



Managing Intellectual Property in the Book Publishing Industry

A business-oriented information booklet

Creative industries – Booklet No. 1



WORLD
INTELLECTUAL
PROPERTY
ORGANIZATION



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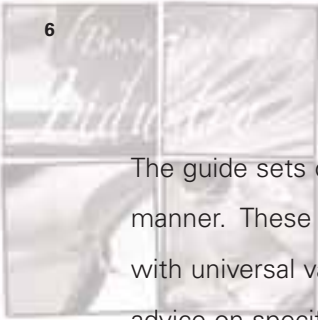
PREFACE

The World Intellectual Property Organization (WIPO) is pleased to present this introductory guide for publishers who wish to increase their understanding of how to manage intellectual property rights in a business context. The book offers practical information to help publishers both to exploit intellectual property rights as economic assets, and to avoid infringing the rights of others. While focusing primarily on publishers of trade books, the concepts covered are equally relevant to publishers of other printed literature, such as textbooks, newspapers, magazines and corporate literature.

The authors begin by introducing basic notions of intellectual property, drawing on examples from the publishing world, before focusing more closely on the bundle of rights covered by copyright. The legal relationships inherent in these rights are considered in relation to each of the different stages of the economic value chain of book publishing, from creation to consumption.

The second part of the book covers the negotiation of copyright-based contracts and licenses. This starts with the primary or “head” contract between an author and publisher; followed by the authorizations required to incorporate other copyright material, such as images or excerpts, into a publication; through to the licensing of subsidiary rights for the purposes of creating, for example, a film or merchandizing based on the original publication. In the final chapters, the authors present a series of concrete business models. They offer practical guidance on the nitty-gritty of how to calculate royalty and other payments, including a number of illustrative payment scales.

The information is based on conventional practices of publishing houses and does not seek to cover all business models of publishing. In particular, a detailed discussion of the complex issues relating to digital and electronic publishing lies outside the scope of the current publication.



The guide sets out broad principles of intellectual property law in a non-prescriptive manner. These descriptions should not, however, be understood as legal statements with universal value, nor should the guide be used as a substitute for professional advice on specific legal issues or on national copyright legislation.¹

This is the first publication in WIPO's *Creative Industries* series. It was written by two experienced publishers, Ms. Monica Seeber, Consultant, The Academic and Non-Fiction Authors' Association of South Africa (ANFASA), South Africa, and Mr. Richard Balkwill, Consultant, Centre for International Publishing Studies, Oxford Brookes, and Associate, Rightscom, United Kingdom. The International Publishers Association (IPA) also contributed valuable input.

¹ Publishers should consult their local authorities and national legislation for detailed information and advice on troublesome matters. National publishers' association should also be a good source of advice.



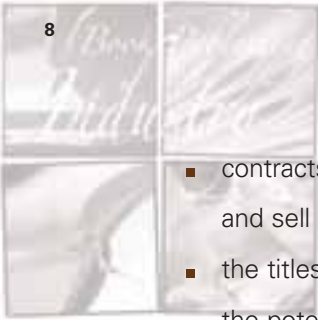
INTRODUCTION

At the heart of the book publishing industry lies the ability of a publisher to select or commission content that the reading public will be ready to purchase, which will satisfy their interests in a variety of thematic areas. Book publishers produce this content in print and/or in other formats (electronic versions of books, periodicals, websites, blogs, etc.) and use sales and marketing skills to sell this content to readers.

Book publishers are creators, acquirers, custodians, and managers – *owners* and *users* – of intellectual property rights. They possess certain rights in the books they produce and sell, and they hold other rights on behalf of third parties. Their business involves exploiting the rights of others, just as they equally seek to defend and protect what is theirs and what they have been entrusted to defend. Publishers therefore have a professional interest in exploiting these rights to the best advantage of their authors as well as themselves. They are thus obliged to treat the rights of others with respect. This is a moral obligation, which is equivalent to their legal responsibilities. There is also a responsibility to society, for intellectual property rights are central to the promotion of cultural advancement and the flow of knowledge and information.

For any enterprise in the business of creating or using the products of the mind, a poorly-managed intellectual property portfolio can be detrimental to the success of its business. For this reason it is essential for publishers to protect their company's intellectual property assets, as they will in turn work for them and be their most vital and valuable asset in the business of publishing books.

The value of a publishing company is not calculated according to the land, property or equipment it owns, or even the books stacked in the warehouse. Its most valuable assets are those that will continue to generate income when the warehouse shelves have long been emptied, namely the rights the company owns or controls. These include:

- 
- contracts with authors which grant the publisher the right to publish and sell their works;
 - the titles in the publishing house catalogue and its backlist;
 - the potential revenue streams from sub-licensing arrangements; and
 - the potential to publish for other and different readers through digital means like print-on-demand, or in digital format (i.e. by way of the Internet).

Of all the intellectual property rights relevant to the book publishing industry, copyright remains the most significant. Typically, **the first owner of copyright** in any created work – a novel, a biography, a letter, a drawing, a photograph, a song, a concerto – is the person who created it, (leaving aside national legislation which gives the employer the copyright in an employee’s work created in the course of employment, and other cases). The publisher will have to enter into a legal relationship with the creator – author/writer of a manuscript – in order to publish the work and issue copies of it in sufficient quantities to satisfy the needs of the public. The publisher does this by virtue of a contract in which the author either assigns copyright to the publisher or, more usually, grants to the publisher an exclusive, or non-exclusive, license. There are, however, notable exceptions and these are covered in more detail in Section C.i.

There is no law that can protect an idea which has not yet been expressed. Hence copyright does not protect ideas. The underlying principle of intellectual property law is to protect and reward the products of the mind, but an idea has to be expressed in some form before it can be the subject of legal protection. Thus, the letter must be written; the landscape must be drawn, painted or photographed; the song must be taken down in musical notation or recorded before its creator can claim rights over it.

Books often contain more than one copyright: in the literary content (the text) and also in different artistic works if it contains drawings, paintings or photographs. Each one of these copyright works is the subject of a contractual agreement permitting its reproduction and publication, and, where the publisher does not himself acquire the rights contractually, he acquires a license to exploit them. He therefore needs a good understanding of the different types of contracts that cover all these rights.



It is imperative that the publisher understands that he is more than merely the packager of information, bringing it from its creative source to the marketplace. More importantly, the publisher gives substance, and adds value to the original creative work and is thus a vital link in the **book value chain** as we shall see in Section C.

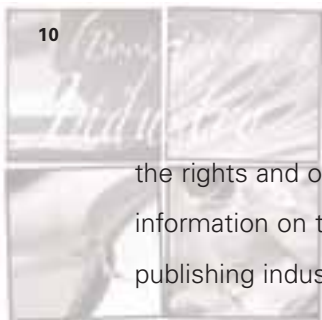
Yet many book publishers have a feeling of deep insecurity when it comes to intellectual property. They know that it is a crucial part of their business but they also know that it is complex and has many pitfalls for the incautious. Nevertheless, the book publisher must regard the intellectual property system as a significant business tool to skillfully and strategically optimize his operations. Publishers should appreciate intellectual property since it underpins the entire structure of the knowledge and information industries of which publishing is just one part.

Publishers must therefore be familiar with the way their country administers intellectual property and in particular its national copyright legislation. For example, while the general principles of copyright law are applicable worldwide, legislation varies from country to country. Some common international regulation is necessary to avoid conflict between different national laws and this is particularly so in the information age, with the blurring of boundaries and the explosive growth of trans-border information dissemination.

Hence the publisher must become acquainted with the basic notions of intellectual property law. This is because the publisher, in order to do business, needs to acquire from the author the exclusive rights of reproduction and distribution, which are recognized at the international level by the **Berne Convention for the Protection of Literary and Artistic Works** (the Berne Convention), and with regard to publishing in the digital environment, the **WIPO Copyright Treaty** (WCT)².

However regulation of the **contract between author and publisher** is left to national legislation. While in some legal traditions there are few, if any, rules on the form and content of that legal relationship, other countries dispose of detailed legislation on the formalities of the publishing contract and its content, as well as

² For more information on the Berne Convention and the WCT please see <http://www.wipo.int/treaties/en/>.



the rights and obligations of the parties and the way the contract ends. Further information on the basic notions of copyright and other relevant rights in the book publishing industry is provided in Section A below.



SECTION A


Basic Notions of Copyright and other Relevant Rights in the Book Publishing Industry

Intellectual property is a global overall term defining creations of the mind – in other words, ‘things’ that people create from their personal imagination: a story, a wood carving, a song, a dance routine, or an invention. The collection of intellectual property laws, i.e. patent, trademark, and copyright law, are the commercial and legal frameworks that have been built around these creations.

Without some fundamental understanding of how the system of intellectual property functions, publishers, as well as authors, will find maneuvering the corridors of publishing houses a significant challenge. This section thus provides an overview of the general principles of copyright and in a few words identifies other relevant rights, i.e. trademarks, confidential information/trade secrets, that may have an impact on a publishing business.

Intellectual property laws enable authors and other rights owners to protect their contributions and to control or license their use by others. For example, a writer may allow a publishing company to use his work, but terms and payments need to be defined, as do any limits on the extent of that use and on the duration of the license.

Book publishers are usually licensees of other people’s works. Although they can acquire copyright from creators through an outright assignment, they may need to make ‘publishing agreements’ (i.e. a license agreement) with a variety of rights owners – writers, artists, designers, photographers, picture libraries, or other publishers. These assignments or licenses specify what the publisher can do and define any limits that have been set by each rights owner. Yet a publisher is not



always just a licensee of the creator. There are ways in which a publisher may acquire content, other than by contracting with the content's creator. This is further explained below. In some countries, an assignment of copyright is not legally possible, and only licensing is allowed.

The **value of a publisher's name** or brand can be considerable, particularly in a business that has been established for a number of years. When publishing houses merge, or when one acquires another, the value of the separate brands, or the merged **brand** may be significant. A familiar **imprint or trademark** may add to the worth of the newly-formed company. By the same token, a new trademark can be introduced with a flourish and a publicity campaign designed to establish it in the public's eye. Some publishers do not take into account the value of distinctive identifiers such as trademarks in developing a brand image. The value of a brand may go well beyond mere recognition. Over time, customers will grow to respect, even depend on a brand, and their confidence will grow in its ability to produce – and deliver – the goods.

Copyright

What is copyright?

Copyright is a legal concept describing **rights given to creators** for their literary and artistic works which include books, music, works of fine art such as paintings and sculpture, as well as technology-based works such as computer programs and electronic databases. **A work does not need to be published or 'made available to the public' to be protected.** It is protected from its creation.

As seen earlier, copyright law protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors and shapes.

Copyright law protects the owner of property rights in literary and artistic works against those who 'copy' or otherwise take and use the form in which the original work was expressed by the author. To qualify for copyright protection, a work must be **original**. An original work is one that 'originates' in its expression from the



author, that is, the work was *independently* created and was not copied from the work of another or from materials in the public domain. The exact meaning of originality under copyright law differs from one country to another. In copyright law, originality relates to the **form of expression** and not to the underlying idea.

The *Da Vinci Code* Case

The copyright infringement case against the publishers of *The Da Vinci Code* was



brought by Michael Baigent and Richard Leigh, two of the authors of a 1982 non-fiction work, *The Holy Blood and The Holy Grail*. At the center of the dispute was a hypothesis presented in

The Holy Blood and The Holy Grail concerning the early Christian legend of the Holy Grail. The core of the authors' hypothesis was that references to the Grail in early manuscripts were disguised references not to the chalice, but rather to the bloodline of Jesus Christ. Baigent and Leigh used six known 'indisputable' historical facts, or supposed facts, though their conclusion was the result of 'historical conjecture' based on those facts. This quasi-historical approach was also the basis of various other published hypotheses.

Baigent and Leigh claimed copyright in the literary work and alleged that Dan Brown, author of *The Da Vinci Code*, had copied the way in which they had made the sequence of connections of the facts of the merging of the bloodlines. Since there was little copying of the actual text of *The Holy Blood and The Holy Grail*, the claim was that there had been **non-literal copying of a substantial part** of their literary work.

The Holy Blood and The Holy Grail is comprised largely of historical facts, which are unprotectable ideas. Baigent and Leigh therefore based their case on the claim that Brown had taken a substantial part of the "manner" in which they had expressed those ideas.

The court held that, while the evidence was clear that Dan Brown had drawn on *The Holy Blood and The Holy Grail*, this did not mean that he had infringed copyright in the book. Rather, he had used the book to provide general background material.

Source: Dr. Uma Suthersanen of the Intellectual Property Law & Policy department of Queen Mary, University of London, WIPO Magazine, June 2006.
See *Michael Baigent and Richard Leigh v. The Random House Group Limited* [2006] EWHC 719.³

³ The *Da Vinci Code* jacket used courtesy of Doubleday, a division of Random House, Inc.



What rights does copyright provide?

Copyright law gives an author or creator of a work a diverse **bundle of exclusive rights** over his work for a limited but lengthy period of time. These rights enable the author to **control the economic use** of his work in a number of ways and to receive payment, i.e. royalties.

The exclusive rights allow the creator and/or owner to authorize or prevent, among others, the following activities:

- reproduce a work in copies (making copies);
- distribute copies of a work to the public;
- communicate a work to the public (e.g. display, perform, broadcast, or make available in an interactive manner);
- rent or lend copies of a work;
- make translations or adaptations of a work;
- make the work available on the Internet.

It is the authors' use of their imagination and effort – the 'sweat of their brow' – that creates an original work. It is this intellectual activity that has a value that can be traded as any other form of 'property', for example, sold to a publisher or bought by a film company.

Copyright law also provides moral rights, including:

- **the right of paternity** (the right to claim authorship of the work); and
- **the right of integrity** (the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to the author's honor or reputation).

Moral rights are accorded only to human authors and cannot be 'owned' by a company. For this reason, a publishing house cannot claim moral rights. Infringing moral rights – by failing to identify the creator, or by altering or modifying his work – could harm that reputation.



Who owns copyright?

Generally, when a work is created, it belongs to the creator – he, the creator, is the ‘first owner of copyright’. So, in the publishing context, authors/writers start off owning copyright in the works they have written. The same usually applies to an illustrator’s artwork, or to a photographer’s pictures. There are, however, circumstances in which the publisher is the first owner of copyright, for instance: a publisher’s project like a dictionary or encyclopaedia in which there is a multiplicity of authors, each of whom contributes a tiny portion of the entire work. Note however that this varies according to national laws. There can either be a statutory provision, or there can be a provision in the commissioning or employment contract.

Copyrighted material created by employees, as part (within the scope) of their employment duties, is usually owned by the employer. When someone creates a work under a contract of service (i.e. when it is part of his job) copyright will belong to the employer, unless the employer and employee have agreed otherwise by means of a contract. It is often thought that when a work is commissioned, the person commissioning it and paying for it owns the copyright. This will depend a great deal on national laws; in most legal regimes the author keeps his copyright when the work is commissioned unless the contract includes an assignment. In some countries, the commissioning of photographs and of portraits are exceptions to this rule.

Hence, it is of critical importance to check with the national laws in question to fully understand who the owner is in a commissioned work. In any event, publishers should make provisions to have written and signed contracts with all those who make contributions so as to avoid disputes as to ownership of works.

The **ownership** of a manuscript is distinct from the ownership of copyright in the work embodied in the manuscript. Unless there is an agreement to the contrary, the manuscript will belong to the author, yet he will have no rights to publish it if the copyright has been assigned to the publisher.

I bought and own the book: do I also own the copyright?

No. Unless you wrote the book yourself, you do not own the copyright. You have to separate the physical object, the book, from the intangible intellectual property contained in it. Ownership of the book, by having purchased it, does not mean ownership of the expression of ideas in its pages.

Similarly, you can buy a painting, hang it on your wall, and even re-sell it without ever acquiring ownership of the artist's intellectual property. This means that you may not take a photograph of the painting and 'publish' that photograph by making it available to the public. You may not make picture postcards or calendars of your painting; you may not include it in a book or journal; you may not place an image of it on your website.

How long does copyright last?

According to the Berne Convention, the minimum duration of copyright is for the life of the author and fifty years after his death. In much of Europe and the US, that legal term of copyright has been extended to seventy years after the death of the author and in some instances even beyond. In the case of **joint authorship** the term of copyright runs from the end of the year in which the last surviving author dies.

For book publishers, the duration of copyright is important to know as different terms apply in different countries and national treatment under the Berne Convention is limited by the rule of comparison of terms. Accordingly if the country of origin of the work grants protection that is shorter than in the country of exploitation, this country may apply the shorter term. Specific terms may also apply to certain works, i.e. anonymous and pseudonymous works. Each publisher must avail himself of the local copyright legislation in order to fully determine the copyright duration.

Are some works free of copyright?

There are certain instances where authorization from the copyright holder is not required. These include:



- If you are using an aspect of the work which is not protected under copyright law. For example, if you are expressing the **facts or ideas** from a protected work in your own way, rather than copying the author's expression.
- If the work is in the **public domain**.
- If your use is covered by the concept of 'fair use' or 'fair dealing' or by a **limitation or exception** specifically included in the national copyright law.

Public domain, in a copyright sense, does not just mean 'available to the public'.

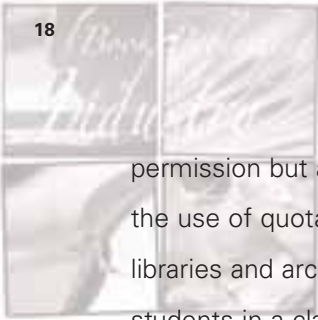
Once a work has run its full legal term of copyright, then it is said to be 'in the public domain' and can be used, adapted, or published by anyone. For example, certain texts by the authors Aristotle, Mark Twain, Shakespeare, Dante Alighieri, Hans Christian Andersen, etc. may be reproduced without seeking permissions.

Depending on the jurisdiction, certain rights may remain, such as the right of attribution and other moral rights. In addition, an author can decide to license his work under a collaborative scheme such as that of the Creative Commons that allows wide possibilities to use and redistribute the work.

Anonymous and pseudonymous works (when the author's identity cannot be determined or is not revealed, such as ballads, nursery rhymes and jingles) may be considered as works under copyright. The common practice is that anonymous works, depending on national legislation, enter the public domain 50 years after they have been made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his identity during that period: in the latter case, the general rule applies.

Works created for governments. In some countries, the government will own copyright in works created or first published under its direction or control, unless otherwise agreed in a written contract. For example, in the UK this is called 'Crown Copyright'. However in many, but not all, countries texts of laws, court and administrative decisions are excluded from copyright protection.

Use of a work under a limitation or exception to copyright, or under the concept of 'fair use', 'fair dealing'. All national copyright laws include a number of limitations and exceptions, which limit the scope of copyright protection, and which allow either free use of works under certain circumstances, or use without



permission but against payment. Exceptions and limitations include, among others, the use of quotations, some copying for private and personal use, reproduction in libraries and archives, reproductions of excerpts of works by teachers for use by students in a class, and special copies for use by visually-handicapped persons.

In common law countries (i.e. Australia, Canada, India, the UK, and the US) works are subject to 'fair use' or 'fair dealing'. The descriptions in the copyright laws are less specific. 'Fair use' recognizes that certain types of use of other people's copyright-protected works do not require the copyright holder's authorization. It is presumed that the use is sufficiently minimal that it will not unreasonably interfere with the copyright holder's exclusive rights to reproduce and otherwise use the work. It is difficult to describe any general rules about 'fair use' because it is always very fact-specific. However, private individuals who copy works for their own personal use generally have much greater 'fair use' rights than those who copy for commercial uses. Note that the scope of 'fair use' varies from one country to another.⁴

As regards 'fair dealing, 'fair use' and limitations and exceptions it is important to consider very carefully the intended use of material belonging to someone else, and when in doubt to seek permission.

Alice Randall's *The Wind Done Gone*

In **Suntrust v. Houghton Mifflin Co., 252 F. 3d 1165 (11th Cir. 2001)**, the US Court of Appeals overturned the decision prohibiting the publisher of Alice Randall's *The Wind Done Gone* from distributing the book. According to this case, the creation and publication of a carefully written **parody novel** in the US counts as **fair use**.

The Wind Done Gone re-tells Margaret Mitchell's Civil War-era story from the point of view of *Gone With The Wind* heroine Scarlett O'Hara's half-sister. Ms. Randall stated that her work was designed to critique a book depicting slavery and the Civil-War-era American South, while Margaret Mitchell's estate argued that the use of the same settings and characters amounted to a breach of the original work's copyright.

⁴ See WIPO, 2006, "Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises."



Although the court ruled that Alice Randall's book constituted parody, which is permissible under copyright law and protected by the First Amendment of the US Constitution, which guarantees freedom of worship, speech, assembly and a free press, it also stated that Mitchell's estate may be entitled to monetary damages. Subsequently the parties settled out of court to allow the book to be published.

Source: <http://www.yale.edu/lawweb/jbalkin/telecom/suntrustbank.pdf>
and <http://laws.lp.findlaw.com/11th/0112200opnv2.html>.

***La bicyclette bleue* (The Blue Bicycle)**

Cour de Cassation, 4 février 1992 (RIDA, avril 1992, page 196) et sur renvoi, Cour d'appel de Versailles, 15 décembre 1993 (RIDA, avril 1994, page 255).

Régine Desforges wrote a novel in three parts entitled *La bicyclette bleue* (The Blue Bicycle) set in France during World War II. The rights owner of Margaret Mitchell's *Gone With The Wind* sued the author and her publisher for copyright infringement of this work, whose plot is set in the US during the Civil War. The Court of Appeals of Versailles rejected the claim, stating that only the idea of "free course" had been taken and that it was not possible to consider the scenes and dialogues, or even the litigious situations or episodes from *La bicyclette bleue* as infringement. Given their composition and expression, which formed part of an original novelistic creation, the scenes and dialogues from *La bicyclette bleue* did not resemble *Gone With the Wind* so as to constitute reproductions or adaptations of the latter.

Source: WIPO, July 2002, *Principles of Copyright: Cases and Materials*, pg. 190.

Does copyright protect titles, names and characters?

Protection of **names and characters or titles of books** largely depends on applicable national legislation. Accordingly, a character could be protected under copyright if it were an original expression of the author. Because trademarks can be registered if they are distinctive enough, many names (of characters from children's books, for example) are registered, and the familiar and sometimes famous illustrations of those characters all form part of the protected brand. For example,

characters from literary works include Pinocchio by Collodi or Tarzan by E.R. Burroughs, and of strip cartoons, Tintin by Hergé or Astérix by Uderzo and Goscinny.

Under legislation in certain countries it would be possible to claim copyright in the title of a publication, especially when, given its length and complexity, it constitutes a literary work in its own right.

Playwright Anne Nichols *Abie's Irish Rose*

– *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121-122 (2d Cir. 1930).

In this famous case by the US Court of Appeals on copyright infringement by non-literal copying of a dramatic work, the Court refused to find that copyright subsisted in a character where the common element between the plaintiff's and defendant's plays was a theme, and not protectable characters.

The plaintiff, playwright Anne Nichols, was the author of *Abie's Irish Rose*, a play about a young Jewish man who marries an Irish Catholic girl against the wishes of both their fathers, with ensuing hilarity. The defendant had already produced *The Cohens and the Kellys*, a film about an Irish boy who marries a Jewish girl from feuding families, with ensuing hilarity.

The Court noted that protection of literature cannot be limited to the exact text, or else an infringer could get away with copying by making trivial changes. The question then is whether the part taken is 'substantial'. In this case there was no infringement, as the ideas that were copied were universal concepts and stock characters. In the words of the court: "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."



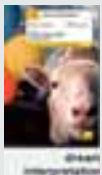
International, 'copied' versions of Harry Potter



The Harry Potter character is a highly profitable but heavily copied/imitated/counterfeited character. In a number of countries it is possible to find a Harry Potter 'sequel' entitled *Harry Potter and Leopard-Walk-Up-to-Dragon*; a Harry Potter twin, Tanya Grotter, star of *Tanya Grotter and the Magic Double Bass*; *Porri Gatter and the Stone Philosopher*; and *Harry Potter in Calcutta*, where Harry meets up with various characters from Bengali literature.⁵

Sometimes a series title may be part of a **registered trademark**. The **'Teach Yourself'** series (Hodder), first published in 1938, is now a well-established and distinctive brand. The design and appearance of the books, the name 'Teach Yourself' – even the colors of the book covers – are part of the overall protected brand.

Teach Yourself books

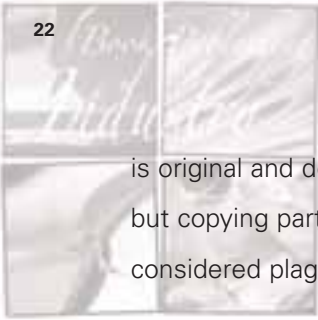


Source: <http://www.teachyourself.co.uk>.

Copyright protects both the **components and the arrangement** of a work. In a poetry anthology, each poem may have a separate rights owner (if the works are still in copyright), but the compiler will have copyright in the organization of the anthology and in the selection of those specific poems, as well as in any notes, commentary, or introduction. In some countries, the publisher will also have copyright in the **published edition**, the typographical arrangement of the publication – the design, layout, and typeface.

Publishers must ensure that the works they publish comply with all relevant intellectual property laws. Authors must promise that the work they have produced

⁵ The Harry Potter book image is used courtesy of J.K. Rowling (author), Jason Cockcroft (illustrator) and Bloomsbury Publishing.



is original and does not **plagiarize** the work of others. There is no copyright in ideas, but copying parts of another creator's work, or its arrangement or structure, might be considered plagiarism, although this can be very hard to prove.

Plagiarism is a culpable activity that occurs at many different levels – from the student who incorporates pages from an article in his assignment without acknowledgement – to the scientist who appropriates his colleague's test results and publishes them under his own name – to the author whose novel is a re-working of an obscure folk-tale.

Whereas finding and proving copyright infringement would depend on evidence of actual copying, the paradigms of plagiarism are more difficult to identify. There may not be any actual copying at all, for the re-working may take the idea and express it in a new, original form – and still be considered as plagiarism.

Strictly speaking, plagiarism is when the perpetrator passes himself off as the originator of the work, whereas he is not in fact the originator. As for the real author, his copyright has been infringed and so has his moral right of paternity, the right to be identified as the creator of the work.

It is extremely difficult for a publisher to identify a plagiarized work. Unless he can remember having read the same text elsewhere he would have no way of knowing that it did not originate with the author with whom he was contracting. This is why the **warranty and indemnification** clause in a publishing contract is essential to protect the publisher, even though plagiarizing authors are quite rare – not least because of the shame and humiliation of exposure.

What might alert a publisher to plagiarism? Obviously, any abrupt change in language, style or idiom indicates that more than one author is involved, so unless the work in question is one of joint or multiple authorship, such change might be due to plagiarism.

If the publisher or the author decides to include **third-party material** in a new publication, then they must jointly ensure it is done safely. Permission must be sought from and given by other rights owners if substantial parts of their works are



to be included or reproduced beyond the scope of the right to quote or other available limitations. This applies equally to text excerpts or substantial quotations, artwork and diagrams, photographs, or pieces of music.

The concept of plagiarism

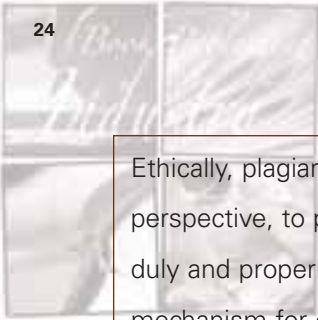
The story of Dr. Dorothy Lewis is a manifest illustration of the concept of plagiarism. Lewis, an American psychiatrist specializing in the study of serial killers, was dumbfounded upon coming across the script of the highly successful Broadway play *Frozen* by British playwright Bryony Lavery.

Perusing the play, expressions and situations started adding up to more than mere coincidences. Lewis had worked at New York University School of Medicine, had done a study of brain injuries among fifteen death-row inmates, had been sniffed by a serial killer, and had kissed another. All of this happened to her *alter ego* in *Frozen*. And there were countless instances of such “borrowings” that Lewis could detect, ranging from thematic similarities to almost verbatim copying from a 1997 magazine article about Lewis.

Discovering that the play was entirely based on her life and writings—mainly her book *Guilty by Reason of Insanity*—she felt “robbed and violated in some peculiar way. It was as if someone had stolen—I don’t believe in the soul, but, if there was such a thing, it was as if someone had stolen my essence.”

When asked to explain her creative process, playwright Lavery put it in plain words: “what happens when I write is that I find [...] that I’ve cut things out of newspapers because the story or something in them is interesting to me, and seems to me to have a place onstage. Then it starts coagulating. It’s like the soup starts thickening. And then a story, which is also a structure, starts emerging.” She had thus noticed Lewis’ work in articles here and there and started writing her play.

So why hadn’t Lavery credited Lewis, and attributed her “borrowings” to her? “I thought it was O.K. to use it,” Lavery went on, somewhat confused. “It never occurred to me to ask. I thought it was *news*. [...] I just didn’t think I was doing the wrong thing.”



Ethically, plagiarism could be equated to bad literary manners, or in a more drastic perspective, to plain theft. Using material written by others as a source of inspiration, duly and properly quoting references is acceptable and indeed fairly common as a mechanism for creative expression. Some may even consider “borrowing” as a compliment. But lifting material without authorization or simply replicating the work of another with impunity inhibits true creativity. “Old words in the service of a new idea aren’t the problem. What inhibits creativity is new words in the service of an old idea.” “The final dishonesty of the plagiarism fundamentalists is to encourage us to pretend that a writer’s words have a virgin birth and an eternal life.”

Source: Malcolm Gladwell, *Something Borrowed—Should a charge of plagiarism ruin your life?* The New Yorker, November 2004.
http://www.newyorker.com/fact/content/articles/041122fa_fact?041122fa_fact.

Trademarks

A **trademark** is a sign capable of distinguishing goods or services produced or provided by a specific person or enterprise. The sign may be one or a combination of words, letters, and numerals. It may consist of drawings, symbols, three-dimensional signs such as the shape and packaging of goods, audible signs such as music or vocal sounds, fragrances, or colors used as distinguishing features.

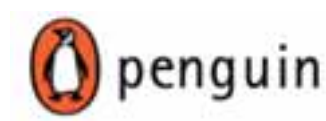
Depending on the national law, **registrable publishing signs** may include:

- Single letters or sets of initials
- Single words
- Proper names
- Names of authors (only in certain circumstances, e.g. Roget’s Thesaurus)
- Names of characters
- Titles
- Phrases or slogans
- Logos and other designs
- The distinctive shape or size of a publication.



To the customer (i.e. the reading public), a trademark is a sign that may confirm a certain level of quality or reliability. To other manufacturers or providers, it is a warning: the mark has been registered and can be used only by the owner.

A trademark provides exclusivity over a sign (such as the trademark penguin⁶: a word, a logo), which helps to distinguish the products of a business from those of others. Almost all countries in the world register and protect trademarks. The effects of such a registration are, however, limited to the country (or, in the case of a regional registration) countries concerned.



The public at large has a high **brand awareness** for obvious consumer goods, especially food and drink products. Publishers, however, generally spark a very low level of recognition in most people's minds. Often, it is not the publisher but the main character who is the brand (sometimes not even the author) – we talk of a James Bond novel (or, more likely, the film based on the book). We may know the name of the author, Ian Fleming, but what about the publisher? Many people will know *Harry Potter* or *The Lord of the Rings*. Some will know that the authors are J. K. Rowling and J. R. R. Tolkien, respectively. But few, surely, will realize that Bloomsbury publishes *Harry Potter* and Penguin now holds the rights to publishing *The Lord of the Rings*. Only Dorling (family reference publishers), and Puffin (children's picture books) perhaps, are the exception here.

The main exceptions to brand awareness (or 'unawareness') are children's books, travel guides, and dictionaries. Dorling Kindersley has a strong presence in the travel guide market, along with *Rough Guides* and *Lonely Planet*. Tourists and travelers buy travel guides, even if they do not generally read books and so a number of names have become known in an intensively competitive market.

In reference works, dictionaries probably have the strongest brand and here the title and the publisher are as one. The name 'Oxford'⁷ is synonymous for many with the

⁶ The Penguin logo is used courtesy of Penguin Books Limited.

⁷ The Concise Oxford English Dictionary cover is used courtesy of Oxford University Press.

wide range of authoritative dictionaries that carry that name, but to students of language the names Larousse⁸, Langenscheidt⁹, and Linguaphone¹⁰ may have equal impact.



A Trademark Office, usually a department of government, will register these marks only if they are distinctive enough. **Domain names** used in association with websites and e-commerce can also be registered and protected as trademarks. Unlike copyright, a trademark, once registered, can be of permanent benefit to the owner and his descendants. The registration (sometimes denoted by the symbol ®) is not subject to copyright term, and can be renewed, as long as the trademark is used.

A few publishers have registered their names and products. For example, 'Oxford' is the registered name of Oxford University Press when used in association with any publication. Possibly the best way of distinguishing the different types of intellectual property from each other is to imagine the different types of rights you could possess over a new idea – a new type of hair coloring cream, for instance: the formula for the cream could be registered as a patent; the cream's brand name could be registered as a trademark; and you would have copyright in the instruction leaflet inserted into every box.

One of the essential differences between copyright and the other forms of intellectual property, therefore, is the question of registration. Copyright arises automatically as the literary and artistic work is created and does not need to be registered – indeed in most countries there is no form of copyright registration available although in the US it is possible to register a copyright work with the

⁸ The Larousse dictionary cover is used courtesy of Editions Larousse.

⁹ The Langenscheidt book cover is used courtesy of Langenscheidt Publishers, Munich.

¹⁰ The Linguaphone book cover is used courtesy of Linguaphone Group.



Library of Congress. Depending on the jurisdiction, trademarks often require registration in order to be protected, usually in the government office dealing with intellectual property law.

JACOB AND SIFISO

There are no compulsory registration formalities for copyright in literary, artistic and musical works as there are for trademarks, patents and registered designs.

Copyright subsists automatically as the mental act, giving rise to an idea, followed by the physical process of recording the expression of that idea in permanent form.

Without material expression, however, the idea cannot be protected, and even when the idea has been recorded, chain of title can be difficult to establish if the creator has failed to identify himself as such.

There is no better way to demonstrate the power of the publisher over the intellectual property under his control than to provide examples of how unscrupulous use of it can deprive creative workers of their just rewards.

– **Jacob** is an artist who was commissioned by a publisher to illustrate a children's book about rabbits. When he was paid for his illustrations he signed a contract assigning all his rights in the drawings to his publisher. The book was a huge commercial success and Jacob's sketches found their way onto a range of children's clothing, mugs and bed linen. Jacob received nothing.

– **Sifiso** is a history teacher in a rural school. His pupils were too poor to buy textbooks, so Sifiso decided to create his own, and typed up notes that he photocopied. Another teacher at the school, Cecilia, took the notes and submitted them to a publisher as her own manuscript. The book was published under Cecilia's name and thousands of copies were sold as a result of which Cecilia made a great deal of money. But how was Sifiso to prove that he, not Cecilia, had written the book? After a long-drawn out (and expensive) process, Sifiso was able to prove he was the real author only because he had written to a friend, long before the book was published, saying that he was developing his own classroom text. His friend was able to produce the letter as evidence.



Confidential Information and Trade Secrets

A duty of **confidentiality** can usually exist only when a relationship of confidence has been established, as between a husband and wife (contract of marriage) or between an employee and the company or organization for which he works (contract of employment).

Publishers who receive typescripts from authors have a legal duty not to disclose the contents to anyone else (another publisher, for example). The terms of a contract, once signed, are also confidential to the parties – the publisher and the author (or his agent).

Employees of a company will have contracts of employment that oblige them not to reveal **trade secrets** to outsiders. A sales manager would not be allowed to pass company sales figures to a rival, or give the ingredients of a recipe to a competitor.

In some countries, defense and military information may be subject to an Official Secrets Act such as that of the UK. Publishers of sensitive commercial information – the design specification for a new product, for example – will also be restrained from disclosing that content to others. Publishers like Jane's (who produce definitive guides to defense products like planes and ships), are constantly under pressure not to disclose confidential or commercial information, while aiming to provide an accurate public reference service.

These duties of confidentiality are normally part of a contract, but may also be governed by common law.

Further Business and Legal Considerations

Another business consideration concerns the **sale or merger of a publishing company**. This does not affect the terms of a publishing contract. This contract will usually explicitly state that its terms and conditions will remain in force under such circumstances. Similarly, if the author dies while the contract is still in force, his rights and obligations under the contract fall to his heirs. It is important to remember that intellectual property is like physical property – it can be bought, sold, bequeathed and inherited.



Publishers must ensure that the material they publish is not libelous. **Libel** is an untrue defamation of an individual that would cause others to ‘think less of him (or her)’. Similar laws forbid incitement to racial hatred. Any publication that promoted racism, or encouraged racial ill-feeling, or discriminated against people on grounds of their gender, disability or sexual preference might be considered illegal by the courts.

Defamation has to be directed at an individual. It has to be published, and it has to be untrue (truth is the normal defense in a case of defamation). So saying that someone is a thief (when he is not) would defame that person; if it could be proved that he were a thief, then it would be fair comment to say (or publish) it.

Obscenity applies to material that has ‘a tendency to deprave or corrupt’, while **blasphemy** (in UK law, against only the Christian religion) is deemed to be offensive, or to insult and outrage those who believe in that faith. It could be against the law to publish obscene or blasphemous materials.

In some parts of the world, laws controlling **freedom of information** and those that protect **human rights** can find themselves in conflict with each other. There may be a powerful reason to disclose the illegal behavior of an individual, yet that same person might argue that their silence was protected by their human right of privacy.

As well as respecting the copyright of other creators’ works, authors and publishers are liable for the accuracy and safety of what is published, including mistakes or misprints. If someone who bought and read a book followed directions that caused harm – incorrect pharmaceutical dosages, or a poisonous ingredient of a recipe – the author and publisher might be found liable for publishing a negligent misstatement. Authors and publishers have equal **moral responsibility** for what is published.

Legal protection of creators’ works can extend to others involved in the publishing process. For example, a printer found responsible for a misprint that could cause harm or a distributor (bookseller or wholesaler) who offered a libelous work for sale could be equally liable, alongside the publisher and author. Yet it would depend on the contractual arrangement as liability clauses may differ on these matters.

SECTION B

The Book Publishing Value Chain

Publishers may better understand the centrality of intellectual property if they envisage themselves as one of the links in the **book value chain**. Just as a publisher would not isolate his publishing business from related enterprises, such as printing and book-selling, so should he regard intellectual property as the commodity that is the subject of a series of legal relationships starting with the author and ending with the reader. Together, the separate but related stages in the process – creation, production, dissemination, and consumption – form an integrated chain of economic activity. This section will briefly discuss the nature of those relationships.

As seen in the previous section, copyright is the branch of intellectual property most important to publishers. Not only will intellectual property affect a publisher's potential for commercial success, it will, to a certain extent, affect the other links in the book value chain. Hence the chain is only as effective as the strength of all its links.

To begin with, ideas originate in the minds of authors (creators) and are then given material expression. Publishers will add value to authors' manuscripts by employing editors, designers, layout artists, illustrators and indexers to polish and package the books, and to undertake extensive sales and marketing campaigns to capture the attention of the public. Paper manufacturers provide the materials and printers produce the finished, bound book. Distributors, acting as intermediaries between the publisher and retailer, will deliver the books to trade wholesalers, retail bookstores, Internet booksellers, etc., who in turn will add to their value by making the finished product available and accessible to the reading public, the ultimate consumer.




The life cycle of a book does not necessarily end with the consumer; publishers must recall their obligations with regard to first returns, out-of-print, etc.

But what is it that passes through this process of transformation? It is the product of the mind, the result of mental labor that finds expression on the printed page, the canvas or the computer screen, the 'packaged content'. This content attains recognition through a myriad of communication activities, such as marketing and publicity (cover reviews; author interviews, book signings, book readings, radio and television appearances, etc.), having as its objective the development and expansion of boundaries of learning; of knowledge and information sharing; of cultural exchange.

In the **digital environment** publishing is in the process of transforming its value chain and the business models in place. Electronic publishing is flourishing in areas such as science and education, news and databases.

The description that follows identifies the value chain of traditional book publishing, a paradigm that must be analyzed before venturing into the study of the structures and processes driving electronic publishing into areas such as e-books, digital rights management (DRM) and print-on-demand (POD).

- **Content creators** are writers, journalists, photographers, artists and illustrators. Content creators are usually the first copyright owners. One of the underlying principles of copyright is fair reward for their labor and, concomitantly, encouragement to develop more creative works.
- Closely related to both the content creators and the publishers are **freelance workers** such as freelance editors, translators, designers, typesetters, indexers and project managers, who depend on the sector for their livelihood. Freelance workers may also be copyright owners and contract with publishers to use their works under license.
- **Publishers** of books, newspapers and magazines rely on the protection afforded by copyright law – and, to some extent trademark law – to safeguard their investment. Generally speaking, publishers will own copyright in their



published editions and often in the content as well. They will also be the owners of trademarks.

The core publishing activities are conducted by various **in-house departments** (which in many cases overlap) within the publishing house, and include editing; design production; sales; marketing; publicity; rights department; etc. With regard to the **rights department**, many small and medium-sized publishing houses do not usually have the benefit of a fulltime staff dedicated to making the most of their publisher's rights, which were acquired and stipulated in the publisher-author agreement. As explained earlier, such rights include foreign rights, serial rights, translation rights, etc. Not to be forgotten are the key functions of the **finance departments**, namely those dealing with purchase ledger and royalties. Generally, the first deals with the publisher's daily financial activities such as invoices, etc., while those dealing with royalties focus on author advances as well as "keeping account of the different royalty percentages payable on book sales, serial deals, film rights, permissions, etc."

Like many other creative industries, the publishing industry pools its resources, which leads to the formation of a network and establishment of partnerships. These industry clusters, in which a number of sectors (separate, but interrelated as far as their economic activities are concerned) share knowledge; cooperate in information management and skills development, and join together to encourage strategic investment and development. The sectors making up the industry cluster engage jointly in advocacy on behalf of key issues such as the defense of intellectual property rights. Typically, the publishing industry is composed of book, magazine and periodical publishers, along with printers, book binders, book distributors, bookstores, literary agents, publicists, writers, photographers and illustrators. Major publishing clusters include London, New York and Munich.

Advocacy is an important function of a book publishing industry cluster, especially in a developing country where public policy considerations concerning access to information are able to bring influence to bear on legislative development.

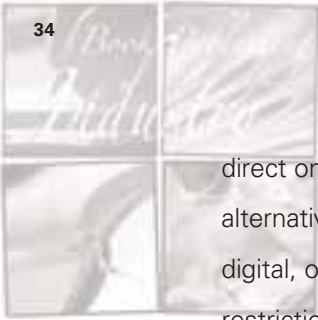
The underlying principle of an industry cluster is that the industry sectors are individually strengthened by cooperation with each other. In the case of publishing,



the common thread that runs through all the industry sectors is intellectual property, but of all the links in the book value chain, publishers have the strongest stake in an intellectual property regime that offers them adequate protection and room for growth.

- A **printers'** stake in the book publishing industry will also depend on the overall health of publishers, even though, together with paper manufacturers, their interests in products other than publications (such as packaging materials, business stationery, direct mail advertisements and all forms of merchandising and labeling) mean that they are not solely reliant on the creation, production and sale of knowledge products. But because copyright and trademark laws are central to their clients' interests, intellectual property issues will have an effect on the growth of the printing industry.
- **Paper manufacturers** provide the raw materials for book production. Although their economic activity is not directly affected by the intellectual property system their interest in the robustness of the publishing industry is as strong as that of the other links in the chain.
- **Distributors** play a critical role in getting print material (books in this case) to the end user/consumer at large. Very few publishing houses have their own distribution systems; hence most companies will have to negotiate a distribution agreement directly with a distributor so as to ensure that their books are effectively managed and reach the retail outlets, including libraries. The negotiation that takes place between the two is of consequence to the publishing company and important to authors, for it is here that the interplay between **discounts** and royalties occurs. For example, a publisher must be careful as to the percentage promised to distributors as this percentage will affect the royalty amount or percentage payable to authors, and at the same time, have an impact on the company's returns.

In contrast to the traditional distributor who stocks books (inventory) in a warehouse facility for distribution to retailers, new alternative distribution channels are emerging. The advent of digital technologies and the Internet now enable digital content delivery through such services as print-on-demand and



direct online 'mail'-orders (i.e. *www.amazon.com*), for example. Even more alternative to the above model is the open access model, where content "is digital, online, free of charge, and free of most copyright and licensing restrictions". Generally speaking, scholars and scientists use such a model (Open Access journals, archives or repositories). The future of the book publishing industry is in constant flux given the 'experiments' currently taking place on the Internet.¹¹

- **Booksellers** (and other intermediaries: wholesalers, merchandisers, etc.), the 'deliverers', are the interface with consumers. As the agents of delivery, booksellers understand and analyze, as well as serve, the market. Although they play no part in the creative or productive processes – in other words do not generate the product that is the subject of intellectual property protection, their well-being is important for the publishing industry as it provides the channels through which their works reach the consumers. In turn, they too depend on the publishing sector's strength, as a weak sector resulting in fewer sales and lower profit margins feeds back into the value chain causing contraction of the writing and publishing industries. In the electronic era, Internet Service Providers (ISP) are content deliverers as well.

The life cycle of a new title will vary greatly with each individual publishing house's commercial requirements. Success will depend a great deal on the **core functions** (content acquisition and development) of the publisher, which encompass **operational (economic) activities** described as being at the heart of any copyright-based industry, namely those linked to the creation, production, marketing, distribution and sale of literary or scientific works.

As seen above, the value chain of the publishing industry reflects the **business model** of a publishing company. This business model refers to the nine building blocks of a company,¹² namely:

¹¹ See for example the articles on *Digital Publishing Is Scrambling the Industry's Rules*, <http://www.nytimes.com/2006/06/05/books/05digi.html?ex=1307160000&en=a5abdb7fe3a0f48b&ei=5088> ; McKenzie Wark at <http://creativecommons.org/text/2006/10/gam3r/>; as well as *The Institute for the Future of the Book* at <http://www.futureofthebook.org>.

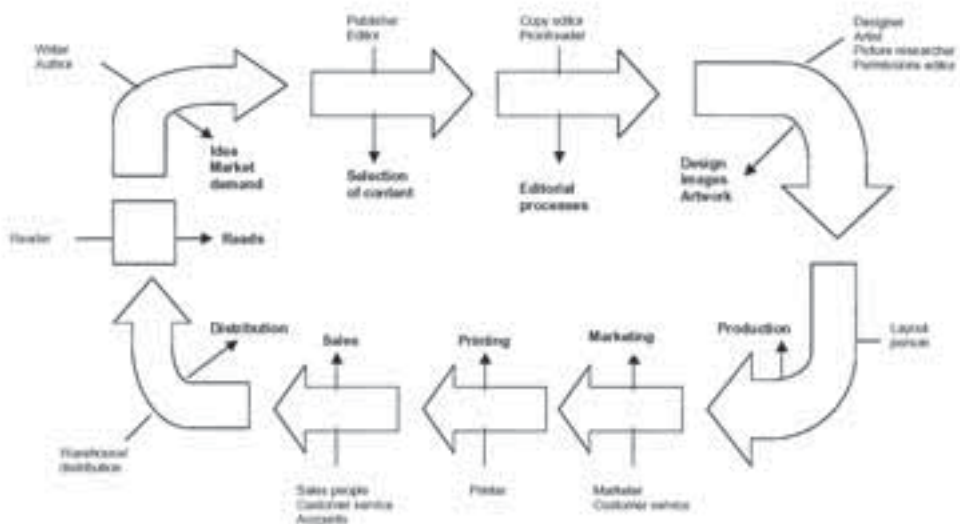
¹² Osterwalder, Alexander, (2004), *The Business Model Ontology: A Proposition in a Design Science Approach*, Présentée à l'École des Hautes Etudes Commerciales de l'Université de Lausanne, <http://business-model-design.blogspot.com/2005/11/what-is-business-model.html>.



1. **value proposition** of what is offered to the market;
2. **target customer segments** addressed by the value proposition;
3. communication and **distribution channels** to reach customers and offer the value proposition;
4. **relationships** established with customers;
5. **core capacities** needed to make the business model possible;
6. **configuration of activities** to implement the business model;
7. **partners** and their motivations for coming together to make a business model happen;
8. **revenue streams** generated by the business model constituting the revenue model;
9. **cost structure** resulting from the business model.

That is, it is not describing the functions within the publishing company but rather the activities or processes that span functions which can be tracked on the value chain scheme as seen in Figure 1.

Figure 1: The Publishing Process and Associated Jobs



Source: Evans, N. and Seeber, M. *The politics of publishing in South Africa*. London: Holger Ehling Publishing, and Scottsville: University of Natal Press.



Publishing Across the Digital Landscape

Every book requires a different production and dissemination schedule. Yet on average, the book production timeline – starting with ‘in-house’ processing and ending with the publication of a book – ranges from twelve to twenty-four months. This is the time it takes the publisher to process the author’s manuscript and does not include the time it takes for the author to draft the manuscript, its delivery to the publisher, editorial considerations, and work on the publishing contract. Consequently, from the inception of the ‘idea’ of the book to its delivery on the shelf in bookstores, considerable time is spent on ‘manufacturing’ the product. The intellectual property implications, while relatively complex in this process, are nevertheless straightforward in terms of management. Yet, what happens to the book publishing timeline in today’s digital landscape?

It is understood that copyright in a work is distinct from its ‘means of delivery’ (distribution channels), yet books stored in a warehouse – over time – have a number of important economic consequences to the copyright owner. In the digital age, where an inventory is housed in ‘virtual reality’ (i.e. note the important concept of Print-on-Demand (POD), e-book editions, downloads via e-mail, etc.), distribution mechanics become ever more complex. While the complexity exists, what will differ is the actual timeline of ‘printing’ a book – whether in small or large print runs. Again, while every book has varied production and dissemination schedules, the electronic book publishing process can be a matter of a few weeks or as long as four months. Much will depend on the publisher’s needs as per production quality (i.e. formatting, design, etc.), distribution (including marketing), inventory, costs (i.e. book list price, etc.). Further complexities exist in publishing in today’s digital landscape, and such issues will be dealt with in a future publication.

Figure 2 below is an abbreviated flowchart of how a book is delivered, starting with the 'author' and ending with the reader/consumer.

Figure 2: Publishing Across the Digital Landscape



Source: Courtesy of the International Publishers Association (IPA).¹³

13 The Adobe PDF file icon used courtesy of Adobe. The iPod nano image used courtesy of Apple Computer, Inc. The Google logo courtesy of Google Inc. The Harry Potter book images are used courtesy of J.K. Rowling (author), Jason Cockcroft (illustrator) and Bloomsbury Publishing. The Palm iSilo device image is used courtesy of iSilo. The NetLibrary logo is used courtesy of NetLibrary, a division of OCLC Online Computer Library Center, Inc. The Yahoo! logo is used courtesy of Yahoo! Inc. © 2006 by Yahoo! Inc. YAHOO! And the YAHOO! Logo are trademarks of Yahoo! Inc.



SECTION C

Publishers' Responsibilities in Negotiating Agreements

The business of publishing rests on a contract between the author and the publisher. In many jurisdictions it is necessary that the contract adopt a written form and this is also the advisable way to proceed even in places where verbal agreements are valid. To avoid misunderstandings a written contract should always be issued at the conclusion of discussions and verbal agreement between the parties.

In the contract with the publisher the author licenses the rights of reproduction and distribution over a work, thus providing the publisher with the legal means necessary for publication. It is important – and in some jurisdictions necessary in order to have a valid contract – to indicate the duration of the license. In some jurisdictions there is a maximum duration for the license. On the other hand, in a book or journal with dozens of contributors, or in the case of a photographer commissioned to take a few photographs, it is often customary for the creator to assign copyright to the publisher in exchange for a one-off fee. Again, some legislations set conditions or even completely preclude such legal assignments.

Other agreements may need to be drawn up to cover third-party rights, in which publishers agree to a non-exclusive license to include extracts from another publication, or to reproduce a photograph from a newspaper or a picture library. Re-using illustrations or artwork from another book can be simpler and quicker than commissioning an artist to draw them, but permission will be needed from the artist (and sometimes the publisher).

It may be convenient for the contracts to specify how secondary or subsidiary rights are to be dealt with. The author may decide to grant the publisher the right to exploit



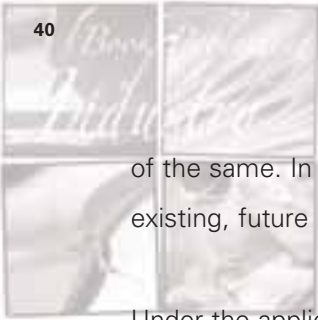
his work in other ways, by selling translation rights, for example, or negotiating with a magazine or newspaper to serialize extracts from his work. Sometimes that author (or his agent) will reserve these rights. In these cases, the agent of a successful and widely-known author may have very good contacts with TV or film companies and be better placed to negotiate options or deals directly with them. Similarly, publishers may not always know what digital or electronic opportunities a printed work could have, nor be the companies best placed to exploit them.

C.i. Managing Primary Rights

Publishing contracts are subject in many countries to detailed regulation, often contained in the Copyright Law. These contractual regulations aim at ensuring a balanced relationship between publishers and authors, so that copyright is effectively licensed while fair treatment and remuneration are accorded to authors. These regulations cover such issues as the minimum content and form of the contract, the rights and obligations of the parties and termination of the contract, some of which are discussed in the following paragraphs without regard to any particular legislation.

Grant of rights and specification

The grant of rights allows the publisher to publish the work, and the contract will specify in what formats, as well as in what countries and languages. The main right granted is the right to publish in volume form in the principal language of the country in which the author and publisher reside, and some authors (or their agents) will grant only this right. From a technical point of view traditional publishing implies licensing the rights of reproduction and distribution. Electronic publishing also implies licensing the right of communication to the public in such a way that members of the public may access the content from a place and at a time individually chosen by them. It is important to note that in some jurisdictions indication of the rights granted is mandatory and that the obligation extends in other countries to the different modalities and uses covered, such as publication in hard cover or paper back, DVDs, e-books. Legislation in several countries also imposes the need to specify such aspects of the license as the territory to which it applies; the remuneration of the author, which in some cases must be proportional to sales of the work; the number of copies and the term for delivery of the work and publication



of the same. In several countries there are explicit provisions preventing non-existing, future modes of exploitation from being covered under a previous license.

Under the applicable legal parameters, contracts will often allow the publisher to publish in other forms (audio or digital versions), and in other territories and languages, so long as shares in any revenue arising from these additional rights sales are specified elsewhere in the contract.

In contracts that grant the publisher an exclusive license, copyright in the work technically remains the author's, even if all commercially-relevant rights are passed on to the publishers. In some jurisdictions licensing is the only way that the law contemplates for the exploitation of author's rights. However, according to other legislation the author may decide to assign copyright to the publisher, and this assignment must be in writing too. It can be in exchange for a one-off fee, or for on-going sales-dependent royalty payments but, once assigned, copyright belongs to the publisher, who (unless bound by the contract to do otherwise) is free to exploit, adapt, and sell the work in whatever way he chooses. Such a process offers an advantage to the publisher (no further agreements are needed, and sometimes no more payments are made), but it is resisted by many authors, who do not believe creators should be made to give up their rights permanently.

Commissioned works

The contract will identify exactly the literary work in question and refer to the publication that has been commissioned as 'The Work'.

In many instances, especially in the field of education and science, the publisher commissions a work that will later be published. In this case it is very important that the contract specifies in considerable detail what the commissioned work should contain and in what form it should be presented.

Details need to be included about the subject and range to be covered. Who is the work for – specialists, lay people, or young learners? If the work is being published for students following a particular curriculum or examination syllabus, then the author will need to adhere to those precepts. The contract should specify the length required (whether by number of words or typescript pages), as well as the level of



difficulty. It may also be wise to specify the complexity (or simplicity) of the language to be used, particularly if users or buyers are not reading the work in their mother tongue.

If illustrations are required, then the specification should list the quantity and whether they are to be photographs or artwork. It should be made clear who is to provide these additional materials, and who is to pay for the costs of acquiring or licensing them. Publishers also need to make a judgement about what material, if any, can be included under limitations to copyright or fair dealing provisions and where permission and payment will not be required (though acknowledgement will).

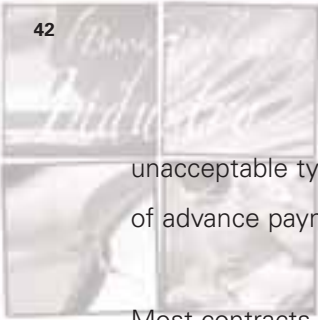
Sometimes the author will list what is required, and the publisher then has the task of finding items and clearing permissions. At other times, the author will be given a permissions or picture budget by which the publisher will pay any fees, but only up to the limit of the budget – after which payment will be made by the author, usually through deductions from royalty payments owing to him.

Delivery and publication dates

Publishers and authors need to discuss and agree on how long the writing of the work will take. Many authors of academic and scientific publications may not have written a full-length work before and they should be guided as to what is realistic. There is no point in putting an unrealistic delivery date into the contract, especially if the publisher does not intend to enforce the date. According to certain legislation the contract is only valid if it includes reference to the term of delivery and publication.

Incentives and penalties can help authors keep to the contracted delivery date. Often the payment will be a portion of an agreed advance on royalties. Although missing the contracted delivery date is a material breach of the contract, and therefore may be a legitimate reason for canceling it, few publishers cancel contracts merely on the basis of late delivery. A far better approach is to establish a realistic end-date in the first place, consider getting the author to deliver sections of the typescript in stages, and keeping in regular contact with the author for progress reports.

If an author has received advance payment for a typescript which is never delivered, it is reasonable to require that author to return the money. In the case of an



unacceptable typescript (*see below*), it is usually much harder to enforce the return of advance payments as there may not be agreement on the adequacy of the work.

Most contracts require the publisher to publish the work once an acceptable typescript has been received. Under some legislation the term of publication is an essential element of the contract and is limited by law, for instance the limit in several European countries is two years after delivery. In other countries a date is often not specified, although the phrase 'within a reasonable time' is often used. It is not always easy to define what is meant by 'reasonable'. This guarantee is subject to a phrase such as 'unless prevented by circumstances beyond its control'. Again, defining those 'circumstances' can be tricky.

Acceptability

Few works are published without any changes to the original author's manuscript. Editing the work of the author is often seen as one of the essential elements of publishing a work. Agreeing on what constitutes an acceptable typescript can lead to disagreement and discord. The most important criterion for acceptability is that the work conforms to the agreed specification and is 'professionally competent'. A judgment on competence can only be made by seeking second (or third) opinions from readers and advisers. It is important that in any case of non-acceptability, the views of equally professional peers are sought, and recorded – and, if necessary, made available to the author.

A typescript that is not acceptable should not be summarily rejected. Indeed, most contracts specifically require the publisher to allow the author opportunity and time to improve it and make any necessary amendments (as suggested by the professional advisers). If the author is unwilling or unable to make these changes, the publisher should have the right to ask someone else (of equal competence) to make the improvements, at the author's expense.

There remains the case where even after improvements and amendments by the author, the typescript is still unacceptable. Publishers must have the right and final say in accepting or rejecting a work, though if there is disagreement about acceptability, it can be useful to agree that any advance paid before delivery can be



kept by the author, and not returned. This gesture of goodwill can sometimes help resolve acrimonious disagreements about the quality of the work.

Warranties and indemnities

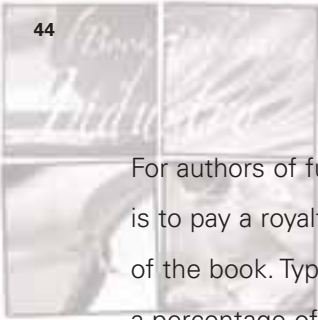
This is an essential and customary provision of all authors' and suppliers' contracts. What a publisher should get a creator to do is to promise (guarantee or 'warrant') that the material he is providing for the publisher to publish is 'trouble-free' and will not leave that publisher open to legal redress once the work is published.

'Trouble' comes in several forms, but there are four main areas to consider. First, the author must affirm that he is free to enter into the contract and do the necessary work (in other words, that he is not contractually committed to another publisher). Secondly, he must promise that the work is original and belongs to him – in other words, it has not been copied and/or plagiarized. Thirdly, he needs to provide material that does not have third-party problems within it, such as copyright items included without permission. Lastly, depending on applicable legal parameters it may be advisable to seek assurance that the work is not libelous, obscene or blasphemous, nor does it lay the publisher open to liability through any mistake or inaccuracy that could be construed as a negligent misstatement.

The author may be required to indemnify the publisher against any claims that may arise through a breach of his warranties although, in reality, things usually proceed differently. As we have seen, the responsibility for accurate and trouble-free publishing is shared between author and publisher, so although a publisher might request the author to share in the cost of settling a dispute, the approach to problems of this kind is usually mutual.

Payments to authors and other creators

The simplest form of payment is a fee paid in exchange for work completed – whether it is an article for a magazine, contributions to an encyclopaedia, or a short non-fiction title for children. These 'work-for-hire' payments are not normally repeated; in other words, it is a one-off fee for a specific job. This method almost always applies to artists and photographers providing illustrations to accompany a publication. Additionally, copyright is often assigned to the publisher, and this transfer of copyright can be a condition of payment.



For authors of full-scale works (novels or textbooks, for example), the usual method is to pay a royalty. This takes the form of a *pro-rata* percentage based on actual sales of the book. Typically, a novelist may receive a share of the sales price, expressed as a percentage of the local published or retail price for each copy sold. Educational publishers, however, often pay royalties based on the net sums received by the publisher after discount. See Section E for some examples.

Publishers may consider paying authors an advance on this royalty. This money on account does two things: it is a statement of commitment from the publisher, and it helps the author to live and pay bills while writing the book. An advance is not an additional fee. It is an up-front payment that has to be 'earned out' before further payments are made. Large advances paid to celebrities can sometimes only be recouped if substantial additional income is derived from sales of film and TV options or serialization rights. An advance rarely exceeds half the amount that would have been earned in royalties from a complete sell-out of the first printing.

Contracts and agreements should also specify what share of any additional income the author is going to receive. This money may come from translation rights or sales of editions to publishers in another country. Larger lump sums may come from serialization rights sales to newspapers and magazines, or options on film, TV and broadcasting rights. Substantial sums can also come from merchandising rights, based on sales of goods showing famous children's characters or personalities. (See Section C.iii below.) Often income derived from sales of subsidiary rights is shared. In other cases the role of the publisher is limited to traditional publishing without further involvement in other forms of exploitation.

Royalty accounts for authors are prepared at an agreed time or at regular intervals, for example, every six months, and any payments due remitted after that. According to legislation in some countries remuneration must be proportional to the sales or the result of the exploitation. These payments may have some deductions made. For example, authors may have to pay for any of their own corrections in the proofs that exceed 10 percent of the setting cost. This is partly to discourage them from changing their minds and making late changes to the set text (an expensive process).



Authors may be expected to take part in publicity and promotion for their book, or offer themselves for signing sessions at a local bookshop. They will not receive payment for this, but the 'cost' of their time will be set against the benefits gained by a stronger promotion of the book. Authors are also entitled to a number of free copies of their book on publication, with the option to buy more at a favorable discount.


Other publisher issues

Publishers may consider including a clause in the contract that restricts the author from writing a competing work while under contract with the publisher. This is a difficult condition to impose, as many professional authors wish to be free to write widely in their chosen field or subject. The phrase most commonly used to try to enforce this restriction is this: 'The author may not write another book that *directly competes* with the work, or which could *prejudicially affect the sales of the work.*'

By way of balance, some publishers include a 'first refusal' clause in their contracts. This gives the publisher the right to consider the author's next work (usually in the same field), but it does not oblige him to publish it. Many feel that compelling an author to submit his work to the same publisher is not very effective as a way of keeping authors loyal to a company. A better method might be to publish and sell the book in a professional and successful way, such that the author positively wished to submit his next work to the same publisher.

Termination

It is uncommon for either the publisher or the author to terminate a contract because of a material breach by the other party. However, contracts do end, and the process normally begins when the book goes out of print. The author may request the publisher to reprint the book and the publisher may refuse. This could well be because he does not believe there is any further market for the book. At this point, all the rights in the work granted by virtue of the license can revert to the author – that is to say, the exclusive license granted by the author to the publisher ends and the author is then free to offer the book to another publisher. There should also be a provision in the contract that clarifies under what circumstances rights revert to the author and how it takes effect, i.e. whether reversion of rights is automatic or requires action by the publisher. To avoid misunderstandings the reversion should in any case be accompanied by a letter from the publisher, effectively ending the contract.



In some countries the reasons for termination of the publishing contract are listed in the copyright law, and may include not only that the book goes out of print or that the duration fixed by contract is fulfilled but also that a general, legal term of duration is accomplished.

The most common ground for termination and reversion of rights includes but is not limited to a breach of contract by the author or by the publisher. That is, with regard to the publication term or the remuneration or the fulfillment of the term that the contract or the law fixes. In the case of a dispute between the author and the publisher, it is safer (and can be cheaper) to go to arbitration first. One or two nominated independent arbiters can review the disagreement and offer a judgment, which should be binding.

Publishers are recommended to include an **'entire agreement'** clause in their contracts. This stipulates that the contract is the only agreement applying to the work, and has the effect of superseding any previous agreements that might have been made earlier in the form of letters (always subject to contract), or even e-mails and recorded or witnessed conversations.

Publishers will normally draw up contracts under the jurisdiction of the country in which they publish. This so-called **'governing law'** clause will state that the contract will be applied according to the national laws of the country in which the publisher (and probably the author) are resident.

Concluding an agreement

Once a book has gone **out of print**, and the rights have reverted to the author, some procedures still need to be followed. It is customary good practice for the publisher to send a few copies of the book to the author before all the stocks have been exhausted.

However, there may be some agreements in the contract, which survive this reversion, such as a subsidiary rights agreement made with a publisher in another country. If that edition remains in print, royalties will continue to be paid to the original publisher, and shared with the author.



C.ii. Managing Secondary and Third-Party Rights

Operating a secure permissions system

In a new book, publishers and authors will often want to include examples of text extracts or illustrations taken from other publications. Apart from usage allowed by limitations and exceptions, fair dealing and fair use, permission must be sought and granted before such items can be published in the new work. The rights owners will need to be identified; they must give their consent; they need to stipulate what fee, if any, should be paid, and they will specify what form the acknowledgement should take and where it should be placed.

Although the process may be different, the **principle of permission clearance** is the same whether the item is a text extract, a poem, a diagram or piece of artwork, a photograph, or material from a website. As emphasized in the first section, rights owners have the right to authorize use of their material – **or not**. In other words, they can refuse to grant permission, and they do not have to give a reason. They can also charge whatever they want for the re-use anyone may wish to make of their intellectual property.

The reality is normally more reasonable. So long as the re-use is not inappropriate, or does not in some way threaten the rights owner's position (by competing with an existing commercial exploitation of their work, for example), permission will usually be granted. A fee will often be payable and the wording for acknowledgement will be specified. It is unwise to assume that a rights owner will be flattered to have his work quoted or used in a book, though the purpose and extent (and merit) of the re-use will often determine the scale of charge, or whether it is free of charge.

The first task is to identify correctly the sources of third-party items that the author or publisher want to re-use. It must be established who is going to clear permissions, whether a budget for fees should be drawn up, who is going to pay for any charges, and what policy should be put in place for dealing with rights owners who do not reply to permission requests or fees that are too high for the budget.



Text excerpts

Apart from incidental quotations of small amounts of a work used as criticism or for review, publishers need to seek and secure permission for all third-party text excerpts that are to be included in the new book. If the material is to be found in an existing publication, it is wise to start by asking the publisher. Even if the author is the rights owner, the author will often (via the contract) delegate permissions requests to the publisher who acts on the author's behalf and shares any revenue. Besides, it is likely there will be at least two parallel copyrights in the excerpt: that of the author for the content of the material, and that of the publisher for the published edition of the work. If the work is a translation from an original in another language, permission to use the translation will also be needed.

Identifying correct sources is very important. Publishers often delegate the task of identifying and clearing permissions to the author, as well as requiring him to pay any fees. But this can be a responsibility that the author is not competent to assume, and mistakes may be made. For example, rights owners may give permission for something they do not in fact own. Sometimes, there is more than one rights owner (joint authors, for instance). A good compromise is to ask the author to identify all the text excerpts that are to be used and for the publisher to handle the clearing and logging of permissions. Often, a budget will be set. The publisher may agree to pay all fees up to a certain limit, with the authors having any excesses deducted from their royalties.

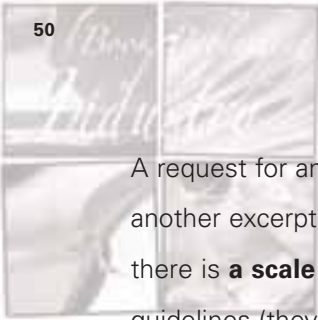
Plenty of time needs to be set aside for this process, particularly if there are a lot of permissions needing to be cleared (in an anthology of prose or poetry, for example). It is unusual for the process to go completely smoothly and time needs to be built in to the schedule to seek permission to use other excerpts (in the case of a refusal, or an unaffordable fee). A decision also needs to be made in the case of rights owners who do not reply to permission requests. Those undertaking the process need to distinguish between rights owners who do not reply to repeated requests, and those who cannot be traced. In neither case is it acceptable to set a deadline and say in a covering letter 'We shall assume you are willing to grant permission if we do not hear from you by the end of April'. No permission is 'no permission' – consent cannot be tacitly assumed by making conditions.



With the reality of deadlines in publishing, a policy must be established about whether or not the publisher should proceed with publication if not all the permissions have been cleared. The words 'the publisher has made every effort to contact rights holders for permission to use their material, but in the event of any omission, will happily make amends and update the publication at the earliest possible opportunity' are sometimes seen in a publication. In law, this disclaimer has no force or application. It is no more than a plea for leniency in the event of a claim, and it is full of risk. Rights owners who notice that their work has been used without their even being aware of the fact, let alone having granted permission, often start in a negative or even hostile frame of mind.

Works should never be used without permission (right owner authorization, legal permission) in one form or another. In some cases when the excerpt is very small or very old (in other words, it is not sure whether or not it is still in copyright), or if it was not possible to track down the rights owner, publishers proceed with publication. In these unfortunate cases if several failed attempts have been made to trace the rights owner, evidence thereof is often collected (copies of letters, envelopes returned with messages such as 'gone away' or 'not known', a brief log of e-mails or phone calls that did not reach their destination, with a view to improving the legal standing of the publisher. These cases are different from those where the identity and location of the author are known and established, but he just chooses not to respond to the repeated requests. A court would regard this second example as tantamount to a refusal. In the case of a book with multiple third-party excerpts, some publishers go as far as to reserve sums of money by placing them in escrow, for example. All these steps might cause a judge to look favorably on a plea for leniency.

It is very hard to make generalizations about permission fees, as rights owners can decide how much they want to be paid for use of their material. Several factors can determine the size of the fee: the main ones being the length of the excerpt, the type of publication in which it will appear and where (in the body of the text or on the cover or title page), and the territories in which the new publication will be used or sold. So a small excerpt published in a low-circulation journal likely to be used in only one or two countries will be charged for at a lower rate than a substantial chapter to be included in a core textbook with international appeal.



A request for an unreasonably high fee can lead to the author or publisher choosing another excerpt, so negotiation is a normal part of the process. In most countries, there is **a scale of charges** that publisher and author groups have produced as guidelines (they are not official rates). In the UK, the Society of Authors and the Publishers Association produce these guidelines regularly and the rates are set as a range. The charge will be higher or lower on the band according to the number of words, the importance of the publication, and the range of its appeal.

It must not be assumed that because the publication from which it is desired to take an excerpt is free (health advice from a doctor or hospital, for example), that it is not necessary to seek permission. Publicly-available material distributed without charge may still be protected by copyright. **The issue of cost or price is quite separate from that of copyright protection.** Even if publishers (or authors) do not sell their work, and are happy for an excerpt from it to be used free of charge, permission will still need to be sought and gained.

The wording (and position) of any **acknowledgement** is also important, and can be set entirely by the rights owner. It is normal to include the name of the rights owner who has given permission, together with the date and place of publication. It may also be necessary to include **the © copyright symbol**, and it is good practice to use this on all publications. It must be borne in mind that works that do not include this symbol may still be protected by copyright.

Illustrations and web content

Reproducing an original drawing or piece of artwork, including a diagram or a photograph from another publication, or incorporating website material into a publication (or another website) – all these require the same process as with text extracts of identification, permission, payment (if required), and acknowledgement.

Drawn artwork

An illustration that has been published in another book may have been commissioned by the publisher, and the reproduction rights assigned by the artist to the publisher. As with text, the starting point should be the publisher who, in this instance, may be able to grant permission without further reference to the artist. An



exception would be a children's book where the artist and author are the same person. The two copyright interests (of creator and publisher) will both need to be met in this case.

Drawings and diagrams are protected in exactly the same way by copyright, but there comes a point where generic items may have many very similar examples. Then identifying an original source from which to seek permission can become difficult, if not impossible. There may be dozens of drawings of the stamen of a flower (to show reproduction) or the eyeball, pupil and retina to show how the eye works. Using works of this kind as a model is normal, as is the use of a photographic source for accuracy, but care needs to be taken that a distinctive feature of the original is not reproduced, thus proving that a creator's original work has been 'copied'.

Photographs

Depending on applicable national legislation the publisher may have required the photographer either to assign or to license copyright to the publishing company (in exchange for a fee), so the publisher remains a good starting point to address a permission request.

Rights owners of photographs will normally give a non-exclusive license for reproduction of the picture. This means it can be used once for the purpose and in the position requested, and may not even cover reprints (in other words, permission may need to be obtained every time the book is reprinted). So, if a publisher approaches a third party for permission to reproduce a photograph, he should expect the right granted to be quite limited. If later he wants to include that same photograph in another title or in a new edition (like a paperback), or he decides to change its size and put it on the cover, he will need to seek a fresh permission.

Similarly, picture libraries with **banks of images** will issue a license for a one-off use of their transparencies or digital files. However, this authority will normally allow 'associated and related publicity' – putting the photo as it appears on a page or spread from the book in a catalogue, for example, would be allowed – so long as that use was covered by the permission letter.



Fine art

Most of our appreciation of fine art – paintings and sculpture, for example – is based on photographs of those pieces, taken from galleries or private collections round the world. Clearing permission to reproduce a work of art that is still in copyright may require as many as four separate agreements – from the artist, or his estate; from the owner of the work of art; from the gallery in which it is permanently displayed; and from the photographer.

Picture acknowledgements

As with text, it is important to get the correct wording that a rights owner will accept when his permission to reproduce a piece of artwork or a photograph is acknowledged. Rights owners are also fully entitled to require an acknowledgement of their work alongside the picture rather than tucked away on an unobtrusive acknowledgements page. It may not look good from an aesthetic or design point of view but there may not be a choice.

Web content

Among the public at large, a misconception has arisen that because it's on the Internet, it must be free. Certainly, there is a huge amount of material that is available at no cost to an individual browsing or seeking information. The publisher (or author) who wants to 'treat or deal' with this material and reproduce it in another medium, like a book, is quite a different matter. Permission may need to be secured in exactly the same way as with print procedures and it can sometimes be more difficult to track down the rights owner. Here, approaching the web master in the first instance may be the place to start.

A further problem can arise when the image the publisher wants to take from a website actually belongs to a third party who was not aware that his material was being used in this way in the first place. Unfortunately, this may create a climate in which it can be very difficult to get consent, or where the rights owner demands an exorbitant fee.

It is also important to preserve any links that may already exist on the website. It is not acceptable to suppress these, nor to present material in another publication or on another website by removing the links and passing the items off as if they



belonged to the publisher. Modern legislation now forbids tampering with any protection measures on a web or other site, so securing and reproducing third party web material without authority would make the use of such material without permission that much more serious. A practical problem exists in that while some countries now have legislation for rights protection covering copyright in a digital setting, many so far have not; yet the Internet is no respecter of territorial boundaries and can cross borders even if the legislation appears to bar them.

It must be borne in mind too, that there is no fair dealing precedent for illustration or web content – the ruling generally applies only to text. One of the reasons for this is that by reproducing a photograph or a picture, a whole work, not a part of it is being reproduced. A clear **permissions trail and log** is even more important for ‘non-text’, and the occasions when it is appropriate to proceed without permission much rarer.

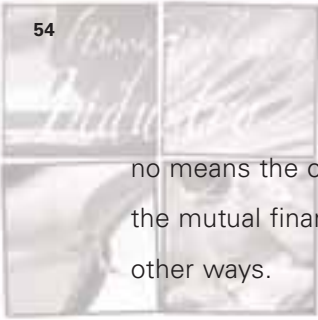
Conclusion

A secure permissions system is one which identifies the rights owner(s) correctly, tracks the permission that has been granted (together with any associated fee), and clearly states the limits imposed on that permission (the license granted). Together with a note of the acknowledgement wording and position, a log can be built up that will be invaluable both for re-clearing permissions of the same material (in a new edition, for example), and for colleagues working on similar publications in the future.

The basic spreadsheet software to be found on Excel or Access is ideal for this, but those managing the system must keep it up to date. Although it can be useful to know what was paid for a third party permission from a rights owner last time, it should not be assumed that the price will remain the same, or that a request granted for no payment will necessarily remain free.

C.iii. Managing Subsidiary Rights

Dealt with above was the primary agreement between the author and publisher (sometimes called the ‘head contract’) through which the author grants the publisher a license to reproduce and distribute a work in tangible form (in print or by means of digital copies contained in tangible carriers such as CD-ROMs). Also alluded to earlier was the point that making the manuscript into a print book, or even an e-book, is by



no means the only way in which the potential in a manuscript can be exploited to the mutual financial benefit of author and publisher. This section will explore the other ways.

The first thing a publisher needs to grasp very firmly is that copyright is not a single right. There are so many 'branches' to the copyright 'tree' that copyright is often referred to as a bundle of rights that the owner has the exclusive right to assign or license singly or in full. For example, a rights owner might authorize use world-wide or by territory; for the entire duration of copyright protection or for a shorter period; in one language only or in many; in volume form or as a film, and so on.

It is also vital to remember, before we go any further, that the act of publication itself spawns a fresh work – a published edition – which becomes the subject of copyright for the publisher. In a book there are at least two copyrights: copyright in the literary work embodied in its pages (which usually belongs to the author), and copyright in the published edition, the typographical arrangement on the page (which is not protected in all jurisdictions and if so, usually belongs to the publisher). There may also be a number of other copyrights – in illustrations or photographs, for instance – which would belong to the illustrators or photographers.

Depending of course on the nature of the work, the publisher can do much more to take full advantage of the intellectual property entrusted to him than merely publish a book. The potential may exist for the book to be serialized in a newspaper or magazine, digitized in whole or in part, or adapted for the screen. A successful and popular film might open up a whole new world of merchandising based on the characters or locations.

The rights that enable the publisher to exploit these and other possibilities are known as the subsidiary rights, one of the most commonly used of which is the right of reprographic reproduction, or the making of a photocopy. The economic potential of subsidiary rights can hardly be over-estimated and must always be taken into account by the publisher in calculating the expected revenue from a new title.

How are the subsidiary rights managed? Let us deal with assignment first. If the author assigns copyright to the publisher he signs over the entire bundle of rights




and the publisher is free to exploit, or not to exploit, any and all of the subsidiary rights. Often this assignment means the author receives no share of any subsidiary rights income. However, in some cases the publisher will be obliged to pay the author his share of the financial rewards from such exploitation. A contract between an author and a publisher which includes an assignment of copyright does not need to list the subsidiary rights because they are part of the bundle, but it does need to denote the proportion that is paid to the author on the one hand and to the publisher on the other. For example, the split could be 50/50 and if so, the clause in the contract laying this out would be known as the 'half profits clause'.

When, however, the head contract is an exclusive license rather than an assignment, author and publisher are at liberty to negotiate the grant of rights, and the management of the subsidiary rights can be a source of conflict when one or both parties does not understand their importance. Large publishing companies have specialized and experienced rights departments able to recognize potential and act on it. Small publishers often neglect this aspect of their business, either because they are unaware of it or because they lack the skills to make the most of it. Similarly, in countries where agents frequently act on the author's behalf, these agents are experienced in negotiating some or all of the subsidiary rights and advise authors to retain them by removing their rights but in developing countries authors' agents are uncommon. **Proper management of the subsidiary rights is a challenge to the inexperienced publisher.**

The menu of subsidiary rights included in the standard author-publisher contract includes both **volume and non-volume rights**; in other words, types of rights in print and also rights in non-print media.

- **Quotation and Extract Rights** refers to extracts appearing within the body of a new publication.
- **Digest Rights** are rights to publish an abridgement in a serial publication, while **Digest Book Condensation Rights** refer to the publication of an abridgement in book form.
- **Serial Rights** permit the publication of extracts in successive issues of a periodical or newspaper, either before (First Serial Rights) or after (Second Serial Rights) the book has been published.



Further subsidiary rights include:

- **Strip Cartoon Rights**
- **Dramatization and Documentary Rights**
- **Film Rights**
- **Mechanical Reproduction Rights (i.e. audio and video rights)**
- **Merchandising Rights**

– and crucially important in the digital era –

- **Electronic Version/Publishing Rights**

If the author authorizes the publisher to exploit any or all of these subsidiary rights on his behalf, he will also determine in the contract the proportions in which the proceeds from the sale of the rights are to be divided. In the case of ‘Dramatization and Documentary Rights’ the author usually receives the lion’s share of the proceeds because the publisher’s input is so much lower.

In the case of **‘Non-commercial Rights for the Print-Handicapped’** (the right to transcribe a work into Braille or to record it free of charge for the print-handicapped), the proceeds depend on applicable legislation on the matter, and often no proceeds follow.

Who controls and thus exploits the subsidiary rights can be – but ought not to be – a battleground between author and publisher. In contracting with an author to publish his work, a publisher is obliged to exploit that work to its fullest potential. However, an agent who reserves too many rights for the author may render the project not commercially viable for the publisher. Publishers usually have both a network and contacts for exploiting the subsidiary print rights of a work. They may be less well placed to exploit a work’s digital or electronic potential.



Who is best placed to exploit subsidiary rights?

The author, who did not have an agent but was contracting directly with the publisher, refused to allow the right of translation (or adaptation into another language) to be part of the bundle included in the exclusive license. He had been 'advised' by a friend that it would be to his advantage to reserve this right and sell it himself to foreign publishers. Soon after the book came out the publishers received a letter from a publisher in The Netherlands who wanted to acquire rights to a Dutch language edition. The publisher forwarded the letter to the author, who phoned to say that this was the publisher's job, not his. The publisher reminded the author that they did not have foreign language rights as the author had expressly reserved them to himself.

In the end the publisher and author amended the contract to include foreign language rights, but the lesson in this incident is that both parties to the agreement should understand the nature of the subsidiary rights and that either party's insistence on reserving them should be based on the willingness, ability and competence to exploit them.



SECTION D

The Collective Administration of Rights

To a large extent, the relationships in the publishing industry are traditionally managed on an individual, or rather on a one-to-one basis. Yet the increasingly widespread use of the photocopier since the 1960s and 1970s has led to an explosion of the unauthorized reproduction of printed works. Copying takes place everywhere and by everybody. It is a massive use of intellectual property, which, if unauthorized and unpaid, represents huge losses to rights holders. Seeking permissions for every individual act of copying is more than impracticable – it is impossible.

Consequently, rights holders mandate organizations to manage their rights collectively. Such organizations issue licenses for the reproduction of literary and artistic works – or, in the case of recorded music, for the public performance or broadcasting of musical works. They collect the fees and channel them back to the authors and publishers. In the case of literary works, such collecting societies are known as **Reproduction Rights Organizations or RROs**.

The exclusive right of reproduction is the starting point. The rights holder may want to exercise the right himself in each and every circumstance or he could decide to authorize an RRO to exercise this right on his behalf. In a voluntary system the RRO gets its authority from the mandates of its participating rights holders, which means that its repertoire could be limited by the exclusion of non-participating publishers or authors. In this case users would still need to apply directly to rights holders in respect of excluded works.



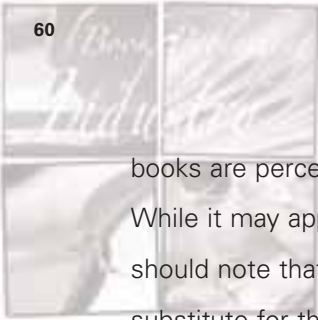
In some countries the legislation supports collective management and deals with the problem of **non-represented rights holders** by stipulating that where an agreement is concluded it covers the works of both represented and non-represented rights holders. These two support mechanisms are extended collective licenses and compulsory collective management.

In some other countries a legal, or statutory, license means that although rights holders cannot prohibit the use of their material (under limitations for private use) they have the right to be remunerated for that use. This regime is therefore based on the existence of a copyright limitation that allows reproduction for private use, which takes place in a private sphere, on a non-commercial scale and from a legitimate source. **Remuneration** may take the form of a fee negotiated by rights holders and users or it may be fixed by law. In some cases the legislation finds an indirect way to generate remuneration by imposing a levy on copying equipment.

Remuneration for reprography is part of the publishers' return on their investment and creates revenue streams that enable them to bring new products to the marketplace. Further, even when a book is out of print and a return no longer accrues to the publisher, or royalties to the author, revenue streams from licenses may continue to flow. This applies equally to back issues of journals and backlists of book publishers.

It is a question of balance: users, whether commercial concerns, administrative organizations or educational institutions gain legal access, under license at reasonable cost, to extracts from copyright published works for internal use. A balance is created between the economic interest of rights holders (the 'legitimate interests' in the words of the Berne Convention) and the needs of users. Moreover, the integrity of the whole work is maintained.

Access to information is an overpowering need in the developing world and content providers in these countries can find themselves under severe pressure to provide such information-based resources. This is especially so for those countries where the publishing industry is relatively small and the market unstable; where distribution networks are inefficient; and where publishers struggle to raise capital for new projects. At the same time, infringing copies of works could become a threat if



books are perceived as “too expensive”. Hence licensing becomes a safety valve. While it may appear that a license to copy detracts from book sales, publishers should note that RRO licenses permit copying only of extracts and are not a substitute for the purchase of a book.

RROs exist in some fifty countries around the world and are linked by their umbrella organization, the International Federation of Reproduction Rights Organizations (IFRRO). Further links, indeed a network of rights and obligations, stem from the bilateral agreements that RROs conclude between each other so that, for instance, when a license is granted in Australia for a work published in Argentina, the Australian RRO transmits the fees collected to the Argentinean RRO, which disburses them as royalties to Argentinean rights holders. Rights may be managed collectively by the RRO in different ways, depending on the legal framework in a particular country.¹⁴

In addition to managing the right of reprographic reproduction, some RROs also manage reproduction for the purposes of publishing as described in the preceding Section on permissions. Some RROs have been mandated to manage reproduction in the digital environment.

RROs need to be authorized to exercise this right on behalf of creative workers when their mandate includes digital rights. It covers the transmission of content over the Internet. Public performance rights – poetry readings, for instance – can also be managed by RROs. In certain countries which have a public lending right (legislation by which rights holders are compensated when works containing their intellectual property are lent out by public libraries, for example), RROs manage this right. Some RROs are also authorized to administer mechanical reproduction rights such as the licensing of audio books.

When authors, publishers, artists and other creative workers come together to set up a new RRO they can encounter many problems; usually they start off very short of funds to establish efficient **distribution systems**. In developing countries,

¹⁴ For further information, please see the WIPO-IFRRO publication on *Collective Management in Reprography*, http://www.wipo.int/freepublications/en/copyright/924/wipo_pub_924.pdf.



fledgling RROs can often find themselves lacking the support of either the rights owners or the potential users. Rights owners fear loss of control and mass copying of their work, while users resent having to pay for something that up to then had been free. In this case, they can be granted bilaterals with RROs in industrialized countries according to which repertoires are exchanged rather than revenues. Some mature RROs in highly organized societies with sophisticated publishing industries and high levels of literacy, readership and book-buying, establish development funds through which grants may be made to support local authors and publishers or to develop writing, publishing and licensing in the less developed world.

The collective administration of rights is a demonstrable instance of how management of intellectual property feeds back into the creative industries.



SECTION E

Business Models: Payment to Authors, Permissions and Subsidiary Rights

E.i. Payment to Authors

There are several ways of considering how to pay for the main source of supply in the publishing industry: the authors and writers who create the books and the publisher who produces and sells them. As established, copyright in a creative work – written, drawn, painted and photographed – belongs to the creator, so publishers need to reach agreement and decide on a fair rate for the job, but one that the publisher, and the market, can afford.

Publishers may be intermediaries between academic researchers or scholars and their readers. Here, publication tends to be much more important to academics than payment, and contributors to journals often get paid nothing. But a journalist asked to write a chapter of a book that deals with contemporary issues – anything from the water table to greenhouse gases – will expect to be paid a fee for the job on completion.

Many publishers want to build a long-term relationship with their authors over several years and, they hope, over several successful books. That relationship may be more like a partnership in which each side takes a risk and is prepared to wait for a return on its investment and time, the author receiving a percentage royalty based on sales of the book. But authors also need to live while they are writing, so it is often appropriate that they get a portion of their payment in advance. As mentioned above in some countries the remuneration must be proportional to the actual sales or to the result of the exploitation.



From a financial point of view we need to look at **two kinds of business models:**

1. **fee payment based on work-for-hire**, and
2. **royalty payment** based on volume of sales.

Fee-based payment

For books with several different contributors, each writing separate chapters or sections, the payment of a fee based on the length of the piece, or the time taken to write it, is a practical and acceptable way of working. **How should the amount be calculated, and where should such payments appear in a publisher's accounts?**¹⁵

Many professional writers work to a standard range of payments based on the numbers of words, usually calculated per thousand. The sum per 1000 words could be, for example, between US \$200 and US \$300, though much lower – and higher – figures are common, since the publisher may have to pay more if the writer is an expert in his field, or is required to do the work quickly because there is pressure on a deadline.

Some kinds of publishing projects almost always carry a fixed fee. For example, authors of non-fiction titles for school pupils or children are typically paid a fee for the whole job, and this includes help with finding illustrations or photographs, writing captions, producing a glossary and index, as well as researching and writing the book. A 32-page 6000-word book might earn a fee of \$2500 (a little over \$300 per 1000 words). Normally, fees are paid once only. They can be broken down into staged payments – for example, 25 percent on signature of the agreement, 50 percent when the publisher receives an acceptable typescript and the balance when the additional work (including checking proofs and layout) has been completed. It is not a large sum of money for 15 days' work (about \$150 a day) but it is cash in hand, and is paid regardless of how the book sells when it is published. The writer will not normally be paid anything further, even if the title is translated into many different languages.

Next, a margin has been worked out to show how these fees are included in calculations, and the benefit to the publisher of having to pay the fee only once.

¹⁵ Figures quoted are in US dollars.

The gross margin of reprints can be substantially higher than the gross margin of the first print. This is because the writer's fee and other one-off costs do not recur in the reprint costs.

NON FICTION TITLE FOR 12-YEAR OLDS

		3000 copies @ \$15 r.r.p.*	1500 copies @ \$15 r.r.p.
		FIRST PRINTING	REPRINTS
Origination costs	Writer's fee	2500	-
	Artwork and photographs	2500	1500
	Design and typesetting	1000	-
	Origination	1250	250
		7250	1750
PPB freight costs	Print and Bind	3600	1980
	Paper (100 gsm)	400	200
	Freight	600	300
		4600	2480
	Total cost	11850	4230
	<i>Unit cost</i>	\$3.95	\$2.82
Sales revenue	1000 @ 35% d/c	9750	500 @ 35% d/c 4875
	1900 @ 60% d/c	11400	1000 @ 60% d/c 6000
	(100 gratis)	-	-
	Total revenue	21150	10875
		Revenue	21150
	Costs	11850	4230
Margin	Margin	9300	6645
		<i>44% of Total Revenue</i>	<i>61.1% of Total Revenue</i>

*r.r.p. = Recommended Retail Price



Royalty payments


Paying authors a royalty in the form of a percentage of sales revenue can help publishers in two important ways. First, authors may identify more closely with the progress of their book and will therefore make a greater commitment to its success. Publishers may want to build a long-term relationship with their authors in the hope that they will write several books and build on the reputation of earlier titles, and royalties can contribute to that sense of partnership. Second, paying authors as and when sales revenue is created can help cash flow.

Royalties take the form of a percentage based either on the selling price of the book, or – more commonly with educational and scientific books – on the sums received (net receipts) by publishers after discounts to booksellers or retailers. There is no such thing as a ‘normal’ royalty rate, although many publishers use 10 percent as a reasonable benchmark.

Royalty rates can vary widely, and with some titles, particularly those with very high start-up and origination costs, a sliding scale is sometimes paid: for example, five percent of net receipts up to a sales level of 3000, 7.5 percent up to 6000, and 10 percent thereafter. The argument here is that early in a book’s life cycle, the publisher is still trying to recoup his start-up costs and has less of a margin to share with the author. Once sales have passed a certain level, the rate can increase.

Basis of royalties

Authors of consumer titles, particularly those whose agents negotiate the contract, may demand that royalties are paid on the selling price of their book, or ‘recommended retail price’. The problem for publishers is that some sales channels can be serviced only by way of very large discounts. A chain bookstore that takes important quantities of a lead title, holding stock as well as promoting the book in-store, may demand large discounts. For example, if a publisher pays a royalty of 10 percent based on a selling price of \$20 but is receiving only \$10 in sales revenue, then the \$2 he is paying to the author (10 percent of \$20) is, in effect, a royalty of 20 percent on the sum received (20 percent of \$10). In some countries legislation imposes a fixed retail price for books, which has an important effect on the whole value chain of the publishing industry, from the author to the retailer.



A compromise can be reached by which the royalty rate is lowered if the discount exceeds a certain level. From a publisher's point of view, paying authors on 'net receipts' means that payments are kept more closely in line with the funds available from actual sales. However, authors might argue that their income should not be dependent on how big a discount the publisher has to make – they should be getting, as far as possible, the same amount on every copy of their book that is sold. Examples of royalties paid by each method are shown at the end of this section.

Advances

As pointed out in the earlier sections dealing with payments to authors and other creators, authors who write for a living will expect to be paid a sum up-front for the work they have been contracted to do. An advance is a portion of the royalties that the book will 'earn' for the author, once it is published. This money on account serves two purposes: it is a statement of commitment from the publisher, and it allows the author to cover some of his living costs while he is writing the book.

Many authors of educational and scientific books do not write for a living. The books, or contributions to publications such as journal articles, represent an important part of their reputations – even their career advancement – but their main source of income derives from their work as teachers or researchers. Publishers of books for these sectors may have very high start-up or origination costs in the form of artwork and illustrations and so may not be in a position to pay substantial advances, which represent a considerable drain on cash for publishers, particularly if a work takes two to three years to write, trial, and publish.

As a rule of thumb, it is often considered unwise to pay an advance that amounts to more than half of that which would be paid in royalties when the first printing has been sold (*see example below*).

Advances are usually paid in stages, for example, 25 percent on signature of the contract, 25 percent on delivery of an acceptable and publishable manuscript, and the balance on publication. Authors (or their agents) may demand a larger share up-front, while publishers will try to conserve their cash by paying the largest portion of the advance nearest to the date when revenue starts to come in to cover that advance. A compromise could be a division into equal shares – a third on signature, a third on acceptance, and a third on publication.



Unless forced by the promise of substantial other income (from broadcasting rights or film options), publishers should resist pressures to pay large advances that run the risk of never being earned. In business terms, this is like locking up sums of money that could turn out to have no value. Unearned advances will need to be written down in the accounts and will constitute a loss on the 'Profit and Loss' account.

Author's costs and charges

If a work contains a large number of third-party items for which permission for copyright clearance must be sought and paid, it is a common practice in certain countries to share in both the work of identifying and clearing those permissions, and paying for part of them. Sometimes (for example, in the case of an anthology of articles or stories), the publisher and author will agree on a budget for text extracts. Up to the level of this budget, the publisher may pay for permissions. For extracts that exceed the budget, the author will carry the charge – normally in the form of deductions from his royalty earnings. The same principle can apply to photographs. The author may provide some that belong to him (at his expense), but if pictures are licensed from a photographic library, the costs of this may partly be borne by the author.

Most contracts also stipulate that if authors make editorial changes to their work when it is in proof form (as opposed to merely correcting printers' errors) then a ceiling is placed on the cost of those changes – usually 10 percent of the total typesetting costs. An author who makes changes that cost more than this will be charged, once again by having sums owed deducted from royalties due.

Shares of subsidiary income

In some cases licensing agreements between publishers and authors allow the publisher to develop other works based on the original typescript, or to exploit the value of the asset in other ways. These can take the form of adaptations (such as a translation into another language), the re-publishing of an extract in a magazine or periodical (a so-called serial right), or an exploitation in another medium – dramatization, a film or TV option, or the creation of a software product derived from or based on the original work.

The contract will specify the shares of income that are to be paid to the author. Money received as subsidiary rights income is remitted at the next accounting period, in addition to royalties owed to the author, and is set against any remaining advance or any expenses the author may have incurred.

Here are two examples of a four-year sequence showing an author’s royalty payment and shares of other income. Publication takes place at the beginning of Year Two. The book is published at a price of \$20, and initially 3000 copies are printed. In the first example the author is paid a royalty of 10 percent based on the net sums received by the publisher. The book sells at an average discount of 25 percent. In the second example, the royalty is based on the recommended retail price.

Royalty based on net receipts

	Year 1	Year 2 (1 st print 3000)	Year 3	Year 4 (reprint 1500)
Sales (unit)	–	2000	1000	600
(value)	–	30000	15000	9000
Royalty [10% receipts]		3000	1500	900
Advance (\$2000)		Earned out	–	–
Author costs (permissions) (\$1500)		(\$500) (still owed)	–	–
Share of other income	–	750 (serial rights)	500 (translation)	–
Net payment (\$3500)		250	2000	900

Royalty based on selling price

	Year 1	Year 2 (1 st print 3000)	Year 3	Year 4 (reprint 1500)
Sales (unit)	–	2000	1000	600
(value)	–	30000	15000	9000
Royalty (10% of selling price)	–	4000	2000	1200
Advance (\$2000)		(earned out)	–	–
Author costs (permissions) (\$1500)		(covered)	–	–
Share of other Income	–	750 (serial rights)	500 (translation)	–
Net payment (\$3500)		1250	2500	1200



E.ii. Permissions

Permissions need to be sought and cleared and any fees paid, before publication. These costs can be borne entirely by the author, absorbed into the production cost of the publisher, or shared in some way by author and publisher. Permissions and fees, may apply to text extracts (prose or poetry); artwork, diagrams and drawings reproduced from an existing source (not necessarily published); photographs (whether commissioned or licensed from a picture library); and web material (whether textual, consisting of images, or a composite mixture).

In the following narrative sequence, the author and publisher are working together to produce an illustrated anthology of literature and non-fiction from a particular region.

Text material:

- 20 third-party owned prose extracts of 500-1000 words
- 10 third-party owned poems or poetry extracts of 50-100 lines

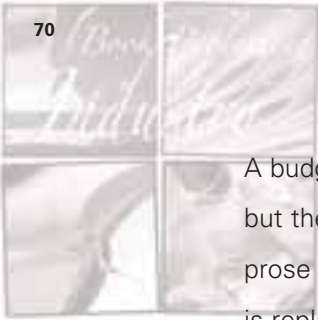
Permission is granted for five of the prose extracts with no charge. Of the remaining 15, the breakdown is as follows:

8 @ \$100 each	800.00
5 @ \$200 each	1000.00
1 @ \$500	500.00
1 @ \$750	<u>750.00</u>
Total	\$3050.00

Two of the poems and poetry extracts are cleared with no charge. Of the remaining eight, the breakdown is as follows:

5 @ \$100 each	500.00
2 @ \$200 each	400.00
1 @ \$800	800.00
Total	\$1700.00

Total extracts **\$4750.00**



A budget of \$3000 for all the text extracts has been set by the publisher but the author is unwilling to fund the full additional \$1750. So the \$750 prose extract is replaced by another piece costing \$150 and the \$800 poem is replaced by another also costing \$150.

The prose budget now stands at $3050 - 750 + 150 = 2450$

The poetry budget now stands at $1700 - 800 + 150 = 1050$

\$3500

The author agrees to pay the extra \$500 over the budget by having the sum deducted from his first royalty statement.

Artwork

Publishers normally pay for specially drawn artwork and in this book only two third-party pieces are to be included, one on the back cover. The back cover illustration is charged at \$1000 and the other piece at \$250. The publisher agrees to pay for both.

Photographs

The author supplies 100 photographs of his own but they are of variable quality. The book is designed with space allocations for 50 photographs, and after some disagreements only 15 of the author's are deemed of sufficient quality for reproduction. A professional photographer is commissioned to produce 30 pictures to a specific brief and is paid \$300 for a day's shoot. This cost is borne by the publisher as part of the start-up costs.

The remaining five photographs must come from a picture library and the rates for these are very high, a fee of \$500 per image being initially quoted. After much haggling, the library agrees to provide all five for a one-off fee of \$1500. When the picture library discovers that one of the photographs is to be used on the cover, they revise the figure back to \$2000. More negotiation follows and a compromise is reached whereby the author and publisher agree to split the photograph library cost, each paying \$1000 of the total bill.

So the author has agreed to pay \$500 towards text extracts and \$1000 towards the cost of the photographs, a total of \$1500. He has been paid \$1000 of a \$2000



advance, so when the second half of the advance is due to be paid on publication, no more money is paid. Indeed, he still 'owes' \$500, which will be set against the first year's sales and royalties.

The above example merely demonstrates how an author and publisher come together to produce and publish a literary work. It is important to be aware of certain book publishing traditions in particular jurisdictions as they may differ. It is therefore recommended that both parties, publisher and author, agree at the outset as to payment modalities.

E.iii. Subsidiary Rights

We have already discussed the management of the subsidiary rights, and this is the place to provide business models. It would be wrong to think of income from publishing as deriving solely from sales of the book (primary revenue) for there are many ways of raising **secondary income** by exploiting the assets represented by the book. Again, the author may decide to exploit some or all of his secondary assets without any involvement from the publisher.

The initial grant of rights from author to publisher gives the publisher the right to produce the work in volume form, and it also gives the publisher the right to license the work in other formats to third parties. The publisher might license other editions or versions of the complete work (in its original language or in translation); the publisher might sell rights to part of the work; and/or the publisher might adapt and exploit the original material and produce it in different media.

A hardback can be published as a paperback, either by the originating or by another publisher. A work of literature can be produced in an educational edition, with background or explanatory notes to help students studying it for an exam. Visually-impaired readers may need an edition of a book manufactured with large print. Perhaps the most common way in which an entire book is published in a different edition is when it is translated into another language and sold in other countries.

If the original publisher produces another edition or version of an author's work, then royalties are the most common way of paying that author. The rates may be different if the discounts offered to retailers are different.



Cost for 800 (Buyer B)	Make ready	500
	Printing 800 @ \$1.50	1200
	Royalty of 50c	400
	Freight @ 50c	<u>400</u>
	Total	2500 (unit cost \$3.13)

So if Buyer B wanted to buy his 800 copies and get them printed as a separate printing, the unit cost of \$3.13 and seller A's charge of around \$6, would be prohibitive.

Now look what happens when all three 'needs' are printed together. (Seller A's 1000 reprint, plus Buyer B's and Buyer C's 800 and 700 copies.)

Cost for 2500	Make ready	500
	Printing 2500 @ 80c	2000
	Royalty of 50c	1250
	Freight @ 50c	<u>1250</u>
	Total	5000 (unit cost \$2)

With Seller A achieving a unit cost of \$2, he would try to sell on the special editions to buyers B and C at about twice the printing unit cost (including make ready), plus royalty and freight.

So now Buyer C can buy his 700 copies as part of the total printing of 2500 copies.

For Buyer C (700 copies)

The total printing cost for 2500 (including make ready and PPB) was \$2500, or a unit printing cost of \$1.

Seller A marks this up by 100 percent and the \$1 becomes \$2.

Charge to Buyer C	\$2
+ royalty and freight (50c + 50c)	\$1
Total charge to Buyer C	\$3
The cost to Buyer C for 700 copies	
(royalty and freight inclusive) is thus	\$2100

Seller A has to share the royalty element of the income from Buyer C with the author, according to the contract. The royalty element is 50c.

Thus 700 copies at 50c = \$350. According to the contract, 75 percent of this goes to the author (\$263) so the publisher is left with \$87.

The **second method** (publisher supplies film or files) is illustrated by the following:

A Nigerian publisher reaches agreement with a South African publisher in Johannesburg to sell the isiXhosa language rights of one of his illustrated titles, printed in four colors. The original book sold for \$20.

The Nigerian publisher agrees to provide duplicate film at cost plus 10 percent so that the South African publisher can make use of the four-color film of the illustrations unchanged. He translates, sets and makes film of the black text in isiXhosa. 'Cost plus 10 percent' means the actual price paid for the duplicate film or digital files, plus a 10 percent handling charge – the cost of the production staff ordering it and sending it. This mark-up is not shared with the author.

Six months later the South African publisher produces and publishes his edition. He prints 2000 copies at a local selling price of 195 Rands.¹⁶ An 8% royalty on the South African published price is agreed with the local publisher. When he sells out his edition the expected earnings will be:

$$8 \text{ percent of } R195 \times 2000 = R31,200$$

When the deal was concluded, an advance of R15,000 was agreed, which was about half the expected income. The South African publisher paid this advance in November, as soon as the contract was signed.

¹⁶ At the time of publication, the approximate exchange rates were: 1 U.S. dollar = 7 South African Rands.



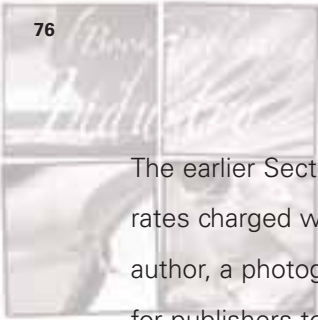
In December the following year, the South African publisher prepared accounts. To that point, he found he had sold 1200 copies of the book. At 8 percent royalty, R18,720 were due. But an advance of R15,000 had already been paid. When the account was settled the following March, the balance of R3,720 was received by the original publisher.

At the end of that year, 500 more copies had sold. The price of the book in South Africa had been increased to R225 from 1 January, so royalty earnings for the year were 8 percent of $R225 \times 500 = R9000$, which was paid the following March.

The original publisher's contract with the author states that the share of income from translation rights shall be 75:25 – that is 75 percent to the author and 25 percent to the publisher.

This table shows how it works:

Date	Event	Income Rand	Author's (75%)	(Publisher's (25%))
Oct. 05	IsiXhosa Language Rights sold	–	–	–
Nov. 05	Advance received	15,000	–	–
Mar. 06	Author's accounts for second half 2005	–	R11250	R3750
Dec. 06	South African accounts prepared for 2006 1,200 sold	(18,720 less advance)	–	–
Mar. 07	Account paid	3,720	–	–
Sept. 07	Author's accounts For first half 2007 paid	–	R2790	R930
Dec. 07	South African accounts 2007 prepared 500 sold	(9,000)	–	–
Mar. 08	Account paid	9,000	–	–
Sept. 08	Author's accounts for first half 2008 paid	–	R6750	R2250
	Total income to end 2008		R20790	R6930



The earlier Sections dealing with permissions show the kinds of items and possible rates charged when a publisher wishes to acquire rights to parts of the work of an author, a photographer or another publisher. Reversing the process, it is appropriate for publishers to derive income from selling parts of the publications to which they hold rights. However, it can be a lot of work to achieve sales of many different small parts of dozens of works, so this is not normally a very profitable side of the overall business. Additionally, the publisher (even acting on the author's behalf and with his authority) will not always own all the rights in the parts of the work that other publishers may wish to acquire.

Text extracts

If a publisher publishes the works of a famous fiction writer or a poet there will be a steady demand from other publishers wanting to include extracts, stories or single poems in anthologies, or collections of genres of work. Examination boards may want permission to include part of a work in literature papers. The big question – and one that is impossible to answer – is **'how much should he charge?'** Looked at purely from a commercial point of view, it could be said 'as much as the publisher can get away with', but there are other factors to consider.

The issues under which the publisher should reach a decision are first of all legal and depend on national legislation on limitations and exceptions. Secondly the issues involved are *ethical, cultural, moral* and, of course *commercial*.

The balance that has to be struck is one that gets a reasonable return for both the author and the publisher, but does not prevent legitimate third-party users from re-publishing a work (or part of it) by the application of prohibitive prices. Besides, there can be a benefit in promoting and publicizing an author's work in other publications. A judgement also has to be made on how much of the whole work is being requested for re-use, how prominent the use is (will part of it be used on the cover of the book?), and how extensively the publisher's new work will be sold and distributed.

The greater the use (and prominence) and the wider its dissemination, the higher the fee. It should be borne in mind that under the terms of fair dealing (or fair use), publishers may use a small part of a work without seeking permission or paying a fee. Note too that the publisher and author will normally require the extract or the work to be reproduced exactly as in the original.



In 2002, the following guideline rates were suggested by the UK's Society of Authors and Publishers Association for prose and poetry.

Prose	\$200-\$250 per 1000 words
Poetry	\$150-\$200 for the first 10 lines
	\$3.50-\$4 per line from 11-30 lines
	\$2.20-\$2.50 per line for 31 lines and over
	Flat fees for short poems are more common now.
	Rates can be between \$200 and \$300

These were for **world rights**, so lower fees would be in order for more limited use, or if the work was to be used in a low-circulation specialist journal.

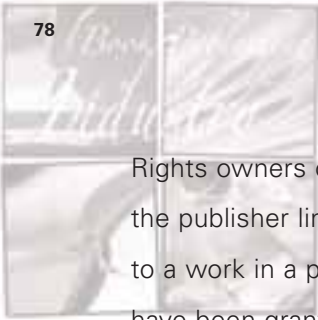
Illustrations

Works of art are normally commissioned, as are some photographs. Acquiring artwork that has already been published or using photographs from a picture library requires a license and usually the payment of a fee. The cost will depend on two things: the size of the reproduced illustration on the page, and the extent to which the new work will be published and disseminated.

The British Association of Picture Libraries and Agencies (BAPLA) produced some guidelines in 2002 to show a range of prices:

Page size	UK rights	Commonwealth Rights	World English language	World all languages
25%	\$120	\$145	\$190	\$225
50%	\$135	\$175	\$225	\$275
75%	\$170	\$200	\$275	\$305
100%	\$225	\$275	\$355	\$390

Once again, the rule of thumb is that lower fees may be appropriate for publications with limited circulation, and higher fees for a prominent re-use, such as on the cover rather than in the main text.



Rights owners of photographs, for example, will almost always have accorded the publisher limited rights in the form of a non-exclusive license, and these rights to a work in a publication cannot be sold on to a third party if only limited rights have been granted. For example, a page of a textbook may contain text, artwork, photographs, diagrams and even maps. The rights to reproduce that page can only be sold if the publisher holds rights in *all* those components – which would be unlikely.

Further, when selling rights it is vital to ensure that publishers reproducing or republishing the material continue to respect the creators' moral rights. This will normally mean insisting that they reproduce things accurately and completely, so that there is no danger of infringing creators' rights of integrity.

Adaptations and exploitations

Some works lend themselves to substantial further exploitation, in different forms and new media. A novel can be dramatized and performed; it could be read on the radio, either in a complete form or abridged or condensed; it could form the basis of a screenplay for a film or television program. Sections of the novel might be published in a newspaper or magazine. Before publication (first serial rights) extracts can help publicize the book, while after publication (second serial rights) extracts can extend the appeal or sale of the work to new or wider audiences.

For many academic and scientific publications, such glamorous possibilities are very limited. However, a publisher might want to adapt a section of a textbook for a different audience (at a lower ability level, or in simplified language); this would come under the heading of adaptation or abridgement rights.

Often it is the *medium* in which the exploitation takes place that defines and limits the rights – audio, visual (still and moving images), audio-visual, digital/electronic, and so on.

For some popular children's works, the characters will become so familiar that **merchandising rights** can be sold, and the image of the famous character used on all sorts of goods and merchandise – from T-shirts to mouse mats, from yogurt to beans. Licenses to use these characters can be very lucrative if the publisher has

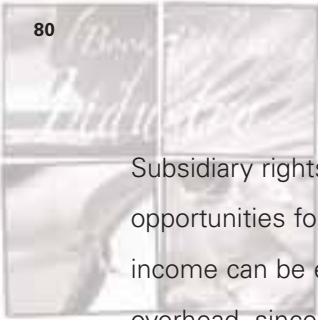


retained a share in the rights, but most of the money in these examples goes to the author or creator. Whatever the form or medium of the exploitation, the author's share has to be agreed. As described earlier, it will normally not be less than 50 percent of the income received from the rights sale and can be as high as 90 percent for consumer books. A 75 percent author-25 percent publisher split is a reasonable midway point, while in education and academic publishing, a 50:50 split is much more common.

To show how rights income can be generated and distributed, the example below is of a high profile mass-market work, which has commanded a large advance for its famous author. An income and royalty statement after the first year of publication has been prepared for Jackie Jones' novel *One Night of Romance*. The book is priced at \$15.

Jackie Jones: *One Night of Romance*

Royalty advance	\$200,000
<hr/>	
25,000 copies at 10% of selling price	\$37,500
Less returns reserve (20%)	(\$7500) = \$30,000
25,000 copies at 10% of average receipt of \$8	\$20,000
<hr/>	
First serial rights sold to Sunday newspaper for \$100,000 (90% to Jackie)	\$90,000
<hr/>	
Option for TV serial \$50,000 (90% to Jackie)	\$45,000
<hr/>	
Advance on French and Spanish translation rights \$10000 each (Total \$20,000) (75% to Jackie)	\$15000
<hr/>	
Total royalty income generated	\$200,000
Less advance already paid	\$200,000
New royalty income due to Jackie	\$0.00



Subsidiary rights come in all shapes and sizes and many publications will offer no opportunities for exploitation, except perhaps translation. Generally, generating rights income can be expensive and hard work, though much of the revenue is free of overhead, since the work of generating the income has largely been undertaken by the buying publisher.

From a business point of view, this revenue is often a welcome, and sometimes unexpected, extra. Agreeing how that income is to be split with the author is the key issue to negotiate and resolve.



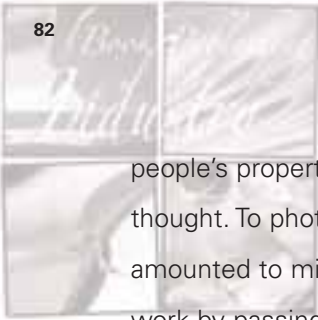
SECTION F

Copyright Compliance

A publisher in a West African country once said that his greatest competitors were not other publishers but those who produced and sold infringing copies (also referred to as counterfeit or pirated goods) of his publications on street corners. Blatant intellectual property infringements are more of a problem in some countries than in others. Yet it is the most persistent drain on publishing resources and energies when the public is said to be 'complicit' in these activities through insufficient knowledge about intellectual property and lack of awareness of the ramifications of their actions.

Although legal action against copyright infringers, including those who plagiarize and provide counterfeit copies to the public, may be effective in the short-term when the attendant publicity makes an impression on the public conscience, the only long-term solution is a better-informed and more aware public.

Academia is particularly receptive to awareness campaigns if senior officials and policy-makers 'buy into' the principle of copyright compliance. In one developing country the department of education issued copyright guidelines to schools in which it stated unequivocally that school principals were ultimately responsible for compliance in their institutions and that copyright infringement was not only a potential embarrassment to the department but was both morally condemnable and educationally unacceptable. The guidelines went on to say that the department was aware how teachers often complained that restrictions on photocopying were frustrating and prevented the dissemination of materials and information to pupils, and that it wished to emphasize that not only did school principals bear the responsibility for instilling in their pupils the moral obligation to respect other



people's property; they were also responsible for encouraging creativity and original thought. To photocopy in excess of what the law allowed and without a license amounted to misappropriation of intellectual property. To plagiarize someone else's work by passing it off as their own was not only dishonest but also a pedagogically unsound practice inhibiting intellectual growth and development.

Publishers acting alone will find it almost impossible to crack the public indifference to the losses suffered by the supply of counterfeit copies in the marketplace or the continued erosion of their profits from sales by unauthorized reproductions in educational institutions. For this reason publishers' associations position themselves to mount effective campaigns. For example, RROs have had success in creating compliance cultures, not only through awareness campaigns but also by providing a 'safety valve' whereby copies may be made legally against payment of a small fee and, very importantly, by streamlining the process through which the license is granted. It has often been said that enforcement and licensing complement each other and that a publishing industry has a far greater chance of success if it can rely on the support of a legal framework with adequate measures for countering violation of intellectual property provisions, combined with a functioning system of collective administration.

Publishers find it ironic that the justification for the making of illegal copies or the purchasing of counterfeit books is that the originals are 'too expensive' since the erosion of the market leads to smaller print runs, smaller print runs lead to higher unit costs and higher unit costs lead to increased retail selling prices. The goal of awareness campaigns is public attentiveness to such issues. Publishers should aim to enlist the support of other rights owners – authors, artists and photographers – to lend weight to their campaigns, and all the members of an industry cluster are potential allies since, as has already been shown, each link in the publishing value chain depends for its health on all the others, and all are weakened by an uninformed and uncaring public. In a developing country the national market is always the worst hit by large-scale copyright infringement because it is the smallest, the most fragile and the most susceptible to threats. Foreign publishers will either 'ride out' the damage or withdraw their publications from a market that is not crucial to them in any case, but local publishers are dependent for their livelihoods on the domestic market.



The state also has a responsibility to support its publishing industry with intellectual property awareness campaigns in the interests of cultural advancement and diversity. The threat of legal action by publishers is a disincentive. However, a disincentive is insufficient to turn around a culture of copying and the goal of an effective campaign should go beyond educating the general public to convincing them that unauthorized use of intellectual property is not only illegal and morally objectionable, but above all, is counter-productive to their nation's economic, social and cultural development objectives.



SECTION G

Conclusion

The reader will have seen by now that book publishing companies' greatest economic assets are the intellectual property rights they own and control. Such ownership of rights will begin with the expression of the idea – the content – in a book to the management of those rights in the marketplace. Yet, how and when a publisher decides to enter a market will depend primarily on one factor: whether or not he is able to sell his books.

Book sales and publishers returns in a given market will depend in turn on a variety of factors, the most important being whether or not there is a regulatory framework to assist in the production, dissemination, administration (i.e. collection of royalties) and enforcement of intellectual property rights. At the same time, markets are created by factors that include favorable demographic variables, a growing or existing literacy rate, an increase in educational institutions, efficient distribution and sales outlets, and a willingness of society to respect the rights of authors, but above all the demand for new ideas.

The promotion and protection of book publishers' intellectual property assets encourage the further publication of literary and artistic works. Such encouragement promotes the supply of diversified cultural products and this is of great significance to a country's cultural traditions and market. As cultural agents and transmitters of ideas, publishers' investments and return on assets must be ensured. This requires the appropriate and mutually-reinforcing strategies on the part of government and the private sector.

This introductory information booklet draws the reader and potential publisher's attention to the various aspects that constitute important elements in ensuring a viable, vibrant, and profitable book industry to promote creative abilities in society.

Although this industry is considered to be the most mature of all creative industries, where entry barriers are low, it still requires vigilance vis-à-vis its importance to the economic, social and cultural contributions to a country. Book publishing industries flourish best beyond borders of traditional centers of learning when they become not a 'luxury' industry but a welfare-enhancing industry.

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