UNIT 11 PUBLISHER’S CONTRACT OR MEMORANDUM OF AGREEMENT (MOA)

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11.0 AIMS

After a publisher has reviewed the manuscript submitted to him by an author and decided that it will be possible for him to publish it, some legal issues need to be resolved before much time is lost and energy expended into an activity that will become more and more demanding as time progresses.

We are talking of a Publisher’s Contract here of course. This may come in the form of an Memorandum of Agreement (to publish) There are several issues that seem very simple, on the face of it, once this mutual agreement has been arrived at, but must be properly discussed, documented and duly signed at by the parties concerned so that legal complications do not develop. It is therefore good that some professional, legal, help is taken and issues are resolved before such a situation arises. Normally, the agreement fairly straightforward and most publishers will have readymade formats at hand. However, it is not necessary, as authors discover afterwards, that these formats are in the best interests of the authors!
11.1 INTRODUCTION

You know of course, that sometimes discussions take place between individuals and do not get recorded except over a handshake. However, it is not necessary that the parties that had the discussion are the same ones responsible for their implementation. In the unfortunate event of a death, a takeover of the company or other business pressures, a situation may arise where there is a dispute over work allocation, costs, profit (or loss) sharing. In such a situation, if there is a document clearly setting out issues and how they can be resolved, much heart burn will be avoided. A Publisher’s Contract will anticipate all such situations, and serve as a tool for resolution of disputes, if any. 

Note however, that publisher’s contracts need to be read closely for the fine print — if the draft has been prepared by the publisher, the author must read it. If a standard contract is used, with appropriate amendments, both the author and the publisher must negotiate the terms. Issues like where is the jurisdiction for the resolution of disputes (the city, country etc) need to be discussed and put down in black and white. Sometimes the author is so anxious that her or his book gets published that she or he does not look at the finer details of the papers s/he is signing.

As a publishing professional if you are at a lower level in the hierarchy, you may not be in a position to enter the negotiations but you must make it a point to read wherever possible, agreements that your publisher or publishing house has signed. Now we shall look at some issues point by point.

11.2 AGREEMENT TO PUBLISH

As soon as a ms has been accepted by a publisher for purposes of publication, the author and publisher need to document the fact of this agreement to publish.

This therefore, is the first thing to put down on record — name of publisher, name of author, name of work...in the language given below:

This Contract is entered into as of this day of (month and date), (year), by and between Mr XX, publisher, a resident of (name of place) (hereafter known as the Publisher) and Mr YY, a resident of (name of place) (hereafter known as the Author) concerning a novel presently known as (name of book — may be only a working title for the moment), hereafter referred to as the Work.

11.3 GRANT OF RIGHTS

Now, what are the rights you the publisher or you the author need to discuss? Do you even know what is meant by the term ‘rights’? And if you are an author, you can grant exclusive rights to the publisher, on your own behalf and on your heirs’ behalf—if you so wish. You may see a list like this in the format available with the publisher—if you agree, then proceed.

- The Author, on behalf of the Author and the Author’s heirs, executors, administrators, successors and assignees, grants the following exclusive worldwide rights to the Publisher:
11.4 ROYALTIES

Neither publisher nor author should be coy about this ticklish issue. Mostly, the rules regarding royalties are fixed, but you may wish to negotiate them further. The list should read somewhat like this:

- For electronic copies of the Work, the Publisher agrees to pay the Author a royalty equal to fifty percent (50%) of the retail price (INR) for each unit of the Work sold directly by the publisher, and 50% of net receipts for each unit of the Work sold indirectly through channels (retail price is defined as the price charged the customer—whether at introductory or full price levels).

- For paper copies of the Work, the Publisher agrees to pay the Author a royalty equal to 50% of net profits (calculated as the difference between the cost of production, including distributor fees and royalties as well as shipping, and the retail price).

- No royalties shall be paid on copies distributed for advertising, reviews, promotional or other similar purposes, or on copies sold at cost or below, or provided free to the Author for the Author’s personal use. No royalties shall be paid for any segments or chapters used for promotional purposes.

- Royalties shall be calculated and paid no later than the thirtieth (30th) of the month following the end of each calendar quarter for sales during that quarter, except that if the royalty amount owed Author is less than (amount in rupees, if in India, say 100 Rs) it shall be accrued forward until such time as the royalty owed Author equals or exceeds (the amount given say 100 Rs).

- The Publisher makes no promises or guarantees regarding estimated sales figures.

11.5 AUTHOR’S WARRANTEES

Now, it should be clearly understood that neither author nor publisher is in the business of social service but in the business of publishing, recovering investments made and then making a realistic profit, after fixed costs, recurring costs etc have been recovered by publisher and after the author has made some profit too.

The author then assures the publisher that s/he is the sole author and will cooperate fully in the process of editing, publishing and will not involve the publisher in any legal problems. Further, s/he may safeguard herself/himself by saying that, on the date of the signing of the contract, whatever she is saying is true.
Activity 1

Why should the author take responsibility for any legal actions arising out of the publication of the work?

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(Check your answer with that given at the end of the unit)

11.6 COPYRIGHT

The issue of copyright has already been covered in unit 3 of the previous block of this course in detail. Suffice it here to say that the Copyright is maintained by Author. The publisher shall include a copyright notice on the work at the appropriate place. Copyright registration, if any, is the responsibility of the Author.
11.7 TERMS OF CONTRACT

- The terms of the Contract may say that “This Contract is exclusive for
electronic rights, and optionally for Paper Rights” (we may call it print). The
Author may enter into other publishing agreements for film, or other rights for
the same work covered in this Contract. (Specific exceptions may be noted
here.)

- This Contract may be terminated by either party with a (give number of
cays, say ninety) 00 day written notice, to be delivered by registered mail or
equivalent.

- All rights granted to Publisher shall revert to Author at the time of such
termination and Publisher shall make final royalty payments (if any) within
thirty days of such termination (see if the publisher agrees—he may not!)

- Publisher shall make good-faith efforts to end all distribution agreements during
this period and, in any event, terminate such agreements for distribution of
Author’s work as quickly as feasible. Customer rights to access already
purchased books shall continue, however. (This is one model—your publisher
may decide differently, hence the need to have the details in writing.)

11.8 EXECUTION AND DELIVERY OF CONTRACT

Now the contact needs to be signed by the author and returned within a specific
time frame so that the processing of the work—editing, copyediting, proofreading
etc may proceed. No publisher would like to keep either staff of machine idle and
so the following needs to be inserted into the contract:

"If this Contract shall not be signed and returned to the Publisher within
a period of two (2) weeks (or as agreed mutually) from the date of its
transmittal to the Author, the Publisher shall have the option to withdraw
its offer of agreement. Nothing contained herein shall be construed to
vitiolate the Publisher’s right to withdraw its offer of agreement prior to
delivery of the signed agreement to the Publisher by the Author."

In keeping with the explanation above, the author will have to

"agree to deliver to the Publisher, no later than (give date rather than
period for clarity’s sake)_______one (1) complete manuscript of the
Work, acceptable to the Publisher in Microsoft® WORD format. The
Author will also deliver written authorizations for the use of any materials
owned by a third party included in the manuscript (if any).

(Remember the copyright clearances need to be obtained by the author. S/he
knows best what the sources used are and what permissions have been
obtained/sought).

- Deadlines are important, especially to the publisher.

The Publisher reserves the right to reject the Work and terminate this
Contract if the Author fails to meet the afore-mentioned deadline, or if
the Author delivers the Work and the Work is not accepted by the Publisher
as being satisfactory.
Activity 2
Why must the author commit to a deadline?

(Check your answer with that given at the end of the unit)

11.9 MISCELLANEOUS

Many issues are to be resolved before the work of publishing can commence and these may be bunched under “miscellaneous”. For example, the well-known mutual distrust as to actual number of copies the publisher has printed and sold and given royalties for! There could be a clause for audit, stipulating who will pay the auditor—quite possibly there will be bad blood in the situation and most authors and publishers try to avoid this kind of clause.

Other issues can involve

- **Who is the author/s:** clarifying who the author is, if there is more than one, what proportion the royalties are to be distributed in, and whenever the term Author refers to more than one person, such persons shall be jointly and severally responsible for all aspects of this contract.

- **In case of bankruptcy:** If the Publisher should file for bankruptcy or reorganization, or the Publisher liquidates its business for any reason, all rights granted by the Author to the Publisher will at that time revert back to the Author.

- **The contract should also lay down issues of Transferability:** If the Publisher changes its legal form, is acquired by another entity, or otherwise changes ownership, all rights and responsibilities granted in this contract will be transferred to the succeeding entity.

- **Severability:** If any part of this Contract is determined by a Court to be unenforceable, the rest of the Contract is still considered to be in force.

- **Copyright Infringement:** in case there is infringement of the copyright, the publisher should take appropriate steps to halt it and seek damages but it is not binding on the publisher to do so. Then the author would need to address the issue, and bear the cost.

11.10 INDEMNIFICATION AND LIMITATION OF LIABILITY

Here the contract should indicate that it is the author's responsibility to ensure the publisher is not involved in any legally inappropriate action arising out of the publishing of the work. To indemnify means to absolve the publisher of any legal notices by a party affected by what the author has said—this may be defamatory, untrue, libelous or otherwise objectionable to an individual or organization. Obviously, a publisher would not be in a position to look at each statement made by each author he or she is publishing and this is a standard clause inserted in a publishing agreement.
11.11 THE ENTIRE CONTRACT

The final sentence should say that this is the final contract and any prior agreements are null and void, that no changes can be made unilaterally and that “By signing the following and submitting the required materials, the Author agrees to be bound by the terms and conditions of this Agreement.”

Experience shows that authors keep making changes at the second or even the page proof stages. This causes delay and confusion. Even if an agreement says that not more than 10% changes can be made by an author and that he will be charged for any extra changes, publishing is not an objectifiable, quantifiable activity in the sense that this can be calculated. To be fair to the authors, many of them do not understand the publisher's problems in accommodating author's changes and as a publishing professional, it will be good to explain the problems to your author.

11.12 SUMMING UP

This unit is only an example of the situations that may arise where there is possibly a dispute. Possibly, it is slanted in favour of the publisher in its present form. This is the reason why there are authors' guilds, publishers' guilds, editors' guilds—so that each party can look out to cover his or her rights and legal commitments. However, the process should aim at congeniality and not mutual mistrust and as a publishing professional, you should approach the entire issue with transparency and clarity. Finally, the contract must be signed and dated by both parties and the work of publishing can commence.

11.13 APPENDIX: A SAMPLE AGREEMENT BETWEEN PUBLISHER AND AUTHOR

MEMORANDUM OF AGREEMENT MADE IN DELHI

This __________ day of __________ Two thousand and __________ between (hereinafter called AUTHOR, which expression shall, where the context so admits, include his heirs, executors, legal representatives, successors and assigns) of the one part and the President of India (hereinafter called "the PUBLISHER", which expression shall where the context so admits, include his successors and assigns) of the other parts.

WHEREAS THE AUTHOR has written/compiled/edited a book in the ________ language, entitled ________ (same together with accompanying illustrations etc., hereinafter called the WORK) and is the owner of copyright in the WORK and is desirous of having it published by the PUBLISHER on the terms and conditions and for the consideration hereinafter appearing.

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. ACCEPTANCE OF MANUSCRIPT

The AUTHOR shall deliver to the PUBLISHER for his approval, the complete typescript of the text and the illustrations of the WORK, free of charge and if the PUBLISHER after examining the WORK, decides to undertake its publication, he shall print, produce, publish and sell the
said WORK, at his own cost and expense in such manner and style and at such prices as the PUBLISHER may at his discretion deem fit.

2. COPYRIGHT

The PUBLISHER shall have the sole and exclusive right on publishing and producing the said WORK and all translations thereof, in any language whatsoever, in any part of the world. The AUTHOR hereby undertakes not to publish or cause to be published, the said work or any translation thereof, in any language, in any part of the world, during the subsistence of this Agreement and further agrees that the entire control and rights of publications, production, publicity and sales shall remain with the PUBLISHER.

3. AUTHORSHIP

The PUBLISHER shall publish the WORK under the name of the AUTHOR. In the case of any new and revised edition(s), prepared by another editor(s), it may, at its discretion, publish the revised edition(s) under the names of the AUTHOR and of the editor(s) making the revision.

4. ADAPTATIONS

During the continuance of this Agreement, the AUTHOR shall not, without the consent of the PUBLISHER, prepare or edit for any other publisher any WORK that is an expansion, abridgement or revision of the WORK, or of any part of it, or publish or cause to be published any WORK on the same subject, the sale of which may prejudice or may reasonably be regarded as likely to prejudice the sale of the WORK.

5. FAILURE OF AUTHOR TO COMPLETE THE MANUSCRIPT

Should the AUTHOR be prevented by death or any other cause from completing the manuscript of the WORK within

the PUBLISHER shall have the option either of purchasing from the AUTHOR or his heirs, successors, executors or administration, as the case may be, such writings as the AUTHOR may have done in respect of the WORK and the copyright therein at a price to be mutually agreed upon and of entrusting the completion of the WORK to another author or of commissioning the writing of a new book on the same subject by another author in which case this Agreement shall cease and determine without any liability on the part of the PUBLISHER to make any payment to the AUTHOR or his heirs, successors, executors, administrators or assignees.

6. CORRECTION IN PROOFS

The AUTHOR agrees to revise and correct the final page proofs of the said WORK without delay, or in the event of his inability to do so for any reason, to obtain at his own expense, some competent person to correct the same or else authorize the PUBLISHER to do so on his behalf.

7. NEW EDITIONS

If any time the said WORK goes out of print, the AUTHOR may propose in writing to the PUBLISHER to publish a new edition, If the PUBLISHER does not, within a period of six months thereafter, publish new edition or take steps to publish the same, then the AUTHOR may, in writing, terminate this Agreement and then all rights under this Agreement shall revert to the AUTHOR and the AUTHOR shall have the right to buy
from the PUBLISHER all blocks, stereoplates, electrotypes, designs and engravings, especially made for the WORK, at one half of the original cost.

8. TRANSLATION

In the event of the AUTHOR desiring to have a translation of the WORK in any specified language or languages published, the AUTHOR may, subject to the provision hereinafter contained in Clause 12, in writing, either offer such translation to be published by the PUBLISHER or require the PUBLISHER to have such translation made and published. If within three months of such request the PUBLISHER declines or fails to take steps to have such translation or translation made and/or published, the AUTHOR shall be at liberty to give the publishing rights of such translation or translations in the specified language or languages to any other person or body. In such case where the AUTHOR gives publishing rights to a third party, the PUBLISHER will have no title to copyright, royalty or any profits in such publication.

9. INDEX

The AUTHOR shall, if so required by the PUBLISHER, prepare and supply an index for the WORK in the original language at his/her own cost within the time prescribed by the PUBLISHER failing which the PUBLISHER may, at his discretion, entrust the WORK to any competent person and debit the cost to the Author’s royalty account.

10. ROYALTY

The PUBLISHER shall subject to the provision of Clause 15 hereof, pay to the AUTHOR:

a. A uniform royalty of fifteen per cent on the Indian published price/prices of all copies of the said WORK sold in all the editions provided, however, that if any copies be sold as remainders or for any other reason at prices lower than that originally fixed, the royalty payable on the sale of such copies shall be calculated at fifteen per cent of such lower prices as the case may be.

b. A uniform royalty of seven and a half per cent on the Indian published price/prices on all the copies of the said translated version or versions of the said WORK in all the languages brought out by the PUBLISHER, where the translation is not provided by the AUTHOR, sold in the first edition in each case and at a uniform rate of fifteen per cent of the published price, on second and subsequent editions, provided, however, that if the AUTHOR provides the translation of the said WORK in particular language, and the same is accepted by the PUBLISHER for publication, the PUBLISHER shall pay to the AUTHOR, the royalty at the same rate as on the original WORK.

c. For the purpose of calculating royalties on sale effected outside India at prices fixed in terms of foreign currencies, the foreign priced edition shall be deemed to be priced at the same price as the corresponding Indian edition and royalties on sale of copies in such circumstances shall be calculated on that basis.

d. Division of royalty, if there are two or more AUTHORS, will be on the basis of the terms to be mutually agreed upon and accepted by the said AUTHORS.
11 PAYMENTS

The PUBLISHER shall render to the AUTHOR, an yearly account of sales, commencing one year after the date of first publication and shall pay to the AUTHOR the amount becoming due under this Agreement within three months after the rendering of an yearly account.

12. PUBLICATION OUTSIDE INDIA

The PUBLISHER alone shall be entitled to have the said WORK or any translation or abridgement thereof, printed, produced or published by any other person or body in any country outside India and in that event the PUBLISHER shall pay to the AUTHOR seventy five per cent of the net royalties or sums realized or received by the PUBLISHER provided that this Clause will not be applicable to cases where a translation is published by a third party by permission of the AUTHOR on failure of the PUBLISHER to publish the translation, under the provision of paragraph 8 above mentioned.

13. FEES & MISCELLANEOUS AMOUNTS RECEIVED BY THE PUBLISHER

In the event of any fees being received by the PUBLISHER for reprinting any portion of the WORK or in the event of any other sums being received by him in respect of the said WORK not derived from sales, the PUBLISHER shall have no obligation whatsoever to pay to the AUTHOR any amount on that account.

14. AUTHOR'S COPIES

The PUBLISHER shall deliver to the AUTHOR free of charge twelve presentation copies of the said WORK. For the reprints, revised editions or translated language versions, the number of presentation copies shall be three, six and three respectively. The AUTHOR shall have the right to purchase further copies subject to a maximum of fifty copies for personal use, but not for sale, at a discount of twenty five per cent.

15. PRESENTATION AND REVIEW COPIES—EXEMPTION FROM PAYMENT OF ROYALTY

No royalties shall be payable on copies presented to the AUTHOR or on copies sent out for review or given away free for any purposes in the interest of the said WORK, provided that the total number of such copies does not exceed 250 (two hundred and fifty), or on copies destroyed by fire or white ants or lost in transit or damaged.

16. PRODUCTION AND DISTRIBUTION

All details as to the time and manner of production, jackets, embellishments, advertisements, sale and terms of sale and the number and distribution of free copies for the press or others, shall be left to the sole discretion of the PUBLISHER.

The PUBLISHER shall print and publish the WORK as soon as reasonably may be, after the complete copy shall have been delivered to him and he shall have the sole control of all details of production, advertising, sale price and terms of sale of the WORK and right at his discretion to raise or reduce the published price of the WORK.
17. AUTHOR’S UNDERTAKING

The AUTHOR hereby declares and covenants with the PUBLISHER that the said WORK is an original WORK and that the AUTHOR is the owner of the copyright therein and that the WORK is in no way whatsoever a violation of any existing copyright, that it does not contain anything contravening any provisions of law, objectionable, indecent or libelous, that all statements contained therein purporting to be facts are true and that he has full power to make this Agreement, and that the publication of the said WORK will in no way be unlawful, and that he will indemnify the PUBLISHER against any loss, injury or damaging, including any consequent of any breach of this warranty. The AUTHOR hereby further warrants that he has not made any assignment of or granted any licence in respect of any of the rights in the said WORK comprised in this Agreement.

18. NOTICES

Subject as herein before otherwise provided, all notices to be given on behalf of the PUBLISHER and all other actions to be taken on behalf of the PUBLISHER may be given or taken on behalf of the PUBLISHER by the Director, Publications Division or any officer for the time being entrusted with the functions, duties and powers of the said Director, Publications Division.

Any notice to be given to the AUTHOR under the terms of this Agreement shall be considered to be duly served if the same shall have been delivered to, left for or posted by registered mail to the AUTHOR at his last known address. Similarly, any notice to be given to the PUBLISHER shall be considered as duly served if the same shall have been delivered to, left for or posted by registered mail.

19. ARBITRATION

If any question, difference or dispute shall arise between the AUTHOR and the PUBLISHER relating to this Agreement or any matter arising therefrom or incidental thereto, the same shall be submitted to the arbitration of two persons (one to be named by each party) or in case of the said arbitrators not agreeing then to the award of an umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators, or in the event of their not agreeing, of the umpire appointed by them shall be final and conclusive and the provisions of the Indian Arbitration act, 1940 and the Rules thereunder and any Statutory

Modifications thereof as applicable from time to time shall be deemed to apply to the reference.

The PUBLISHER has agreed to bear the stamp duty, if any, payable on this document.

IN WITNESS THEREOF the above names AUTHOR Shri/Smt. ____________ has hereunto set his/her hand and the President of India has caused Director, Publications Division, New Delhi-110 001 on his behalf to here unto set his hand the day and the year first above written:

Signed by ___________________ in the presence of
1. 

2. Signed by ___________________________ for and on behalf of the President of India in the presence of 

1. 

2. 

N.B. This is only a sample MoU and it may differ in the details from place to place, country to country, or as agreed between author and publisher.

11.14 AIDS TO ANSWERS

1. He is the person who knows what sources he has used.

2. The publisher has other deadlines to meet in order to sell the book.