

The PA / AAA GOOD PRACTICE GUIDANCE FOR THE PROCESS OF AGREEING CONTRACTS

Statement of Intent

The Publishers Association and the Association of Authors' Agents agreed to consider how to reduce delays in negotiating and concluding contracts and thus reducing the delay in making payment. It was acknowledged that delays cause friction. Representatives from the Trade Publishers Council (a division of The Publishers Association) and the Association of Authors' Agents have met over a period of months to discuss certain reasons for the cause of delay in the contract drafting and negotiation process, and to identify where improvements can be made to expedite the process. Below is the summary of the Publishers' and Agents' recommendations to take steps to make improvements in this process. The PA and AAA have drafted Good Practice Guidelines ("Guidelines") which are attached. The Guidelines are to support Publishers and Agents in making improvements to the contractual process.

Publisher specific intentions

- Publishers recognise the need for publishing contracts to be resolved expediently so that authors receive their signature advances without delay.
- Publishers will review their end to end acquisition, deal note/offer, contract and payment processes in order to reduce delays where possible.
- Publishers will provide agents, on request, with details of the members of their respective Contracts teams (where there is one) and the split of responsibilities within each team.
- Publishers will improve communications with agents to keep agents informed about what stage the contract is at in terms of signature by publishers and submitting the contract to the Publisher's accounts department for payment of the signature advance.

Agent specific intentions

- Agents will give clear instructions to publishers as to who the contracting party to a contract should be i.e. the author in their personal capacity or the author's company.
- Agents shall notify Publishers' contracts teams (or editor if no contract team) as soon as they become aware – either pre or post signature – of any change in the status of the contracting party from an individual to a company set up by an author.

- Agents shall inform publishers at the earliest opportunity in a deal negotiation of any possible territory restrictions if a US publisher has already acquired US rights or other territory where there is a potential territorial conflict.
- Agents shall carry out due diligence to establish the copyright owner if author is deceased.

Joint intentions concerning the process for negotiating contracts

- Publishers and Agents will aim to draft and negotiate publishing contracts as quickly as possible to minimise delays.
- Publishers and Agents will agree to use a deal note to cover all key rights and terms relating to a deal. Each Publisher and Agent to agree a form of deal note appropriate for their business dealings.
- Publisher/Agent template negotiations to be held outside of deal specific negotiations.
- No deviation from template terms in a specific negotiation unless agreed as part of a deal.
- Publisher to inform Agent when issuing final form of the contract about the information which is required from agent/author for publisher to remit payment of advance and Agent will supply this information promptly.
- Agent to arrange for author to sign the final form of the contract first and then submit copies to Publisher for signature and payment of signature advance, if any.

It is acknowledged that Publishers or Agents may have their own processes and procedures in place already, and the Guidelines are not intended to override current practice or procedure unless Publishers or Agents elect to do so of their own accord.

TPC AAA GOOD PRACTICE GUIDANCE FOR AGREEING CONTRACTS

These notes set guidance on good practice for publishers and agents to adopt when negotiating contracts and Templates in order to achieve greater speed. They do not constitute agreement between any parties to follow any particular practice.*

1. THINGS TO DO / CONSIDER BEFORE CONTRACT STAGE

1.1 Negotiation of deal

- 1.1.1 The primary negotiation of the deal by the editor/contracts team and agent at the acquisition stage should cover all key rights and terms, which should not be left to the contract stage.
- 1.1.2 Where possible, the Publisher and Agent should use an agreed Deal Memo** so that all key terms are already stated.
- 1.1.3 The use of a Deal Memo is recommended to cover key terms and any important changes to Template Clauses. Key terms may include:
- a. The type of book e.g. if it is fiction/nonfiction/illustrated;
 - b. Word-length and description;
 - c. Delivery date;
 - d. Advances; and agreed payout, and terms of any bonus advances;
 - e. Royalties; main home and export royalties for all formats;
 - f. range of primary rights granted (e.g. print, digital, audio etc);
 - g. Territory schedules (where not a deal for world rights);
 - h. Any other commercial terms (where not boilerplate);
 - i. Any other information specific to this project;
 - j. Term;
 - k. Quotations – clearance and cost;
 - l. Illustration/photo provision, clearance and cost; and
 - m. Indexing cost (where relevant)
 - n. Cost of legal read – who pays, whether shared between author and publisher.
- 1.1.4 If there is an agreed Template between a Publisher and an Agent, then the negotiation and the Deal Memo should cover any non-Template items, which should not be left to the contract stage.
- 1.1.5 Agents should be clear about what territories are available, especially where a US deal is already in place. Accurate territory schedules should be given to Publishers at the earlier opportunity, ideally during the deal negotiation stage. Changeable terms such as “Commonwealth” should be avoided or clarified. Where entities such as Commonwealth, EU or EFTA are referred to, these should reflect the accurate and current list of countries which are part of such bodies. However, the list of territories normally granted may form part of the Agency/Publisher Template, and any variations from this should be flagged up in the Deal Memo.
- 1.1.6 If rights not normally granted within an existing Publisher/Agent Template are required for a deal, then these should be negotiated at the deal stage, flagged up in the offer and reflected in the Deal Memo (and not at the contract stage).

- 1.1.7. Unless the Contracts teams of the Publishers are already involved, when the deal is concluded, the Contracts Manager of the Publisher (if there is one) should be copied in by the editor and agent and contracts drafted by Agents should be sent direct to the Contracts Manager (copying in the relevant editor for information).
- 1.1.8 The Deal memo should include the name and email address of the person in the Publisher's Contracts Team to whom the contract should be sent.

1.2 Where the licensor is a company

- 1.2.1 Agents should inform Publishers at an early stage where the licensor is a company as due diligence by the agent will be required to determine that the licensor company owns the copyright or the rights it is licensing under the contract. The requirement for consequential changes should be flagged up at the earliest opportunity. Later change of party from the Author to a company can cause delays due to the need for due diligence and amendments.
- 1.2.2 Agents should inform the Contracts Department as well as the Royalties Department of the Publisher if the Author later sets up a company to which their copyright is assigned as an addendum is required. When the request is made, the documents required as part of the due diligence such as the assignment of copyright, should be provided. Such notice should not just be sent to the Royalties Department for change of payee.

1.3 Deceased Authors

- 1.3.1 Contracts should be with a named entity or person (e.g. a Trustee or beneficiary) who is the owner of the copyright in the work. "The Estate of [deceased author]" is not a legal entity.
- 1.3.2 When entering into contracts for books of authors who have died recently, the Agent should identify which step in the probate process is occurring to determine who should or is able to sign the contract.
- 1.3.3. The Agent should obtain copies of the deceased author's will, grant of probate (if granted) and vesting assent (if there is one). This will also be required if the beneficiary/beneficiaries under the author's will is/are also dead in order to demonstrate the chain of title.
- 1.3.4 If the author is dead, due diligence will be required from the Agent on the chain of title for new acquisitions, especially if the author died some time ago. Agents should therefore consider having the necessary paperwork on such due diligence showing who currently holds the rights in question and who has authority to sign the contract.
- 1.3.5 If the author has died recently it may be necessary to place deals on hold to avoid legal issues surrounding the disposition of assets as the executor may not be empowered to deal with the asset and the beneficiary would not own it until it was vested in him at the end of the administration.

2. NEGOTIATING CONTRACTS

- 2.1 In the absence of any Template agreement between the Publisher and Agent, it should be agreed between each Publisher and Agent who is responsible for starting the process by sending the draft contract to the other party. This can, if agreed, be set out in the Deal Memo.
- 2.2 If the Agent is starting the process, the contract should be sent to the relevant member of the Publisher's contracts team. As stated above the Deal memo should have the name and email address of the relevant person on the Publishers' contract team. Failing that it should be sent to the Head of the Publisher's contracts department.
- 2.3 With standard author contracts where a Template is being used and subject to any agreement between individual Publishers and Agents:
- (i) the first draft contract should be sent within ten working days of the deal being concluded;
 - (ii) the first response to the draft should be sent within ten working days
 - (iii) thereafter responses should be sent within five working days.
 - (iv) Once the contract is agreed, it should be sent for signature by at least first class post.
 - (v) Where possible the Author should sign first (as this usually helps expedite the processes of completion and payment by Publisher).
 - (vi) (Where necessary) when the signed contract is returned by the Agent it should be sent with the invoice for payment of any sums due and details of how or where the payment should be made.
 - (vii) Original signatures should be used and not scanned or electronic signatures or any other method of "signing". If the Agent is authorised to sign the contract by the Author, then such authorisation should also be sent unless the Publisher already has it as a result of previous course of dealing,
 - (viii) Once the Publisher receives the contract duly signed by the Author, and where necessary the invoice and/or payment details, counter signature by the Publisher should be obtained within five working days, which will then trigger the process for payment which should not be unduly delayed. Where possible, the Publisher should inform the Agent of the conclusion of the necessary internal processes and thus when payment can be expected.
 - (ix) Contracts should not be dated until the second party signs. If that is the Author and the contract is sent back undated, the Publisher may date it with the date of receipt notifying the Author/Agent so their copy can be similarly dated (but note that guidance under v above suggests author should sign first).
- 2.4 An unlocked (unless password protection is required for a specific reason), editable Word document should be sent as the first draft contract, and not a Pdf.
- 2.5 If any changes have been made to the first draft these should be clear by use of track change or similar marking up software. Likewise any future changes should be noted in the same way. Wording should not be amended without notifying the other party.
- 2.6 Where it is not possible to adhere to the above guidelines or to any individually agreed procedure due to holidays, illness or the need to consult other people e.g. the author or others

at the publishing company, this should be made clear and the party in question should state a date by which they expect to respond.

- 2.7 Publishers should inform the Agent in advance what information its accounts department requires to generate the payment of any sums payable under the contract on signature.
- 2.8 Agents and Publishers should agree in advance how many copies of the contract are required for signature.
- 2.9 On request and where possible Publishers should share with the Agent any information which is relevant to the contract such as insurance provisions which affect a clause.

3. TEMPLATES*

- 3.1 Templates should be agreed between Publishers and Agents wherever possible, regardless of size of organisation.
- 3.2 Agents and Publishers should each appoint representatives who are able to negotiate changes to Boilerplate Clauses and Templates on behalf of their organisation. Once agreed, the changes will bind the employees / members of the organisation. It needs to be clear when the publishing representative is negotiating on behalf of one company/division or on behalf of a group of companies/divisions, and agents' representatives need to be clear whether they are negotiating for agents affiliated or associated with their agency.
- 3.3 Where a party wishes to alter the Publisher/Agent Template in order to acquire certain rights not currently included (or, where there is no Publisher/Agent template, where they are not part of a conventional publishing contract), or wishes to refuse the grant of such rights, this should be approached as part of a Template review/renegotiation and should not be approached as part of the negotiation of individual Author contracts (thereby complicating and delaying the completion of individual Author contracts).
- 3.4 Changes to Boilerplate Clauses should be kept under review by the Publisher and Agent.
- 3.5 If a party requires a minor change outside of a Template review/renegotiation e.g. to address a change in the law, a note should be sent to the nominated person for discussion.
- 3.6 Any Boilerplate or Template Clauses which are amended for a particular contract for a particular author should not be treated as an amendment to the Template unless agreed otherwise.

*"Template" means the agreed contract used by one particular agency and one particular publisher,

"Boilerplate Clauses" means the standard clauses (in a Template) usually found at the back of contracts such as warranties, indemnities, third party rights, notices, governing law, jurisdiction. It can also include commercial clauses which may be fixed in a Template e.g. reversion process

** "Deal Memo" means a deal memo, offer letter or email or similar document that sets out the offer and on which the deal is agreed, subject to contract.