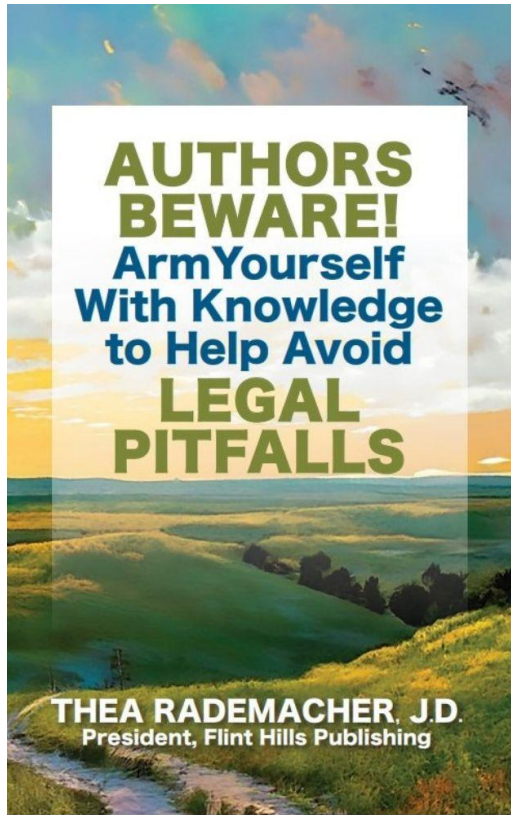


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Authors Beware!

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Knowledge to Help
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Thea Rademacher, JD
President
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The materials contained in this document are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

This book is dedicated to Bill Davis, an extraordinary educator and coach who profoundly influenced the lives of thousands of Kansas high school debaters, me included.

Miss you, Mr. D.

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INTRODUCTION

Becoming a published author takes a lot of grit. And I know from my own experience as an attorney, author, and president of Flint Hills Publishing, that most aspiring authors would rather be writing, reading, researching, maybe even editing, before diving deep into seemingly mundane or esoteric legal issues related to book writing and publishing. But from working with many dedicated writers, I can also guess that you take your work seriously. With that kind of dedication and commitment, you owe it to yourself and your work to educate yourself about legal issues related to publishing. After all, it's just common sense to realize that avoiding a problem is much easier, less time consuming, and less expensive than having to clean one up. *Being a serious author means you need to arm yourself with some basic, important legal information.*

When you decided to become an author, you also made the decision to create a business. As a business owner, you need to educate yourself about a lot of things that may not sound that exciting:

COPYRIGHT LAW. . . CONTRACTS. . . TAXES. . .

Let's start with something positive—let's start with the intention that your book will be a huge success—and with that intention in mind, it is critical that you get some things right from the very beginning that will help you as an author **avoid legal pitfalls**.

Law school molds a lawyer's brain in some weird ways. We are taught to always assume that the worst possible thing could happen, and therefore, to prepare for worst-case scenarios. And though lawyers are expected to dive deep into the details of exciting topics like the U.S. Tax Code and the ins and outs of estate planning, it is impossible to memorize or even be closely familiar with all there is to know. Consequently, we are taught to do something called "issue spotting." When presented with a particular set of facts, one should turn on their critical thinking skills to identify problems and potential dangers on the road ahead. You can become aware that a possible issue in a certain area exists and realize, *Hey! Maybe I'd better do some heavy-duty research about defamation before I write a tell-all about my ex-spouse.*

As writers, I know you've honed your critical thinking and research skills. Don't be intimidated by learning about the law. Arm yourself with information. Work to avoid a problem so you don't have to pay a hired gun to clean things up.

And because I *am* a lawyer, I'll repeat here the disclaimer I put on the copyright page: *The materials contained in this document are for informational purposes only, and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.*

Gee, it makes me sound so serious, so unfriendly.

Authors Beware!

Yet, if you have an issue you are worried about, it really is a good idea to consult an expert. But if we sat around and disclaimed all day, we wouldn't ever get anything accomplished, right?

So, let's explore some legal ideas relevant to authors. . .



Chapter 1

COPYRIGHT LAW

How You Protect Your Work

Let's begin with the most significant legal issue authors need to understand: copyright law. It's a critical topic because it's the concept that protects your work. It's also, if I am to be totally honest, not the most exciting topic to sit and read about. Maybe it will be a bit more interesting if we make up some hypothetical facts, a standard law-school approach. But let's not call it a "hypothetical." *Let's call it a story. . .*

A young woman named Blossom had always dreamed of being a published writer. She never could have guessed that her beloved Aunt Rose might be the key to achieving her dream. On a beautiful fall day, Blossom visited her Aunt Rose at her cabin nestled in the Kansas Flint Hills. Aunt Rose had led a pretty amazing life. The oldest of four sisters, she'd never married nor had children. She had returned to Kansas to spend her final days after traveling the world as a pioneering photojournalist. For years there had been rumors about rifts between her and her

sisters, the youngest being Blossom's own mother. But the details were only whispers kept from young ears.

After a cup of spiced tea shared on the front porch, Aunt Rose showed Blossom a thick, well-worn leather journal and said, "I want you to have this after I die. It's my memoir. You'll need to clean it up, but I know you'll do a great job and get this thing published!"

After Aunt Rose's peaceful death a few months later, Blossom was determined to see that this writing project was born. And if she made a few bucks along the way, even better.

I can't wait to be a published author, thought Blossom. Look at all those books on Amazon—how hard can it be?

So, that's our "fact pattern." The question now is: what potential legal hurdles does Blossom have to overcome?





Intellectual Property Defined:

The content of the journal is “intellectual property.” As mentioned, this is a critical legal concept for writers because it is what protects your work. **Intellectual property is the intangible aspect of a physical product.** Blossom has the tattered journal in her possession, but does she have the legal right to publish its contents?

Intellectual property, like other property—houses, cars, jewelry—is owned and therefore can be bought, sold, lent, or bequeathed (gifted at death). Let’s use the example of a book to explain intellectual property. When you as a reader buy a book, you only own the tangible part of that book—the outside binding, the paper—and you can resell or give it away. You do not own the intellectual property: the narrative. As a book buyer, what you have done in the eyes of the law is “licensed” the intellectual property from the seller.

As an author, this is an important concept for you to know. In traditional publishing houses, the author grants a *license to the publisher*, a topic that will be covered in a later chapter about publishing contracts.

For Blossom to have the legal right to publish the contents of her aunt’s journal, she needs to have the copyright, one of the four main areas of intellectual property law. The others are trademark, trade secret, and patent law.



Copyrights are the legal rights that belong to the owner of the intellectual property. Examples of intellectual property covered by copyright include written words, music, plays, choreography, photographs, and graphic designs. Unique creations are deemed to be “original content” and therefore may fall under the umbrella of copyright protection.

The original content requirement logically means that there is content that is **not** covered. A few sentences, or a meme, for example, do not create enough content to successfully argue that there is enough material to copyright. Therefore, a title or one-line quotes are not copyrightable because there is not enough original material.

There are, however, cases where a word, phrase, color, sound, or even smell, does fall under the protection of intellectual property. **Trademark law** kicks in when brands can be identified by these small little pieces of content. Trademark law applies to “goods and services.” How would that impact you as an author, you ask? I have seen lots of creative add-ons from authors: a T-shirt with

a phrase from a self-help book, a plush toy made to look like the character in a children’s book.



There are some important differences for authors to understand between copyright and trademark law. Remember, copyright protection applies when there is “enough originality to be protected.” One-line phrases and quotes will not meet this standard. That’s why under the Fair Use Doctrine, you can quote from a very small portion of a work. How do you define “small?” That is a complicated question without a definitive answer, and a topic we’ll explore more in-depth later. There are also complications about book titles and trademark law—issues that we’ll also address later.



What Does It Mean to Own a Copyright?

Let’s step back and ask a very basic question about copyright law: What does it mean to have this legal

protection? There are five important rights given to you under the law:

1. When you own the copyright to a work, it gives you the right to produce the work.
2. You can prepare derivative works based on the original work. Therefore, no one can write a theatrical play or screenplay based on your work without your permission.
3. You can distribute the work.
4. You can perform the work publicly.
5. You can display the work.

Under U.S. law, for you to claim a copyright to your original work of sufficient content, you don't have to take any special steps. You create a copyright the moment you put pen to paper, keystroke to screen. You do want to add the copyright symbol, © (Keyboard Shortcut: Ctrl+Alt+C. So quick and easy!) with the year of publication and your name. You now have a copyright on this work that lasts for your life plus 70 years after your death. And yes, even that last statement has some variables. So keep reading!



How Long Does a Copyright Last?

All copyrights have expiration dates. The length of time a copyright lasts has changed a lot since 1790, the year the copyright provision was officially added to the U.S. Constitution and provided for a 14-year protection.

Then a little cartoon mouse grew into a household name. The influence of the Walt Disney Company has been significant regarding the extension of copyright protection. After some intense Disney lobbying, in 1976 Congress passed a new copyright act which extended Disney’s protection of *Steamboat Willie*, the first incarnation of Mickey Mouse. This act protected the original mouse until 2003. Not willing to give up exclusive rights to their favorite rodent, Disney again lobbied successfully for the Copyright Term Extension Act of 1998, more widely known as the Sony Bono Copyright Law. However, in January of 2024, the extensions expired, and “Mickey Mouse 1.0”—the version drawn for *Steamboat Willie*—now sails in public domain waters! And remember, trademark law is still relevant here. You cannot create an image with Mickey 1.0 that misleads consumers into thinking the work was produced or sponsored by Disney.

The history of U.S. copyright legislation helps explain why there are different lengths of protected time. A copyright start date is determined by the date the work was first placed in a tangible medium, and that date informs how long the protection lasts:

- ◆ If a work was created before 1927, it is considered to be in the public domain.

- ◆ Works created from 1927 to 1977 have two different rules about duration. The best way to determine if a copyright still applies during this time period is to use online tools to see if a work has

indeed entered the public domain. Cornell University has a chart.

◆ For a comprehensive collection of public domain works dedicated to the “exploration of curious and compelling works from the history of art, literature, and ideas,” see: publicdomainreview.org/about.



What Does Public Domain Mean?

Once a work is in the public domain, it can be published in whole or in part without permission. A word of caution here: if you use a public domain work, make sure it is the public domain version, not a derivative work inspired by that original version. It’s not too hard to guess that *A Muppet Christmas Carol* is a derivative work. Other examples may not be so clear-cut. The Project Gutenberg Literary Archive Foundation has been collecting public domain books for over 50 years, providing readers with free access to their archives. (www.gutenberg.org)

Bottom line—for work you have created since 1977 on, your copyright lasts for 70 years after your death. Original content created in a work-for-hire situation in which the creator is anonymous, extends the protection to 95 years from publication, or 120 years from date of creation, whichever is first.

The fact that your copyright extends beyond your death raises an important issue with regard to estate planning. And yes, that’s also a topic we’ll return to later.



How Can You Best Protect Your Copyright?

We've already discussed that to hold a copyright you don't have to take any special steps: the act of creating original content and recording it in a tangible way is enough. Honestly. It's that easy. It's more urban myth that you need to put your coffee-stained manuscript in an envelope and mail it to yourself to have a copyright claim. Yet there are some things you can do that are best practices with regard to protecting your work.

1. Register Your Copyright.

Let's assume you have completed your book, and even though you know you own your copyright by the very act of creating a unique work, you want to make sure your rights are more formally protected. You can strengthen your rights by filing your copyright with the United States Copyright Office. Doing this gives you a public record of your claim. And if it's done before a lawsuit is filed against ownership issues, it will give you legal advantages regarding standards for evidence and allow higher money damages. If you file online, the cost for a single author is \$65.

It's a good idea to register your copyright before you share it with a third party, including a sponsor, an illustrator, coach, or publisher. Even if you don't register your copyright, it's a smart practice to include in your written communication a request that your document be

kept confidential and not shared with anyone other than people that need to see it. We'll get more specific about suggested language for this when we discuss contracts.

What if you have a large collection of books you intend to publish and you are concerned about paying for the copyright registration for each title? I know of authors who are planning to write a series of recipe books or other "how to" books, for example, that follow a standard format, releasing the books over time. Fortunately, the U.S. Copyright office adopted a final rule creating a group registration option. This allows an author or joint authors to submit up to ten unpublished works for a single fee.

2. Comply with the Mandatory Deposit Requirement

While copyright registration is optional, there is another legal requirement that is not: the Mandatory Deposit Regulation. 17 U.S.C. § 407 (part of the Federal law governing copyright) requires that the owner of the copyright or the person or entity that has exclusive right of distribution is to deposit in the U.S. Copyright office two complete copies of the "best edition" of the work within three months after a work is published. The copies are then sent to the Library of Congress.

Strategically, it makes sense to submit the PDF file of your work before the print version is available, thus meeting the standard for "best edition" without having to go to the trouble and expense of mailing two print copies of your work.

It is important to note that if you have registered the copyright of your work, you have automatically satisfied

the Mandatory Deposit Requirement and you don't need to take any further action. Whew! That's nice! And just to be super clear: you've decided not to register your copyright? You still need to deposit your work. The term "mandatory" is in the description, after all.

I wanted to put an image of the United States Copyright Official Seal here.

But I couldn't find a free image sanctioned for commercial use. 🙄

3. Know about other tools that help identify and protect your work:

TOOL NUMBER 1: ISBN:

The International Standard Book Number (ISBN) is a 13-digit, unique number assigned to a published book. It is the way distributors, bookstores, and libraries order books. It's how data is tracked regarding an individual book title.

If you are self-publishing on KDP/Amazon, you will be offered a "free ISBN." It's important to understand that if you choose this option, Amazon will be listed as your publisher. Maybe you are fine with that. Just be aware that this is an easy way to identify that your book is self-published. Many self-published authors will create a "publishing company"—perhaps in name only—and if you do this, you'll need to pay for an ISBN.

ISBNs are purchased from Bowker if you are in the United States. For those in Australia, the service is Thorpe-Bowker; for the United Kingdom, Nielson. It's expensive to purchase just one Bowker ISBN (\$125 as of the time of this writing.). There are price breaks if you buy a 10-pack, for example. Be aware that if you purchase from anyone other than Bowker, the service or company you purchase from will be listed as the publisher.

An eBook published on KDP/Amazon does not require an ISBN. I have come to believe, however, that the best practice is to purchase another ISBN for your eBook. But I made this decision because I want the title published by my company to look as professional as possible and I buy the ISBNs in such a large number the cost per identifier is quite reasonable. Other eBook platforms do not require an ISBN (Kobo, NOOK, and iBooks). And Smashwords provides a “free ISBN” which has the same consequence as the free Amazon ISBN for print books: Smashwords is listed as the “publisher” of this version of your eBook. If you own the ISBN for your eBook, you'll be able to use it on other eBook platforms, like the ones I just mentioned.

Anytime you publish in a new format—hardcover, audiobook—you'll need another ISBN. If you are working with a publisher, they will provide the ISBN(s).



TOOL NUMBER 2: Library of Congress Control Number (LCCN)

The Library of Congress (a very majestic building located across from the U.S. Capitol) issues a unique identifier for books in their collection. Unlike ISBNs, a book only has one LCCN. And like the copyright declaration and ISBN numbers, the LCCN is also placed on the copyright page of your book.


You have to request this number before your book is published. It's easy to do. Set up an account at the Library of Congress website and follow the instructions to request a number. You will receive an email with the LCCN quickly. And some good news—it's free.

TOOL NUMBER 3: Tech Solutions

Bowker, the company that provides ISBNs, has a fee-based service called “Digital Shield.” I have not used this service, nor am I endorsing it. But it is an example of a merger between copyright protection and technology. The service purports to monitor the web, searching for sites that may have used your copyrighted materials (written text, photos, illustrations, recordings, videos) without permission. If you upgrade your account, the service will have “their people” send take-down notices to offenders.

This service highlights a significant issue with the real-life impact of information once it is published to the internet: it's not easy, and sometimes it's not even possible, to get stuff taken down. I recently attend an online continuing legal education seminar where example

after example of hair-raising defamation stories were shared by an intellectual property attorney—from angry restaurant customers posting mean, less-than-fair reviews, to downright nasty posts from narcissistic ex-spouses. And the problem is always the same—a tersely worded email to an offending party asking that the offending material be taken down is easily ignored. Bringing a lawsuit to seek an order from a judge is an expensive, time-consuming, energy-draining experience with no guarantee of the outcome or that a favorable verdict could be enforced. There is, however, a new development that attempts to address these practical concerns. . .

 **TOOL NUMBER 4: The Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act)**

Included in the Federal COVID relief package, the CASE Act is designed to make it easier to resolve copyright disputes by avoiding formal litigation and all the problems associated with filing lawsuits. The goal of the CASE Act is to make it easy to seek relief if your copyright has been infringed upon or to have a declaration that your actions are not in violation of another's copyright. The Copyright Claims Board (CCB) is now open for business. You can file a claim online at ccb.gov. While you are on the site, sign up to receive their newsletter. The CCB is sponsoring free educational seminars for the public. I have attended one online and found it be very valuable.

If you find yourself needing to bring a copyright

claim and want to use this new administrative law option, you must have registered your copyright. You can represent yourself, discovery will be limited, and you don't need to follow the tricky Rules of Evidence (A year-long class first year law students spend a lot of time studying!). Keep this option in mind if you find yourself in need of help.

TOOL NUMBER 5: Copyright Protection Outside the U.S.A.

If you list your books on Amazon, or many other platforms for that matter, you automatically reach a worldwide audience. So, do you have copyright protection beyond the borders of the U.S.? In general, there is no such thing as “international copyright protection.” Each country has their own copyright laws. There are relevant international treaties, the Berne Convention being the most important. Most countries abide by this treaty; the United States joined in 1989. The crux of this treaty is that a country's copyright laws and protections apply the same to all copyright holders, regardless of their nationality. There is no registration requirement—the protection automatically occurs. (Though those who are not U.S. citizens and have distribution in America should consider registering with the U.S. Copyright Office to obtain the same legal benefits that U.S. copyright holders also receive with registration.)

If you are a U.S. citizen and are wondering if you need to take additional steps to register your copyright in foreign countries *just to be safe*, most legal experts believe this is not necessary. The existing treaties and

Authors Beware!

agreements will, in general, extend the same rights you have under U.S. law to other countries. (Do you notice me saying “in general” a lot? I can’t help myself. It’s basic lawyer-C.Y.A. language.) If you are still concerned, check to see if the country you want to publish in is a member of the Berne Convention. If it’s not, assume copyright protection of your work will be difficult to enforce.



Chapter 2

WHAT YOU CAN'T COPYRIGHT

A fact is a fact, and it can't be copyrighted. Seems pretty straightforward. But what about an *idea*? One of the more interesting things about copyright law is that you cannot copyright an idea itself, but you can copyright the way it is expressed. Copyright law does not prevent you from writing about another's ideas, but you must make sure you write it in your own words.

So, what can't you copyright?



You Cannot Copyright a Title

Authors, from my experience, spend a lot of time worrying about titles for their books, often seeking the opinions of friends and family members and furiously searching the internet to see if someone has taken their title idea! This concern about using an existing title is really a marketing issue rather than a legal one. As a

practical matter, you probably don't want to pick a book title that already has 30 books of the same name published on Amazon. But as far as the law goes, titles are not copyrightable. The majority view of courts in the United States, as well as the U.S. Copyright Office, is that copyright law does not apply to book titles.

But wait! The issue of titles and copyright becomes more complicated when we bring in trademark law. Isn't the law so much fun? So many twists and turns, just like a good plot!



Trademark Highlights for Authors

Trademark law kicks in when a word, phrase, symbol, or even a shape (the Coca-Cola® bottle, for example), identifies the “source of the product.” Trademark law applies to “goods and services.” These small little pieces of content may identify a successful brand or product: Let's Get Ready to Rumble!® That's Hot!® Hosta la Vista Baby® Velcro®.

Be aware of using phrases or words that are trademarked. For fiction writers, it is tempting to use brand names because that's how we talk. The key is not to confuse or deceive the reader as to the relationship between the trademark and an affiliation with or endorsement of the book. Your main character may love to drink Bud Light®, but your book should not imply that

Anheuser-Busch sponsors or endorses your book in any way.

There are trademarks that have become part of our everyday language. We usually reach for a Kleenex® instead of a tissue, and many people have argued Google can be used as a verb (lower case “g”). Authors should be mindful of these commonly-used trademarked words and phrases and consider a substituted word or description. Never appear to use the trademarked material for personal gain, and don’t tarnish the trademark by writing about it in a negative or defamatory way.



A Title Can Be *Trademarked*

We know that a book title is not subject to U.S. copyright law. However, if a book title can “identify its source,” then that title may fall under trademark protection and therefore be considered intellectual property.

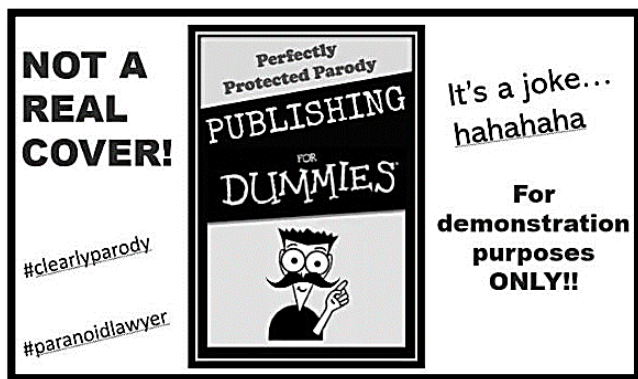
It is rare that a single book title meets this standard. An example where trademark protection has been granted to a single title is *Gone with the Wind*, a 1,000-plus page novel that has sold over 30 million copies worldwide since its publication in 1936. But in general, for a title to receive trademark protection, it needs to be a part of a series.

It’s not hard to find examples where a series title clearly identifies the source. *The Chicken Soup for the Soul* series has sold over 500 million books worldwide.

The *For Dummies* books, a collection of over 2,000 titles that introduces readers to a variety of topics, can clearly be identified by their distinctive black and yellow covers.

As an author, if you are going to do a book series, you should use a series title you put on every cover in the series. (This is a good marketing plan as you can give away an eBook or reduce the price of the print book, write a cliff hanger, and then of course your reader will want to buy the next book!) You don't have to register your series to have TM protection, but that is the best practice. Registration can be tricky so you should probably consult a lawyer.

It's not just the words in the series that are potentially protected by trademark. Graphic and design elements used in a series can ignite a concept called **Trade Dress**. As mentioned, a single book does not have copyright protection. However, a series of books with similarly-themed covers may have both copyright and trademark protection. When consumers recognize a cover by its design, that design has given the cover a "secondary meaning" and is considered trade dress.





SIDEBAR:

PARODY. . . LOL

One thing so easily leads to another in the law. The graphic you just saw was meant to be a joke about trade dress and then the nagging thought of trademark parody snuck in my #paranoidlawyer brain. Arguing something is a parody is a defense against trademark infringement. But, of course, there are certain things that must be met to use this defense successfully, including that the creator of the parody must bring only so much into the parody design that is necessary to recognize the original host work and that the parody must be clever enough so that it is clear it is not the original work.



You Cannot Copyright a Recipe— With A Big Exception

Cookbooks can be a great niche market, so not surprisingly, many authors are attracted to the idea of putting together a recipe book. The law regarding copyright of recipes is seemingly clear: copyright law does not protect the listing of ingredients. Courts have also held that directions are not protected by copyright as they are a “procedure, process, or system” that exists outside the bounds of copyright protection. *Publications International, Ltd. v. Meredith Corp.* (88 F.3d 473, 7th Cir. 1996).

But wait—would you be surprised to know it’s not that simple? Copyright protection **may** extend to a recipe if it has a “substantial literary expression.” This can include a description, explanation, or illustration that accompanies the mere listing of ingredients.

So, if you write a recipe in a creative way—maybe you write it like a poem, or you add some of your own personal “tips and tricks”—an argument could be made that you have a copyright interest in the material. Likewise, the layout of the recipe—how you format your cookbook—might also be considered a substantial literary expression.

Recent examples illustrate why you should be careful if you are looking at other recipes in preparing your own book. A former Food Network chef, Anne Thornton, lost her show contract after a battle with some famous chefs including Martha Stewart who argued that Thornton had lifted some of her recipes. The accusation did not rely on copyright law, but rather stemmed from a charge of plagiarism—using someone else’s ideas without proper attribution and giving the impression the idea is your own. As you’ll remember from our earlier discussion, *ideas* are not subject to copyright violations, and plagiarism charges are generally thought of as ethical or academic violations, not something you would get sued over. But you can be sued for plagiarism if certain conditions are met, though these are tough cases to win. But why risk Martha’s wrath? Bring your own creativity to the kitchen and always attribute ideas you are inspired by to the original owners.

In your effort to employ the best standards regarding recipes, copyright concerns, and attribution, look at the

International Association of Culinary Professionals (IACP). You'll find a code of ethics and standards for properly crediting recipes.

And because I love to cook and want to encourage authors to write cookbooks (I have one rumbling around in my brain!), look up Sharon Palmer's lovely article on "Rules for Good Recipe Writing."

Bon appétit!



Chapter 3

AI & COPYRIGHT

ChatGPT and other content-generating website platforms raise very significant legal and ethical issues for authors and publishers. Artificial intelligence (AI) platforms are making their way into the publishing world. Currently, these applications vary from entire books being generated by AI (“Boo!” I say to this!) to creating first drafts of those often hard-to-write back cover descriptions. Authors and publishers are using AI to brainstorm ideas for book content and create outlines, to write book summaries, to get suggestions for character names, and to develop illustrations and cover concepts. AI can be used to translate books into other languages. Additionally, there are many marketing applications such as creating ad copy, social media, videos, and website content.

While many alarm bells have been sounded by technology experts about AI, the fact is that AI is already well-entrenched in the creative arts. This is a complex and quickly evolving issue, and one that we need to examine.

So, let's look at the salient issues authors need to know regarding AI.



COPYRIGHT LAW & AI

The very way AI creates content raises copyright issues. AI is a machine-learning software—the program can “learn” without being programmed by a human. Intellectual property law expert Andres Guadamuz of the University of Sussex explains:

“A computer program developed for machine learning purposes has a built-in algorithm that allows it to learn from data input, and to evolve and make future decisions that may be either directed or independent. When applied to art, music, and literary works, machine learning algorithms are actually learning from input provided by the programmers. They learn from these data to generate a new piece of work, making independent decisions throughout the process to determine what the new work looks like. An important feature of this type of artificial intelligence is that while programmers can set parameters, the work is actually generated by the computer program itself—referred to as a neural network—in a process akin to the thought processes of humans.”
WIPO Magazine, 2017

Whew. I know.

But a basic understanding is key to identifying issues relevant to authors. So, let's make this personal. . .



Does an author have a copyright to AI work generated by that author?

The right to copyright one's work is established by the U.S. Constitution, which authorizes Congress to secure protections to "authors" for limited times of protection for "original works of authorship." Both courts and the U.S. Copyright Office (USCO) have recognized that an author must be a "human." For example—and these are all from real cases—a selfie taken by a monkey, a mural painted by an elephant, or a naturally occurring living garden, could not receive a copyright because these works lacked a human author.

With respect to AI generated content, determining human authorship is more complex. The Copyright Office addressed this issue recently and concluded that AI generated work is copyrightable if a human can prove they put a "meaningful amount" of creative effort into the final content.

When you apply for copyright protection, you need to be very transparent about any use of AI in the content you wish to register. Be clear on the application in explaining how exactly you used the AI generated content. Was it just for inspiration? Or did you simply copy and paste your ChatGPT results? (I'm sort of

kidding about this example, but I've read about people arguing that crafting the search query could be considered *meaningfully creative*. I'm not buyin' it and I suspect a court wouldn't either.)

A recent example of this issue involved an author who created a comic book whose images were generated by text-to-image software. The USCO allowed the author to register a copyright for the text but would not register the images. They recognized, however, that there could be more blurred lines in the future if a human used the AI images as *part* of a final image. These determinations will require case-by-case analysis—an approach that makes it hard to predict with any real certainty what a particular outcome might be. The important thing for you to remember is that if you use AI in works you want to register, you must clearly disclose that use.

Even if the generated work meets the *human* requirement, and there is enough *meaningful* work to be copyrighted, there is an additional question of *which* human in this technically-inspired creative process has a claim to the material: the content creator whose work was “scrapped” by the AI program, the owners of the AI program, the AI programmer, or the AI user? Courts have not yet come to an answer on this question. The first place to look now is the “terms and conditions” of the AI provider. These terms of use, written by the provider, will of course, vary. Some providers release any copyright claim to content generated by their programs. Others do not give away anything. Thus, the question of who owns the copyright becomes a contractual issue between the parties. So, make sure you review these terms of use provisions carefully.



Is an author at risk if they use AI-generated content in their work?

There are several issues to consider when you incorporate AI generated content into your work:

◆ You Could Be Using Incorrect Information.

Content created by AI generators often contains misinformation. And that's putting it nicely. From making up court citations out of thin air (A true story. Pretty dumb move to submit a brief to a judge without checking your citations!) to perpetuating racial bias, AI-generated content can be full of inaccuracies. The very people who work in the field of AI recognize this issue and have a name for it: *hallucinations*.

◆ You May Be Exposing Yourself to a Copyright Infringement Claim.

Recently, 8,000 published authors signed a letter sent to AI companies, asking them to stop using their work without permission or compensation. Do you as an author want to play in the mud with companies that are building AI content generation from copyrighted material they lifted without asking? I've talked to many authors who felt violated when they've discovered their information was pirated by other websites. This scrapping of content by AI companies seems to be on the same dirty playing field.

Aside from the ethical questions, there are currently class action lawsuits making their way through the court system that will force an answer to the issue of whether AI programs and/or users are liable for using copyrighted material without permission. As my grandma used to say, “It’ll all come out in the wash.” I know this was her way of telling me to act with integrity. A good principle for life in general and writers in particular.



Is My Original Work At Risk for Becoming Part of the “AI-MATRIX?”

The short answer is, yes. As illustrated by the thousands of authors urging AI companies to stop using their work without permission, your published work, if it can be found on the internet, could be at risk too. Also of potential concern is AI-generated content that copies an artist’s “style.” As of this writing, U.S. copyright law does not protect works that are inspired by the creative styles of another. For example, a song inspired by the work of pop-icon-goddess Cher would not necessarily be a copyright infringement if the work wasn’t substantially similar to one of her songs. This issue existed before AI, but the concern now is that AI can do a much better job mimicking an artist’s style, and therefore may become more of an issue in the future.

If only we were all amazing enough to have a style as great as Cher’s to mimic...



What Can I Do to Protect Myself and My Work?

◆ **Be mindful of what you are doing when you use AI.** Keep it very clear to yourself and the Copyright Office how you used any AI-generated content.

◆ **Read the fine print on AI provider’s websites.** What “rules of the game” are they establishing when you decide to use their program?

◆ **Review your publishing contract.** The Authors Guild (a wonderful resource—you should check it out!) recently suggested a contract provision that will help protect authors by preventing a publisher from intentionally allowing AI providers access to an author’s work. *Here is the suggested language from their press release of March 1, 2023:*

No Generative AI Training Use:

For avoidance of doubt, Author reserves the rights, and [Publisher/Platform] has no rights to, reproduce and/or otherwise use the Work in any manner for purposes of training artificial intelligence technologies to generate text, including without limitation, technologies that are capable of generating works in the same style or genre as the Work, unless

[Publisher/Platform] obtains Author’s specific and express permission to do so. Nor does [Publisher/Platform] have the right to sublicense others to reproduce and/or otherwise use the Work in any manner for purposes of training artificial intelligence technologies to generate text without Author’s specific and express permission.

◆ **Follow good copyright management information (CMI) practices.** For images, you can make sure the appropriate metadata is used on the description of your picture. (Are you shaking your head here? Thanks to my “website guy” and mentor Greg German, I have learned that it’s critical that for all images I put online, I should: right-click on the image, select properties, select the details tab, and then add the “metadata” which is the description of the image, the author, the title of the book the image is in, etc. *Maybe you learned something new and important here? If so, go treat yourself to a snack! That’s how you get better at tech. Reward yourself for learning!*) Oh, and for CMI for text, follow the suggestions discussed earlier about steps you can take to protect your work.

Legal and publishing issues revolving around AI are evolving quickly. In response to these changes, the Copyright Office launched a new initiative in March of 2023 to examine copyright law and policy issues raised

Authors Beware!

by AI. I encourage you to look at their website and study the “registration guidance” provided. You can stay on top of important developments by following their website:

www.copyright.gov/ai/



Chapter 4 THE FAIR USE OF ANOTHER'S WORK

I'm just going to be blunt—I have seen a lot of sloppy work from normally very ethical, intelligent people when it comes to the use of quoting from the work of others. And things really start to go to heck when there is “borrowing” of images snagged from unsuspecting websites. The proper use of another’s creative work in your own projects is an important topic, so I’m going to break it down into easy-to-follow bites:



Don't Be a Copycat!

If you use a direct quote from another source, make sure you **clearly attribute** the source of the quote. It is just plain laziness to do otherwise. And there’s a good word for it: plagiarism. Be better than that.

You know that facts and ideas are fair game, but you have to express that information in your own words. You’re a writer. You like to write. Don’t cut and paste

another's work without proper attribution (yes—more on that later). There is software to check if someone has gotten sloppy with the cut and paste. There are **lots** of free websites that can check for plagiarism. I will often run checks if my copycat alarm starts to rattle. Don't get nonchalant and think that because the internet is such a great big place you won't get busted. Remember that Bowker service that scours the internet looking for cheaters?

Okay, I feel like I'm starting to nag. I know you know this. Let's move on to the proper attribution of sources if you want to use another's creative material, say an inspirational quote, in your own work.



Be Careful with Quotes

If you are looking for a black and white answer to the question of using a quote from another author's work in your book, you're not going to like what I have to say: Unless the quote is in the public domain, as a general rule, the best practice is for you to seek permission from the quote's author.

I know. You've read lots of books that have quotes after the title page that set the stage for what's to come. The use of "small" quotes is one of those murky areas of the law. In a blog published on book distributor IngramSpark's website, and therefore presumably in line with the distributor's viewpoint, Alex Fullerton pulls no punches, "As a common practice, all quotes are copyright

to the author, which means that legally you should get permission from the author you hope to borrow from.” (www.ingramspark.com/blog/including-famous-quotes-in-your-book-or-blog) And no, I didn’t ask Mr. Fullerton for permission to use this quote because I figured, 1.) He probably likes the idea that his blog is getting attention in this very blog-filled world, and 2.) I’m going to rely on the Fair Use Doctrine, a concept we’ll soon turn to in detail.

Now before you pound the delete key on your Word file, let’s look at why this issue of using another’s creative work in your work is more complex. To review: You do not need to obtain permission to use another’s quote if the copyright is expired; the quote was published before 1928 (as of January 1, 2023, or if the work was placed in the public domain by the copyright holder. Anything you use that has been designated as a Creative Commons work, you’re fine to use without permission.

Let’s take a minute to talk about Creative Commons:



In 2001, Creative Commons was founded and led by a board of directors full of cyberlaw and intellectual property experts. The goal of the project remains the same as it did then: to create a way for individuals and corporations to grant a standard license for the use of their creative work. And this process does not involve money. The project has created a pool of creative work that

creators—or licensors, as they are called by Creative Commons—give the right for their submitted work to be copied, distributed, edited, re-mixed, and built upon, all within the acceptable frame of copyright law.

You can go to the Creative Commons website and search for content to use in your own work and it will cost you nothing. However, there are some rules you need to follow: give credit to the licensor; keep that Creative Commons notice on your work, and; provide that link back to the licensor on all copies of your work that use CC content.

Back to old school thoughts about copyrights. . .

We know that facts can't be copyrighted, so quotes that simply state factual information do not need permission. Be very careful if you are using quotes that contain song lyrics or are from a poem. The use of song lyrics in your book deserves special attention, so we'll discuss that more later.

The bottom line is that using another's work that doesn't fall within the exceptions just discussed means that theoretically, you could be sued for copyright infringement. This risk, however, can be weighed by examining the Fair Use Doctrine, a legal concept unique to the United States.





The Fair Use Doctrine

There are many myths that surround the general concept that a party may take a little bit of copyrighted material and not infringe on the holder's rights. There are four factors courts look at to see if the Fair Use Doctrine should apply:

◆ First, what is the purpose and character of the use? Is the material in question being used to teach, in news reporting, or in a scholarly work? Is it for commercial or non-commercial use? The latter is given more leeway for use.

◆ The second factor looks at how much creativity went into the quote. Courts have considered song lyrics and poems to have a higher level of creative thought and therefore are more likely to require permission for use.

◆ Third, and this factor is even more unclear, courts will look at the amount of content used. Don't believe someone who gives you a percentage of the total word count to determine Fair Use. A lot depends on the context: Are you quoting from the most significant part of the work or just some introductory material? It's not hard to see how this factor becomes a case-by-case determination. In general, many publishing houses use a guideline of 200 to 300 words for a quote taken from a book-length work. But this is an industry standard, not an absolute legal defense.

◆ Finally, courts look to the effect on the market for the original work. If the use of the quote will decrease the value of the original work, the less likely Fair Use will apply.

Are you starting to feel a little skittish about using quotes in your work? You can reduce your anxiety by contacting the copyright holder and asking for permission to use the quote. Before you do this, you'll want to do some research: Make sure you have the correct author and make sure you quoted them correctly. There are page after page of websites listing "inspirational quotes," for example. Don't assume they are correct. The level of formality that can be used for obtaining permission from the copyright holder can vary from a simple email to a licensing agreement that is sealed with a financial payment. You can find examples on the internet of letters requesting permission to use a quote. Tailor it to fit your circumstances.

If you are signing a publishing contract, pay special attention to any provision that discusses the need for permissions. The contract might require you to promise that you hold any and all necessary copyrights to publish the work. Some big houses may offer to help you seek permissions. Smaller houses usually don't.





Songs and Poems Are Different When It Comes to Fair Use

A common question I hear from writers is, “It’s fine for me to use these song lyrics in my novel that perfectly sets the scene’s mood, right?” And my answer is, “Sure! IF you can get the proper permission and prove it to me!”

Probably more so than any other creative material, the copyright protection of song lyrics is closely guarded. My general advice is that you try and figure out a way to write around the need to quote the lyrics specifically. You can refer to the song title or the musician without concern (assuming there isn’t a trademark on the title). Again, you’re a writer. Rewrite that paragraph!

But if you decide you really do want to include the lyrics, take the following steps. First, determine if the song is in the public domain. At the time of this writing, that will include songs written before 1924 (And honestly, how many authors are quoting pre-Depression song lyrics?). It gets more complicated after that as the copyright on the song may or may not have been renewed. Therefore, you will need to do some detective work and find the copyright owners. You can look for the publisher who might be able to lead you to the copyright holder and tell you how to contact them. Start with American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc (BMI). These groups license performance rights but may have contact information about the copyright holder or their licensing agency.

Once you know whom to seek permission from, you

will need to supply the exact song lines you want to use, excerpts from the part(s) of your manuscript that contain your lyrics, and details of how many copies of your book you'll publish and in what format(s). *And then* your request may be ignored, denied, or accepted. Expect to write a check if it's accepted. The fees (we're talking from a nominal amount to thousands) will vary greatly based on many factors.

Maybe right now you're feeling a little discouraged and your plot-producing mind is thinking, *Heck! I'll just use a short little lick and if I'm caught yell 'Fair Use Doctrine!'* I'll admit it, I like your style. But this argument has been tried unsuccessfully with regard to both lyrics and poetry. And doesn't this make sense? Lyrics and poems are usually short—a couple of lines could be a significant portion of the work. As we've discussed, the law regarding Fair Use is murky and not worth your precious time trying to define.



Chapter 5

LEGAL ISSUES OF CONTENT YOU PAY FOR

If you haven't figured it out already, you will learn that in most every situation, the process of creating a quality published work requires outside help. From the creation of a beautiful cover to images you need for your social media, it's likely that you'll be reaching out for assistance. And when you take this step, there are some critical copyright and licensing issues you need to know about. Here is the most important concept you need to understand:

**Just because you paid for a creative work
doesn't mean you have the right to
use it without limitation.**

Maybe you have done some ghost writing? Without a written agreement stating otherwise, you still own the copyright to that work, even if you've been paid in full. The exception to this rule is if you did the writing in a "work for hire" situation; that the product was something done within the scope of your employment. Federal

government employees and probably most state employees fall under the “work for hire” umbrella. Other private employment situations will vary.

The nature of work relationships leads to the most common misunderstandings among authors about copyright. When you pay for others to create intellectual property for your book, unless you have a written agreement stating otherwise, you do not have the copyright on that work. You have permission to use the work, but not ownership of the work created by an independent contractor. (There are some basic ways to identify if someone is an independent contractor: they are not on your payroll; they supply their own equipment, materials, or tools, for example.) So, you do not have a copyright on the work you pay for from a photographer, graphic designer, website creator, copywriter, or videographer. Unless you have a work-for-hire employment situation or a written agreement stating otherwise, you legally have nothing more than a license.

Why does this matter? Remember, a copyright gives you rights to display, copy, distribute, perform. While it is implied that the book cover you received from your graphic artist will be used for that specific purpose—your book’s cover—other situations can be trickier. What about photographs or illustrations you had created by an independent contractor to be used within the book? Can you use those photos for publicity or on your website? What if you wanted to make a plush toy from the illustration you leased for your children’s book? If you don’t have something in writing, you are potentially on shaky legal ground.



Book Covers: There Really is A Lot of Judgment

Speaking from personal experience, I have found the process of creating a professional looking, eye-catching cover to be one of the most difficult parts of creating a book. So please indulge me, as I have a lot of thoughts when it comes to book covers.

There are so many creative choices to consider when creating your cover. Who is the intended audience for the book? What image or artwork conveys the promise of the book? What colors will you use to create the vibe you want to get across? What font looks thematically appropriate, updated, and can easily be read on a thumbnail size image on a phone? Though there are many resources available for self-published authors to make their own book cover, I have come to believe that unless you are an author with serious experience in graphic design, this is a time when you should reach out for help.

When you look for a seasoned designer, try to find someone experienced in creating print book covers. Look at other work they have done to get an idea of the quality and style of their work. There are a lot of technical aspects that go into the creation of a solid book cover. EBooks are fairly straight forward once you have the front cover design completed. A quick search will provide the size and file type requirements used by the particular publishing platform(s) you choose.

Print book files are more complex. The cover must

be created in the right size template to fit the interior file of the book; the spine width must be calculated based on a host of factors including the total page count and the type of paper the interior of the book will be printed on. The back cover is critically important from a design and copy-writing point of view. How many times have you picked up a book because of its intriguing cover and turned it over with a sense of excitement about what that book is all about? That back cover copy is your opportunity to capture the potential reader. Maybe you'll impress them with stunning reviews? Or maybe it's the description of your novel's plot that captures them? Writing that back cover copy is hard work. It's well worth your time to research this topic for more specific advice or maybe even consider hiring an experienced copy writer.

If I had a fairy wand (And believe me, I am always on the lookout for one!), I would wish that every author who needs a book cover could find a designer like the one I work with: Amy Albright, the owner of Stony Point Graphics. Amy and I have established a protocol where I write a "cover memo" that includes all the information and copy she needs to create the cover. I include any other files she'll need, like my publishing house's logo, the author's headshot, and any images.





Do Not Be Sloppy About the Use of Images

Be careful using images in your book that you've snagged off the internet. Look for images that are **royalty-free** and **available for commercial use**. For this book, I made graphics from a website that has thousands of professional quality photos and many templates and design elements: [canva.com](https://www.canva.com). (There is a free version but the paid one is very reasonable and opens up a lot of options.) Another site I often use, though it is not free, is [getstencil.com](https://www.getstencil.com). [Pixabay](https://www.pixabay.com) is a great resource, as well. Good quality images are essential for your platform. Make sure you have the right to use an image before you publish it. This goes for social media too. When you are using social media for your business or anything related to your writing, like blogging, for example, don't just re-post your friend's beautiful photo they took on vacation. Ask your friend for permission and then credit it in the post. It's always best practice to credit where you found the image.

Many book cover designs incorporate pre-existing artwork or graphics. When you are creating your cover or supplying graphics to your designer, you need to know for sure that the graphics being used are not in violation of copyright law. It is your responsibility to make sure you have the proper authority or "license" to use the image on your book cover.



Hunt For Free For-Commercial-Use Images

An easy way to steer clear of a copyright problem using images is to find images in the “public domain.” An image is in the public domain when there is no copyright attached to it. This can happen for a number of reasons: the copyright has expired, the image was created by an employee of the Federal Government as part of their job, or the owner decided to release the copyright into the public domain.

You can find public domain images in some interesting places. NASA has put their images of space in the public domain. Many museums offer high quality scanned images of their collection. Don’t forget about the pool of work at Creative Commons. And a quick search for commercial free images will turn up a lot of resources. Just make sure to read the rules of the website to make sure you are in compliance with how you use their images.

There are many online images you can purchase. Be careful when going this route. Make sure there aren’t any hidden limitations. Watch out for provisions that the image can only be used for non-commercial purposes or for a certain number of times, for example. And you need to have assurance from your graphics designer, preferably in writing—best yet a contract—that they have the appropriate license for use of the image they decide to work with to create your book cover.

You don't have to learn the hard way. . .

After going through the publishing process for some time now, I have decided that original art or photographs for a book cover should be the goal. There are many ways to find talented artists. Reach out to art departments in your local high schools or colleges. Joining a writer's group or author's club can create connections. Put a post on your social media asking for suggestions. Again, it's been my experience that connecting with a solid artist is not difficult if you set the intention to do so.

So, let's fast forward and assume you want to hire an artist to create art for your cover. There are some important legal issues for you to know. Like graphic images, cover art is intellectual property and therefore has copyright protection that is separate from the overall cover design. If you have a publisher, it is most likely that the amount of input you have with the cover design will be set out in your contract, ranging from full creative involvement and final approval power, to granting all the control to the publisher. Read your contract carefully so you know what amount of creative control you have.

When you commission original art for your covers, it is naturally implied that you may use the art for the intended purpose: creating a fantastic cover. However, unless the copyright for the original artwork is transferred to you, your right to use the art does not extend beyond the cover unless you have an agreement with the artist stating otherwise. And, of course, it's best to have that understanding in writing.

I have recently connected with an amazing artist who is at the beginning of what is sure to become a wonderful

career in cover and book illustrating. And it happened just when an author I'm working with needed some fantastic illustrations for her children's fantasy book. Working together, the artist and author created a licensing agreement that is very respectful of both parties: the artist maintains the copyright of her work and has the option to sell prints of the cover and interior illustrations she creates. She will include the title of the book and its website on the back of the prints. The author is excited to develop subsidiary products (Who doesn't love book bling and it's a great way to increase revenue!) that will use the illustrations. For these products, the net proceeds will be split evenly between them.

And isn't that a happy ending?



Chapter 6

TRANSFERRING COPYRIGHTS: DEAD OR ALIVE

I'm sure you've gotten the message by now that the law sees owning a copyright as a pretty big deal. Because it is an “exclusive legal right,” the owner has the ability to give it away either during their life by transferring the copyright to someone or something else, or the more common transfer situation, when the copyright holder dies.



Transferring a Copyright While You're Still Kickin'

There are situations where an author or person or entity holding a copyright would want to give the copyright to another person or entity. An “entity,” like a non-profit organization, for example, can legally own a copyright. This is a very common situation. It's easy to imagine a situation, and I have had this occur in my publishing work, where an author wants to give their work

to a non-profit with the goal of helping the organization raise money through book sales.

Because a copyright transfer is a significant decision, it is best that it be done in writing. You can easily find an example of a “Copyright Assignment Form.” It should include the date of the transfer and be very clear about the exact work that is being transferred (perhaps identifying it by title, copyright date, number of words and pages, ISBN and LCCN if they exist). And the copyright holder, and person or representative of the entity receiving the copyright, should both sign the document.



Make Sure to Include Any Copyrights You Own in Your Will

It was a bunch of pages back, but remember our story about Aunt Rose and her desire for Blossom to get her memoir into the world? Unfortunately for Blossom, Aunt Rose was too busy living life and never got around to doing something as boring as going to an attorney’s office to make a will. This failure to make a “written assignment,” to spell out in writing who would inherit the intellectual property contained in her leather journal, was foolish. Aunt Rose needed to go see a lawyer or at least download and fill out a form from some legal website. In about half of the states, even a handwritten will without witnesses but signed by the testator—what is formally called a holographic will—would have worked to determine who would receive the intellectual property contained in the journal.



SIDEBAR:

States that allow holographic wills:



The best practice for an author doing their estate planning is to state specifically who is to receive the copyright(s). This is something every author should include in their wills, even if your work is not published.

If there is not a specific provision in a will, then we would look at the “catch all” provision that should be in every will. It is the section that covers “any and all remaining assets” and says to whom they will go.

In our story about Aunt Rose where no will exists, Aunt Rose died “intestate.” The laws of intestacy vary from state to state. The majority rule across the U.S. is that Rose’s estate would go in equal shares to her sisters

as both her parents are dead, and she had no spouse or children. Therefore, each of her sisters would inherit one-third of the intellectual property in that leather journal. It would have been so much easier if Rose had just put her desires regarding Blossom and her journal in writing. But you won't make that same mistake.



Perhaps that's more than you ever wanted to know about intellectual property? And honestly, we could have gone a whole lot deeper. But we have a lot of writing and editing and marketing to do, so let's move on to other legal issues relevant to you as an author.



Chapter 7

AVOID TROUBLE: KNOW ABOUT TORTS

For decades, my mother patiently listened to me explain “how my day went,” a practice of many Midwesterners. But after my first day of law school when I told Mom that my favorite class might be “tort law,” there was some confusion. “Why are you learning about tortes?” my mother, a woman who had studied the science of cooking, asked. I barely knew what the class was about, but I knew it wasn’t going to involve delicious desserts like she would whip up.

A tort is “an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability.” *I agree, flourless chocolate cake does sound more interesting.* . . . But this topic is of great importance to authors who want to stay out of legal trouble, so pay attention and then treat yourself to a cookie.





Defamation

Are you writing a book that refers to a real person who is going to be upset by what you have to say? If so, there is a possible *defamation* issue. When we are talking about the written word, it's called *libel*. There are several requirements, or elements as lawyers like to say, that must exist for a statement to be considered defamatory,

First Element: *There must be a false statement of fact.*

The person who is bringing the defamation claim must show that there is an untrue statement of fact that harms a living person's reputation. The statement must be more than annoying or embarrassing. It has to be the kind of statement that would, as one court put it, "deter a reasonable person from associating with that person." Other courts have said that the statement should rise to "ridicule, contempt, create public hatred, or hurt business interests."

Second Element: *The defamatory statement must identify the person being defamed.*

There must be enough information so that the reader can figure out who is being written about. And it's not just private people that can bring these cases. Businesses, corporations, non-profits, and small groups whose members can be identified, can bring a lawsuit. Government bodies cannot, but individual politicians can.


Third Element: *The statement must be published.*

Someone other than the author and the target need to read the statement. Publishing in this context can happen through the sharing of an email, a blog, or a newsletter. The publication doesn't have to be a best seller; the number of readers is not a determining factor.

Fourth Element: *Examining the intent of the author.*

Courts have different views of how they look at the author's intent. Some states say a claim can be dismissed if the author can prove they made an innocent mistake, while other courts find that irrelevant. There is agreement with respect to public figures; if the person suing is a well-known figure, they will have to prove that the author acted with "actual malice." This means that they knew the statement was false and that the statement was meant to do harm.

Defamation:



- A false statement of fact,
- Person defaming can be identified,
- Statement is published,
- Statement causes significant harm to reputation,
- TRUTH is ALWAYS a defense.

The good news? *Truth is always a defense to a defamation claim.*



TIPS to Avoid Defamation Trouble

As you've figured out by now, being aware of potential legal hurdles is always helpful because it focuses your thinking on ways to avoid trouble. So, here are some tips for you to mull over. Many of these tips apply to both fiction and non-fiction works, but let's separate the two and look at fiction first.

TIPS FOR FICTION WRITERS:

◆ Use the “Frankenstein Monster” approach when creating your characters. Fiction defamation claims can happen when a character is easily recognized as a real-life person. The general standard is that the “description of the character is so aligned with the plaintiff that a reasonable person could not tell the two apart.”

A famous case that was decided in favor of the plaintiff (the person who claimed they were defamed), arose from the book *The Red Hat Club*. A Georgia court awarded damages to the plaintiff for a fictionalized portrayal of her as a sexually promiscuous alcoholic who drank on the job. The author's mistake was making the plaintiff so recognizable. Even though the character was mixed with other traits, the real-life person had not been sufficiently disguised.

This was an unusual case. Most defamation cases arising from fiction works are dismissed early on in the legal process. Most courts will find that fiction authors

should be given a lot of leeway. Authors can use names of real people. They are not expected to search national name databases to come up with a unique name. And if the parties do go to court, the “actual malice” standard is usually what is required: that the author meant for the reader to know who the character is based on, and that there was an intent to harm the person that inspired the character.

So, make it difficult to figure out who your character is based on by changing features like gender, age, physical characteristics, ethnicity, where they live. . . you get the idea.

◆ **You may not need to hide who the character is based on if you refrain from making false embellishments that put the character in a negative light.**

◆ **Include a disclaimer.** If you research “fiction book disclaimers,” you’ll find a lot of suggestions. Here’s an example I think is pretty good:

Although portions of this novel are derived from real events, and some characters have traits derived from real people, this is a work of fiction. Dialogue, scenes, interactions, and settings are products of my imagination, and should not be taken as facts.

A disclaimer about disclaimers:

A disclaimer, no matter how artfully worded, does not automatically give you a get-out-of-court pass. But using one certainly can’t hurt.

TIPS FOR NON-FICTION WRITERS:

It should not surprise you that defamation claims are more of a concern for non-fiction writing, particularly memoir. Memoir—my favorite genre, so please don't be afraid to write yours—include people's recollections of events in their lives from their unique perspectives. We all remember differently, so it's wise to be to be very clear that you are trying not to distort the past or cast anyone in an unjustified negative light.

◆ **Again, a disclaimer can be of help, such as:**

This book is memoir. It reflects the authors' present recollections of my personal experiences and observations over a period of time. Some names and characteristics have been modified by me, some events compressed, some dialogue recreated.

◆ **Ask for permission.** In an easy world, you could ask the party you are writing about to sign a written release acknowledging that they aren't mad about being in your book and absolutely, no fingers crossed, will not sue you. I would encourage you to at least try this unless circumstances make it ill-advisable.

◆ **Don't lie.** Even considering that in the case of memoir courts are generally more favorable to authors who are telling their own stories, you still need to take special care to tell the truth.

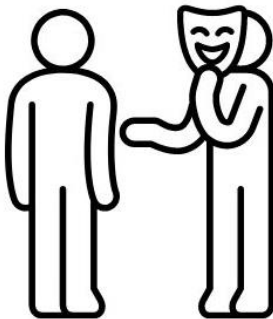
◆ **Have evidence to back up your claims.** The more damaging the information you are sharing is, the more you need to be able to back up what you are writing. Keep records or proof of your claims. Are there witnesses who can confirm your statements? Have you interviewed them? Write the truth as you know it; if you are unclear on details, err on the side of caution. A good strategy is to say what you **don't** know. That makes it hard for readers to assume the worst. Another strategy is to use language that makes it clear that these statements are your personal opinions. Don't embellish or over-exaggerate. Think of your claims in different tiers and pick the most cautious one. For example:

Tier 1: "He is a freakin' thief!"

Tier 2: "It's reasonable to assume he's a freakin' thief."

Tier 3: "More investigation is needed on the question of whether or not he is a freakin' thief."

The idea is that you are using opinion-based words to state your claim.





Invasion of Privacy

Lawyers like to beef up the complaints, so if they bring a defamation claim, they are also very likely to argue an additional tort: invasion of privacy. In this scenario, an author doesn't have the defense of saying, "But this private information is true!" Unlike defamation, truth is not a defense to an invasion of privacy claim. There are two basic elements for this claim:

First Element: The information is about a living person that can be identified.

Second Element: There is not an overriding public interest that the information should be shared.

Invasion of Privacy

- Disclosure of embarrassing, unpleasant, offensive information,
- About a living person who can be identified,
- No over-riding public interest.

A graphic featuring a close-up of a silver combination lock with the text "Invasion of Privacy" overlaid on the left. To the right, a list of three bullet points defines the elements of the tort. The background is dark and shows some electronic components.

To win a case against an author, the revealed information must be "offensive to someone with ordinary sensibilities." An off-hand insult is not enough to trigger a claim. Examples where the law has found a privacy

claim include sharing that a person has been the victim of physical abuse or that they have a serious disease. Statements that have hurt a person's personal or professional reputation have met this definition.

This claim is easier to win if the person filing the lawsuit is not famous. Courts have consistently ruled that a famous person will be given a much lower expectation of privacy. Even gossip can be considered fair game, falling with the public interest exception.

When authors share private information from their own lives that implicates others, courts have been more likely to rule again plaintiffs. Susan Kaysen, the author of *Girl Interrupted*, suggested in her memoir, *The Camera My Mother Gave Me*, that her ex-boyfriend raped her. The court found for the author, emphasizing that she should be allowed to share her story and also noted that having a traditional publisher was evidence that the story was in the public interest.

But if you don't have a big publishing deal, you could still advance a couple of arguments to prove your book is in the "public interest." Do you have strong sales? Are there titles similar to your own that have been traditionally published? These arguments could help in your defense.

As the author, if you have any reason to think that the person you are writing about might be upset with what you are writing, I want to again encourage you to consider talking to the person before your work is published to see if they will sign a release that states they are cool with it. And just like with defamation concerns, if that is not an option, I'm willing to guess that the author believes there is, in fact, a compelling public interest in sharing the

information, and if so, the author will have well-thought-out analysis to support that position.



Future Trends

Legal precedents in the area of libel and privacy are being pushed by innovative, successful writers. Ben Lerner, author of *The Topeka School*, one of the *New York Times* 10 Best Books of the Year and a finalist for the Pulitzer Prize, pushes the limits on any restrictions about incorporating life experiences and people in his life in his writing. It will be interesting to see how—or if—the law evolves with these new approaches.



International Law Considerations in Defamation and Privacy Claims

Everything I've shared with you so far about torts has been based on U.S. law. But, as we all know, that web is worldwide. In fact, it's estimated that half of all defamation cases in recent years have come from online content.

Sadly, we haven't caught up with the geopolitics of Star Trek and created a United Earth Republic. So, of course every country has its own laws. For example, defamation law in the United Kingdom is much different

than in America. If an author is hit with a defamation lawsuit in the UK, the author has the burden of proof to show they are not at fault, the opposite of the U.S. where the plaintiff must prove the elements. The UK is also more protective of privacy and thus their courts are more likely to find in favor of plaintiffs in invasion of privacy cases.

Some countries are very heavy-handed when it comes to defamation and impose criminal penalties that can include fines and even jail sentences. “Insult laws,” where it can be considered criminal to disparage the honor or dignity of public officials or symbols, exist in some form in Poland, Saudi Arabia, Spain, Switzerland, Thailand, The Netherlands, and Venezuela. In 2010, 140 nations had laws making defamation a criminal act.

I am certainly not telling you to pull down your eBook. There are practical hurdles to international jurisdiction. If you are served with papers from an international court, one strategy could be to not respond to the lawsuit. Clearly this means you won’t want to travel to that country. This is an issue that has been examined by politicians in the U.S. There is a movement to stop the enforcements of foreign libel judgments in the U.S. on the basis that they often violate our First Amendment. As of the time of this writing, these “libel tourism laws” exist in California, Florida, Illinois, and New York.





Product Placement

You've probably noticed, especially in movies, the strategic placement of real-life products. Writers refer to products as well. From a legal standpoint, this is fine. When you reference products by name, just use some common-sense precautions:

1. If you are going to use a famous brand name (and there are so many: "Band-Aid" "Visa," "Olympics," "Starbucks"), capitalizing the first letter is usually enough to avoid a reprimand letter from a company attorney.

2. If you claim in your non-fiction writing that the product is dangerous or defective, you need to have the evidence to support your theory. If you make this type of claim about a real product in your non-fiction book, the company owner would have to prove that some readers thought the remark was actually *a statement of fact*. In a court of law, this is a tough standard to meet, but it is something for writers to think about.

It's always best to try and avoid legal problems, so unless the product is critical to the storyline, the most cautious approach in a fiction work would be to invent a brand or company.

This next concept isn't a "tort" but there are things to think about when. . .



Conducting Interviews

Authors often decide to conduct interviews while doing research for their book. This is not limited to non-fiction. One of the authors I work with gets very intense about her research. Fiction writer Susan Kraus (*The Grace McDonald Series*) has attended an actual autopsy conducted by a county coroner, talked with district attorneys, rape counselors, and police officers. The result of this hands-on research with experts in various fields creates some very realistic dialogue and plot development.

Before you conduct an interview, you should consider the reasons for having the person you are interviewing sign a release. If you are interviewing someone just to gain general information, then perhaps the release is not that critical. However, if you would like to quote the person, use photographs, incorporate documents they may have provided you, then having a signed release is worth giving serious consideration. Remember those pesky issues of defamation and invasion of privacy? Having a release can be a defense to those claims. It can also help everyone understand that the information received may very well be used when the author is writing the book, and if all goes well, published.

If you decide to ask the person you are interviewing for a release, it's best to have them review and sign the document prior to the interview. If the interviewee is under the age of 18, you will need to have their parent/guardian sign. And you should always record the

interview to avoid any potential conflicts about what was actually said.



Two Final Suggestions

If you ate that cookie I encouraged you to reward yourself with at the start of this chapter, I hope I haven't given you indigestion from worry. Let me leave you with two suggestions you may want to consider if you are feeling uneasy. They do require a financial investment, so you'll have to determine for yourself what is in your best interest.

◆ **Consult with an attorney who is an expert in this area of the law.**

There are attorneys experienced in media and publishing law that will review your writing and point out concerns they see in your manuscript. Like anything, the cost can vary widely. Do some research and look for creative-arts type organizations. Often there are attorneys who volunteer their time at no cost. If you do engage an attorney, tell them you are on a budget and see if they will negotiate their fee. Also, make sure to check out the Authors Guild, the "nation's oldest and largest professional organization for published writers." I've met one of their attorneys and he knew his stuff and was passionate about protecting the rights of authors! I highly encourage you to look at their website.

◆ **Consider buying liability insurance.**

If you have a contract with a publishing house, make sure you understand what the contract provides in the case of a defamation claim. Do they have liability insurance that will cover you? Know who will pay the deductible. What are the limits on liability? There is the possibility that you may have signed away your claim to be represented by your publisher if your contract contains an “indemnification clause” which puts any responsibility of a lawsuit on you.

At the very least, you should ask your publisher if they have liability insurance. Some publishers require you to buy your own. In looking for insurance, you could start with the Author’s Guild, or if your publisher is a member of the Independent Book Publishers Association, they offer insurance for both publishers and authors at reduced rates.



Chapter 8

PRACTICAL TIPS FOR THE DIYer

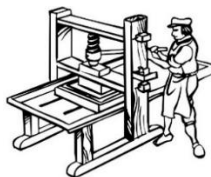
Congratulations! You have a fantastic, well-edited manuscript! And if you haven't already thought about it, you are probably now wondering how you will get your book published. Technology has given authors so many opportunities, but at the same time it seems it has created nearly as many opportunities for getting ripped off. The issues you will face getting your work published will vary given the route you take with publishing: complete self-publishing DIYer, DIYer that contracts for third party assistance, or a traditional publishing house. And there are many varieties of those, as well.

The primary reason why there has been such an explosion in the publishing industry has to do with “print-on-demand” technology. Twenty years ago, the stereotype of a self-published author was that they had to personally purchase enough books to fill their garage! This changed, however, with the creation of companies like CreateSpace, one of the first on-demand printing companies. Rather than having to run a large order of books that would be stored in a warehouse, on-demand printing allows a book to be printed only after an order is

placed. CreateSpace (originally called Book Surge) was founded in South Carolina in 2000 and was purchased by Amazon in 2005. As of the end of 2018, CreateSpace merged into KDP, formerly the eBook publishing division of Amazon. So now, publishing a print or eBook on Amazon requires going only to one site: kdp.amazon.com.

Though it is the largest on-demand publishing platform, Amazon is not the only on-demand publisher. There are many more platforms: IngramSpark, Book Baby, Blurb, Lulu, and a newer website, Draft2Digital, that all publish print books. There are more websites that only publish eBooks. If you use an aggregator site like Smashwords, they will publish and distribute your eBook to a variety of sources: Barnes & Noble online, Kobo, Sony, Apple, and Diesel, for example.

I have my opinions about the various sites and what works well for me and the authors I represent. If you are not represented by a publishing house that is taking care of everything for you, you will want to do your own research and figure out the pros and cons of the various services. As with any decision, make sure you do enough research to be confident that you've moved past a company sales pitch. There are some really great websites that appear to put an author's interests first. Joanna Penn's website [The Creative Penn](http://TheCreativePenn.com) is a good place to start, and she also has a very well-received podcast.



If you are a total “Do-It-Yourselfer” and you decide to publish your book without shopping it to a publisher, you must remember that *you are running a business*. Believe me, running your own business is a lot of work. And it’s nice to have things spelled out clearly. **So, what follows is a hopefully helpful list of critical things to keep in mind if you decide to self-publish.**



Keep Track of All Your Expenses

Keep any documentation to support your business-related expenses. Putting everything neatly in a file folder, or scanning and organizing documents in your computer, will make you a lot less grumpy at tax-preparation time. Money earned selling a book is taxable income, but you can also deduct expenses you incur in the production of those books. One tip to keep in mind is that when you order wholesale copies or “author’s copies”—as KDP/Amazon calls them—of your book, you will be charged for both shipping and sales tax of that purchase. If you do in fact resell those copies, you can deduct the shipping fees and sales tax the distributor charged. Keep in mind you will need to collect and pay sales tax for your sales (see the next point). Don’t go crazy with deductions that you think might be related to your business. For example, the IRS has very specific, strict rules about home office deductions. Where can you find out more about this? If you prepare your own taxes, there are IRS publications you can consult. But in truth, most people hire someone else to do their taxes and you should work

with someone you feel comfortable consulting with, and asking questions of, throughout the year.



Educate Yourself About Sales Tax Rules for Your State

When you use a service like Amazon's publishing service, KDP, they take care of the sales tax. However, if you are selling copies of your book directly to the public, then you are responsible for collecting and paying the sales tax. These laws vary from state to state, and if you directly sell books in other states, you need to become versed in those states' sales tax laws as well. The collection and payment of sales tax is something you should always be aware of when you put your book in a store on consignment or if you are participating in some kind of festival, for example. You should know exactly what the sales tax collection arrangement will be. Many states have helpful websites, usually through the official website for the Secretary of State's office. Check those out. And if these issues are not your cup of tea, meet with an accountant. They love this kind of stuff!





SIDEBAR:

Do you need to Form a Special Legal Entity?

A question I am often asked is, “Do I need to form a LLC for my writing business?” After consulting with my live-in CPA and talking with him about this issue at length, I feel quite comfortable telling you, “No!” There is no reason an author, particularly one who is just getting started, should form a limited liability corporation or anything along those lines, for that matter.

The moment you establish some kind of legal entity—a partnership, limited liability corporation (LLC), S Corp, C Corp—you have created a separate business entity that immediately makes your life much more complicated. Maybe you were able to set up the LLC on your own, but most likely, you had to hire an expert to help you. Many people seem to have the perception that they need liability protection and that a fancy legal entity will give them that. This is not accurate. If you defame someone in your writing and you’re sued, you are not going to be able to hide behind some kind of corporate legal veil.

In January of 2024, a new federal reporting requirement went into effect that applies to all legal entities created by the filing of documents with a secretary of state or similar state office. The “Corporate Transparency Act” requires “reporting companies” to disclose certain information to the Treasury Department’s Financial Crimes Enforcement Network. There are deadlines for filing this information and up to \$500-a-day

penalties for non-compliance. Research the act for more specifics. To me, this is just another reason not to over-complicate your author business by creating legal entities that really aren't necessary.

A much easier solution for an author is to call yourself a “sole proprietor,” and pay your taxes with your normal personal tax return, including a Schedule C. This allows you to include business income and expenses on your personal return. Easy-peasy. Honestly, this is one of the great things about being an author; it's so easy to set up your business!

Creating a legal entity can involve hiring an attorney to draft papers of incorporation, buying special tax software (and you probably shouldn't be doing these kinds of taxes unless you're a CPA), making sure you comply with any requirements from your Secretary of State, having partnership meetings, keeping notes of meetings. . .

Save your time and put your money into book marketing so you'll have more income to put on your Schedule C.

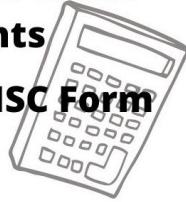


Pay Special Attention to Your Work with Independent Contractors

DIY authors are wise to hire help with editing, formatting the interior file of the book, or creating a beautiful cover. You know from our earlier discussion that these people, who are not on your payroll, are called independent contractors. There are important tax consequences associated with this distinction. For

example: if you pay an independent contractor \$600 or more in a calendar year, you are required by Federal law to send them a 1099-MISC form—you need to have their Social Security number to complete this form.

- **Track your expenses**
- **Research sales tax requirements**
- **IRS 1099 MISC Form Issue**



Ask That Your Work Not Be Shared Without Permission

It may feel a little weird to send out a PDF copy of that book you worked so hard on to someone you don't even know. If you don't have a personal or working relationship with the person you are sharing your book file with, it's not a bad idea to ask them to sign a confidentiality or nondisclosure agreement. As a publisher, I am mindful of this but don't make too big a deal of it. I will include a specific statement in the text of my email to a potential author that might say something like, "Consider this declaration my promise not to share your work with anyone, and that I recognize you own an exclusive copyright to the **work** (*insert title here*)." As an author, you could turn that around and say, "I request that you not share my work with anyone outside of your organization, and that you and I acknowledge we have not

entered a formal agreement with each other, and therefore, I maintain complete control and ownership over the attached work.” That’s the general idea. Make it your own.



Understand Exactly What Services You Will Be Receiving

If you do engage outside help, make sure you and the other person have spelled out exactly what services will be provided. If you hire an editor (and I would encourage you to do this!), what level of editing will you receive? Line-by-line copyediting or more substantive help? How many revisions can you expect?

We’ve covered a lot of issues with regard to creating a book cover. Here are a few more practical things for you to consider: how many revisions will the designer do? If you are working with a close friend, that may not be an issue. But if you have engaged someone online who lives halfway around the world, you’ll want to know how much back and forth you will have on the cover.

If you don’t have a written contract with your designer, at least make sure you have a written record indicating who the original source file belongs to. I can

tell you from experience that it is best to be given the source files—a format that allows for changes to be made. Again, this will depend on your relationship with your designer. If she’s happy to add a “*New York Times* Best Seller” banner to your front cover, then don’t worry about it as much. But if you have found your designer in the deep recesses of the internet, it’s best to have a written agreement (or to pay an extra fee) to have the cover files provided to you.



SIDEBAR:

Quick Cover Tip

If you are publishing on Amazon and you do hire a professional designer for a print cover, you don’t need to pay extra to have an eBook cover created. Once you publish the print book, you will be offered a download version of the cover that is formatted correctly for Kindle eBooks. Or you can use a design service like Canva. Create a custom size template that is Height/width: 2,560 x 1600 pixels. Upload your cover image and position it so that it covers the template. If it’s a square shape like many children’s books are, just lay the image over a white background.





What Will the Interior of the Book Look Like?

Creating the interior files for your book requires specific technical knowledge. For a print book, you must have margins that are the correct size. (There are some terrific templates.) Many things happen to make your original word processing document look like a book complete with title page, copyright page, table of contents, section breaks for chapters, headers, and footers. There are different requirements for an eBook that include removing those headers and footers, type and size of fonts, and an interactive table of contents, for example. These formatting issues may not excite you, and if that's the case, you reach out for help. When hiring someone, be sure to consider:

- ◆ Does the designer have experience formatting a print book? Do they know about making Kindle eBooks using Kindle Create?

- ◆ How complex will the formatting be? Will there be illustrations, interesting fonts, cool scene dividers?

- ◆ How many opportunities for revisions will be allowed?

- ◆ Will you be given the interior files at the conclusion of the project, and if so, will they be in a format that you can change if need be?



SIDEBAR:

A Quick Tip About Formatting

If you decide to publish with Amazon on KDP, then you can download a variety of different-sized templates from KDP.com for your paperback and/or hardback book. You can learn more about print formatting on KDP's website, for starters. EBooks require a different type of formatting. KDP provides a free interior formatting software tool that you can download for PC or Mac. Kindle Create will convert your Word file to a well-functioning eBook; you can pick the style you like, generate an interactive table of contents, and preview the file to see what it will look like to readers across different devices. If you go with other print and eBook publishing platforms, you will have to study their websites—each company has different formatting requirements.



Chapter 9

WORKING WITH A PUBLISHER

Technology has significantly expanded the scope of “traditional publishing.” With the creation of on-demand printing, a publishing house no longer needs a huge capital outlay to create books. In fact, many publishing houses, my own included, use the on-demand printing services provided by the companies I’ve previously listed. I believe these services have created fantastic opportunities for the dissemination of ideas and have resulted in the creation of new publishing house-business models. But not all of which have the author’s best interests in mind. Frankly, there are many ways authors can be taken advantage of. So regardless of the size of the publishing house you are working with, and the nature of the offer extended, there are some fundamental things for you to keep in mind.





Do Your Homework About the Publishing House.

If you are approaching a publisher, be aware of predatory sales techniques. If they are giving you a hard pitch (“We only have a few spots left—you need to sign up now!”), they don’t have your best interests in mind. Vet the company. Figure out how long they have been in business. Read reviews about their services. Look closely at their publication catalogue. Reach out to their authors and see if they will talk with you about their experiences. Ask specific questions about their relationship with the publisher: Does the publisher respond promptly to questions? Do they work hard to deliver the services promised? Did they improve the work?

A good non-profit organization to start with when you are doing this kind of research is the Better Business Bureau. You can search on this site to see if the publishing company has had any complaints filed against them, and if so, how they were addressed. As always, use your best judgment; they could be unfair rants by overly-caffeinated authors.



Take the Time to Read a Contract CAREFULLY Before You Sign It.

If you are working with a publisher who is going to require that you “pay to play” (and there are many variations of this), **never** give your credit card until you have reviewed the fine print of the publisher’s offer. This

means you are going to read every word of the contract provided to you by the publisher. Therefore, you will require that you see a written contract before you agree to work with the publisher.



Know What to Look for When You Examine a Publishing Contract.

If you have an opportunity to publish with a large, well-known publishing house, *you need to have an attorney review the contract.* But even if you engage outside counsel to help you, there are important issues you should know:

◆ **Does the contract meet basic requirements?** Is there an *offer*? Is there an *acceptance of that offer*, what is often called a *meeting of the minds*. Is there *mutual consideration*; i.e. something of value must be exchanged between the parties. This could become an issue if one publishing house sells to another and your book is transferred to that new publishing house. What happens in this situation should be provided for in your original contract. A publishing contract is not legally required to be in writing (unlike a contract about the sale of real estate, for example), but of course you want things to be clearly defined. You are a writer. You know the best way to clearly define things is to put them in writing!

◆ **You absolutely have the ability to negotiate the terms of a contract.** I have family members that think EVERYTHING is negotiable and are always scheming about how to modify any transaction. Whether or not a publishing house will agree to negotiate on the terms of their contract with you depends on them. But you should never sign an agreement you don't feel completely comfortable with. If you don't like the terms, walk away. When you sign a legally binding contract, you are potentially giving up a lot of power and control over your work. Make sure you understand the terms of the agreement and what they mean for you and your book.

◆ **Keep in mind that contracts are all about preserving the rights of individual parties.** As a practical matter, the publishing house is the party that will be offering the written contract. The contract was written by their attorney and frankly, has most likely been written with the publisher's interests in mind. You write. You read. **READ A CONTRACT BEFORE YOU SIGN IT!**



What Rights Are You Giving the Publisher?

There are a lot of specific details for you to consider when engaging a publisher. For instance:

◆ **How will the book be created and distributed?**

Will the book be created through in-house printing or print-on-demand? What are the distribution channels: online, bookstores, libraries?

◆ **What is the scope of the distribution?** Will the book be sold worldwide? Just in North America? These questions raise the issue of a *licensing agreement*, a concept introduced in our earlier discussion about copyright law. Typically, when you sign with a publisher, you are not giving them the copyright to your book—you are giving the publisher a license to publish the book. There are two types of licensing rights:

◆ **If an *exclusive right*** is granted to the publisher, this means that no one who is not the license holder, including the author, can publish the book in the format for which it is being licensed.

◆ **If a *non-exclusive right*** is granted, this allows the author or another publisher to publish and sell the work during the contract term.



Know What Format You Are Licensing.

An author I work with had a publishing agreement that took a license on the electronic version of her novel with a 12-month option to make a print version of the book as well. The publisher did not exercise their option to publish

the print book, and for a year, the author had only an electronic version of her book and was legally prohibited from publishing the physical book on her own or with another publisher. If you've done any reading about book marketing, you know what a weak position this was for her book to be in.

Know if the Contract Gives Licensing Rights to the Publisher that Go Beyond the Publication of Your Book.

Is there language in the contract that includes licensing rights for “all rights, whatsoever, including movie, television, radio, stage play?” If you are concerned about this language, you could counter with the suggestion, “The publisher is not claiming any other rights other than those directly related to print, electronic, or audio book publication.” But perhaps you are happy with your publisher representing you in other contexts. The important thing is that you are *aware* of the implications of the contract you are signing.

◆ **In a proposed publishing contract, you may see clauses about *Author Warranties*.** Simply put, this means you are promising that the work you are providing is original in content. And of course, it is!





Understand the Financial Provisions.

You need to carefully study the financial arrangement provided for in the contract. Are you paying a fee for services with all royalties coming to you? A fee and a royalty? Or a straight royalty?

When analyzing a publishing contract and money issues, the place to start is to know how much you will make if you self-publish. It's not hard to determine how much you will make if you sell your eBook on Amazon-KDP. According to their rules, if you sell an eBook exclusively through KDP, and you price the eBook between \$2.99 and \$9.99, you will make 70% of the sale price, minus some varying delivery charges that are quite small. If you sell your KDP eBook for any other price, the royalty will be 30%. There are some promotional benefits that go beyond this simple formula, but this is the basic concept. To calculate your eBook royalties on Smashwords, simply enter the price of your book and you will be shown charts that tell you how much you will make from the sale of your book. This is not a tough issue to research if you are wanting to publish on other sites. The important point is that you gather the information so you can make informed publishing choices.

It's more complex to determine the amount you will earn on KDP from the sale of your print book at Amazon.com. The amount you make will depend on the physical size of your book, both the length and width, and the number of pages. KDP has set options for books sizes and minimum and maximum page numbers.

If you know the size and total page length of your book, you can use the Amazon Royalty Calculator to determine how much you will earn on the sale of your book from Amazon.com. You can find the Royalty Calculator on the KDP website.



A bit of a disclaimer about figuring out how much you will make on the sale of your Amazon/KDP print book—

There are different distribution options on KDP. For example, you can select “Expanded Distribution.” This allows a book to be available “wherever books are sold”—both in brick-and-mortar stores, online, and libraries. The royalties for these different venues will vary and will be less than those you are shown in the Royalty Calculator. But be aware that if you select Expanded Distribution on KDP for your book, you will not be able to publish that title with that ISBN on other distributors, like IngramSpark, for example.

Why is it important to gather this data?

I have lived with a CPA for over thirty years. I have seen the extraordinary efforts he’s taken to gather information and then analyze it. A self-described nerd (and a darn good musician too!), he subscribes to the idea that a person can make better financial decisions with better financial information. This is certainly true in the

case where you are thinking about signing a contract with a publisher. (And no, I didn't ask his permission to write about him. I think, or at least hope, he's gotten accustomed to me talking about him.)

A publishing contract may provide that the publisher will take “X” amount of each sale. If you know roughly how much it costs the publisher to produce your book, you will be able to discern if the publisher is making additional money off the printing of your book. This gives you a more accurate picture of your royalty percentage. You want to see the whole picture—what is the difference between your royalty if you self-publish versus a traditional publisher, while also considering other factors such as advances, whether you will be responsible for paying back royalties of returned books (you don't have to worry about this if you publish on Amazon and IngramSpark gives you the option to allow for returns or not), if your publisher will pay for a whirlwind book tour and dinner with Oprah. . .

When you are looking at the money portion of the contract, pay particularly close attention to the following:

- ◆ Is the contract a fee for services arrangement or is it a royalty situation?

- ◆ Is the royalty based on gross or net sales of your book?

- ◆ Is the royalty the same across all formats: hardback, paperback, eBook?

- ◆ When will you be paid?

◆ How will you be told about your book sales? Will you receive reports, a snip from the KDP website? How often will you receive these reports? Does the publisher allow you to bring in an independent auditor to review the reports and be given supporting documentation? And if you have been given an advance, do you have to pay it back if your royalties don't exceed the advance?



You Need to Know What Services You are Getting from the Publisher.

I know several authors in my home state that have worked with a publishing house that has a successful business just formatting and doing the technical side of publishing books for an up-front fee, a small royalty, and a sales link to their company website. I am not saying this is a bad service; in fact, it may be exactly what you want! My point is that you be aware of exactly what you are getting. To help you clarify, consider asking the following questions when negotiating with a publisher:

◆ Will the book be edited? Ask the same questions you would ask an independent contractor; what level of editing will there be? Is there a limit to the number of revisions? Will you be able to make any corrections or revisions after publication?

◆ Are you giving up editorial control over the work? Do you get to approve substantial changes to the work?

◆ Who will own the final files, both interior and the covers?

◆ Will the book be distributed in hardback? KDP now has this option for books that have a minimum page count of 75. IngramSpark's minimum hardback page count is lower which is helpful if you are publishing a short children's book. They also have the option of printing a jacketed hardcover book.

◆ As an author, can you purchase books wholesale? At what price? Does this include shipping? If not, get estimates for that as it can be substantial.

◆ Will the publisher provide the International Standard Book Number (ISBN)? Will they register the copyright? Will they catalog the book and submit it to the Library of Congress?

◆ Does the contract cover marketing efforts? Will your book be on their website? What will they do to help you get your book the attention it needs to sell?



How Long Does the Agreement Last and What Happens if You and the Publisher Part Ways?

Study the contract to see how you can get out of the agreement. I've seen lots of publishing contracts that don't add this provision. You want to make sure you can escape something that may go south. Specifically:

Authors Beware!

- ◆ Be aware as to how long the contract lasts—is it for a set period of time or the life of the copyright (in general—the author’s death plus 70 years)?

- ◆ Is there an opt-out provision for lack of sales? If the publisher sells to another company? And if the publishing house is sold, will you be given your files (and in what form) if you don’t already have them?

- ◆ What happens to the book and the contract if you die?

- ◆ Is the contract automatically renewed? If so, note this date and put it on your calendar.

- ◆ Do you have to give a *right of first refusal* for your future work? Particularly in a series, it is common that the publishing company who publishes additional books would get first dibs on future books. This means you couldn’t shop the book to another publisher if your original publisher decides they want to publish your new book(s). How broad is this provision? Does it go beyond the series you signed up with? Make sure the contract doesn’t prevent you from creating competing works on topics that are similar to the ones in your book that is under contract.



Special Concerns with an Author-Pays Publishing Arrangement.

I have seen a lot of sour grape comments lately that argue if authors make **any** payment to a publisher, then “all they are doing” is publishing with a “vanity press.” I believe this is far too harsh of a statement—there are many high quality, highly selective indie/hybrid publishers. There are also a lot of scammers.

So, how do you tell the wheat from the chaff?

Understand that you must be careful when researching publishers. I personally know many authors who have been preyed upon. You also need to realize that the quality, experience, and business practices of indie publishers varies greatly! There are some that may not have the intention of “scamming you,” but they still are not worthy of publishing your book and you may feel at best “ripped off” by the process.

There are efforts to oversee good hybrid publishing practices. The Independent Book Publishers Association is a non-profit organization dedicated to advocating, educating, and helping the independent publishing community thrive.

Each IBPA member subscribes to a Code of Ethics. Working with a publisher who has membership in IBPA can also be of financial benefit to authors as the IBPA has discounted prices on many publishing services including

marketing services.

But just because an indie house is not a member of IBPA does not mean it's unworthy of your business. There are many indie publishing companies that are forging new business models that are more inclusive and give authors more freedom along with greater financial returns for those books that are successful.



Chapter 10 AVOIDING SCAMS

I'm sure it's clear by now that I have no patience for hard working creative people being taken advantage of. I've mentioned several concerns throughout the book, but scams and rip-offs have become so significant in this industry, I want to highlight some particularly crummy things I've seen.



Literary Agent Scams

As we've discussed, if you are looking to have one of the big five traditional publishers publish your book, in nearly every case, you will need to have a literary agent who will then sell your book to one of these publishers.

A legitimate, ethical literary agent will not cold call you. Quite the opposite, you as the author must reach out to an agent by means of a query letter. This seems to be a common scam—you find a flattering email in your inbox with promises from a so-called agent that they can sell your book for big bucks. And you think, *Pretty sure I didn't reach out to them.* (It's because you didn't.) And guess what, they'll be your agent! You just need to pay

some money.

An ethical, professional agent will never ask you for money. Agents have a fiduciary duty to act in an author's best interests—to be the author's advocate regarding the book, to negotiate the contract, to make sure the author gets the correct royalties. Most agents and authors will have a written agreement outlining these responsibilities.

Now, some agents call themselves “editorial agents.” Really, they are more of a book consultant. These are people who do in fact have editing skills. An editorial agent may ask for money or work on commission, but if they become your agent to sell your book to a publisher, they have an ethical obligation to return that money. Agents work on commission. The only time an author pays is when they have successfully sold your book.

Recently, after hearing several agents speak, and talking with a couple, I can promise you that because they receive so many query letters, no legitimate agent is reaching out on their own to talk with you about representation. It's safe to assume anything else is a less than reputable source and you would do best to avoid them.

It's easy to search legitimate websites for agents and there are many authors conferences where you can sign up to pitch to agents and learn more about how this process really works. See for example: The Association of American Literary Agents; Association of Authors' Representatives; and AgentQuery.com.



Movie Agent Scams

A cold calling scam similar to literary agent scams was going around a lot recently. This one is where authors are contacted by a “famous” director or producer’s representative who wants to turn your book into a movie or television show. This is so heartless. Within the past year, I talked to an author who had published a very short children’s book that consisted of one poem. A flattering, professional-looking email had been sent to her claiming that powerful people wanted to turn her children’s poem into a movie. Unless you have a project that’s gone viral, you should never trust someone who reaches out to you unsolicited with these kinds of promises.

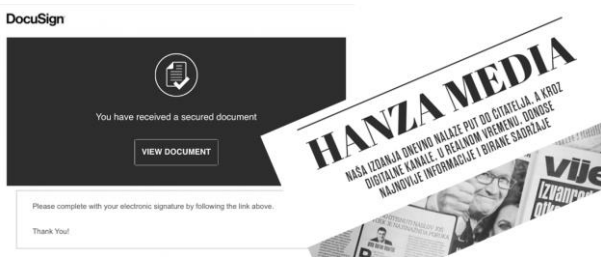


Slimy Emails

We authors and publishers get a lot of email. And sometimes it can be tough to specifically recall everything we have going on. So last week, when I received a pretty legit looking email designed to appear as though it was from “DocuSign”—a legitimate online document signature service—I thought, *Oh, what’s this? What did I forget to sign?*

Fortunately, my radar went off and I looked up the website address. I’m not even sure what language that website uses:

Authors Beware!



Another recent potential scam that came by way of email to my in-box stumped me for a minute. I like my domain name: flintshillspublishing.com. I want to keep it safe. So, when I got an email that told me this was *urgent*, that a company in China wanted to register my domain name as their “internet keyword,” and that I needed to reach out to them “in order to deal with this matter better,” I thought, *Oh man, what is this?!*

This is a scam. And I guess I’m a bit late to the party because evidently, it’s been going around for a while. The goal is to get you to pay for a **.cn** after convincing you it’s necessary to protect your intellectual property. This is not true. You should block these emails.

The lesson? Be careful with emails! Don’t click on anything when you don’t recognize the source. Check the return email address carefully. We writing-types sign up for a lot of stuff—so be very careful with what you click on in an email.



Book Contest Scams

Winning an award in a legitimate book contest is an admirable goal. But unfortunately, there are those who will prey on this desire. So, once again, use good judgement, especially if there is an entry fee attached to a contest.

In recent years, it has become common place for legitimate book contests to charge an entry fee. A lot of literary organizations support themselves with these fees or use the fees to fund the prizes.

The potential red flags here vary—some contests are just fake. They are taking your money, saying that there will be winner—maybe even publication—and then it doesn't happen.

You want to be a contest winner for a contest that matters. A claim that “everyone wins” isn't prestigious, and while the prize money may sound great, you need to read the fine print. Some prize contests have a disclaimer that the prize amount will be lowered if the number of entries is less than expected. Check to see who is running the contest: is it just a private individual or more reputable literary groups, magazines, or publishers?

Read the rules and guidelines of the contest carefully. A legitimate contest will have clear rules including information about entry categories, deadlines, eligibility,

the format to submit, and rights you may be surrendering.

Look closely at how many book categories the contest has. Some have more than 100 categories. If you can't find information from previous years about the number of books submitted for a particular category for the contest, that could be a red flag.

Look at the contest website to see if the judges are named. A more prestigious panel means that winning the contest could be a boost to your writing career.

Sometimes the prize is publication. Maybe this is what you are shooting for? But the publication might not be the level of quality you want. Be careful with the publication process scenario. Make sure you read all the fine print.

Again, doing research pays off. *Poets & Writers Magazine*, a publication that's been in business since 1987, has a search engine for writing contests, grants, and awards. As part of your book contest research, check them out.



Chapter 11

SOME FINAL THOUGHTS

One of the very first things new law students learn—other than you can never drink too much coffee or have enough yellow highlighters—is that you can **ASSUME NOTHING!** Making assumptions about unclear statements, unanswered questions, money, and contractual provisions, is not how an author builds a strong business for themselves. And anytime you are paying for publishing services, you must be particularly careful. Ask for a copy of the publisher’s standard contract prior to conversations. Get an email contact and follow up phone conversations with a detailed email. And never pay upfront for any services without a signed agreement.

Don’t undervalue yourself. Know what you are receiving and what you are giving up. Are you getting what you want out of the deal? The pen really is mightier than the sword—make sure you are armed with all the information you need to make informed decisions about your writing career.

Now get busy writing! The world needs to hear what you have to say.



ABOUT THE AUTHOR

Thea Rademacher founded Flint Hills Publishing after her inspiring experience co-authoring *A Drop in the Night, the Life and Secret Mission of a WWII Airman*. A former social justice attorney, Thea is passionate about helping authors avoid predatory publishing traps, teaching them how to take responsibility for their writing, and creating a solid business around their work. Armed with stories, skills, and knowledge from her experiences as a competitive debater, court room attorney, executive director of a non-profit to help mothers in poverty, a certified life coach, wife for more than 30 years, and the mother of four unique and talented grown sons, her publishing company now includes over 80 titles.

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Flint Hills Publishing does accept
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A TREAT!

As your reward for reaching the end of this book, you are invited to join **Flint Hills Publishing's Private Facebook Group** where information is curated on topics related to writing, graphic design, publishing, marketing, speaking, and of course, legal issues relevant to authors. Just answer the question about how you heard about the group, and we'll let you in!

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