

The Authors Guild

ELECTRONIC RIGHTS

Electronic Rights

The Authors Guild has consistently argued that authors should be compensated for electronic publication of their work, just as they are paid for print publication – whether the works are published as electronic books, reprinted on the Internet, included in a library database or made available in any other electronic format.

Does Your Print Book Publisher Also Want Electronic Rights?

Carefully inspect the Grant of Rights clause in your publishing contract. You may discover that one of the rights your publisher has requested is the exclusive ability to publish or allow others to publish electronic versions of your book. A furious struggle over electronic rights has been waged in the past several years, and nowadays many publishers routinely ask for very broad grants of electronic rights in their boilerplate contracts.

Determine whether your publisher has the ability to adequately exploit the electronic rights requested. If you aren't certain your publisher has the ability to effectively produce and market an electronic version of your work, reserve these rights to yourself for now. If you decide to grant electronic rights, try to pin your publisher down on its plans for your book – Internet download? Verbatim text electronic edition? Multimedia format? – and grant only those rights.

Currently, most publishers are more interested in verbatim text electronic rights than in multimedia formats. Therefore, you should be able to reserve multimedia electronic rights for sale at a later date. If you cannot, ask your publisher to accept a right of first negotiation with respect to future disposition of these rights instead of an upfront, outright grant with a pre-established royalty rate.

If your publisher insists on an upfront, outright grant of electronic rights, insert contractual language requiring the publisher to negotiate royalty and Subsidiary Rights licensing splits with you immediately prior to the planned exploitation or licensing of electronic rights.

The royalty rate your publisher proposes to pay if it publishes its own electronic edition of your book should be enumerated in the Royalties clause of your contract. If your publisher licenses electronic rights to another publisher, your share of the fee should be enumerated in the Subsidiary Rights clause of your contract. Although electronic publishing is still an evolving industry without clear standards, not long ago, Random House announced an intention to evenly split ebook sales revenue with authors. Before this announcement, Random House had been offering authors royalties of no more than 15% of the retail price of an ebook. Many other publishers, including Harper Collins, have started to offer a 50-50 split of net proceeds also. Therefore, you should negotiate to receive no less.

Have Your Freelance Articles Been Published On The Internet?

Supreme Court jurisprudence has firmly established that publishers must obtain your prior permission before publishing or allowing electronic databases to publish your freelance articles on the Internet.

Carefully inspect the Grant of Rights clause in your freelance journalism contract. You may find that you're being asked to surrender electronic rights in not only the current article but also rights in all your previous contributions to the newspaper or magazine. Even worse, you may also discover that you're being asked to sign away your copyright in the article.

Don't agree to transfer your copyright to your publisher. Copyright law gives you all rights in and control over your work. If you give your copyright to your publisher, you relinquish control over your article, including the ability to republish the work.

Under the current climate, you may find it difficult to reserve electronic publication rights in the article that is the subject of your freelance contract. However, you should make every effort to negotiate additional compensation for electronic publication. Also, even though your publisher may ask for rights to your previous contributions without offering additional payment, you shouldn't agree to this type of retroactive rights grab. Guild members, acting on our advice, have been able to negotiate this prior contributions provision out of even their New York Times freelance contracts.

Are You Receiving Royalties For Your Internet Publications?

Created as part of the Guild's advocacy efforts in the electronic rights area, the Authors Registry acts as a collection and distribution agent for individual payments for electronic and photocopy reproduction of participants' published works.

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Electronic Rights and Royalties

A Statement by the NWU Book Division

The opportunities for publishing in many different formats and for reaching wider and wider audiences are greater today than ever before and growing. Writers face a variety of confusing and inconsistent terms when publishing their books in the rapidly expanding field of electronic publishing. The National Writers Union offers these guidelines to help writers as they navigate their way through this rapidly changing industry:

E-Rights

The rights to publish electronic versions of any book should be negotiated. These rights are retained by the creator of the work unless specifically stated in the contract. The NWU is aware that some publishers claim that electronic versions of a book are simply extensions of print rights. The NWU's position, recently reinforced by the Supreme Court decision in *Tasini vs. NY Times* is that electronic versions of any book are NOT extensions of print rights; an e-book is a different version altogether (i.e. movie rights, audio rights, etc.), and should be a separate item negotiated for in the contract.

E-Royalties

Royalties based on retail price are preferable to royalties based on net (gross revenue minus publishers' costs) because the costs deducted that result in the net amount are often unclear and/or unstated. It is probable that a 50% royalty on net may actually result in less money for authors than a lower rate on retail.

In this newly emerging field, with frequent and rapid changes, we offer these recommendations for royalty rates on electronic books at this time:

1. Contact an NWU Advisor before negotiating any contract: advice@nwu.org.
2. Try to negotiate for royalties based on retail or suggested retail/list price as opposed to net.
3. Royalty rates vary widely, from 15% of net to 50% of list. The union recommends negotiating for a rate as close as possible to 50% of list or retail.
4. If a publisher will only offer royalty rates based on net, ask for a complete itemized list of all deductions. Again, an NWU contract advisor can help you negotiate through this.

Writer's Resources

The Electronic Rights Clause In Magazine and Newspaper Contracts Prepared by the ASJA Contracts Committee

The Committee is frequently asked, by freelancers and publishers alike, to suggest a standard clause for electronic rights in periodical contracts. The unfortunate truth is, one size does not fit all. How an e-rights clause is written will depend on which electronic uses are required and how the rest of the contract is shaped. This short discussion should help by laying out guidelines. The Committee is pleased to provide further, specific recommendations on request.

There are two basic kinds of "electronic" use of editorial material.

The easier one to deal with is an enterprise in which the only revenues are user or purchaser fees, such as database use (whether online or CD-ROM by subscription) or sublicensed individual CD-ROM production. For these, the income attributable to each piece is best tracked to the extent possible and split between author and publisher. For some uses, such as typical library CD-ROM databases, "hits" on each article are not recorded. For those untracked uses of material, the overall authors' share of royalties may be divided equally among all contributing writers.

A 50-50 split between author and publisher is well on the way to becoming the standard, following the longstanding practice in the book and periodical worlds of equally sharing income from subsidiary uses. Some have suggested an 85-15 division favoring the author, arguing that publishers serve only to bring the material to the republisher and so are due just the usual literary agent's commission. Typically, however, a publisher has more claim than that. After all, database producers and computer users alike are attracted not only to the individual articles but to the compilation--the publication itself, which they value for its reputation and presentation. The enterprise, then, is a combination of author's property and publisher's marketing position--a joint venture.

Exact income sharing for online use is made possible by the kind of article tracking already being done in databases found on the key online services, such as CompuServe, Lexis-Nexis, et al. World Wide Web site databases, too, either now track by article or are preparing to do so. Since the online portion of the database business seems likely to grow and CD-ROM to shrink, as time passes the "rough justice" approach to apportioning untracked uses--dividing CD-ROM database income as though all articles are accessed equally--should be needed less and less.

The accounts-payable aspect of this income sharing--record keeping and check writing--need not be the nightmare many publishers have feared. The not-for-profit Authors Registry, created for that specific purpose and endorsed by writers' groups and literary agents representing more than 50,000 writers, is already handling royalty division for major magazines.

The other, more complicated kind of use is typified by Web sites and online versions of magazines on commercial services. Here, a variety of revenue sources and other benefits accrue to the publisher, including user time fees, download fees, advertising income, marketing lists, subscriptions, promotion, and sale of ancillary goods and services. The various gains can be troublesome to attribute, to apportion, or even--in cases of promotional giveaways of editorial material, for example--to quantify.

But unlike database deals, which yield pure (if often small) profit from the start, these other uses cost the publisher money for startup and maintenance and don't pay off immediately (or even, in some cases, ever). How, then, are freelancers to be compensated for contributions of raw material to the ventures?

At least one publisher is experimenting with setting a percentage of total revenues as a royalty pool and dividing it among all freelance contributors according to size of contribution. Although intriguing, this method will probably prove troublesome at best, because of the array of benefits

mentioned above and the difficulty in quantifying some of them. Most publishers will find fee-based compensation easier to handle.

With the kind of electronic use discussed earlier, involving a royalty or revenue share, a broad license is acceptable; it might even last forever, if need be, because publisher and writer will always receive their agreed-upon allotments. But when the arrangement calls for a flat fee, the license should be specific, covering such-and-such a use for so-and-so many months or years. Options to renew and expand can easily be included in such agreements, precluding the need to negotiate from scratch for each new use, but each use and extension should be addressed separately and explicitly.

A typical clause might provide, for example, that the author is to be paid X dollars upon an article's inclusion in a Web site, to cover a period of one year, with an unlimited option to renew at Y dollars for each additional one-year period and Z dollars for each site added.

Often, if both kinds of electronic use are anticipated, an e-rights clause in a freelance contract will include both kinds of arrangements: a 50-percent share of database royalties and a fee schedule for other uses. When needed, the catch-all "on terms to be negotiated" is always available.

A one-time fee for all electronic rights forever would be, of course, the simplest way to pay. But that ultimate simplicity has drawbacks for both parties. Writers would lose the right to share in ongoing earnings of a work, which may continue for many years. Publishers would also lose advantages by buying it all upfront: A time-based series of fees spreads the cost out, and a royalty arrangement permits deferment of payment until money is actually earned.

Writer's Resources

Electronic Publishing: Fiction and Fact Prepared by the ASJA Contracts Committee

These days, contracts for freelance articles can be super-dense, high-legalese documents longer than the articles they commission. Rights clauses--in particular, those pertaining to electronic rights--cause the most consternation, especially when the publisher wants those rights for free. Often they cause the most confusion, too.

Editors may find themselves called upon to explain and justify to writers a contract that demands for the publisher "the nonexclusive right to exercise, by itself or through third parties, the rights granted herein in any form in which the Work may be published, reproduced, distributed, performed, displayed or transmitted (including, but not limited to, electronic and optical versions and in any other media now existing or hereafter developed) in whole or in part, whether or not combined with works of others, in perpetuity throughout the universe...."

The discussions frequently include certain basic information about electronic publishing in the world of periodicals. The problem is, much of that information is wrong.

Here are the Most Repeated Cyberfables, each accompanied by what you should know to correct them.

"Databases like Lexis-Nexis are just another way of distributing our publication. You wouldn't expect more money if we signed up 1000 more newsstands, would you?"

A database is *not* simply another means of distributing a publication, because a database doesn't distribute publications at all; it distributes individual articles. Online services usually collect a per-article fee from database users; publishers collect a piece of the pie in regular royalty payments. It's as if a reader could go to a newsstand, slice an article out of a magazine and pay for the clipping alone. It is, in effect, an electronic delivery system for a reprint service.

"We don't 'cherry-pick.' We use the article only as part of the whole issue in which it appears. It's simple archiving."

In a text-only database, there are no graphics and no ads, and frequently the database is missing some editorial matter, such as letters to the editor, short items, and articles by authors who have insisted that their work not be included. Hardly "the whole issue."

"This is just like microfilm."

Microfilm, which replaced bound volumes, was a new form of archiving, containing each issue in its entirety, page after page, just as it appears on paper. But an electronic database, online or CD-ROM, is an archive of articles, not of issues. The publisher's copyright covers the collective work--the articles, graphics, and ads as strung together--but not the individual constituent parts. (Just as a writer's copyright in an article is for the stringing together of words; the writer doesn't own the individual words.) In the case of online databases, the reader generally pays the online service per hit, the database producer takes a cut, and the publisher gets a royalty. The only party in the chain who doesn't keep making money is the author--unless the author-publisher agreement calls for sharing the revenue.

"But no publisher is making a dime at this."

Wrong. With databases, publishers profit from the first sale on, because they have no startup costs; they sign a deal and collect royalties. Some heavily researched publications, like the *New York Times*, already make millions a year from electronic products. Others make peanuts. But whatever they make from these databases is pure profit. On the other hand, publishers' own online efforts, including sites on the World Wide Web, may have high startup costs and bring little initial income (although major advertisers are starting to sign up for some prominent magazines' sites). But while bottom line is what it's all about, in a print venture no publisher expects profits from Day One, and no publisher expects freebies from freelancers. In electronic publishing, even before they start turning a profit, publishers pay everyone from their computer programmers to the electric company. Why should they get content for free?

"We don't charge download fees on our Web site. If we start charging, then we'll pay authors."

Download fees are just one of several ways online publishers profit. They sell ads, products and services, and mailing lists. They gain increased paper subscriptions and general promotion. In deals with commercial services, like America Online, they may earn finders' fees for bringing new subscribers to the service. Some of the most profitable print publications are controlled-circulation giveaways with heavy advertising; should writers provide them with free articles because they don't charge for subscriptions?

"We don't know which articles are accessed. It would be too expensive to keep track."

Untrue. Per-article tracking is not only doable but common.

"It would be too expensive to write a lot of small checks."

It might have been, but writers and agents have joined in the Authors Registry, which will keep accounts and conglomerate those small checks for authors. "The bookkeeping is difficult, so we'll keep all the money" was always undesirable; now it's also indefensible. Such major publications as *Cooking Light*, *Food & Wine*, *Harper's*, *The Nation*, *Publishers Weekly*, *Travel & Leisure*, and *Yankee* have already begun arrangements with the Registry to get payments to authors. *"The exposure will be good for you. It'll get your name around. In the case of books, it's free publicity."*

By that reasoning, authors shouldn't be paid for print publication either, and should give away first serial rights to books. Even if it seems that an online appearance can help a new book with extra exposure, how will it help in a couple of years, when the book is out of print? The chapter excerpted in a magazine or newspaper may continue to earn royalties for that publication...but not for the author.

"We can't delete one article."

Standard agreements with database producers allow for removal of any material as requested by the publisher, before compilation or after. If a publisher won't pay, a piece can be left out.

"If you make us delete this article, you'll be interfering with the flow of information, research, scholarship, the future of the world...."

In other words, when it comes to aiding research, publishers should be allowed to profit but authors should do it as a public service?

"We ask for only nonexclusive e-rights; the author can relicense the work too."

Should an author have to compete with Condé Nast or Hearst in marketing? And what happens when a potential purchaser asks for territory or category exclusivity? The author has to say no, because the original publisher may be selling to the competition. But even more basic is this question: Should a publisher be able to make continuing use of a free-lancer's property and keep all the proceeds?

"The business is new. Let it shake down a few years, then renegotiate."

Ever try to push the toothpaste back into the tube? Industry standards of the future are being established now. Publishers and freelancers should build them together. Fairly.

"All the other writers are signing."

Oldest line in the book of Publisher-Speak, and rarely true.

"Our lawyer won't allow any changes."

Best response: "Neither will mine."

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