APACT

ANFASA-PASA AGREEMENT ON CONTRACT TERMS

(annotated version with explanations for authors)

The ANFASA-PASA Agreement on Contract Terms (APACT) is the product of discussions between authors and publishers on what makes up a reasonable and fair contract and how best a document encapsulating these qualities can be formulated. APACT provides a framework within which both parties can examine and fully understand their contractual relationship.

> *One overall effect of a good publishing contract should be to place rights in the hands of those best able to exploit them in the interest both of the wide availability of the work and also of income to the author and to those who work for the author, for example, the publisher or literary agent.*

(Lynette Owen. *Clark's Publishing Agreements: A Book of Precedents*. Seventh edition, 2006. Hayward's Heath: Tottel, p. 4)

INTRODUCTION

ANFASA and PASA mandated their respective copyright committees to meet and discuss standard terms in a book publishing contract. The resulting document is an explanatory ***guideline*** for authors and publishers in respect of the standard terms of publishing contracts.[1]

It is aimed at fostering and upholding a constructive and cooperative relationship between authors and publishers.

APACT is not a static document. It is subject to review, development and adaptation from time to time by ANFASA and PASA.[2]

APACT:

records the essential, standard clauses of a publishing agreement

defines the standard clauses of a publishing agreement, and the scope for negotiation

[1] It is not compulsory for a publisher to abide by the conditions of APACT, but PASA ***recommends*** compliance to its members.

[2] The first version of APACT was negotiated in 2012. This is the second, revised, version.

provides guidelines for the understanding and interpretation of key contractual terms

As no two contracts will have the same wording or structure, APACT should be regarded and applied as a ***guideline***. Publishers may find the guideline helpful when first drafting their standard contractual terms, and when reviewing them from time to time. Authors may compare contracts presented to them by publishers with the APACT guidelines, to determine possible scope for negotiation.

THE PUBLISHING AGREEMENT (CONTRACT)

The term 'publishing agreement' refers to a legally binding ***contract*** between a publisher and an author (or authors) – a business transaction between two or more parties. The terms and scope of the transaction must be stated in clear, unambiguous terms so as to enable the parties to rely on the contract to achieve their original intentions.

As the publishing agreement records the respective rights and obligations of publishers and authors, the parties should deal with it as early as possible in their relationship.[3]

Negotiating the agreement

It is customary for the publisher to initiate proceedings by presenting a draft contract to the author and, by doing so, setting the agenda for continued negotiations between the parties. The draft contract is the start of the negotiation process. It will typically be a publisher's standard contract, designed to keep the legal, administrative and financial aspects of the contractual relationship straightforward.

[3] Authors should insist on a satisfactory signed contract before the work is published. The earlier, the better.

However, this standard contract is not necessarily in its final form. It is subject to negotiation.[4]

Having introduced the draft contract, the publisher will be familiar with its content. The author, on the other hand, may be less familiar with a publishing agreement, and should therefore read it very carefully.

If there is anything that the author doesn't understand he or she should seek clarification from the publisher or from ANFASA.

The possibility of negotiating changes to the publisher's standard or draft contract will depend on whether the proposed changes are fair and reasonable to both parties.

[4] The value of APACT is that it tells authors which are the terms that ***can*** be negotiated. Authors should not make unreasonable demands but on the other hand they should not be afraid to challenge unfavourable conditions.

TERMS IN THE CONTRACT

Contracting parties

The contract should contain a clause clearly identifying the contracting parties: the publisher and the author (or authors).

Title

The 'title' or 'work' should be described and if the title is not yet finalised, a working title may be used (as often happens). The title defines the work.

The contract may cover more than one work, such as an educational textbook comprising a learner's book, a teacher's book and a workbook.

In case of a series, all the works may be listed in one contract. In the case of translations (for instance of an English work into African languages) where these are being planned while the work is being written, all the works will typically be listed in the definition of the work.

Rights granted, assigned and licensed

This clause specifies whether the author is assigning the copyright in the work to the publisher, or whether the author

is granting an exclusive licence to the publisher.[5] In each instance, the position should be recorded unambiguously.

Both a copyright assignment and an exclusive licence may pertain to the full and complete copyright in the work, or to only some of the acts to which the owner of the copyright has the exclusive right. It may for example be limited to a specific term (a number of years), or a specified country or region (for example, Southern Africa). The scope and extent of the assignment or exclusive licence should be described clearly and unambiguously in the agreement.

Copyright assignment

Copyright assignment means that the author assigns (or signs over) the copyright in the work to the publisher and is no longer the copyright owner.

Copyright assignment often occurs in respect of works such as educational and academic textbooks, encyclopaedias, reference works and publishers' compilations. For works of this kind it is likely that the publisher did the research for the project, identified, approached and briefed an author or authors to write it, and managed the writing process.

[5] Contrary to popular opinion, a commission to write a book does ***not*** mean that copyright is automatically conferred to the commissioner. Assignment must always be in writing, and signed by the copyright owner, the author.

Copyright assignment is often applicable where a book has multiple authors, as it allows the publisher to easily manage the intellectual property of the team of authors.

Exclusive licence

An exclusive licence means that no person or company other than the named licensee can exploit (or manage) the rights that have been licensed. The author is also excluded from exploiting the rights that have been licensed, as he or she has signed them away to the licensee.

An exclusive licence should indicate:

the duration of the licence

the possibility of the publisher granting sub-licences (see below for an explanation of sub-licences)

the territory where the work may be published and distributed (for example, the country or region and, where necessary, a schedule depicting the countries in the relevant region, such as Southern Africa)

the language(s) in which the work is to be published and the format in which the work will be published, such as hard copy, paperback or electronic format. Nowadays, electronic publishing rights typically form part of the primary publishing rights granted under a publishing agreement, as most publishers have moved to publishing

electronically as well as in print. The grant of electronic publishing rights should be clearly defined with reference to the relevant formats, such as XML, CD-ROM, DVD-ROM and HTML, Internet downloads, e-books and enhanced e-books. Royalties payable on different formats may vary.

When considering which rights should be included in the licence and which should be excluded, the author should consider the publisher's potential to successfully exploit (manage) those rights compared to his or her own potential to manage them.

The copyright in the work includes subsidiary or secondary rights and uses. These are rights and/or uses which allow further forms of exploitation of the work. The publisher does not exploit these rights directly as a primary right, but is authorised to license or sell them to third parties (such as other publishers) on behalf of the author. Subsidiary rights typically include the right to:

translate the work;

publish it in electronic formats, such as XML, CD-ROM, DVD-ROM and HTML, Internet download and other electronic formats and e-books;[6]

[6] The author can decide on which electronic formats should be included in the contract. Since the production costs of such publications are low, the royalty percentage should be higher than with print.

create merchandise based on characters in the work;

publish excerpts from the work as a serial;

use quotations from the work;

publish an abridgement;

produce sound recordings, films and the like, based on the work;

use the work as base text in wikis or blogs;

reproduce the work in an anthology or compilation.

Subsidiary rights can be an important additional revenue stream for both the author and the publisher.

The publisher owns the rights in the design, layout and typography of the work. This is known as the published edition.

Moral rights

Moral rights are the author's rights to be identified as the author and to object to any distortion, mutilation or other modification of the work that would be harmful to his or her honour or reputation.

Moral rights cannot be assigned or sold to a publisher, although an author may waive the right to enforce these rights.[7]

Royalties

Royalties are normally a percentage of the publisher's net receipts (the money actually paid to the publisher from book sales, which therefore excludes VAT and discounts granted to booksellers).

A percentage split indicating the division of income between author and publisher should be agreed upon for each of the subsidiary rights included in the publishing agreement. Examples include: quotation, translation rights, serialisation rights, publication of an abridgement; television, radio broadcasts, performing rights, film rights.

Permission may be granted free of charge for the reproduction of the work, or a part of the work, for non-commercial purposes (transcribed into Braille for the visually impaired, for example) as there would be no sales of such works.

[7] Under South African Copyright Law authors do not have to assert their moral rights as they do in certain countries abroad, so a moral rights clause need not appear in a contract unless the publisher wants the author to waive these rights. Moral rights should only be waived where the author is a ghostwriter.

Authors are free to exclude any of the rights referred to in this clause of the contract should they choose to do so, but they should consider whether they would be able to handle the rights if they are approached directly by would-be licensees.

Variations on the royalty system as a means of payment could include the following:

Share profit arrangement: The author forgoes ongoing royalties, receives payment only once the publisher has reconciled the books of account relating to the work, and both parties get a 50% share of the net profit. When opting for this payment model it is important that all expenses incurred in publishing and distributing the book should be clearly defined.This arrangement is common in contracts between small publishers and NGOs.

Once-off payment: the author forgoes ongoing royalties and receives a single amount, normally when the manuscript has been received and accepted (this arrangement is very unusual, as publishers usually require sales before paying an author).

Advance payments: the publisher could pay an author an amount based on estimated royalties when the contract is signed, a second amount when the manuscript is received and accepted, and a third when the work is published. These amounts are deducted from royalties as they are earned through sales. This option is normally only

considered by publishers where the prospects of profitable sales are reasonably good.

Rising or 'stepped ' royalties: this is a royalty arrangement in which the publisher and the author share the risk and the reward in the sense that the publisher offers a lower royalty percentage until the title has established itself, when the royalties will increase. Where rising royalties are agreed, the royalty rate typically increases once sales have surpassed specified thresholds.[8]

Certain deductions are normally made from royalties, mainly for items that form an integral part of the text, but which were not created by the author – for example, when an author shares in the costs of compiling an index, securing copyright permissions from third parties for the use of quoted texts, illustrations and the reprint rights (whether print or electronic) on texts and photographs.

The publishing agreement should indicate when sales statements will be provided and royalty payments sent to the author. Statements may be sent twice yearly or annually calculated to the end of the publisher's financial year, and royalty payments are usually made within three months of statements.

[8] For example, the first 2 000 copies; the next 3 000 copies…

Statement of sales

The publishing agreement should oblige the publisher to report to the author regularly on the number of sales and returns as well as the royalties payable.[9]

The time frames for the issuance of these statements (usually every six months or annually), should be recorded in the agreement.

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These statements should specify the print run, the number of copies remaining from the print run, the number of copies destroyed, and the number of free copies. Also, they should specify the percentage royalties payable in respect of both domestic and international sales, hard cover and/or paperback sales, and the sale of subsidiary or sub-licensed rights.

The agreement should entitle the author to examine the books of account, should he or she wish to verify the sales as indicated on the statement. The author will bear the cost of

[9] Bookshops usually buy from the publisher on a 'sale or return' basis: after a certain period of time they return all unsold copies to the publisher and only pay for the copies they have sold.

such an examination, but will be reimbursed if a disparity of an agreed percentage is revealed.

Obligations and rights of the parties

The contract should explain the obligations and rights of both the publisher and the author.

The publisher's roles and tasks

appointing an editor, typesetter, proof-reader and translator (where required)

providing a design specification for the cover and content of the work

determining the style and appearance of the published work, the type of paper to be used, the format, the typeface, the cover, the design of the dust jacket (if any), and the general finish

planning publication dates

deciding the number of copies printed, and overseeing printing and warehousing

deciding the number and distribution of free copies, promotion, marketing, distribution, selling price;

reprinting the work

managing rights enquiries

The contract should contain a clause saying that in carrying out these tasks the publisher should exercise reasonable care and diligence. It is good practice for publishers to consult authors on matters of mutual interest that would contribute towards the success of the publication of the work – for example, the cover design. The contract should stipulate that the author's opinion will be sought where practicable.

The author's role and tasks

Where the work has been commissioned, the author has to write the work according to the publisher's brief and to submit the manuscript on time. The agreement should stipulate the deadline for submission of the manuscript and a penalty clause in respect of late delivery.[10]

The agreement may state various other conditions for the publisher's acceptance of the manuscript: for example, that it needs to be typed or submitted in an electronic format, and

[10] If the author realises that he or she is not going to finish writing by the submission date in the contract he or she should contact the publisher ***immediately***. A later date an often be arranged ***by mutual consent***.

that all supplementary material to be acquired from a third party will be properly listed and referenced.

The publishing agreement should cater for the situation where the publisher deems the manuscript submitted by the author as unacceptable in terms of length, content, level or style. Where the author fails to deliver a publishable manuscript, the publisher may have the right to terminate the agreement and to recover from the author any sums advanced in connection with the work. If an author has been commissioned to revise a new edition of the work, and is unable – or fails – to do so, the publisher may employ another person to do so.

The author's other duties, such as the proofreading of page proofs, involvement in marketing activities such as book launches or promotional tours, and the provision of training to educators,[11] also should be recorded in the agreement. The author's right of approval of the edited manuscript should be acknowledged.

Submission and publication dates

The submission date is the date on which the author has to submit the manuscript to the publisher, together with items related to the work and agreed upon by the parties: the index

[11] In the case of a textbook.

(if indexing was the author's responsibility), photographs, maps and other illustrative material. This should be recorded in the agreement.

Publishers tend to steer clear of contractually committing themselves to a definite publication date.[12] Also, the time span between the conclusion of the agreement and the actual date of publication often may be anything from 12 months. Despite this, the publisher contractually should undertake to publish the work within a reasonable period, unless the parties agree otherwise.[13]

Subsequent editions

The contract may record the author's future involvement and duties, should future reprints or editions of the work materialise. Authors may be required contractually to commit themselves to be available for updating their work in future, should the need arise.

[12] Mainly because an unforeseen national (or even local) event could make it advisable to shift the date.

[13] Authors could ask for a definition of 'reasonable period'. The publisher needs leeway, but the author needs some measure of certainty.

Warranties and indemnities

The author should warrant in the contract that the work is his or her original creation, does not constitute an infringement of any copyright, is not defamatory, does not contain any plagiarised material, and that all statements purporting to be facts are indeed true. The author should then indemnify the publisher against all legal actions and costs which the publisher may incur as a result of the author's breach of any of the warranties given.

Third party copyright material

Third party copyright material is the intellectual property of others used in, and regarded as part of, the text for which the author is responsible. It may include photographs, illustrations, models, diagrams, and quotes from poems, songs, other books, texts or journals.

The agreement should contain a clause obliging the author to acknowledge each use of such material in the work. The contract should state clearly whether the author or the publisher is responsible for obtaining permission for the use of copyright material in the work. If the author is responsible, all correspondence should be lodged with the publisher.

The costs of permissions are normally shared equally between the publisher and the author and the author's share usually is

deducted from the first royalty payment.[14] It is advisable for the publisher to set a limit to permission costs.[15]

Author copies

On publication of the work the author should be entitled, as a once-off, to a number of free copies. In addition to the free copies, the author normally is entitled to buy further copies at a discounted price. Author copies are not for resale.

Remainders

The agreement should set out the procedure to be followed where income from sales of the work has dropped below the cost of keeping the remaining stock in a warehouse. Where sales of the work have declined, with stocks remaining high and warehouse costs exceeding the income from sales, authors should have the right of first refusal to buy the remaining copies on terms to be agreed. The balance of the remaining copies, if any, normally will be sold below cost by the publisher to a remainder dealer.

[14] In the case of an anthology, the publisher usually pays the full cost.

[15] Above that limit, the author would have to pay – or reduce the number of extracts/images.

The agreement should state whether royalties will be payable in respect of the sale of remaining stock, and on what terms. Royalties are not normally paid if copies are remaindered at or below the cost price.

Termination of the contract and reversion of rights

If the work is no longer selling, with little or no market potential, and the publisher does not intend to reprint or otherwise publish the work (for instance as an e-book), the work will be considered out of commerce and all rights granted in the contract could revert to the author.

The contractual clause dealing with a published work considered out of commerce should clearly define when exactly a work shall be deemed to go, or have gone, out of commerce. [16]

The contract should also provide for the termination of the agreement and the reversion of rights *in writing*. The clause should stipulate that the publisher has to inform the author

[16] The definition of 'out of commerce' may stipulate that the failure to meet certain thresholds of sales within a period of time will mean the book is out of commerce (for instance, if less than 100 copies have been sold across formats in the preceding year).

when the work goes out of commerce. In the event of the author enquiring in writing whether there is an intention to publish another impression or edition of the work (for example, within the next three or twelve months where the publisher has stopped offering the work or the publisher is out of stock in the case of print editions), the publisher should respond within a reasonable period (for example, four to six weeks).

If the publisher has no such intention, or fails to respond at all, the clause should provide that the contract will terminate and the rights will revert to the author upon the author's written notice to this effect.

The clause may also need to provide how rights will revert in the case of a multi-author work or where one co-author has passed away and his or her rights are held by his or her heirs.

In any event, the termination of the agreement on these grounds does not affect any sub-licences agreed upon by the publisher and third parties. Authors may request a publisher to revert specific rights to them, in particular subsidiary rights that the publisher does not offer for exploitation. Examples are translation rights or film rights. In the case of electronic rights, such as e-books, a reversion of rights may also be requested where sales are low over a period of time.

The contract should provide for the possibility of the publisher being sold, liquidated or ceasing to do business, and the author's rights in respect of the publisher's successor should be recorded in the contract.

The contract may also provide for the opportunity to review terms in the contract (for example, the royalty rate) after a certain time has lapsed. The contract should stipulate that a review may be undertaken at the request of either party, and that it should be undertaken in good faith.

Right of first refusal on an author's next manuscript

It is advised for both the author and publisher to base their decisions about a second publishing agreement on the outcome of their first venture, and not on a contractual clause to this effect in their first publishing agreement.

The publishing agreement, nevertheless, may contain a clause whereby the publisher is granted the right of first refusal. This requires the author to grant the publisher the very first opportunity to publish the author's next work on terms to be agreed. Consequently, the author may only present the work to another publisher if the first has declined to exercise the right to publish.

Competing work

This clause prevents the author from having a similar and competing work published by another publisher.[17] For example, if an author wrote a Grade 12 Mathematics Book, which is to be published, this clause will prevent the author from writing another Grade 12 Mathematics Book and having it published by another publisher.

If included in the agreement, this clause should clearly state the exact work to which it applies and exactly what would constitute a breach. Terms such as 'similar', 'competing', 'market' and 'sales channel' should be defined clearly, and the clause should specify that the author may not write, and present for publication, another book that will compete with the work covered by the agreement.[18]

[17] The competing works clause is almost exclusively applicable to textbooks.

[18] *'Instead of restricting authors during the continuance of the agreement or while the work remains in print with the original publisher, time limits on the restrictions are included by some publisher so as to allow expert authors to continue to write about their specialist subjects, while at the same time protecting the publisher during the all important pre- and post-publication periods. Time limits can range from anything between one year before publication until two years after, to three months before until six months after. Additional considerations that may be built in so as to vary the clause include the recommended retail price, the target*

The clause on competing work should not be so rigid as to prevent authors from publishing a similar work in a ***different*** market. It should allow for authors to maximise their earnings in accordance with their fields of expertise – but it also should protect publishers against unfair competition, and safeguard their investment in the publication of the author's work.

Breach of contract

This clause should specify the conditions under which either party to the agreement may be in breach and, in each instance, the remedies available. It should include:

the procedures for dealing with alleged breaches, including arbitration and all related matters

such as the appointment of the arbitrator, legal representation, and the venue and the date for arbitration

the time frame for the settlement of the dispute
the conditions and procedures for the cancellation of the agreement

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market (age group, in particular), and the exact subject matter of the book.'
(Lynette Owen. *Clark's Publishing Agreements: A Book of Precedents*. Seventh edition, 2006. Hayward's Heath: Tottel, p. 4)

the conditions for claims for damages

This clause should be capable of being separated from, and should survive the termination of, the rest of the agreement.[19] Nothing in this clause should prevent any party from approaching a court for urgent or interim relief.[20]

[19] In other words, breach of agreement can occur (or can be deemed to have occurred) after the term of the publishing contract has come to an end.

[20] Further information for authors on publishing contracts may be obtained from the ANFASA website **(**www.anfasa.org.za) or the ANFASA office (info@anfasa.org.za).