

## Negligent publishers

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What do you do if your publisher does something which seems outrageous, unfair or merely questionable? Here are some frequently raised complaints and our replies:

### **I hate the jacket the publisher wants to put on my book**

Have a look at your contract. It is very unlikely that you will have the right to choose the jacket or to veto your publisher's choice. Publishers invariably insist that the production, advertisement and distribution of books be under their control. They argue that they are the experts in selling books and must have discretion to use a particular design to attract their intended audience or to fit in with a series. The most that they are likely to agree in your contract is to take account of your views and to show you roughs. Only the most famous authors will be able to insist on a veto.

If you hate a proposed design, contact the publisher to see if it can be changed. Your reasonable views will often be taken into account, particularly if you are able to suggest a suitable alternative (though you may be asked to pay the additional costs), but in the end the publisher's view will prevail and there is little you can do about it. The only exception is if they suggest a jacket or cover which so grossly misrepresents the nature of the book that you could claim it was defamatory (e.g. a naked woman on a religious tract), but this is of course unlikely. You would also have a legal claim for infringement of your moral rights if the publisher failed to state your name on the cover with due prominence or added the name of another author.

### **I don't trust my publishers' royalty statement, but they refuse to let me send my own auditor in to check what's due**

Check whether your contract allows you to send in an auditor. Many publishers who do not have such a clause in their standard contracts will insert one, if requested when negotiating the contract; usually on the basis that you will pay the costs of the audit unless errors exceeding a certain percentage or sum of money (often £50) are found to your disadvantage, in which case they will pay the costs. If your contract does not contain an audit clause and the publisher refuses to let you send in an independent auditor you could apply to the Court for an account. You would have to provide evidence as to why you did not trust the publisher's royalty statement. A vague feeling that it can't be correct would not suffice; you would have to explain why you suspected the royalty statement was incorrect and where the omissions were. For example, your publisher might have told you that Belgian rights had been sold but no overseas royalties appeared on the royalty statement.

The Court would not initially order the publisher to allow your own auditor to go in and look at the accounts; the publisher would be ordered to give full royalty statements

setting out all amounts received by them and amounts due to you with copies of the supporting documents. You could then inspect the original documents and appoint an auditor for this purpose. However, Court action is neither quick nor cheap and is only recommended if you believe there are large amounts unaccounted for. The Court would only order the publisher to pay your legal costs if you prove from the inspection that there are substantial amounts due to you and if you do not, you may have to pay the publisher's legal costs. Do note that if your contract has an arbitration clause for resolving disputes you might not be entitled to apply to Court for an account. To avoid this difficulty, ensure that your contract includes an audit clause and that it does not dictate arbitration as the method of solving disputes.

### **My publisher hasn't been paid on the German edition but is refusing to chase up the payment**

Most contracts do not specifically state that the publisher must recover payment due from sub-licences. However, some obligations may be implied. Implied terms are best described by what the law calls the 'officious bystander test': if an officious bystander had asked when you were negotiating the contract 'should this term be part of the contract?' both you and your publisher would have said, 'of course.' It is likely to be implied that a publisher should make reasonable attempts to collect money from sub-licences. The real question is: what is reasonable?

Generally it would be reasonable to write a few letters and make some phone calls to chase money, but it might be asking too much to expect a publisher to litigate in a foreign country. However, what is reasonable will depend on the amount due and the difficulty of collecting it. If you are only owed £10 it might be unreasonable to ask the publisher to write more than one letter; if £1m was owed, it would almost certainly be reasonable to expect the publisher to take legal action, even in a foreign country. Ask your publisher what has been done to chase up payments and press them to try harder. If you can get the details from your publisher, phoning the debtor yourself can be remarkably effective.

### **My publishers are exporting to their overseas associate and I think they are paying me a lower royalty than I would get from an independent company**

This is a very difficult issue. Most unagented authors (and some with agents) grant worldwide volume rights, sub-licence and subsidiary rights including translation rights to their publishers. Many publishers choose to sell or sub-licence to their overseas associate companies. This can work in your favour; very often a publisher is able to give a larger advance because it knows that its associate will take the book overseas. In an ideal world its

established relations with its associate company should allow the two companies to work smoothly together to ensure that sales are maximised. However, many authors are rightly suspicious that cosy deals go on within groups which result in lesser overall royalties to the author.

HarperCollins Publishers Inc, the American arm of HarperCollins, has recently settled a legal action in New York by two of its authors who claimed that by selling books to its foreign affiliates in Canada, Australia, New Zealand and the UK at high discounts they could unfairly reduce the royalties payable to authors (see *Front Line* p.2). The discount given to its overseas affiliates was generally 72.5% for hardback and trade paperbacks and 75% for mass market paperbacks. HarperCollins Inc have recently settled the action by making lump sum payments to all their authors who received royalties paid on sales to foreign affiliates at these very high discounts.

Publishers do not have a duty to use all efforts to sell books, and most novels do not merit a nationwide advertising programme, even if, by providing one, sales would be increased. However, publishers must make reasonable endeavours to sell books, and must deal with third parties on a *bona fide* arm's length basis which is reasonable and fair to you. Publishers are not entitled to make a secret profit by selling through a subsidiary, particularly if you would have obtained more by direct sales.

If your work has been sold to an associate company it is worth asking your publisher some questions to ensure that you are obtaining a fair royalty. Even better, ask that you be paid royalties on all sales linked to British published price or on a percentage of the associated company's receipts. Some publishers already calculate US royalties according to the receipts of their American subsidiary, which is clearly much better for authors (even taking into account HarperCollins' point that the other method means that you are paid on all books sold and receive your money more quickly).

If you are unhappy about what your publisher is doing, don't simply accept it; ask for an explanation about anything that seems odd, check in your contract to see if it is covered and then speak to the Society or a solicitor if you are still uneasy.

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