



A Guide to Writer's Rights

in the New Millennium

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The Digital Age is (a) a terrible threat to writers, (b) a great opportunity for writers, or (c) a threat to writers who ignore new technologies and developments, but an opportunity for writers who respond flexibly to changing technologies and publishing models.

This author/lawyer chooses (c). Let me help make that your choice, too.

Strategies for the Millenium

To maintain flexibility and independence in the New Millenium, writers must understand, and extract maximum value from, their rights. To do this they should following these easy-to-state but tough-to-implement rules: (1) use written contracts that protect their interests; at least confirm their understanding of important terms by letter or email; (2) avoid granting rights that their publishers can't readily exploit; (3) grant short-term rights, especially for electronic and new media uses; (4) maximize compensation for the rights granted; and (5) require the publisher to exercise these rights, for example, adopting a "use it or lose it" approach.

This article will apply these rules to three recent developments, two affecting mainly authors of books, the third affecting mainly writers of short works.

E-Books

In the New Millenium more and more people will read using lightweight, hand-held devices, such as the highly publicized Rocket eBook and Softbook. E-books should drive up profits; but writers who aren't alert could get taken for a ride.

Ever wonder why you write the book, the publisher publishes it, you keep a paltry 5-20% of the list price, and your publisher keeps a generous 95-80%? Basically, it's because of the (historically) high cost of publishing: paper, ink, printing, binding, storing, shipping and returns account for a sizeable chunk of that \$25 list price (not to mention that most chains and resellers get discounts of 40-60%).

But hark! With e-books publishers avoid most of these expenses. So shouldn't the author's share be higher, more like the split in licensing deals where, with few exceptions (such as first serial rights) authors and publishers divide third party payments 50/50? Though publishers argue that the savings on e-books are not as great as they appear - after all, publishers now bear the costs of formatting for each device, upgrading for system changes, and encryption and security - they certainly seem significant.

So in your next book publishing contract be sure to address electronic uses, especially e-books. You should: (1) resist granting electronic right; (2) grant them for a short time, or reserve the right to terminate the grant after a short time (say, 2-4 years); (3) reserve the right to terminate if your publisher hasn't exploited these rights after a reasonable time; and (4) demand at least 50% of the fees received from licensing electronic rights, including fees received for e-book distribution. If you can't get that much, do the best you can while reserving the right to renegotiate to market standard rates after a short time.

How should you handle this issue under existing contracts? There's no way to answer that without examining the specific terms of your contract. But here are a few tips.

If neither e-book rights, electronic rights generally, nor "all rights" are specifically granted the publisher, you almost surely have reserved e-book (and other electronic) rights and can do with them what you wish. If e-books aren't specifically mentioned in your contract (as they aren't in most), but you did grant "electronic rights" or even "all rights in future technologies, whether now existing or later developed," then you may have room to negotiate. Indeed, even if the contract covers "rights in future technologies," if it was entered into before 1997, there's a good argument that no one had e-books in mind and thus the issue is open. In short, if the issue matters to you, in most cases it will be worth a serious talk with your publisher.

Print on Demand

A book publishing contract embodies the following basic deal: As long as the publisher produces your book, keeps it available for buyers, and pays you your due, you cannot publish or allow others to publish the book, any derivative, or (in most cases) any competitive work. In other words, you can terminate the contract and retrieve your rights only if your publisher fails to publish your book or (here's the kicker) having published it, fails to keep it in print.

Publishing contracts tend to take a narrow view of when a book is out-of-print. In many contracts a book is not out-of-print unless it is completely unavailable in any language and the publisher fails to make it available within six months of a written demand from the author. Still, even under such restrictive clauses, books will often go out-of-print.

But now consider the impact of print-on-demand technology. Your book will always be available. No lost sales, no disappointed fans, no need to search for another publisher to get your work back in-print. Sounds great, no?

However, this creates a world where your publisher may not be marketing your book in any way, where no one is buying it any longer, and where you still can't get the rights back because in theory it remains "available" to interested purchasers. No sales, no fans, yet no way to get your book to another interested publisher, or even to self-publish it, something the Internet and new technologies make easier than ever for writers. Sounds awful, no?

In future book contracts, ask the publisher to agree that your book is out-of-print if it is not available to U.S. customers in English in a print edition through ordinary commercial channels or if your publisher fails to promote your book reasonably, at least by including it in all relevant catalogs and listings, including publisher Web sites from which works in the same category can be ordered. You might also try to deem your book out-of-print if the publisher fails to meet minimum sales or revenue targets, such as failing to sell 50 copies or pay you at least \$150 from book sales in two consecutive semiannual reporting period. A caveat: Savvy publishing lawyers and agents have been asking for these minimums for years, and few publishers give them. So your time might be better spent

extracting your publisher's promise to cooperate with your own efforts at sales and marketing.

Aggregators

For writers concerned about electronic storage, reproduction and distribution of shorter works, rights issues came to a head in 1997. That's when a federal court in New York held in *Tasini v. New York Times* that publishers could place the contents of their periodicals in electronic databases and CD-ROMs, unless they'd agreed otherwise with the writer.

The ruling was based on a broad interpretation of a Section 201(c) of the Copyright Act, which states that, absent an express transfer of the copyright, "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The court considered electronic databases "revisions" of collective works if they include identifying information that preserves the original selection and arrangement, such as the issue, date, and pages of the individual articles.

A court in San Francisco moved the pendulum slightly back (at least sideways) in the 1998 case *Ryan v. CARL Corp.*, when it held that publishers could not authorize the defendant, a document fax-delivery service, to reproduce individual articles written by the plaintiffs, freelance writers. Although this was not a direct refutation of *Tasini*, it was a strong statement of authors' rights - and a direct refutation finally came. In September 1999, to the delight of the writing community, the 2nd Circuit Court of Appeals reversed *Tasini*, holding that NEXIS and the other electronic databases involved were not "revisions" and therefore that "Section 201(c) does not permit the Publishers to license individually copyrighted works for inclusion in the electronic databases." Although this is now the law of the 2nd Circuit and not necessarily the entire country, few doubt this was the better interpretation of the Copyright Act.

Let's summarize the important legal rules. First, unless they expressly transfer ownership in writing, non-employee writers own the copyrights in their works. Second, absent a written agreement, the periodical's publisher buys only the right to publish the freelanced work in that issue, a revision or a later issue. Third, selling single copies of an article, or including an article in a comprehensive electronic database, is not the creation of a "revision" and may not be done without the author's permission.

Proactive Approaches. If this issue matters to you there are ways to protect yourself. (That's an important if. Many writers are delighted to have their work circulated and available, even if they receive no additional pay. If you're in that group, you're neither alone nor crazy.)

- Use written contracts that grant first serial rights, single reprint rights, or other defined single-use rights and that expressly prohibit online publication or

inclusion in electronic databases. The contract needn't be formal; for example, it could be an exchange of letters, or even your unchallenged notation in the upper right corner: "First Paperbound Serial Rights Only." (Beware of conflicting legends on publishers' payment checks!) Keep a copy of the relevant materials, including emails.

- If the publisher insists on such rights, make the grant relatively short (1-2 years) and require payment for each use. (The Tip Sheets of the American Society of Journalists and Authors - check out www.asja.org - contains useful guidance on structuring payment.)
- *Register your copyrights*, at least in those works with "legs." You can use Copyright Office Form GR/CP (with Form TX) to register 12 months' of periodical publications with a single application, deposit and \$30 fee. (For forms, circulars and instructions, then visit the Copyright Office website at www.loc.gov/copyright or call 202-707-9100.)
- Require your publisher to include a copyright notice *in your name* by your piece, in standard form: "© 1999 [year of first publication] Abby Author [author's name]"
- *Act on important dates*. For example, remind publishers that your piece is scheduled for publication in the December 1999 issue, that payment was due last week, that electronic rights expire next month.

Retroactive Approaches. What about pieces published before you got so smart? If there's a contract, look there first for answers. If there's no agreement, or none addressing these issues, consider these actions:

- *Register your claim* of copyright in the works you care about.
- *Notify your publisher* that you did not grant electronic or database aggregation rights in those works and, therefore, that your piece may not to be published electronically without your express permission and additional payment. Refer to *Tasini v. The New York Times* (2nd Circuit 1999).
- If the work has already been aggregated, notify your publisher that you didn't grant electronic rights; that, regardless, you terminate any right to publish or aggregate your work electronically; and that you expect the publisher to act promptly to have your work removed from the aggregation. Again, citing *Tasini* should get their attention.

Under the Digital Millenium Copyright Act, signed into law last year, Internet service providers and web sites can limit their potential liability for contributory infringement if

they take certain measures, including identifying an agent to receive notices of infringement and responding promptly to infringement claims by taking down the infringing material or disabling access to the infringing site. If you believe that your work is improperly posted, consider sending a detailed notice identifying the infringement to all sites and service providers who link to or host the infringing site. (But first, consult an attorney so you don't violate anyone's rights yourself!)

Though this is little solace to most writers, the law provides a sure-fire means of terminating copyright transfers and licenses. Section 203 of the Copyright Act generally permits the termination of a grant of copyrights during the 5-year period beginning 35 years from the date of the grant. That's a long wait for most people and most pieces; but if you have works you assigned or licensed years ago and you want to learn when and how you might terminate the grant, ask a copyright lawyer about these rules.

As I said in the beginning, this new era poses a threat to writers who ignore new technologies and developments, but an opportunity for those who are flexible. Writers who appreciate that technology is evolving quickly, that this affects everyone, from global publishing empires to academic presses and literary magazines, and that to survive (and occasionally flourish) writers must seek new outlets, models and methods to market, sell and extract value from their work, will find ways to increase their independence and checking accounts.