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## NEWSPAPER, MAGAZINE, AND SYNDICATION CONTRACTS

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Prior to the mid-1990s, freelance contributions to newspapers and magazines were routinely sold without a written contract. Matters such as the scope of the rights granted and secondary use rights, payment terms, discretion to edit, acceptance for publication, and allocation of legal risks were addressed, if at all, by verbal agreement and industry practice. In those days, publishers did not routinely use contributions after first publication, and it was understood that writers had the rights to resell and reuse their stories freely. Established freelancers could make substantial extra income from reselling their pieces after first publication.

This arrangement changed after publishers discovered the lucrative electronic database market for their publications and began to license their publications, including the freelance contributions, to firms such as LexisNexis and Westlaw. In 1993, six freelance writers sued several publishers and databases over this practice, and, although they eventually prevailed in the Supreme Court, the victory proved to be a Pyrrhic one. Beginning in 1994, newspapers and magazines began to pressure freelancers to give up many—or all—of their rights through written contracts. The *New York Times*, one of the defendants in the writers' suit, introduced a nonnegotiable contract for all its freelancers that purports to cover both previously published and all

future articles sold to the paper. Most newspaper chains quickly followed with written contracts that were structurally similar to the *Times*', though not as extreme. Written contracts with newspapers and magazines are now the order of the day for most freelance articles. The terms of these contracts vary among publishers; prestigious magazines and smaller publishers appear more willing to agree to better terms than the bigger chains. The common terms in the contracts currently offered by major newspapers and magazines, and revisions you might want to request, are explained below.

You might receive the assignment via an email or telephone exchange with an editor, in which the topic, word count, and fee are agreed. Typically, the publisher will follow with a formal contract that is likely to say that its legal terms apply both to the current assignment and to any future work you sell to the publisher. This gambit has both advantages and disadvantages for you. On the one hand, you will only need to negotiate the terms once no matter how many articles you sell to the publisher; on the other, you might have more leverage to negotiate later, after proving your value as a contributor. Remember, though, that you are never really "locked into" your original agreement. You can always ask to revisit your contract in the context of a later assignment.

Ideally, the written contract will confirm the nature of the assignment, due date, fee, the extent to which expenses will be covered, how and when payment will be made, the effect of killing the piece, and how revisions will be handled. If the document lacks any of those terms, ask about them. The contract will also contain legal terms that you should not neglect: the grant of the rights in the work, warranties and an indemnification obligation, a noncompetition clause, and a right of the publisher to use your article, image and likeness to advertise the publication.

While it is in your interests to have the understanding in writing, keep in mind that the document you receive is an offer and that the terms are open to negotiation. If the editor does not send a contract, consider providing your own confirmation of the assignment. It need not be long or formal. (A sample is included at the end of the chapter.)

#### THE SCOPE OF RIGHTS GRANTED

Before accepting an assignment, ask yourself whether you might want to reuse the piece, either as published or as the basis for other work. If so, then you will need to secure the rights to do so in your contract.

The rights in your work that are granted to the publisher are defined according to exclusivity and duration, format, languages, and territory. Many publishers will agree to take only the rights that are necessary to meet their business needs; others will ask for a broad scope. If the contract requires you to grant “all rights of whatever nature” on an exclusive basis or similar, ask the publisher to parse the rights as suggested below.

*Exclusivity and Duration.* Most contracts require the writer to grant the publisher the exclusive first right to publish the piece for some period of time that starts on publication date; this is reasonable and fair. Because secondary uses of your stories are potentially lucrative, the *duration* of the exclusivity period is the key point. If the publisher’s exclusive period is too long, or even permanent, you will effectively be prohibited from reusing your work for its useful life. The most draconian contracts (including the *New York Times*) deem the freelancer’s contributions to be “works made for hire,” meaning the publisher is legally considered the sole original author or require an exclusive assignment of the copyright; without an affirmative reversion of rights, the writer would never be able to reuse the work.<sup>85</sup>

The prestige and reliable pay offered by the *Times* have allowed it largely to succeed in taking all rights permanently to its contributors’ work. But “work for hire” contracts and assignments of copyright are rightly considered by most in the industry to be retrogressive, unfair, and unnecessary and many authors (and their agents) refuse to sign them.<sup>86</sup> In fact, most newspapers and magazine publishers offer fairer contract terms. Most of them limit their exclusivity period to thirty up to ninety days, after which, the writer receives back the rights (usually nonexclusively) to reuse the piece in any way she wishes. Some publishers even agree to revert exclusive rights to the author to make some uses of the story, although this is becoming rare. Receiving back nonexclusive rights is not ideal because they are generally harder to sell than exclusive rights and you might find yourself in effect competing with your publisher in secondary use markets. For that

<sup>85</sup> Chapter 4 explains the meaning and implication of works made “for hire” under copyright.

<sup>86</sup> In fact, the employees of newspapers (who are members of the Newspaper Guild) work under a collective bargaining agreement that provides them a share of the publishers’ revenues for reuses of their columns. Freelancers have neither the benefits of employment nor the opportunity to earn anything for reuses of their work under “work for hire” agreements.

reason, it is worth trying to negotiate for a reversion of exclusive rights to make certain uses (such as reprints, inclusion in anthologies, and syndication) that offer the opportunity for real income, and nonexclusive rights to reuse and relicense the piece in all other ways permitted under copyright. If you cannot persuade the publisher to give you back some rights exclusively, getting nonexclusive rights is much better than nothing.

*Formats.* Typically, the contract will allow the publisher to exploit your story “in all media now known or hereafter invented” or “by any and all means, methods, and processes, whether now known or hereafter invented.” Although retrieving rights back after a reasonable exclusivity period is more important than limiting the formats the publisher may exploit, if you have enough clout, you might be able to change the “all media” language. For example, the grant of rights section might list the publisher’s allowed uses as follows: print and online publication of the periodical, the right to exploit the verbatim text in electronic and digital media, to authorize photocopies, and to license reprints (for a share of the fees).<sup>87</sup>

Whether you limit the permitted formats or not, it is important to add a statement that the grant of rights does not include the right to make derivative works from your story except as needed to edit and exploit it in the authorized formats, and that all rights not granted to the publisher are reserved to you.

*Language and Territory.* Depending on your plans, you might try to limit the language and territory in which your publisher can exploit your work. For example, you could specify that the publisher may exploit the piece in English (and/or other languages). You might allow distribution only in North America or other specified territories. If you do this, you should also place limits on the publisher’s right to license the story to its foreign language or other affiliates.

*Syndication Rights.* In a sense, a syndicate is another publisher, one that gathers written materials by a number of writers and distributes them to a geographically broader periodical market. Once an article is picked up for syndication, it might appear in many newspapers and periodicals. If you reserve these rights, syndication gives you an opportunity to make extra income and to be read by more readers. If you do not reserve these rights, ask your publisher about sharing the income from syndication with

<sup>87</sup> You are more likely to get concessions like this from a magazine than from a newspaper.

you. The ideal share of syndication income is 85 percent to you, 15 percent to the publisher, but you are more likely to get a 50–50 split. More information about negotiating directly with a syndicate is at the end of this chapter.

*Transfer on Payment.* Given the prevalence of slow payment by some periodical publishers, you should add a line that says the grant of rights is not effective unless and until payment is made in full.

### THE ASSIGNMENT AND DUE DATE

The contract should describe the assignment in enough detail, including content and word count, to limit the possibility of a misunderstanding. Avoid language that has you agreeing to submit a “satisfactory manuscript” or that allows the publisher to reject the work “in its discretion.” Whether the work is acceptable should be based on objective, not subjective, criteria—length, topic, professional competence, and fitness for publication. If the publisher’s plans change and it decides not to run your piece, you should still get paid something for it unless you failed to deliver adequate work.

Where the assignment involves some affirmative act by the publisher, such as supplying reference materials, arranging interviews or the like, your deadline should be expressed as a certain number of days from your receipt of such input. Strike any reference that makes the deadline for delivery “of the essence.” Give yourself some flexibility in meeting the deadline, understanding that in periodical publishing, your grace period will necessarily be significantly shorter than in book publishing. The contract should provide for an extension for delays beyond your reasonable control, such as illness or travel delays, although the publisher will understandably resist allowing this period (called *force majeure*) to exceed a specified period of time.

### EDITING AND PUBLICATION

Magazines and newspapers often edit articles extensively for length and style, but it is reasonable to request the right to review and discuss modifications made to your work. Due to time constraints, the publisher might be reluctant to give you a right of approval—or even review—over changes, so make the amount of time you request for review reasonable in the circumstances. If you wish, ask for the right to make substantial changes yourself if they are required and ask for a chance to revise the piece if it is deemed

unacceptable for publication. You should also be able to have your name removed from the byline if you really disapprove of the publisher's revisions.

To avoid waiting indefinitely for payment and publication, consider asking for a clause stating that the publisher will inform you whether or not the work is acceptable for publication within a specified period of time after delivery and will publish by a certain date or period of time after acceptance. Because the publisher's exclusive ownership period usually begins on publication, it is important to ensure the clock will start within a reasonable time. One way to ensure this is to provide that if the publisher does not publish the work within a certain period of time after acceptance or delivery, the rights will automatically revert to you.

#### EXPENSES AND KILL FEES

*Expenses.* There are two ways to deal with the expenses you might incur in researching and writing your piece. One way is to include them in the fee. The second way is to have the publisher agree to reimburse you for expenses incurred. When negotiating your fee, ask whether and to what extent the publisher will cover your expenses. If it will not, build your expected expenses into the fee. If the contract is silent about your expenses, your publisher will consider them your responsibility.

By their nature, some articles will require extensive research, permission fees for third party materials, fees for privacy releases, and the like; the publisher should agree to cover these. For such pieces, before agreeing on the fee, discuss an expense budget. If the publisher requests that you provide a budget, allow for a variance such as 10 percent in the event of unforeseen costs. For extensive or long-term projects, a progress payment schedule for expenses incurred and a part of the fee, made every thirty days or so, is not uncommon. Or consider asking for a nonreturnable advance for the expenses to be covered. Depending on the nature of the assignment, you might also want to request a term that makes unforeseen or extraordinary necessary expenses the publisher's responsibility, subject to its reasonable approval.

*Kill Fees.* There are many reasons why a publisher might decide not to run a story it has commissioned; the inadequacy of the work product is only one possibility. The practice of "killing" a piece is common enough to have given rise long ago to the industry standard practice of the "kill fee." There are several ways to protect yourself from getting an unfairly

low, or worse, no payment in the event your story is killed. First, as previously noted, you should provide in the contract that your fee is due upon delivery of a “professionally competent” article that meets the assignment terms and is fit for publication. The contract should ideally provide that payment will be issued within thirty days of delivery or acceptance, not on publication, of the article. If the publisher cancels the assignment before completion, it might seek to tie the amount of the kill fee to the stage of the work at the point of cancellation. If the project is half complete or more and the publisher’s reason for terminating the contract has nothing to do with quality, you deserve to be paid the full fee plus all expenses agreed. If the contract provides payment is due on acceptance, add that the payment is “nonrefundable,” meaning it need not be returned if the publisher does not use the article. Less desirable but more common is a promise to pay a kill fee of 50 percent (or higher) of the agreed fee. In either case, the contract should provide that if the publisher kills the piece, your expenses will be reimbursed in full and all rights granted will revert to you automatically. A kill fee of less than 50 percent is unacceptable unless the publisher cancels the contract before you have put any time into the assignment.

#### *CREDIT AND PUBLICITY*

The contract should specify how your story will be credited. Most periodicals credit the author by name, but make sure the obligation to do so appears in the contract if you want to ensure it. Many contracts allow the publisher to use the writer’s name and likeness and to use excerpts from the article to promote the publication. Try to ensure that the publisher will consult with you before making use of your persona and that you will have the right to approve of the photo and bio. Sometimes this clause as written is overbroad; if you do not want the publisher to use your persona to sell its other publications or later issues, refine the contract language accordingly.

#### *WARRANTIES AND INDEMNITIES*

Most contracts require the writer to represent and warrant that the article does not infringe on any third party’s rights, such as copyright, or cause them harm, such as through libel or invasion of privacy. Further, they oblige the writer to defend and pay all costs and losses of the publisher arising out of any legal claim based on the story. If the nature of your article raises

concerns about libel or other legal risks, discuss it with your editor early and work together to decrease the risks.<sup>88</sup>

It is worth making clear in the agreement that you are liable only if and when there is a final judgment based on an actual, not an “alleged” breach of a warranty. Nor should you be responsible for anything the publisher changes or adds to the piece. In practice, publishers often treat expenses from legal claims as a cost of doing business, and most of them carry media liability insurance. But deductibles are high and your indemnity obligation might still require you to cover the deductible and other expenses not covered by insurance. Try to limit your indemnity to an amount you can realistically cover or a percentage of your total fee. If the publisher will not agree to limit your liability, consider obtaining your own insurance. Various writers’ organizations can refer you to appropriate insurers.

#### NONCOMPETITION

Some contracts restrict the writer from publishing a story with another publisher in the same market on a similar topic or one that is “reasonably likely to compete with the article” for some period of time after first publication. One way to control this restriction is to limit the publisher’s discretion to decide whether a new article competes with the first one. Specify that the restriction applies only to works that “actually” compete with the first. Some contracts list those competing publications with which the author may not enter a contract for the restricted period. This might be preferable if you can live with it because it creates knowable parameters; you can interpret it as letting you publish in any publication that is not listed or described. In either case, the restricted time period should be reasonable for you and your plans; if it is not, ask to shorten it.

#### INDEPENDENT CONTRACTOR STATUS

The contract might state that you are an independent contractor. Unless you are on the publisher’s staff, there is no harm in agreeing to this. It protects the publisher from any argument that you deserve benefits, that your acts should be attributed to it, or that it should withhold payroll taxes from your payment. It protects you by helping avoid disputes over whether

<sup>88</sup> Chapter 8 reviews defamation and privacy laws.



your story is a work made for hire (unless you expressly agree in writing that it is).

## SYNDICATION

The terms of syndication agreements cover similar ground as periodical contributor agreements. If you reserved syndication rights and are negotiating directly with a syndicate, keep the following in mind. Limit the grant of rights only to those that the syndicate needs—the right to relicense print and digital versions of the articles you make available. You need not and should not transfer the copyright to your works. As well, grant only subsidiary rights that the syndicate demonstrates to you it is able to exploit directly. Limit the duration of the syndication deal to one or two years. This will give you the ability to renegotiate if you are very successful or to walk away from an unsuccessful venture. Any kind of automatic renewal would defeat the purpose of a short term, so agree to this only if each renewal term comes with increased compensation.

Consider how much control you want to retain over the selection of the organizations that will run your work, the markets in which the work will appear, and how much the re-publishers may change or abridge your work as it was originally published. If having an approval right to any of these is important to you, include it in the contract.

Another key term to include is a guaranteed minimum payment for each of the works you have licensed. The guaranteed minimum should not be contingent on the success (or lack thereof) of the syndication. The amount of the guaranteed minimum will depend on the nature and success of the syndication relationship. For example, are you selling one feature or column, or a continuing series? Which newspapers or periodicals are picking up the work? How much above the guaranteed minimum will you earn?

As for royalties, the syndicate can be expected to keep 40 to 60 percent of the gross receipts, and to pay the remainder to you. Consider limiting the syndicate's ability to include your work in packages to be sold at a special price, which would obscure the value of your individual work and lower your share of the fee. Finally, as in book publishing contracts, noncompete and option clauses can seriously hamper your ability to place your work elsewhere and should be carefully limited to those markets in which the syndicate is active.

## SAMPLE ASSIGNMENT CONFIRMATION TO A PERIODICAL PUBLISHER

Dear Ms. Editor:

I am delighted by Happy Periodical Publisher's offer to publish my article, The Great American Article. I would like us to come to a more specific agreement over a few important issues:

1. Happy Periodical Publisher's exclusive right to publish the article in print and digital formats will be limited to first serial rights in the English language to be sold in the United States, its territories and Canada, and placed verbatim on Happy Periodical Publisher's website, for a term of 90 days beyond the US sale date of the issue in which my article is first published. The right to publish the article in other countries, languages and formats shall be nonexclusive.

2. I agree not to publish the work elsewhere, in whole or in part, until Happy Periodical Publisher has published the work in [Periodical] and for [X] days thereafter.

3. Happy Periodical Publisher shall remit my fee in the amount of [Y] within 30 days of acceptance of the article for publication, and, after acceptance, if it decides not to publish the article, I shall be entitled to keep the entire payment agreed upon.

4. Happy Periodical Publisher agrees to reimburse me for the following reasonable expenses: \_\_\_\_\_, for which I agree to submit receipts, within thirty (30) days of the delivery of my article.

5. I agree to allow Happy Periodical Publisher to use my name, biography, and likeness for promotional purposes, subject to my right of approval, not to be unreasonably withheld.

I appreciate your attention to these concerns, and look forward to working together on my article. Please contact me if you wish to discuss any of these issues. If these terms are acceptable, please sign this letter where indicated below and return it to me.

Sincerely,

Accepted by: \_\_\_\_\_