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Model Publishing Contract for Digital Scholarship

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GUIDE TO THE MODEL PUBLISHING CONTRACT

Introduction

WHAT IS THE MODEL PUBLISHING CONTRACT?

Created with the support of an Andrew W. Mellon Foundation grant, the Model Publishing Contract provides a sample agreement that authors and publishers can use when producing long-form digital scholarship and open access publications. Since the contexts in which publishers operate are different, and publication and business models are evolving, this document is designed for adaptation and is disseminated under an open license. Some users may adopt most of it while others may choose to borrow a few clauses.

Designed to maximize modularity and author-friendly terms, we believe the contract may be an essential building block for a transition to institution-funded subvention programs supporting open access long-form digital scholarship, such as the AAU/ARL/AAUP Open Access Monograph Publishing Initiative. It will also work in a range of other open access publication models and has been designed to accommodate new forms of digital scholarship that may extend beyond the book.

HOW WAS THE CONTRACT CREATED?

In 2014 and 2015, both Emory University and the University Michigan were developing projects funded by the Andrew W. Mellon Foundation to explore institutional subvention funding for long-form digital scholarship. In the process of researching subvention funding, broader conversations began to take place about the future of book publishing, bringing to light the need for a new type of publishing contract for long-form digital scholarship. It became clear that the traditional contracts used by publishers were rooted in a primarily print publication model, and dependent on sales and licensing revenue for sustainability.

Recognizing that a print publication contract does not align well with an institutional subvention business model, open access distribution, or some of the emerging new forms of digital scholarship, Emory University and the University of Michigan joined together to find a solution. In 2016, they received a grant from the Andrew W. Mellon Foundation to create this new model contract.

The Process

The first step in developing the contract was to seek input from the community. The project team gathered together a core group of experts in scholarly publishing, including representatives of university libraries, university presses, and university general counsels

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from Emory University, University of Michigan, University of Minnesota, Indiana University, and University of Georgia. We facilitated a discussion around what elements would be desirable in the new contract and what traditional conventions could be left out.

Based on the input of this initial group, we drafted an outline of what the new contract might look like. We hired an attorney to create a draft contract based on this outline. The initial group reviewed and provided feedback on the draft supplied by the attorney. From this initial feedback, we produced a public draft that was posted online for open comment from December 12, 2016 through February 15, 2017. During the public comment period, we also conducted stakeholder meetings at Emory University and University of Michigan to get input from faculty authors and university stakeholders. An additional meeting was held at the University of Georgia Press to gain additional feedback from press staff and library partners. Following the comment period, the draft was revised to incorporate the feedback provided from the community.

WHAT IS NEW WITH THE CONTRACT?

Responsiveness

The contract is responsive to the needs inherent in long-form digital scholarship. It addresses issues such as:

- Preservation responsibilities of complex digital objects,
- The timing and process for updates to iterative publications, and
- Terms used for describing products and processes that assume primarily textual objects.

By separating the umbrella legal agreement from the description of the Work, the schedule, and various other product-dependent details, the agreement allows greater variability in forms of publication to be accommodated.

Third Party Funders

The contract acknowledges the new role of institutional subvention funders and other key stakeholders. Since the transaction costs for publishers and authors of creating institutionally-specific agreements would be high, we hope that the central elements and structure of this document may be accepted widely by institutions that provide open access book publishing subventions.

Modularity

It is deliberately modular, utilizing a series of schedules that can be intermixed with the core contract to meet the specific needs of a given publisher or author, or tailored to a particular digital work.

Author Friendly

The contract aims to be author friendly, using more natural language that clearly outlines the roles and responsibilities of the author and the publisher. It also includes a Creative Commons (CC) license distribution option allowing for the selection of a CC license by the author.

WHY MIGHT I WANT TO USE THE CONTRACT?

As an author, you may choose to use this contract if...

You are publishing a new online-only open access work with a publisher and you'd like to suggest terms and conditions that better fit this new publishing medium.

You are creating a digital scholarly object that will include a print component.

You're working as part of collaborative team, producing a multifaceted work that will develop in phases.

You'll be publishing a book that will have some kind of open access corollary.

You've received a subvention, and you need a contract able to accommodate that funding model.

As a publisher, you may choose to use this contract if...

You are seeking to revise your current contract to make it adaptive to long-form digital scholarship.

You are looking for ways to create a document that is more author friendly than the traditional book contract.

You are starting a new line of open access and/or digital scholarship publications that you plan to run in parallel with your more conventional imprints.

WHAT SHOULD I KEEP IN MIND WHEN USING THE CONTRACT?

You don't have to use it as written.

This document is a model that is intended to be **modified** and **adapted** to each institution's and/or author's specific needs. If your state or your institution's general counsel requires the

use of certain standard clauses, that's OK! Use and adapt what works for your institution or organizational context and leave the rest.

You don't have to use the whole thing.

The contract has several schedules that are added to the core agreement and become a part of the contract when completed. However, not all of the schedules are required. In fact, some may not be appropriate for your work. It is OK to leave some of them out, which we discuss more below.

You don't have to use everything all at once.

Sometimes, adding a schedule as an addendum to the agreement makes more sense than trying to negotiate it at the time of signing. You can choose to add schedules to the agreement later in the publishing cycle to better align with your process or workflow. However, you can also configure the contract to include all the schedules, expressed in a more generalizable form, at the same time.

Notes on the Structure of the Model Publishing Contract

THE AGREEMENT + THE SCHEDULES

The Model Publishing Contract contains two interlocking pieces—the agreement and the schedules. The agreement is a contract between the named parties, typically the author(s) and their publisher. We believe it contains the essential clauses of a publishing contract, but also includes additional clauses to facilitate the production and distribution of openly accessible digital scholarship.

The agreement is where you will find much of the necessary "legalese," the precise language used in contract law that many authors can find intimidating. In order to make the contract more author friendly, we have tried to avoid opaque language when possible, and we have included a glossary of terms with the Model Publishing Contract's accompanying documentation to help you understand the legalese that was necessary to keep.

The schedules address all of the other aspects of the work necessary to produce a piece of long-form scholarship. In a traditional publishing contract, presses sometimes include many of these things in the agreement itself, such as requirements for the production process, revenue splits, or permissions requirements. Publishers also frequently document aspects of this work in a separate author's guide, which might spell out formatting requirements, marketing information, etc. Changing any one piece of this arrangement is often difficult, either because making even minor changes to a contract requires the permission of a publisher's general counsel, or because an author's guide needed to be applicable/useful for all of a publisher's authors.

For Authors

If you are an author hoping to use the Model Publishing Contract as a tool for understanding (and even improving the terms of) a contract you've been given, we have noted several places where you will likely want to look closely at the terms of your agreement and compare them to some of the possibilities present in this model.

For Publishers

If you are a publisher considering adopting the Model Publishing Contract, it's important to note that it isn't ready for use as written. For example, the "general provisions" section must be amended to comply with state law and your institutional or organizational requirements. We suggest you work with an attorney at your institution or organization to adapt the contract to meet your needs.

USING THE SCHEDULES IN DIFFERENT COMBINATIONS

Working in conjunction with the agreement, the Model Publishing Contract's schedules are modular, and meant to easily accommodate a range of possible long-form publications on the spectrum from a more traditional, book-like object to an innovative digital work. Each schedule addresses a specific piece of the effort required to publish and distribute long-form digital scholarship. As such, the schedules function to create a shared understanding between parties about responsibilities and commitments to one another.

In our conversations with stakeholders, some participants have found the number of schedules daunting, and wondered aloud if there is a core set of schedules we imagine might be common to the majority of published works, regardless of distribution methods or formats. With that concern in mind, we recommend that publishers seeking to implement the Model Publishing Contract consider the following schedules "essential," and let local practice guide adoption of additional schedules:

Schedule A: The "Work"
Schedule B: Distribution and Re-Use of the Work
Schedule D: Publication Schedule
Schedule G: Content Not Original to Author

> ***For Publishers***
>
> Given the diversity of projects the Model Publishing Contract seeks to accommodate, it is likely that you will want to use a subset of the schedules for certain kinds of works.

Books and Book-Like Objects

Schedules in italics could be included when there is a version of the work made for sale.

Schedule A: The "Work"
Schedule B: Distribution and Re-Use of the Work
Schedule D: Publication Schedule
Schedule E: Royalties and Revenue Sharing
Schedule G: Content Not Original to Author
Schedule H: Marketing Efforts of Author and Publisher

Book + Companion Website

Schedules in italics could be included when there is a version of the work made for sale.

Schedule A: The "Work"
Schedule B: Distribution and Re-Use of the Work
Schedule C: Funding and Stakeholders
Schedule D: Publication Schedule
Schedule E: Royalties and Revenue Sharing
Schedule F: Contributors to be Credited or Acknowledged
Schedule G: Content Not Original to Author
Schedule H: Marketing Efforts of Author and Publisher

Dynamic Multimedia Works

Schedules in italics could be included when there is a version of the work made for sale.

Schedule A: The "Work"
Schedule B: Distribution and Re-Use of the Work
Schedule C: Funding and Stakeholders
Schedule D: Publication Schedule
Schedule E: Royalties and Revenue Sharing
Schedule F: Contributors to be Credited or Acknowledged
Schedule G: Content Not Original to Author
Schedule H: Marketing Efforts of Author and Publisher

Amending the Model Publishing Contract

In all cases, if you choose not to include a schedule in your version of the Model Publishing Contract, you will also want to remove the references to that schedule in the body of the Agreement.

Deep Dive into the Model Publishing Contract

1. PARTIES TO THE AGREEMENT

This agreement is intentionally between the author and the publisher. When there is a commitment of institutional funding or other support, it is incumbent on the author to secure that support.

2. PURPOSE OF THE AGREEMENT

List only the schedules in use for the project at hand. Be sure to re-letter to reflect the order they appear in the agreement. Also, remember to update the text of the agreement to properly reflect the changes in schedules, both removing references to schedules omitted, and editing for any re-lettering of the schedules.

3. COPYRIGHT; LICENSE TO PUBLISH

For Authors

This will be the first place you'll want to look. This section of the agreement spells out what rights you grant to the publisher. Broadly speaking, this determines what the publisher may do with your work, what you as the author may do, and (with the use of a Creative Commons license) what readers may do with your work. If you do not understand this section of the agreement, find an attorney who can help you. Many academic institutions have copyright officers in their library who would be happy to help you understand your publishing contract.

For Publishers

Publishers making use of the Model Publishing Contract will want to ensure that section 3 and Schedule B (detailed below) do not contradict one another regarding distribution and re-use of the work. In addition, if there is no subvention or other support (and thus no Schedule C, detailed below) section 4 on funding should be removed.

In this section we have chosen for the author to retain copyright and have copyright registered in her or his name. The author also grants to the publisher an exclusive license for commercialization of the work, and a non-exclusive license for non-commercial publications, such as the open access publications version. We anticipate that both authors and publishers may wish to enjoy broad distribution of the work with a freely available digital open access version, while also selling a print copy of the work.

4. FUNDING

You will note this section indicates funding is required for open access publications, but does not specify the source of funding. We anticipate many open access projects will include plans for funding the work through subventions, grants, or other mechanisms. As a result, we made a conscious choice to address funding of the work in a schedule rather than the body of the agreement since the amounts involved and the exact terms on which the money is delivered will vary by institution and by work. While Schedule C: Funding and Stakeholders can be used to detail the terms of a funding agency's commitment (and possible requirements), it will likely be supplemented by additional documentation (for example, a statement of the elements of the project's costs) depending on the needs of the publisher and the funder. Since the Model Publishing Contract is between two specific parties—the author and the publisher—we have not sought to create other documents for external parties. We have deliberately left the responsibility of obtaining the institutional subvention with the author to avoid initiating business-to-business negotiations that might trigger procurement processes at institutions that have such requirements.

5. AND 6. PUBLISHER AND AUTHOR COMMITMENTS

These sections of the agreement detail the commitments publishers and authors make to one another, in many cases referencing specific attached schedules for details of how aspects of the work will be accomplished. Authors and publishers should work together to make sure both parties have a shared understanding of their commitments to one another. These sections of the agreement contain a number of legal terms for which readers might want to consult our glossary of legal terms.

For Authors

If a version of the work will be made available for sale, authors will likely be interested in how many complimentary copies of their work they will receive, the ability to purchase additional copies at a discounted price, and any potential royalties (which are described in the relevant attached schedules).

For Publishers

Publishers will want to omit or modify several statements in Sections 5 and 6 depending on whether certain schedules are used and the circumstances of the project in question. For example, if there is no subvention or other support (therefore Schedule C is omitted), sections 5.3, and 6.6 should be removed. If the work will not be commercialized or royalties will not be paid for other reasons (and therefore Schedule E is omitted), references to royalties and complementary copies should be deleted. If the work does not contain any material requiring permissions or created/contributed by others, Schedules F and G (and the relevant portions of sections 5 and 6) should also be omitted.

7. REVISIONS AND DERIVATIVE WORKS

Many contracts contain clauses regarding revisions and derivative works. This language should be adapted so that both publishers and authors agree on what defines a “new” or “updated” version of the work, and how publication of that subsequent work might be handled.

8 AND 9. THIRD PARTY CLAIMS AND LIMITATIONS OF LIABILITY

As standard language in nearly all contracts, section 8 addresses action taken by an entity not a party to the original agreement (e.g., not the author or publisher). Examples of third party claims relevant to academic publishing include copyright infringement of someone else’s work, libel, defamation, etc. The limitations of liability clause in section 9 indicates that parties to this agreement will not seek special or punitive damages from one another in the event of a third-party claim.

For Authors

It is important to note that parties are still subject to actual or regular damages, which are tied to loss, injury, or harm as a result of breach or negligence.

For Publishers

Depending on the requirements of the publisher’s institutional or organizational affiliation, these clauses may need to be adapted for local use. For example, if an indemnification clause is required, it could be placed here in the agreement.

10 AND 11. TERM AND TERMINATION; GOOD FAITH BUSINESS NEGOTIATIONS

Setting out the terms under which the agreement is valid and under which it might be terminated, this section includes a subsection on rights reversion.

For Authors

In rights reversion, exclusive rights previously held by the publisher or other entity are transferred back to the author in certain circumstances, and the author can then choose to exercise them. For more information on rights reversion, see the Authors Alliance guide to rights reversion. For example, if the publisher has not committed to a translation of the work within a certain period, the author and publisher could negotiate for that particular licensed use to revert back to the author, who could then pursue it.

12. FORCE MAJEURE

Both the author and the publisher can be excused from completing their obligations under the agreement when certain circumstances beyond their control arise.

13. GENERAL PROVISIONS

For Authors

Authors should note that this section of the contract describes how it can be modified.

For Publishers

Publishers seeking to adapt this agreement for their use will need to review this section of the document with an attorney to make it sure it complies with local practice and law.

SCHEDULE A: THE WORK

The description of the work and the elements to be incorporated in the work serve as a scope statement and clarify the expectations of the author and the publisher. This schedule also allows the author to supply alternative text for images and captions for video files to support the publisher's ability to make the digital version of the work accessible for readers with print, visual, or other impairments. For more information on accessibility, please see Accessible Publishing Best Practice Guidelines for Publishers.

SCHEDULE B: DISTRIBUTION AND RE-USE OF THE WORK

In an effort to accommodate various publication and business models, we have included multiple options for publishing and distributing the work, including assigning a Creative Commons license. If desired, this schedule can be tailored to support only one business model—for example, an online open access publication supported with a subvention—and used as a template by a publisher for all works in that category.

This schedule also includes options for the publisher to commercialize the work, and (as noted above) section 3 of the agreement should be harmonized with any changes made to schedule B. We did not consider online open access distribution to be antithetical to commercializing the work by selling a print copy, for example, so this model publishing contract presents both options.

For Authors

As an author, for more information on selecting Creative Commons licenses, see "Marking Your Works with a Creative Commons License," especially the section on "Noting third-party content in your work."

For Publishers

For works to be distributed with a Creative Commons license, the publisher may pre-select which Creative Commons licenses to provide as options, considering the nature of the work, the methods of distribution, and any commercialization of the work. If you want to learn more about how to use Creative Commons licenses, consult this guide from the OAPEN Project in the UK.

SCHEDULE C: FUNDING AND STAKEHOLDERS

Stakeholders may provide financial support for the publication of the work, technical support or services, or other contributions to the success of the project. If a stakeholder includes obligations or requirements that must be executed by the publisher, author will inform publisher of these obligations in this schedule. In instances where there is no funder or stakeholders, this schedule would be omitted from the agreement.

> ***For Publishers***
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> If a stakeholder requires that the publisher provide a budget, preliminary profit and loss (P&L) statement, or other cost estimate document it may be included here. The Digital Monograph Costing Tool, hosted on the AAUP website, may be a useful tool for developing a customized cost profile.

SCHEDULE D: PUBLICATION SCHEDULE

This schedule defines the milestones and timeframe for creation, review, acceptance, and publication of the work. This schedule should ideally clarify the expectations of both the author and the publisher for the publication process.

SCHEDULE E: ROYALTIES AND REVENUE SHARING

In the event the work is commercialized, the royalties owed by the publisher to the author are outlined in this schedule. In instances where there is no version of the work offered for sale or sublicensed, this schedule would be omitted from the agreement.

SCHEDULE F: CONTRIBUTORS TO BE CREDITED OR ACKNOWLEDGED

Preparing and publishing digital works of scholarship often requires a team of people with varied expertise and skills. It is important to recognize these contributions. Please list everyone who materially contributed to the work being published and their role. Not sure whom to acknowledge and for what? Project CRediT (Contributor Roles Taxonomy) defines a number of contribution types to scholarly works. Though developed for the science research community, this taxonomy provides useful examples of a variety of roles. In the Digital Humanities, the Collaborators' Bill of Rights may provide some guidance. In instances where the author is the sole contributor, this schedule would be omitted from the agreement.

SCHEDULE G: CONTENT NOT ORIGINAL TO AUTHOR

For any content which is not original to the author and which is not a fair use, the author will identify that content for the publisher in this schedule. The Association of American University Presses provides guidelines on author responsibilities which may be helpful in making fair use determinations and seeking permissions.

Various disciplines have also created guides for fair use within that discipline, such as the College Art Association Code of Best Practices in Fair Use for the Visual Arts or the Society for Cinema and Media Studies Fair Usage Publication of Film Stills or Best Practices for Media Studies Publishing, as well as the multiple guides on fair use provided by the Center for Media and Social Impact at American University.

SCHEDULE H: MARKETING EFFORTS OF AUTHOR AND PUBLISHER

In this schedule we recognize that marketing is a joint responsibility, and the author is a full partner in promoting her/his work. The purpose of marketing is increasing visibility and, if applicable, sales. We also recognize that in a press workflow, the marketing efforts are often defined slightly later in the process. This schedule is last in recognition of that likely workflow, and may be completed near the time of publication of the work, and after the agreement has been signed by both parties. If that is the case, it is recommended that a signature block be added for the publisher and author to sign and date to indicate their agreement. If a publisher prefers a different mechanism for establishing marketing responsibilities with authors, this schedule would be omitted from the agreement.

Potential Workflows for Using the Model Publishing Contract

INSTITUTIONAL SUPPORT ON BEHALF OF AUTHOR FOR OPEN ACCESS BOOK

In order to apply open access distribution models to humanistic scholarship, we must meet the needs of scholars who rely on long-form works to advance knowledge in their disciplines. In response, new initiatives around book publishing have emerged. For example, in the United States the AAU/ARL/AAUP open access monograph publishing initiative uses funds from the author's parent institution to substantially support the publisher's production costs, allowing for the distribution of an open access copy of the book. The Model Publishing Contract can be adapted for this and similar initiatives; however, the introduction of a funder into the process can impact the traditional negotiation between the author and press. A key set of questions arise:

- When does the author's institution commit to providing the funds?
- When does the press commit to publishing the work open access?
- When is the contract formalized?

We recommend the following approach as a way forward that can inform and engage all stakeholders at opportune moments. Starting from an assumption that author, press, and institution share the common goal of maximizing the impact of the work through open access, the proposed workflows are designed to ensure a robust quality assurance process while allowing the publisher to make rational business decisions.

Step 1 – Author submits book proposal to press

- Author submits book proposal, sample chapters, full manuscript, or other information requested by the press
- Author may choose to provide the press with information on open access funding initiatives at their parent institution
- Press carries out its normal evaluation processes to decide whether the proposed book fits the relevant criteria for publication

Step 2 – Press prepares a letter of interest to the author indicating

- The evaluation process (acquisitions editor selection, peer review, editorial board review, etc.) used by the press to evaluate the book
- Any conditions or requirements from the Press to publish the book open access, such as timing of receipt of funds
- Any cost estimates or previously set open access charges for books of similar length and complexity

Please note the press is indicating an interest in the work, not an intent to publish the work, when providing this letter. If peer review is not successful, adequate funding is not received, or another change in circumstance occurs, the press may re-evaluate whether it can successfully publish the book.

Step 3 – Author applies for institutional funding

- Author follows institutional procedures to apply for funds, providing the letter of interest from the press in the application

Step 4 – Institution prepares a letter of provisional acceptance to the author indicating

- Any requirements of the institution to evaluate the quality standards of the press, such as readers' reports
- Any requirements of the institution to provide funding, such as supporting documentation for the cost estimate, publication with a certain form of Creative Commons license, specific acknowledgements, a stated preservation strategy, or adherence to accessibility standards
- The amount, or range, of funding available to the author from the institution

Step 5 – Author sends letter of provisional acceptance for funding to press

- If the needs of the author, the press, and the author's institution are met, the press will complete the publishing contract for review and signature by the author. Schedule C codifies the funder and stakeholder requirements.
- If not otherwise specified in the contract, the institution will release funds to the author for payment to the press when both parties have signed.

Finally, we strongly recommend that the publishing agreement remain solely between the author and the press. First, the author should have the responsibility to secure necessary funding for their work. Second, introducing agreements between two institutions (the author's institution and the press's institution) introduces both bureaucracy and delays.

PUBLICATION OF A COMPLEX DIGITAL WORK

The Model Publishing Contract can be configured to accommodate complex digital works which are not strictly “books.” For an author proposing a complex digital publication, we recommend that the press send the author a version of the Model Publishing Contract to facilitate discussion. Together both parties should codify the scope of the work (Schedule A), how it will be distributed (Schedule B), and whether funding or other institutional support will be needed for the author to complete the work or for the press to publish the work (Schedule C).

When the author has completed the digital publication, it will be important to recognize all of the contributors and their roles, including graduate students and interns. Schedule F can be used to codify how those contributions will be acknowledged in the version of record. Any content not original to the author (items for which permission was sought) can be detailed in Schedule G. These latter schedules (F and G, as well as Schedule H on marketing), can be completed after the publishing agreement and first set of schedules (A, B, and C) are negotiated and signed.