the statement would lower the opinion of the person in the minds of others or cause a person to be shunned, avoided, exposed to hatred, contempt, or ridicule.[22] This is an objective test, meaning that the court seeks understand what the average person would think.

The limitation period on defamation claims is two years. This means that a defamation suit must be filed within two years of the occurrence of the defamatory remarks.[23] Seek legal assistance before moving forward on a defamation claim.

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[21] Section 300 of the Criminal Code, RSC, 1985, *c* C-46.

[22] *Supra* note 19.

[23] *Supra* note 18.

RESOURCES

Legislation

- *The Copyright Act* - http://laws-lois.justice.gc.ca/eng/acts/C-42/index.html

Legal Information

- Artists' Legal Information Society - ALIS provides free legal information to artists living in Nova Scotia. http://nsalis.com/

- The Writer's Union of Canada – this organization has various booklets on the business of writing, available for non-members for a small fee: http://www.writersunion.ca/content/writers-union-publications

- The Canadian Intellectual Property Office (CIPO) – this is the government's administrative body which deals with registration of copyrighted material: http://www.opic.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00051.html

General Legal Information for Court Disputes

- Legal Information Society of Nova Scotia –general information about all areas of law: http://www.legalinfo.org/

- Nova Scotia Legal Aid - information on Legal Aid services in Nova Scotia can be found here: http://www.nslegalaid.ca/

- The Nova Scotia Small Claims Court – information on filing a claim in court: http://www.courts.ns.ca/smallclaims/index_claims.htm.

- Nova Scotia Barristers' Society - Guidance on various legal matters may be found here: http://www.nsbs.org/

GLOSSARY

Advance
Compensation for the manuscript given before the manuscript is completed. Advances against royalties are cash advances to the author before royalties are earned.

Agent
A person who represents writers and their work to publishers and other interested parties. An agent typically negotiates publishing contracts and assists in orchestrating the sale of written works.

Assignment of Copyright
When an author sells their work to a publisher and gives up all rights.

Commission
The fee or percentage of sales received for services rendered. Authors, literary agents and sales agents are paid through commissions.

Contract
An agreement between the writer and the publisher that can be legally enforced.

Copyright
The right to copy an original work.

Cover price
The retail price of a book suggested by its publisher and printed on the dust jacket or cover.

Damages
Compensation or money awarded to a person by the court based on a wrongful act committed against them the other party.

Defamation
Statements made verbally which are false and damage the person's reputation.

Electronic Rights
The right to publish the work online, on CD-ROMs/DVD, online libraries and other electronic formats.

Fair Dealing
The right to use copyrighted material for a legally valid purpose.

Indemnity
Security against any damages or losses as a result of a breach in the contract. Indemnity clauses allow for the publisher and the writer to receive compensation for losses under the contract.

Infringement
Unauthorized use of the protected original expression.

Joint Ownership
Two or more persons who authored a manuscript or piece of writing; each person has equal share of the ownership rights.

Libel
False statements that are written, published, or broadcast.

License
Authorization by the author, given to the publisher, to print and distribute the manuscript within a specific territory and time period.

List Price
The price to the retail consumer as suggested by the publisher; sometimes printed on the jacket or cover.

Moral Rights
The right to prevent others from distorting or modifying the work in a way that prejudices the author.

Non-Competition Clause
Where the author is prohibited from using their work in other writings or similar writings.

On-Demand Printing
When single copies of a book or article are printed through in-person or online orders.

Original
A legal term where an artistic work must require skill and judgment to receive copyright.

Ownership
The person or organization who holds the economic rights in the work. Economic rights are the ability of the copyright owner to profit from the work.

Royalties
Payment given to authors for their work, usually the percentage of retail book sales.

Subsidiary rights
The right to publish the work in different languages and/or different territories outside of Canada.

Warranty
A term in a contract which does not go to the heart of the agreement between the parties. Instead, a warranty describes a lesser obligation between parties.

Worldwide Rights
The publisher's right to publish the work throughout the world.