Drafting a Fair Book Publishing Contract

By William R. Newman

The internet age has brought about the advent of major changes in the publishing world, including book and periodical publishing. “On demand” publishing has made it ostensibly easier for an author to self-publish, and individual authors can often market and sell their books in significant numbers through online retailers like Amazon. However, for the most widespread marketing and distribution of a book (particularly through retail book stores), it remains necessary to convince a major publisher to accept the manuscript.

Like most other relationships between the artistic element on the one hand and the business/marketing element on the other, the book publishing contract negotiation usually amounts to a “David/Goliath” scenario. One will rarely find anything approaching equal bargaining strength between the two parties, and major publishers will frequently take a “take it or leave it” stance with authors. Of course, this problem is most pronounced with first-time authors. Established authors with a proven sales record, on the other hand, have a great deal more leverage in the process.

In any event, attorneys for nascent writers should not obsequiously accept the form contracts offered by publishing houses. There are many provisions that can be added for the author’s protection and benefit that publishers often will not resist.

I. GENERAL PROVISIONS

A. Parties. The obvious parties to the contract will be the publisher and the “author.” If the author wishes to use a pen name, this will need to be stated specifically at the outset of the document. Bigger complications arise, however, when there are multiple authors. As with any business partnership, each co-author needs to be protected from the other, either in the same publishing agreement or in ancillary documents. For instance, it would not be uncommon for one co-author to be lazier or considerably less talented than the other. If the manuscript were unacceptable, publishers almost always have the contractual right to edit, revise, or demand better copy. Absent such an objection from the publisher, however, each co-author might want the right to object to his partner’s material and, at a minimum, reserve the right to insist that his name not appear on the published book. In any event, the contract should obligate the publisher to prominently identify the “author” on the cover, spine, and title pages of the book as well as in all marketing materials. If there are multiple authors, the contract should unequivocally state the method for allocating royalty payments among the authors.
In the boilerplate provisions of a typical book publishing contract, the publisher generally has unfettered discretion to decide whether the manuscript is acceptable for publication. Other standard provisions will set forth the following:

1. A working title;
2. A general description of the subject matter;
3. The estimated length of the completed manuscript;
4. A deadline for submission of the manuscript and a description of the technical form in which the manuscript should be presented;
5. A provision for safeguarding and returning the manuscript;
6. A schedule of deadlines for author review and return of galley proofs;
7. A formula for charging excess costs for making changes to proofs;
8. And a clear designation of who will be responsible for preparing the title page, table of contents, preface, foreword, illustrations, and index (if any).

Attorneys for authors should take great care to ensure that the contract imposes an obligation to publish. The contract should provide a specific date by which the first printing will be completed and should state how many copies will be pressed in this first printing. If such a provision is lacking from the agreement, the publisher can postpone publication indefinitely, while the author is contractually bound and cannot market the manuscript elsewhere.

It is generally expected that the publisher will be granted an exclusive worldwide right to publish and license the work in all languages. In terms of copyright, the publisher will virtually always have the contractual right to prepare and control any derivative works (e.g. sequels or merchandise related to the book).

II. COPYRIGHT PROVISIONS

The publisher will require a representation and warranty from the author that he or she owns the copyright in the work and that the work in no way infringes the copyrights of anyone else. The author likely will agree to indemnify the publisher for any damages arising from such issues. In addition, the author is usually required in the contract to assign ownership of the worldwide copyright to the publisher. However, in some instances, the author may retain copyright ownership while giving the publisher a specific license for certain publication rights. If copyright ownership is transferred to the publisher, the attorney for the author should insist in the agreement that the publisher be responsible for all costs associated with the registration and assignment of the copyright.
A. Reversionary Rights. The attorney for the author should insist on reversionary rights for the author if the book goes “out of print.” Major squabbles can result from varying interpretations of the term “out of print.” Therefore, the contract should provide an unequivocal definition (e.g. “if in any one year the publisher fails to sell 250 copies of the book at the regular wholesale price, then the book shall be deemed ‘out of print’ and the author shall have the right to terminate the agreement with the publisher.”) Upon such a reversion, the contract should require the publisher to, at that time, assign all copyrights to the book back to the author. Also, upon such a reversion, the author should have the right to purchase existing inventory of unsold books, printing plates, and other related material at an agreed price.

B. Discontinuation Rights. The publisher may insist on the right to terminate the agreement or to hire others to prepare manuscript revisions if the author fails to do so within a specified period of time.

III. FINANCIAL TERMS

Obviously, it is in the drafting of the financial provisions that the parties may see the most room for negotiation.

A. Advance Payment. Ideally the contract will provide that, upon execution of the agreement, the author will get an advance payment against future royalties for book related expenses incurred by the author. If not, the contract should specify the type of documentation the author must provide to get reimbursed for expenses and a time period for when those reimbursements will be made.

B. Royalties. Incremental increases in royalty percentages are commonplace in book publishing. Thus, the publisher might agree to pay 12% on the first 2500 copies sold, 15% on the next 2500 copies sold, and 16.5% on all copies of a particular edition sold thereafter. The author should insist that sales of revised editions be treated cumulatively, and not as a whole new book.

C. Basis of Royalties. From the author’s point of view, the publisher’s royalty obligation should not be based on profit. Instead, it is common for publishing agreements to base royalty as a percentage of “cash received” by the publisher. This, however, makes the author a hostage to the good, bad, or indifferent business practices of the publisher. Instead, the ideal situation for the author would be to base royalty as a percentage of gross sales, a percentage of cover prices, or a fixed sum per copy sold.

D. Separate Royalty Schedules for Various Rights. The contract should be very specific in setting forth the royalty arrangement for the various ways in which the work might be exploited. For example, the royalty schedule mentioned earlier might apply to hardback books while a different percentage might apply to paperbacks,
recorded books, foreign sales, etc. In fact, the royalty percentage might be as high as 50% for the publisher’s sale or license of the work to others.

E. Termination on Failure of Royalties. The contract should unequivocally state a schedule for the remission of royalty payment and a specified grace period thereon. From the author’s point of view, failure to make such royalty payments within such schedule should be contractually labeled a material breach of the agreement.

F. Liquidated Damages. Form contracts provided by publishers will often state that the publisher’s liability for breach of the contract will be limited to monies already advanced to the author. If possible, the author’s attorney should insist on language that preserves the author’s full equitable and legal remedies.

IV. BOOKS AND RECORDKEEPING

Relative to the payment of royalties, there should be some standard language in the contract requiring the publisher to maintain accurate and segregated records of book sales. The contract should unequivocally make these records and books open to examination by the author or the author’s designee. In addition, the contract should require the publisher to provide periodic reports (on at least an annual basis) detailing book sales and finances.

V. MISCELLANEOUS PROVISIONS

A. Decision Making. The publisher’s draft contract will seek to give the publisher absolute and unfettered rights to edit the manuscript. The author’s attorney, however, should insist on language that prohibits the publisher from materially changing the essence of the manuscript. Also the author should insist on a requirement that the publisher must give specific reasons and explanations if the publisher deems the manuscript unacceptable, and the contract, in such event, should give the author a reasonable opportunity to correct these shortcomings.

B. Right of First Refusal. The author should anticipate the publisher’s inclusion of a right of first refusal on the author’s future works. Similarly, the contract likely will prohibit the author from republishing any material derived from the book in any other form.

C. Future Editions. The author should anticipate the obligation to prepare future revised editions of the same book. If it turns out that the author is not willing or able to work on such future editions, the contract will then allow the publisher to hire a new author to prepare the revision, name the new person as co-author, and reduce the original author’s compensation accordingly.
D. Non-Compete. The publisher will want a provision prohibiting the author from preparing a competing work without the publisher’s consent. However, from the author’s perspective, the term “competing work” should be painstakingly defined. Otherwise, the author may find himself enslaved to the publisher.

E. Term. Typically the lifespan of a publishing contract is contemporaneous with the duration of the copyright on the subject work.

F. Insurance. Some form contracts provide that the publisher will obtain publishing liability insurance to protect against the kind of claims that the author has agreed elsewhere in the contract to (e.g. libel, copyright infringement, etc.). The author should be included as an additional insured on any such insurance policy.

G. Protection of Copyright. If either party gets wind of a third party’s suspected infringement of the book’s copyright, the contract should spell out the extent to which the publisher has the right and obligation to take vigorous legal action. Ideally, an author likes a provision that gives the publisher the discretion to pursue such claims, while also reserving the author’s right to pursue infringers at his own expense. If the publisher takes legal action against a third party infringer, the contract should spell out a formula by which any recovery will be distributed between the author and the publisher.

H. Author’s Copies. It is standard custom and usage for a publisher to provide the author with a certain number of complimentary copies of the book. The author should also have the contractual right to purchase additional copies at significant discounts.

I. Boilerplate Provisions. The usual boilerplate contractual provisions can be just as important in a publishing contract as in any other contract. These include choice of law and choice of forum provisions, arbitration clauses, merger clauses, and a provision setting forth each party’s address for purpose of future notices.

ILLUSTRATIVE FORM

AGREEMENT made July 15, 2010, between Andrew Taylor, of 123 Elm Street, Mayberry, North Carolina (the “Author”), and Gazette Co., Inc., of Mt. Pilot, North Carolina (the “Publisher”).

The Author declares that he is the sole proprietor of work which is the subject of this Agreement and that he has full power to make this Agreement.

It is therefore agreed:

1. Exclusive publishing right. The Author hereby grants to the Publisher the exclusive right to publish in book form in the United States of America and Canada his next mystery novel (the “Work”), during the full term and all renewals of the copyright.
2. Copyright. The Publisher shall take out the Copyright at its own expense in the United States as follows: “Copyright, by Gazette Publishing Co., Inc.” The Publisher may secure copyright on the Work in all other countries that are now or hereafter covered by this Agreement.

3. Indemnity. The Author guarantees that the Work in no way violates any existing copyright either in whole or in part, and that it contains no matter, which, if published, will be libelous or otherwise injurious; that the Work has not heretofore been published; that he is the sole and exclusive owner of the rights herein granted to the Publisher; and that he has not heretofore assigned, pledged, or otherwise encumbered the same. The Author shall, at his own expense, protect and defend the Work from any adverse claims of copyright infringement, and shall indemnify the Publisher from all damages, costs, and expenses which it may incur by reason of any infringement or claim of infringement, or of any injurious or libelous matter in the Work. However, the Author shall not be liable for any matter not contained in the original manuscript and inserted therein by or at the direction of the Publisher.

4. Delivery of manuscript. The Author shall deliver the manuscript copy of the Work to the Publisher on or before December 31, 2010, in proper condition for publication. Time is of the essence of this Agreement. If delivery is not made on or before the stipulated date, the Publisher shall not be bound by the time limit for publication provided in paragraph 6. If, after that date and within three months of written notice from the Publisher to the Author or his representatives, the Author does not make the required delivery, this Agreement shall be deemed terminated. In that event, the Publisher shall recover all amounts it may have advanced to the Author.

5. Revision of Manuscript. At the Publisher's request, the Author shall read, revise, convert and promptly return all proof sheets of the Work. The Author shall be responsible for all costs, in excess of $100, due to alterations in type or on plates required by the Author, other than those due to printer’s errors, provided that the Publisher: (i) forwards a statement of these changes to the Author within 30 days of the receipt of the printer’s bills, and (ii) presents the corrected proofs for the Author's inspection at the Publisher’s office, if the Author requests such inspection.

6. Publication of manuscript. The Publisher shall publish the Work at its own expense within six months after the date it received the complete manuscript copy in the style and manner that it deems best suited to its sale. The catalog retail price of the Work, however, shall not be less than $25 nor more than $29.95. This six-month limit shall be extended to cover delays caused by strikes or other nonpreventable delays, or the Author’s failure to return proofs within 30 days after they have been delivered to him. If the Publisher, fails to publish the Work before the six-month period expires, except as provided above and in paragraph 4, the Author may terminate this Agreement by giving 60 days’ written notice to the Publisher. If publication occurs within the 60-day period, the Author’s cancellation shall be deemed null and void. If cancellation occurs, the Publisher shall immediately return to the Author the manuscript and all other material
furnished by him. The Author, however, shall not have to return any advances made to him by the Publisher.

7. *Royalties.* The Publisher shall pay to the Author or his representatives or assigns:

(a) A royalty of 15 percent of the catalog retail price on all copies sold. Where the discount to jobbers or to wholesale or retail distributors is 48 percent or more, the prevailing rate of royalty as stated above, less one-half the difference between a 44 percent discount and the discount granted, shall be paid, but the royalty on such sales shall in no event be less than one-half the regular rate of royalty.

(b) Three-quarters of the royalty, as specified in subdivision (a), on all copies sold from a reprinting of 1,000 copies or less, made after two years from the date of first publication, and provided the regular sales in the six months’ royalty period immediately preceding such reprinting do not exceed 250 copies. This reduced royalty is provided because small reprintings result in an increased unit cost of manufacture. It, therefore, allows the Publisher to keep the Work in print and in circulation as long as possible.

(c) A royalty of 8 percent of the catalog retail price on all copies sold of any economy or reduced price edition which it publishes, after one year from the date of first publication, at a price of not more than one-half the original catalog retail price.

(d) A royalty of 15 percent of the amount of the Publisher’s charges, less returns, but with no deduction for cash discounts or bad debts, for copies of the Work sold for export, to reading circles or recognized book clubs, as premiums, or otherwise, in quantities to organizations outside the regular bookselling channels, provided such sales are made at a discount of 60 percent or more from the catalog retail price.

(e) A royalty of 10 percent of the amount of the Publisher’s charges, as above defined, for copies of overstock which the Publisher, after one year from the date of first publication, deems it expedient to sell at remainder prices, i.e., at a discount of 70 percent or more from the catalog retail price, except when these are sold at or below cost, in which case no royalty shall be paid.

(f) 50 percent of any sums accruing to the Publisher from the ceding by it to a Canadian publisher of the right to publish an edition in English of this Work on a royalty basis or for an outright sum.

(g) 50 percent of the net cash received by the Publisher from the sale to a recognized book club of the right to publish an edition or editions of the Work for distribution to its members.

(h) 50 percent of the net cash received by the Publisher from the sale to another publisher of the right to publish an economy or reduced price edition or editions of the Work.
8. **Payment of royalties.** The Publisher shall render semiannual statements of account to January 1 and July 1 of each year and make settlements in cash on or before March 20 and September 20 of each year.

(a) **Examination of accounting records.** Such statements shall show in detail the number of copies printed, sold, spoiled, given away, and on hand. The Author shall have the right, by giving written notice, to have his accountant examine the Publisher’s books insofar as they relate to the Work. The Author shall bear the expenses of such examination unless accounting errors amounting to 5 percent or more of the total sums to be paid to the Author are found to be to his disadvantage, in which event the Publisher shall bear such expenses.

(b) **Royalty overpayments.** Where the Author has received on any statement an overpayment of royalties, the Publisher may deduct the amount of this overpayment from any further royalties whether on this book or other books that the Publisher may publish for the Author. The term “overpayment” does not apply to an unearned advance. No royalties shall be payable on copies furnished gratis to the Author or for review, advertising, sample, or like purposes, or on copies destroyed by fire or water. This provision, however, shall not exempt from royalty copies supplied by the Publisher (for resale) in payment for trade advertising.

9. **Subsidiary rights.** The Author shall have the exclusive right to sell, license, lease, or otherwise dispose of the stage, motion picture, radio, and television rights in and to the Work. The Author shall receive 80 percent of all net proceeds received therefrom, and the Publisher shall receive 20 percent of those proceeds. Net proceeds, for this purpose, shall mean the gross receipts from any such disposition of rights less the amount of attorney’s fees, agent’s commissions, and travel expenses paid, charged, or incurred by or for the Author in connection with such disposition of rights.

10. **Advances.** The Publisher shall pay to the Author as an advance against and on account of all moneys accruing to the Author under this Agreement $10,000, which shall be divided and paid as follows: $2,500 on delivery of the manuscript, $2,500 within three months after such delivery, and $5,000 on the date of publication of the Work.

11. **Author’s copies.** The Publisher shall give the Author on publication ten copies of the Work and shall sell to him further copies for his personal use at a discount of 40 percent from the catalog retail price.

12. **Termination.** This Agreement shall continue in force for the term of the United States copyright and for the term of any other copyright or renewal or continuation or extension thereof which relates to the Work and accrues to the Author under the present or any future Act of Congress or under the present or future law of any country in which copyright is taken, but subject to the following:
(a) *Book out of print.* If the work is out of print and within 30 days of written notice to the Publisher from the Author, or his representatives or assigns, the Publisher does not indicate that it will within six months bring out a new edition, then all rights under this Agreement shall revert to the Author without further notice. The Work shall be considered to be in print so long as at least 20 copies are sold at the regular, original price.

(b) *Unprofitability.* If at any time after the expiration of two years from the date of publication the Publisher determines that there is not sufficient sale for the work to enable it to continue its publication and sale profitability, it shall give written notice to the Author who shall for 30 days thereafter have the option to buy from the Publisher all copies on hand at the cost of manufacture, and all electrotype or stereotype plates, if any, at one-third of their original cost of production. If the Author fails to exercise such option with the 30-day period, the Publisher may destroy any plates and dispose of the copies remaining on hand as it deems best, subject to the provisions with regard to royalties set forth in paragraph 7(e). This Agreement shall thereupon terminate and all rights of the Publisher shall then revert to the Author.

(c) *Publisher’s bankruptcy or liquidation.* If the Publisher becomes bankrupt or liquidates for any cause, the Author shall have the right to buy back the rights of publication, together with all plates or remaining copies, bound or unbound, at their fair market value to be determined by agreement or arbitration. In that event, this Agreement shall terminate, except that the Publisher’s representative shall have the right to sell the remaining copies on hand, if they are not purchased by the Author, at the best price he can obtain therefore, and without payment of any royalty thereon to the Author.

13. *Option to publish future works.* The Author hereby grants to the Publisher the right of publication of his next two mystery novels to follow the Work on the same terms as herein provided for the Work. The first of these novels shall be delivered on or before December 31, 2011, and the second of these novels shall be delivered on or before December 31, 2012. The Author shall not make any agreement with any other publisher for the next work to follow these three novels, other than mystery novels for children, without consulting the Publisher. The Author shall not offer a book under any other name to any other publisher without giving notice to the Publisher.

14. *Rights reserved.* All present or future rights in the Work, except those specifically granted herein to the Publisher, are hereby expressly reserved to the Author and may be exercised, sold, licensed, or otherwise disposed of by him at any time.

15. *Infringement.* The Publisher and the Author shall jointly have the right to prosecute an infringement of the copyright in the Work. If the parties proceed jointly, the expenses and recovery, if any, shall be shared equally. If either party refuses to prosecute jointly, the other party shall have the right to proceed alone and such suing party shall bear all expenses thereof and shall be exclusively entitled to all recoveries. If the suing party shall not hold the record title of the copyright, the other party shall permit the action to be brought in his or its name.
16. Notices. Any notice to be given hereunder shall be sent by registered or certified mail, return receipt requested, addressed to the parties at their respective addresses above given. Either party may designate a different address by notice so given.

17. Waiver or modification. The waiver of a breach of any term hereof or of any default hereunder shall not be deemed a waiver of any subsequent breach or default, whether of the same or similar nature, and shall not in any way affect the other terms hereof. No waiver or modification shall be valid or binding unless in writing and signed by the parties.

18. Applicable law. This Agreement and all collateral matters and issues shall be governed by the laws of the State of North Carolina.

19. Arbitration. Any claim, dispute, or controversy arising out of or in connection with this Agreement, or any breach thereof, shall be arbitrated by the parties before the American Arbitration Association, under its governing rules. The arbitration shall be held in the City of Raleigh. Judgment may be entered on the award in any court of competent jurisdiction.

20. Binding effect. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, and assigns of the Author and the successors and assigns of the Publisher.

21. Entire agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements.

22. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

24. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have executed this Agreement.

Corporate Seal
Attest:  
__________________________________________
Secretary

Gazette Publishing Co., Inc.
by  
__________________________________________
President

Andrew Taylor
The Legal “Audit” of a Manuscript and Other Common Questions about Publishing Law

Perhaps due in part to the active egos present in the creative process, publishers of books, periodicals and websites should not be naïve about the very real legal hazards that accompany the publication of a manuscript. Beyond the more obvious transactional tasks inherent in representing a publisher (securing copyright registrations, drafting contracts between authors and publishers, etc.), a big part of a publisher’s job should be the pre-publication legal “audit” of manuscripts. The purpose of such an “audit” is to minimize the risk that the publisher will be liable to a third party for injurious content in the manuscript.

Presented below is a partial checklist of questions and answers that frequently arise in this context.

**The Right of Privacy**

Q. What types of lawsuits might be brought against a publisher by a third party for invasion of privacy?

The four most common tort suits against publishers and authors are (1) false light, (2) intrusion, (3) defamation, and (4) appropriation of name or likeness without permission (i.e. right of publicity).

Q. What constitutes a valid claim for “false light”?

False light is a legal term that refers to a tort concerning privacy that is similar to the tort of defamation. The privacy laws in the United States include a non-public person’s right to privacy from publicity which puts them in a false light to the public; which is balanced against the First Amendment right of free speech.

False light differs from defamation primarily in being intended "to protect the plaintiff’s mental or emotional well-being” rather than protect a plaintiff’s reputation as is the case with the tort of defamation, and in being about the impression created rather than being about truth or falsity. If a publication of information is false, then a tort of
defamation might have occurred. If that communication is not technically false but is still misleading, then a tort of false light might have occurred.

The specific elements of the tort of false light vary among those States which recognize it as a separate tort from defamation, but generally speaking the following must be proven by the Plaintiff:

1. A publication by the Defendant about the Plaintiff;
2. made with actual malice (that is, the statement was published with the publisher or author’s knowledge of its falsity or with a reckless disregard for the truth);
3. which places the Plaintiff in a false light; AND
4. that would be highly offensive (i.e., embarrassing) to a reasonable person.

Auditing attorneys should be on the lookout for false light problems in connection with the editing of the manuscript and with the placement of photographs and accompanying captions.

Q. How exactly does one become guilty of “intrusion”?

Tort liability can exist where a defendant has intruded or trespassed where the plaintiff had a reasonable expectation of privacy – generally on private property. Thus, photographs or information that are otherwise validly publishable would trigger an intrusion suit if the photographer or writer had to trespass on private land or unlawfully eavesdrop (as with electronic devices) in order to obtain the photograph or information.

Q. What are the basic elements of a suit for defamation?

Defamation suits come in two varieties: slander and libel. Slander involves spoken defamation, while libel involves published or broadcast defamation. Obviously, libel is of most concern to authors, publishers and their counsel. A commonly quoted definition of libel describes the tort thusly: “Libel is a false and unprivileged publication by writing or other fixed representation to the eye that exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him/her in his/her occupation.”

Generally speaking, the elements of a cause of action for libel are as follows:

1) a false statement;
2) “publication” of that statement;
3) tendency of that statement to injure the plaintiff’s reputation;
4) if the plaintiff is a “public figure,” a showing of actual malice (that the statement was published by the plaintiff with knowledge of its falsity or with a reckless

Of course, publishing counsel should be familiar with several significant defenses to defamation. Most notably, the cliché that says “Truth is an absolute defense” is generally accurate. In addition, a statement that is not one of fact but instead one of opinion could also be protected speech under the First Amendment. However, publishers and authors should be cautioned not to get too bold with this defense. It is not always clear what the distinction is between fact and opinion, and it will not matter that the author phrased a statement as one of opinion if it could otherwise be deemed a statement of fact.

Moreover, the general rule is that only living persons can bring libel suits, and that person must be identifiable in the publication. Again, however, don’t take too much comfort in this latter defense. Merely changing the names and other elements of a character or attempting to disguise a real life situation by changing facts is not necessarily a defense if the plaintiff is still identifiable. (In addition, merely promoting a book or story as a work of “fiction” does not necessarily solve the problem, and including a disclaimer on the work will rarely shield an author or publisher from liability.)

Additionally, it is possible for a business to bring a suit for “trade libel,” wherein the business claims that the publication defamed the business or its product. For these type cases, the law generally requires proof that the author knew the statements were false and intended to injure the business or product.

Q. To what extent can another person’s name or image be used without authorization?

Lawsuits for unauthorized use of a plaintiff’s name or likeness almost always involve celebrities or other famous people. However, there is a growing amount of case law where private persons have successfully pursued these types of suits. These suits (often known also as “right of publicity” suits), unlike defamation, do not require any falsehoods, but it generally is required that the use have a commercial purpose. Thus, using the name, nickname, photograph, or drawing of a famous person in an advertisement would likely subject the advertiser to liability if permission was not obtained. While this cause of action technically is available only to living persons, there is a huge exception for celebrities who “exploited their name and likeness during their lives and who have rights to pass on to their heirs and estates.” For that reason, the estates of Marilyn Monroe, Elvis Presley, and James Dean will vigorously pursue any unauthorized commercial use of the deceased celebrity’s name or likeness.
Copyright

Q. To what extent can an author/publisher reprint portions of another copyrighted work?

Copyright law is more vigorous and more pervasive than most authors and lawyers realize. It is no defense to claim that the copyrighted work was used for a non-profit purpose. Moreover, even if the actual damage inflicted on the copyright owner is minimal, the federal copyright statute permits copyright owners to sue infringers and recover attorneys fees and statutory damages in the tens or hundreds of thousands of dollars without regard to actual damage. Thus, counsel for publishers should be diligent in their efforts to uncover an author’s unlicensed use of another party’s copyrighted text, photographs, etc.

Many publishers and authors are too quick to claim the protections of “fair use” – one of the main legal defenses to copyright infringement. This defense is not nearly as broad as many assume it to be. To assess the applicability of the fair use defense, the following questions must be asked:

1) What is the intended use of the copyrighted material? Scholarly, educational, and editorial use may qualify (subject to the other factors set forth below). Other uses, particularly those for commercial purposes, likely will not qualify for the fair use defense.

2) Is the copyrighted material fiction or non-fiction? The fair use defense is much more readily applicable to works of non-fiction.

3) How much of the copyrighted work is being used in the new work? Be careful here! There are a lot of myths about magic, bright-line tests. For instance, many lawyers have been led to believe that use of a copyrighted work up to 300 words is permissible. Do not fall for these urban legends! There is no fixed rule here, and any use of a significant percentage of the original work may subject your client to liability for copyright infringement.

4) What is the effect of the use on the marketability of the original, copyrighted work? This is usually the primary focus of a fair use inquiry.

The other significant defense to copyright infringement – parody - stems from the First Amendment’s guarantee of free speech. Indeed, it may be permissible to legally publish a book that imitates another copyrighted work if the obvious intent of the newer book is to mock the original work. For instance, in Suntrust v. Houghton Mifflin, 252 F. 3d 1165 (11th Cir. 2001) a suit was brought unsuccessfully against the publication of The Wind Done Gone, which reused many of the characters and situations from Gone with the Wind, but told the events from the point of view of the slaves rather than the
slaveholders. The court found the newer book to be a protected parody of *Gone with the Wind*.

Also, if there were any collaborative contributors to a new book, a detailed contract should be executed between the various contributors that outlines their respective legal rights. Most importantly, the main author or publisher should insist on the execution of a “work made for hire” agreement in which the contributor clearly transfers all intellectual property rights in his/her contribution, including copyrights, to the author or publisher.

**Trademarks**

Q. **Can I claim exclusive ownership of my book’s title?**

   Generally speaking, an author or publisher cannot acquire exclusive rights to a particular book title (and the title cannot be copyrighted in and of itself, either). However, the title of a book *series* likely can be registered as a trademark if the trademark consists of words that are not currently in use by someone else and that are not a surname, not generic, and not merely descriptive.

**Plagiarism and Attribution**

Q. **If a pre-existing work is no longer under copyright, can I use it in my new work without attributing its original source?**

   Generally speaking, plagiarism and the duty to attribute sources are not legal issues – they are more of an academic and moral issue. If the source being used is not protected by copyright law, the law generally will not require that the source be credited – even if the new work essentially “cuts and pastes” most of the old work into the new work. The United States Supreme Court broadly announced this principle in the case of *Dastar v. Twentieth Century Fox Film*, 539 U. S. 23 (2003).

**ISBN Numbers**

Q. **If I publish a new book, do I need to apply for an ISBN number?**

   The International Standard Book Number (ISBN) is a 13-digit number (previously 10-digit) that uniquely identifies books and book-like products across the globe. These numbers are used for more efficient marketing and cataloging of products by booksellers, libraries, universities, wholesalers, and book distributors. ISBN’s are not required per se, but if you want to sell your book through on-line retailers like Amazon or in bookstores
(or even if you want to place it in libraries or with distributors), you should get an ISBN. The process is very inexpensive, and generally it takes only a few days to get your ISBN. To apply for an ISBN (and to register your publisher – even self-publishers) with the ISBN agency, go to www.bowkerlink.com. When the ISBN is obtained, it should be printed on the copyright page and on the lower back cover of the book. For even more effective use of the ISBN, get a bar code of the number by applying on the same website.

**Library of Congress Cataloging in Publication data**

Q. **What is CIP data, and how do I get it for my book?**

For certain types of books that are forthcoming but not yet published, it is helpful to apply to the Library of Congress for Cataloging in Publication (CIP) data. This means that experts at the Library of Congress will draft bibliographic data describing your book. This data will be used in library catalogs (including the digital equivalents of the old “card catalogs”) to facilitate the public’s access to your book and the information it contains. If your book qualifies (self-published, on-demand, and certain other books don’t qualify), this information is prepared at no cost to the author or publisher. For information, go to http://cip.loc.gov.

**Other Involved Parties**

Q. **Other than the contract between the author and the publisher, what other contracts are needed to protect the author and/or the publisher?**

Creative people can be notoriously sensitive. Thus, if the author or publisher is involving other persons or companies in the creation of the book’s final form, detailed contracts should be worked out with them. Such parties include illustrators, cover artists, editors, literary agents, and distributors.