

2nd Edition

Writer's Market Companion

The essential guide to starting
getting it published

EXCERPT

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Protecting Your Writing

History offers few greater mismatches than that of publisher and writer. On one side you'll find one of the world's largest and most profitable industries with armies of lawyers at its disposal. On the other is one of the world's most competitive, low-paying, and unprotected professions. Many writers live in large part by trusting editors and publishers they've never met without anything prudent souls would consider security.

Clearly the best security you can have as a writer is a written contract. For books, contracts are the norm. But understanding the contract's implications can be difficult. For articles, contracts are somewhat less common. Of course a contract is only as good as your ability to enforce it. If the language is vague, or the cost of a lawsuit far outweighs the benefits, the contract becomes fairly useless. And if drafted the wrong way, a contract can become more like a chain than a bond.

As a writer, you probably can't afford to level the playing field by having a lawyer on retainer. But you can learn the important legal issues. This chapter describes contracts and laws that apply to writers to help you avoid some of the common and more costly mistakes.

Your Rights

Understanding what rights you're selling to a publisher is important. The term *selling* may not even be a good word. In most cases it is more

like you are leasing your work to a publisher. Here, then, is an overview of the options you have when offering your work to a publisher.

- **First Serial Rights.** Rights that the writer offers a newspaper or magazine to publish the manuscript for the first time in any periodical. All other rights remain with the writer. Sometimes the qualifier “North American” is added to these rights to specify a geographical limitation to the license.

When content is excerpted from a book scheduled to be published, and it appears in a magazine or newspaper prior to book publication, this is also called first serial rights.

- **One-Time Rights.** Nonexclusive rights (rights that can be licensed to more than one market) purchased by a periodical to publish the work once (also known as simultaneous rights). That is, there is nothing to stop the author from selling the work to other publications at the same time.
- **Second Serial (Reprint) Rights.** Nonexclusive rights given to a newspaper or magazine to publish a manuscript after it has already appeared in another newspaper or magazine.
- **All Rights.** This is exactly what it sounds like. All rights mean that an author is selling every right they have to a work. If you license all rights to your work, you forfeit the right to ever use the work again. If you think you may want to use the work again, you should avoid submitting to such markets.
- **Electronic Rights.** Rights that cover a broad range of electronic media, from online magazines and databases to CD-ROM magazine anthologies and interactive games. The contract should specify if—and when—electronic rights are included. The presumption is that unspecified rights remain with the writer.
- **Subsidiary Rights.** Rights, other than book publication rights, that should be covered in a book contract. These may include various serial rights; movie, television, audiotape, and other electronic rights; translation rights, etc. The contract should specify who controls the rights (author or publisher) and what percentage of sales from licensing of these rights goes to the author.

- **Dramatic, Television, and Motion Picture Rights.** Rights for use of material on the stage, in television, or in the movies. Often a one-year option to buy such rights is offered (generally for 10 percent of the total price). The party interested in the rights then tries to sell the idea to other people—actors, directors, studios, or television networks. Some properties are optioned numerous times, but most fail to become full productions. In those cases, the writer can sell the rights again and again.

Rights are nearly always negotiable. If you feel uncomfortable with a publisher's proposal, ask if he would consider other terms. If you do sign away all rights to a piece of work, you are normally only selling the rights to a particular group of words set in a particular order. In many cases you can take the same information, rewrite it from a different angle, and resell it.

In the absence of any written agreement, in most cases the copyright law assumes that an author is only giving a publisher one-time rights. The key exception is a work-for-hire arrangement. In these cases the work becomes the property of the publisher. Generally something is considered a work for hire if it is produced by an employee, such as a staff writer. In some cases freelancers are also subjected to work-for-hire arrangements. But most in most instances freelancers and independent contractors own the rights to their creative work unless stipulated otherwise in writing.

Electronic Rights

With the proliferation of books and magazines on the Internet, electronic rights have become a controversial issue between writers and publishers. In one high-profile case (*Tasini vs. New York Times*) the federal courts initially sided with publishers, allowing them to reproduce articles in electronic form without owing the authors additional compensation. The court ruled that putting articles into electronic databases and onto CDs fell under the “collective works” provision of the Copyright Act. The Supreme Court ultimately reversed that ruling

in 2001, deciding that newspaper and magazine publishers had infringed on freelancers' copyrights by republishing their work in online databases.

Given the current state of technology, is putting an article in a database that much different than storing a magazine on microfiche? On the other hand, some publications are developing pages on the Internet that hold the potential of becoming quite profitable. Tracking user "hits" on particular articles is relatively easy, and some writers want a share of those profits.

As technology—and its use—continues to evolve, these issues are far from settled. In the wake of the *Tasini vs. New York Times* ruling, some publications are demanding that freelancers sign away all rights to their work. Depending on the situation, writers of both books and articles may want to make electronic rights a point of negotiation.

Nearly all print publications these days seek some control over electronic rights. When all is said and done, your primary goal is to retain as much control of your material as possible, so that you can profit from its use in the future. Following, then, are some additional terms relating to electronic rights that you will likely see in contracts, and some words of advice for dealing with these issues.

- **First Electronic Rights.** These rights give the publication the first shot at using your material while allowing you afterward to sell reprints in any medium.
- **One-Time Electronic Rights.** This grants publishers the nonexclusive right to use material once in an electronic publication. You can grant this right to more than one publication at a time.
- **Nonexclusive Electronic Rights.** Publications are likely to ask for such rights in perpetuity, or indefinitely. Because the language is nonexclusive, you can still resell or reuse your material electronically at any time. The downside is that the original publication can also resell your work without compensating you.
- **Exclusive Electronic Rights.** If a publisher asks for any type of exclusive rights, it should only be for a reasonable period of time (usually three to six months). Afterward, you are then free to resell or reuse your own material.

- **Archival Rights.** Many print and electronic mediums expect to archive material online indefinitely. Make sure this request is nonexclusive, so that you are free to resell or reuse your own material.
- **First Worldwide Electronic Rights.** Since the Internet does not stop at any border, first North American serial rights has little meaning in the online world. Many publications are therefore using the first worldwide clause as a result. As always, try to avoid signing away exclusive rights indefinitely.

Magazine Contracts

Contracts and negotiations for periodicals are relatively simple. In some cases there will be no contract at all, just an editor giving you the go-ahead to write an article. Yet whenever possible you should try to get some kind of written agreement, even if it's just an informal assignment letter from the editor. If you get nothing in writing, try sending your own letter confirming the assignment. If nothing else it may clear up costly misunderstandings.

If you are presented with a contract or letter of agreement, it should cover the key issues listed below. In cases where there is no written agreement, you should at least talk through these key issues so you are clear on what the publication expects of you:

- What rights are you granting to the publisher? First rights (as defined earlier in this chapter) are a good starting point.
- How and when will you be paid? The best option is to be paid on acceptance, since publication will often occur months later.
- What kill fee will the publisher pay if the finished article is rejected? And under what circumstances is a kill fee normally paid?
- What expenses will the publisher cover?
- Is the publisher responsible for defending you against a libel suit?
- Will you have the right to approve the final version of your work? Most publications retain the right to edit for space and style. This can mean almost anything. But generally if you

write professionally and follow the style of the publication, you won't experience much revision.

- Are you expected to provide additional materials such as sidebars, photographs, or illustrations? If so, the agreement should spell out whether you will be paid separately for them.
- Will you receive complimentary copies of the publication in which your work appears? You should be given at least a couple copies of the publication.
- What is the deadline for the completion of the work? This should be spelled out clearly.

When you are presented with a contract, remember that many points can be negotiable. If you're new to the game you may have less of a chance to negotiate. But as you gain more publishing credits, along with a solid reputation, you will also gain more leverage.

Book Contracts

Regardless of your excitement about getting a book deal, take a long, hard look at how you're treated under the terms of the contract. Better yet, consider getting a lawyer or agent who can. After all, you will have to live with the terms of the contract for years to come.

Book contracts fall within a fairly standard format. But you have every right to negotiate the individual terms. There are no "right" ways to handle the various issues in a book contract. You should simply hold out for the best overall deal you can. Some points are more important to the publisher than others, just as some points are more important to you. Try to hold firm on the issues of most importance to you, while "giving in" on other points that are more important to the publisher.

The following are some contract issues that may come up:

- When is the advance to be paid? If payable in two or three stages (as is the norm), what are these stages? If some stages are delayed for reasons beyond your control, is there a time limit to prevent foot-dragging by the publisher?

- Are royalties based on a percentage of the list price or the publisher's net? In the latter case, getting a fair accounting becomes harder. Most writers organizations recommend royalties be based on list prices. Also, is there a provision for an audit of the publisher's records in accounting for royalties due you?
- Does the contract provide a time frame in which the manuscript is considered to be accepted even if the publisher does not expressly indicate it?
- Do you have the right to review the edited manuscript? If so, how long is the review period? Does the contract specify a time frame in which you must complete any revisions? If so, is it enough time?
- If an accepted manuscript is never published, does the contract become void, allowing you to sell it elsewhere? If so, do you retain the money paid in advance?
- Is there an arbitration clause that allows for peaceful resolution of disputes? If arbitration of contract disputes is called for, the arbitration should be in accordance with the American Arbitration Association's (www.adr.org) rules. Also, does the contract state the place for the arbitration? It should be a locale equally convenient to both parties.
- If the book is to be indexed, who is responsible for hiring and paying the indexer? Who is responsible for the cost of providing photographs and illustrations? If you are responsible for such costs, are they to be withheld from the advance or royalties? This is in the writer's best interest.
- Do you have veto power over the title of the book and the cover design?
- Does the contract provide for free copies to be furnished to you? Are you allowed to purchase additional copies at a discount?
- Does the contract specify a dollar amount for publisher's promotional expense? Does it obligate you to make promotional appearances without being paid for your time and expense?
- Does the contract give the publisher any options on your future work? Unless the publisher wants to pay you for this option, you should probably reject it.

- Does the contract have a “noncompete” clause prohibiting you from writing, editing, or publishing another competing book without written permission of the publisher? Some clauses are so vaguely worded that they seemingly would give the publisher control over virtually anything else you produce. If you must have such a clause, make sure it’s narrowly worded.
- Do publication rights revert to you when the book goes out of print? Do you have the right of consent to any sales of subsidiary rights, such as motion picture, book club, or anthology rights? Is there a provision for full subsidiary rights to revert to you should the publisher fail to exercise such rights in a specified time? Many writers mistakenly hand over potentially lucrative rights to publishers who have no interest or expertise in exercising such deals.
- Does the publisher promise to pay for legal expenses arising from any libel action in connection with the book? If so, do you have the right to choose your own lawyer? If you are partly responsible for any of the legal costs, does the publisher agree not to settle any claim without your consent? Finally, can the publisher freeze royalty payments after a suit is filed? If so, what are the provisions for the resumption of payments following a settlement?

Agents and Attorneys

Whenever you are faced with a lucrative contract or complex negotiations you should consider the services of a literary agent or attorney. This is the norm. Four of five books sold to publishers are sold through agents. Many book publishers and film producers will not even deal directly with writers when it comes to contract issues and negotiations.

Of course the money in question must be substantial for the services of an agent or attorney to be worthwhile. Most agents want a 15 percent share of your proceeds. Attorneys charge \$150 or more an hour, and most negotiations will consume at least several hours of expensive legal service. Accordingly, it is not in your best interest

(nor theirs) for an agent or attorney to get involved unless several thousand dollars are at stake.

In some cases, agents and attorneys are well worth the cost and can increase your net income. Here's how:

1. Good agents and attorneys know more about contracts and negotiations than most writers can ever learn. And by keeping you out of the direct negotiations, they enable you to preserve your working relationship with publishers and editors.
2. Professional representation by an agent or attorney shows a publisher that someone with credibility thinks your work is worthwhile. It means more when someone else does your boasting for you—especially when it's an agent or attorney who understands the publishing world.
3. Most important of all, agents and attorneys relieve much of the work and stress involved in building a successful career. This allows you to be more productive as a writer.

While both can be equally beneficial, there are major differences in what agents and attorneys can do for you. Attorneys only come into play once you have a contract to negotiate. Agents are often necessary early in the process to help you find a publisher. An agent's role can be that of salesman and business consultant. Some will even work with you to develop your talent.

One of the best ways to find an agent or literary attorney is to talk with satisfied customers—other writers. You can also find leads in *Writer's Market* and *Guide to Literary Agents* or through some of the resources given at the end of the chapter.

While an agent can be a great benefit in negotiating contracts on your behalf, consider carefully the terms of the agreement you sign with an agent. Agents customarily make at least nominal contact with all the appropriate publishers. How vigorously and competently they handle those contacts is another issue. If the writer, entirely through

his own efforts, later lands a deal with one of those publishers, the agent could still be entitled to a cut, depending on how your relationship is structured.

Contracts with agents should spell out the agent's responsibilities clearly and prevent agents from claiming a share of income from projects they didn't procure. That's one reason to negotiate short-term agent contracts rather than long-term relationships.

Beware of an agent who charges a fee to review a manuscript. The fees don't obligate the agent to make any other effort on your behalf and can end up costing you several hundred dollars.

Copyright

The basic rules of copyright are easy to understand. All works created after 1977 are protected for the length of the author's life and another fifty years thereafter. After that the work falls into the public domain and anyone can use it without permission. (Any work created in 1977 or earlier can be copyrighted for up to seventy-five years from the time of its first publication or its registration with the copyright office.)

Obtaining a copyright for your work is truly effortless. The way the law is structured today, copyright is assumed the moment your words hit the paper or the computer screen. Technically, you need not even place a copyright notice on your work. There are, however, additional benefits to registering your work with the copyright office:

- Adding a copyright notice allows you to defeat claims of “innocent infringement.”
- You must register your work with the copyright office before you can file suit against someone who steals your work. If you wait to register your work until after the theft takes place, you may not recover attorney fees or some damages from the defendant.

To register a copyright, request the proper form from the Register of Copyrights at the Library of Congress, then Follow these steps:

Step 1: Request and complete the proper form, either Form TX for books, manuscripts, online work, and poetry, or Form PA

for scripts and dramatic works.

Step 2: Into an envelope, put your:

- Completed application form
- \$30 payment (current rate) to “Register of Copyrights”
- Nonreturnable copy or copies of the material to be registered

Step 3: Send the package to the Library of Congress Copyright Office at the address below.

For more information about copyrights, contact the Library of Congress, Copyright Office, 101 Independence Ave., SE, Washington, D.C. 20559-6000. Tel: (202) 707-3000. Web site: www.copyright.gov.

The Copyright Office Web site makes available all copyright registration forms and informational circulars, plus other announcements and general copyright information. The Web site also provides a means of searching copyright registrations and recorded documents from 1978 forward.

You can also use the Forms and Publications Hotline [(202) 707-9100] to request application forms or informational circulars. The Fax-on-Demand service [(202) 707-2600] allows you to use any Touch-Tone phone to order up to three circulars and/or announcements via fax. (Application forms are not available via fax.)

Of course, not even a registered copyright can protect your most valued assets—your ideas. In reality, most articles are written on the basis of an idea proposal, a query, which protects you from starting a piece without being paid. But since you can't copyright an idea, you must trust the editors who read your queries. Fortunately, the vast majority of editors are trustworthy. They have to be. An editor with a reputation for stealing other people's ideas won't last long in the business. (Sometimes what appears to be piracy is simply the result of a project being already in the works when your query arrives. An editor, however, should inform you of this when rejecting your query.)

The American Society of Journalists and Authors defines a story idea as a “subject combined with an approach.” It says a writer shall have a proprietary right to an idea suggested to an editor and have first shot at developing it. Any editor with integrity will respect this ethical standard.

Fair Use

Aside from protecting their work, the copyright issue of most concern to writers is the doctrine of fair use. It is this principle that allows you to quote briefly from someone else's work. It's important to note, however, that the rules of fair use have never been clearly defined by the courts, nor have they been spelled out in law. Fair use can only be judged in the context in which it occurs. If you are unsure of the limits, obtain permission before quoting from any copyrighted material.

To get permission to quote from copyrighted material, you must submit a request to the copyright owner, which usually means contacting the publisher. In a brief letter explain exactly what you want to quote, and note when and where it was first published. Be sure to include information about how you will use the material and the name of the publication in which it will appear. In most cases you will be granted permission, on the condition that you credit the original source. In some cases you may have to pay a fee, which can range from a few dollars to a few thousand dollars. You must decide whether the material is worth the cost involved.

Libel

You are guilty of libel if you publish a false statement that is damaging to another living person's reputation. The false statement can be unintentional and still be ruled libelous in court, which is why the law requires writers to take every reasonable step to check for accuracy. While it is up to the plaintiff to prove falsehood, it is up to you to prove that you made every reasonable effort to be accurate.

Few writers would knowingly publish falsehoods. Yet the pitfalls for writers are numerous. You can accurately print what you have been told and still commit libel—if the person giving you the information was wrong in his facts. Many writers get in trouble simply by failing to check minor facts, which is why you must double-check and triple-check information—even when you believe it is correct.

Misspell someone's name while writing about a crime and you can

implicate an innocent person in wrongdoing. That's libel. You can be held just as libelous if you falsely state someone has died. The "lucky living" have won such cases on claims of undue hardship and emotional distress. Errors in something as innocent as a high school sports story have even resulted in libel suits. While such instances are rare, the important point is that nearly any form of writing can put you at risk of libel.

The only way to be safe is to always be 100 percent certain of your facts. An *Associated Press Stylebook and Libel Guide* is an excellent source of information on libel and how to protect yourself.

Freelance writers have some special issues of concern with libel. First, keep in mind that you aren't necessarily going to be defended by the publisher if your work prompts a libel suit. If the publisher alone is sued and loses, it could come after you for damages.

To protect yourself from groundless suits, it's good to have tapes of your interviews. Bear in mind, however, that taping phone conversations is illegal in some states unless the other party is aware he is being taped.

Not all libel suits may stem from anything you did. Bad editing can cause errors that result in a suit. The best protection is to see a proof of the edited version, including headlines and photo captions. For your own protection keep a hard copy of manuscripts you send to a publisher.

Resources for Contract and Legal Advice

The organizations listed below can help you protect your rights and your work, so that you can have a successful writing career.

Organizations for Legal Advice

The writers groups below offer legal advice and contract help for writers. Contact them or check their Web sites to find out what specific legal services they offer:

Authors Guild, 31 E. 28th St., 10th Floor, New York, NY 10016. Tel: (212) 563-5904. Fax: (212) 564-5363. E-mail: staff@authorsguild.org. Web site: www.authorsguild.org. Offers legal advice

regarding contracts and also can step in and help resolve legal issues and disputes, or help writers find an attorney.

National Writers Union, 113 University Pl., 6th Floor, New York, NY 10003. Tel: (212) 254-0279. Fax: (212) 254-0673. E-mail: nwu@nwu.org. Web site: www.nwu.org. Offers contract advice and guidance on dealing with grievances and what to do if they occur. Also advocate for rights of freelancers and writers.

Volunteer Lawyers for the Arts, 1 E. 53rd St., 6th Floor, New York, NY 10022. Tel: (212) 319-2787. E-mail: jtominar@vlany.org. Web site: www.vlany.org. Provides pro bono services, education, and advocacy for the New York arts community.

Organizations for Locating Literary Agents and Attorneys

The organizations below offer listings and reports on various literary agents and attorneys. Some are free of charge, but some require a fee. Check their Web sites to find out what services they offer:

Writers Guild of America, East, 555 W. 57th St., Suite 1230, New York, NY 10019. Tel: (212) 767-7800. Web site: www.wgae.org. . Offers information and tools for writers and represents writers in motion picture, broadcast, cable and new technologies industries. Another branch is Writers Guild of America, West, 7000 W. Third St., Los Angeles, CA 90048. Tel: (800) 548-4532. Web site: www.wga.org.

Association of Authors' Representatives, P.O. Box 237201, Ansonia Station, New York, NY 10003. E-mail: aarinc@mindspring.com. Web site: www.aar-online.org. Agents in this organization must meet professional standards, such as no reading fees.

Agent Research and Evaluation, 25 Barrow St., New York NY 10014. Tel: (212) 924-9942. E-mail: info@agentresearch.com. Web site: www.agentresearch.com. Offers services to help you locate the agent who is right for you.