



PRESIDENT'S LETTER

Mar/Apr 2012 – ASK THE LAWYER

Dear Bob Stein,

I am very disturbed by all the news surrounding the death of Stieg Larsson and control over his literary works. Do I have to mention by writings specifically in a will to make sure that the correct person will be in charge of my work after I die?

Disturbed in Darien

Dear Disturbed:

The short answer is, "Yes!"

If you do not name a literary executor in your will, and, even more importantly, if you do not include specific bequests in your will for your copyrights, your book contracts, and your royalties, then those assets will be lumped into your residual estate, administered by your regular executor until the estate is closed, and then divided among your heirs.

Your heirs (assuming there is more than one) may disagree about how to handle your literary estate, and may give conflicting instructions to your agent and/or your publishers. It could get very messy.

It gets even worse if you do not have a will. Then your heirs may have difficulty establishing their rights to your literary assets, and to the right to deal with your publishers and your agent.

So, yes, I strongly recommend that you include specific bequests in your will for your contracts, your copyrights, and your royalties. I also recommend that, if at all possible, you appoint as a literary executor someone who is familiar with publishing, and who cares about you and your children. I suggest that in your will, where you appoint the literary executor, you express your wish that that person familiar him- or herself with Sections 203 and 304 of the Copyright Act (www.copyright.gov/title 17), which govern the rights to renew pre-1978 copyrights and to terminate publisher contracts at statutorily determined times. You may also wish to state the powers you are granting to your literary executor. (For instance, if you have minor children, you may want the literary executor to

handle your copyrights and contracts, acting as a kind of trustee for the kids, even after the rest of the estate has been divided up and distributed.)

Bob Stein

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Advice given in this column is general, and is not based upon a thorough review of facts and considerations in any given instance. You should consult an attorney in depth if you need legal advice.

Nov/Dec 2011 – ASK THE LAWYER

Dear Bob,

If I send an agent a submission and he or she asks for a period of exclusive review, is this legally binding? I mean, if I happen to meet an agent during that exclusive period who wants to see my work, can I send it, or am I breaking a contract with the first agent?

Anxious

Dear Anxious:

You know the old Hollywood expression, “You’ll never be published in this town again!”? How about, “Beware the wrath of an agent scorned!”?

Seriously, no, it’s not likely to be legally binding, as far as I know. I very much doubt that it has ever been litigated. However, I can imagine an unlikely scenario in which you would have liability to the agent: you send the ms to a second agent within the first agent’s exclusive period. The first agent reads the ms, likes it, and shows it to one or more editors. She receives one or more offers. The second agent does likewise, and also receives offers. Then a publisher tells both agents that each has submitted the same ms to him.

Which agent gets the sale? More importantly, which lawyer gets to represent the first agent? I’d like to take that case against you, for breach of an oral contract, after the first agent relied on your promise of exclusivity. The thing is, the damages due the first agent would be easily ascertainable: 15% of the best offer you received from either agent. (You’d end up paying a double commission, as well as your own lawyer’s legal fees.)

If you do decide to send the ms to a second agent, you must immediately let the first agent know that you've done so, so she won't waste her time reading it. If you don't, and she finds out another agent also has it, she will be furious and is likely to spread the word that you are untrustworthy and a waste of an agent's valuable time. You may then find yourself without any agent, and with a bad reputation to boot.

If the first agent has already invested her time in reading your ms, and still wants to represent you, you would be wise to so advise the second agent and request that she return the ms to you.

Good luck.

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Sept/Oct 2011 – ASK THE LAWYER

Dear Bob,

As someone who understands the industry, I'd like your input on ebooks. Do you think everything will have to be in ebook format soon? And does the writer have the same protections for their work in ebook format and hard copy?

It seems to me that this is the way the industry is going and I want to know how to protect myself.

Dear -----:

I cannot say authoritatively whether everything will have to be in ebook format soon.

However, I can tell you that of the seventy-eight books I have purchased in the last year, all seventy-eight were ebooks, purchased from either Amazon or Apple. I have not purchased a single hardcover or paperback since I bought my iPad almost a year ago.

I would imagine that many or most Kindle, Nook and Sony Reader owners could say the same thing.

So the short answer to your question is that if your book is not available for purchase in the various ebook formats, you will likely miss out on sales to those readers who, like me, no longer purchase printed books.

Copyright protects books in ebook format just as it protects printed books. In addition, most ebook publishers encrypt their ebooks so they cannot be easily pirated.

Which is not to say that they are completely hacker-proof. Then again, a few years ago one of my clients discovered that some of her books, which at that time had been published only in paperback, and not in any ebook editions, had been scanned into digital form by some enterprising pirate and were available for free download on a Pirate Bay-type website. When we contacted Harlequin, her publisher, to let them know about the problem, Harlequin's lawyers were already familiar with the issue. My client was not the first of their authors to be pirated in this manner. So I don't think ebooks are necessarily less safe from piracy than printed books.

Where authors do require more protection for ebooks than printed books is in the out-of-print/reversion of rights clause in their publisher contracts. Those provisions typically allow authors to terminate the contract (which otherwise would continue in force for the term of copyright, i.e. the author's lifetime plus 70 years) if and when the publisher fails or refuses to reprint the book, and so allows it to go out of print.

But the neat thing about an ebook (from a publisher's perspective) is that, like diamonds, they are forever! They need never go out of print, unless and until technological changes require investment in new ebook formats. Even then, the costs are likely to be much lower than those of ordering new small-run printings of old print titles. So authors need to stipulate in the reversion of rights clauses of their publisher contracts that the availability of an ebook edition (or, for that matter, of a print on demand edition) shall not be sufficient to maintain their book "in print." The publisher, or at least the big New York publishers, will almost certainly respond, "OK, but if we pay you at least \$200 per year on royalties from the ebook and/or print-on-demand editions, then your book will be considered 'in print,' and you will not be able to revert rights." Unfortunately, you're not likely to be able to do much better than that.

I hope this has been helpful.

Best regards,
Bob Stein

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May/June 2011 – ASK THE LAWYER

Dear Bob,

My father was in the army during WWII. He passed away in 2006. He had a hand-written diary along with a scrapbook, documents and original photos taken during his army life.

I would love to publish his diary along with the documents and photos. It would be a fascinating look at the war from the trenches. My question is: If I wish to use photos in which other people are featured, do I need to get a legal release from them or their surviving families before I can use the photos?

Thank you for your assistance.

Sincerely,
Marie C.

Dear Marie C.:

I will assume that the photographs were taken in the United States, or, alternatively, that the persons depicted are all Americans, and thus that U.S. law applies. I will further assume that your father was the photographer who took all of the snapshots, and thus that no difficult copyright issues are involved in their publication. If either of these assumptions is invalid, you may well have difficulties if you proceed with publication.

Given those two assumptions, I see no reason why the diary cannot be published.

Ditto the photographs of other people, unless those other people are still living, and are depicted in extremely embarrassing circumstances, such as undressed, having sex, kissing a person of the same sex (if they were closeted), etc. Ordinary snapshots of ordinary people in everyday circumstances do not require the permission of the subjects when included in a book.

The other thing to be careful about, is if your father discussed identifiable other people in unflattering terms, or accused them of behaviors they would not want publicized. If any such persons are still living, they could bring suit for defamation or invasion of privacy, without regard to photographs. In some states, even the estates of deceased persons may be able to sue for “revelation of embarrassing private facts” invasion of privacy. You might well want to edit any such statements.

Please keep in mind that when I say, “You can do this,” I mean that you should be able to prevail if anyone sues you. The reason publishers want their authors to obtain releases,

even when not legally required, is to deter potential plaintiffs from suing. A lawyer who is not aware of the ins and outs of privacy law in his or her state might well decide to take a flyer and bring a lawsuit, but if informed that his client had previously signed a release expressly authorizing the publication, even the greediest, least intelligent attorney is likely to back off.

I do not mean to frighten you when I talk about possible lawsuits. For a book of this nature, if there are no privacy or defamation issues, I would be shocked anyone sued merely because their names or images were included in the book. And again, even if they were to sue, I am confident you would prevail.

You mentioned “documents.” Documents may or may not be protected by copyright, and would have to be considered on a case by case basis. If these were U.S. government documents, then in all likelihood they are public domain, i.e. available for use without permission or payment.

I hope this is helpful.

Good Luck
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Mar/Apr 2011 – ASK THE LAWYER

Dear Bob,
How long does copyright last? I want to put my grandfather's articles up on a website I've designed. He was published in an Irish paper from 1933-1948 and the newspaper says I can use them. Should I do anything else to make sure I'm safe?

-Concerned

Dear Concerned,

Copyright is territorial. The duration of copyright protection varies from country to country.

It also varies within the United States, depending on when the work was created. For published books or articles written by a US resident between January 1, 1923 and December 31, 1977, copyright protection lasted 28 years, and, if renewed in the US copyright office, continued for another twenty-eight years. Due to various congressional extensions, such works, if properly renewed, are still protected.

Published books or articles written by a US resident on or after January 1, 1978 are protected by US copyright for the life of the author plus seventy years.

Works that were created but not published prior to January 1, 1978 are also protected for the life of the author plus seventy years, and, if published before January 1, 2003, continue until at least December 31, 2047.

You said that the article was published by a newspaper in Ireland. If your grandfather lived in Ireland when he wrote the article, then the copyright in the article would be protected by Irish copyright, which also lasts for seventy years after the death of the author. As to who controls the copyright, it would likely be either the newspaper or your grandfather's heirs, including, I assume, you.

So, assuming your grandfather resided in Ireland when he wrote the article, and that you have the newspaper's written permission and your own permission, you have all necessary rights to publish the article. Assuming further that your grandfather is no longer living, that you are not his sole heir, and that your family, rather than the newspaper, owns the copyright, you may owe each of your siblings and cousins a share of any profits you derive from such publication, such as advertising revenue from your website.

If your grandfather lived in the US when he wrote the article, and if the Irish publication was the only publication, then I think (without research I am not certain) that it would still be considered unpublished under US copyright law, and the article would become public domain seventy years after your grandfather's death. If that time period has not yet elapsed, then copyright ownership would be as described in the preceding paragraph.

As often is the case in the law, even an apparently simple question can require a long, complicated and tedious answer!

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Jan/Feb 2011 – ASK THE LAWYER

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Dear Anxious,

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Nov/Dec 2010 – ASK THE LAWYER

Hi Bob,
I worry about signing a contract with either an agent or a publisher. How binding are these contracts and should I try not to have one? Would it be better to be free?

Cynthia

Dear Cynthia,

Most agents' and publishers' contracts are very binding. That's why there are lawyers who represent writers (ahem!).

However, in my opinion it is not better to be free. Kris Kristofferson wrote it best: "Freedom's just another word for nothing left to lose."

If you don't sign with an agent, then you have no one to help you find a publisher, or to advise you in your writing career. If you don't sign with a publisher, then your only publishing option is self-publication (and I don't know how you would self-publish without signing any contracts). Self-publication, while perhaps gratifying to the ego, is far less likely to result in widespread sales of your book, or in fame or fortune. It should only be considered when you truly have "nothing left to lose".

I believe it is still worthwhile to follow the traditional route to publication, so long as one is careful to avoid the pretenders... those predators who pretend to be literary agents or publishers, but are really just out to steal money from untutored writers.

There are resources available to guide the writer avoid such creatures, such as the websites www.preded.com ("Predators and Editors") and www.aaronline.org

("Association of Authors' Representatives"), and the books, Jeff Herman's *Guide to Book Publishers, Editors, and Literary Agents 2011* and *Putting Your Passion Into Print*.

Only after you have availed yourself of these resources, and found after repeated inquiries that no mainstream agent or publisher is interested in representing you or publishing your book, would I say you "have nothin' left to lose", and so should think about "being free".

Best,
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May 2010 – ASK THE LAWYER

Hi Bob,

My daughter is going to have her first book published by a start up publishing company. She just received the contract and has questions and concerns about parts of the contract. Can you recommend a lawyer who might charge \$1,000 or so to look it over and advise her? The main concerns are the warranty clause and copyright.

**Thank you,
D.B.**

Dear D.B,

I have no idea what any other lawyer would charge to review the contract and to advise the young lady.

If she lives in New York and if her income is low enough, she may be eligible for free assistance from Volunteer Lawyers for the Arts (www.vlany.org).

If she would like to send me a digital copy of the contract, I will tell her (depending on its length, its complexity, and its degree of "evilness") what I could and could not do for \$1,000. (My hourly rate is \$500).

Best,
Bob

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November 2009 – ASK THE LAWYER

Dear Mr. Stein,

Why do contests now say that they won't accept writers who've self-published? I thought that it was a good idea to self-publish my mystery, but now I wonder? What do you think? Will it make it more difficult for me to publish with a publisher in future if I self-publish my book?

Anonymous

Dear Anonymous,

Without knowing more about the particular contest(s), I can only guess that the contest administrators are reacting to the many different forms of self-publication, some of which begin to approximate traditional publication, in that there is an editorial selection process by the entity which enables self-publication. If the contest is for "first novelists", it is easier to prohibit all writers who have published a book (whether by traditional or self-publication means) than it is to distinguish among the forms of self-publication.

If you self publish your book it may well make it more difficult to obtain a publisher for that same book... although I understand that at least one Simon & Schuster imprint is now buying the rights to reprint selected self-published titles. It should have no impact whatsoever on your ability to find a publisher for future books.

My primary concern about self-publication is that it may prove easier to self-publish a book than it is to keep reworking and improving that book (and honing the writer's skills) to the point where a traditional publisher would be interested. In my opinion it would be a shame if promising writers took the path of least resistance rather than persevering until they achieved professional skill levels and recognition.

Secondarily, I am concerned that self-publishing authors underestimate the difficulty of bringing a self-published work to the attention of the reading public. Relatively few self-published books reach the kind of audience that a traditionally published book can reach, even without significant support from the publisher.

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September 2009 – ASK THE LAWYER

Dear Bob,

Should I be worried about putting my writing-in-progress on the web? What if someone steals my ideas?

Putting it out there in NY

Dear "Putting it out there,"

Technically, the expression of your ideas (meaning the words you use) are protected from the moment you write them down... on the web or otherwise. If the web is the only place you record them, I would strongly urge you to keep a copy of your writings on your own computer as well, and also to record a screenshot of your writings on the web page and to keep that indefinitely, showing that they were published on the web, the URL on which they were published, and, if possible, the date on which they were published. If someone steals your expression, you can then prove that you wrote it first, and that the infringer had access to your work online.

However, you asked not about your words, but about your ideas, and I have to tell you that there is no protection at all against theft of your ideas off the internet.

I'm not sure why you'd want to publish your work in progress online. You should be aware that if anyone does steal your ideas, you're basically out of luck. You cannot claim they were a confidential trade secret if you published them for the world to see... and copyright protects only expression, not ideas.

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May/June 2009 – ASK THE LAWYER

Dear Bob,

I am the beneficiary of my mother's estate, including her royalties. She wrote a book published in 1965 by Abelard Schuman. It was picked up by Scholastic for their book club and made into a made-for-TV movie. There's a clause in her contract that says that if the book is out of print for longer than 6 months, rights to publish it revert to her. It's been out of print for many years. I'd like to try and get it republished or maybe do a print on demand thing. Here's the problem – I can't find any trace of Abelard Schuman, so obviously I can't notify them. Is there some other remedy available to me? Like publishing notices in certain trade publications or in national newspapers the way the government does before it holds an auction? Thank you.

Dear Beneficiary:

I do not know of any notice procedure that would satisfy the obligation to request reversion. Was the book published by Abelard Schuman of New York, or of London? Especially if the book was published by the New York office, but ultimately in any case, I would recommend calling the business reference desk at the Brooklyn Public Library, and, if that doesn't provide an answer as to which publishers bought out Abelard Schuman and its successors, the reference desk at the New York public library. They should each have reference materials which may enable them to trace the history of the company and what became of it.

In addition, I would call the Scholastic contracts and royalty departments and ask them whether they have any records of what became of their licensor (the royalty department might have the name of Abelard Schuman's successor in interest).

Finally, Google produced the following current (or near current) information:

Powered by MacRAE'S Blue Book - America's Original
Industrial Directory
Abelard-Schuman Ltd.
Wester Cleddens Rd.
Glasgow, Lanarkshire, G64 2NZ
Scotland
employee size: 10
products: Periodicals

A letter to the company in Scotland may well flush out some useful information about their former American affiliate.

Alternatively, you could take the risk of just self-publishing the book without first reverting rights, and expect that if anyone else still claims the rights, they will come to you. If your publication is limited in scope, and if the book has been long unavailable in any edition, any damages due the claimant would be small, and that would enable you to initiate reversion procedures. You could even print a notice on your copyright page indicating that you had tried unsuccessfully to find Abelard Schumann's successor, and inviting that entity to come forward.

Hi Bob,

I have one book out, one coming out in September and a third under contract. I don't have a will but I realize I need one. Can I make a will that leaves the rights to an heir or do I need any special arrangements to insure that the books can continue to be published if something happens to me? Thanks.

Dear Needs a Will:

Yes, you can make a will that leaves the rights to an heir. You can also name a literary executor, or state in the will what duties relating to your books you would like your regular executor to perform. In either case, you should clearly state who is entitled to receive any royalties under existing contracts, who will own the copyright (careful: if different people inherit existing contracts and the copyrights, then you are creating a potential for battles between them, since it would be in the interest of the copyright owner to terminate existing contracts and enter into new contracts), and who will have the right to deal with your publisher(s).

I'm not sure how anyone can "insure that the books can continue to be published" ... books go out of print rather quickly these days. If you write non-fiction, I suppose you

can leave instructions for your executor that s/he should cooperate with any desire by the publisher to hire another writer to revise your books if and when necessary, even though that is likely to result in reduced royalties to your estate and in credit shared with the revisor (both reduced credit and reduced royalties are still better than no credit or royalties, if the book is considered obsolete and is put out of print).

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March/April 2009 – ASK THE LAWYER

Dear Bob,

I have written a book which I think is good enough to be published. I have done all the research and had it professionally edited but I wonder if there's any point sending it out in this economic climate.

In your experience, do agents actually take on books in times like these, or publishers for that matter? Would I be better off waiting for a while rather than risk being turned down as a knee-jerk thing because people in the business only want sure-things or writers who've already been published?

I'd appreciate your insight.

Dear Writer,

Your concern is justified: it's a difficult market right now. In November Houghton Mifflin Harcourt announced that it was suspending all book acquisitions; in December Random House announced that it would reorganize and consolidate several of its imprints. Other publishers must also be considering every acquisition (and its price) more cautiously than was previously the case.

In December one of my clients informed me that his literary agent (from a very well known and successful agency) had told him that the agency had decided it would be a wasted effort to send out any proposals that month, and it would not do so.

But here's the thing... agents must sell books if they are going to stay in business, and publishers need to buy books for the same reason. Neither can afford to wait out the recession without taking on new authors and new books.

Also, it is impossible to know how long it would be necessary to wait to find a more receptive market.

So my recommendation would be to polish your proposal or your manuscript to within an inch of its life... make it as good as it can possibly be, and then send it off.

Keeping your manuscript in your drawer doesn't serve any useful purpose. Even if your worst fears come true, and it is rejected everywhere because of the poor marketplace, you can wait a few years and resubmit it...there should be a new crop of agents and editors by then, anyway.

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Please send your legal questions for Bob to mhannanmandel@yahoo.com

November/December 2008 – ASK THE LAWYER

Dear Bob,

A publisher wants to publish my book, which is great. My friend, who is an artist, and I always promised that we would help each other out when we became successful and I wondered if I can insist that the publisher use her artwork for my cover. Is it OK to ask?

Can I have it written into my contract?

Thanks for your advice,

A Friend in Need.

Dear Friend in Need:

It is highly unlikely that you will succeed, unless perhaps the publisher falls in love with your friend's artwork. Only the most successful authors... i.e. those whose books earn the most money for themselves and their publishers... are able to obtain cover approval in their contracts.

Even in those cases, I have never seen a clause in a book contract which permitted the author to force the publisher to use artwork selected by the author on the cover of the book (as opposed to exercising an approval right to force the publisher not to use a particular cover design).

In contract negotiations, you are more likely to get (i) consultation, which means the publisher will wave the cover in front of your face and ignore anything you have to say about it, or (ii) “meaningful consultation”, which probably means that the publisher will pretend to listen to anything you have to say, without any obligation to abide by your comments.

The reason is simple: the publisher wants to sell books. That is the publisher’s primary consideration, and it will select a cover design which it believes (whether or not correctly) is most likely to sell the most copies of the book.

So you can ask, but you probably will not receive. Here’s a thought: Pay a photographer to take a picture of you with the artwork just next to you. Ask the publisher to use that photo as the author photo on the back cover or inside flap of the book. You have a better chance of success there than on the front cover.

Before you put your friend’s artwork on (or in) any book, be sure to get your friend’s written permission to do so. The publisher will want to see it, and you can’t afford to take the chance that your friend will be offended, rather than pleased, by your reproduction of his or her copyright-protected work.

Best,
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August 2008 – ASK THE LAWYER

Dear Bob,

I'm considering the self-publishing route for my family history.

Do I need to be worried about dealing with self-publishing companies? How should I handle contracts? I'd appreciate any advice you could give me to help

me avoid any problems in the future with copyright or if I want to publish it in a different form through a regular publisher.

Family History

Dear Family History:

While I don't like using this column for self-promotion, this is a perfect example of a situation in which a lawyer familiar with the publishing industry (I would guess that there are probably about 20 of us in private practice today) can be useful.

Each company which assists authors who want to self-publish does so on its own terms, with its own contract form. I have not studied all of the forms, and so cannot tell you to use this one rather than that one.

But you have to read with great care the contract form offered by any particular company, to see whether you or the company will control the copyright. I say "control" rather than "own" because often publishers will say you "own" the copyright, but you license control of all publishing rights to the publisher.

If the company owns or controls the copyright, how and when can you regain ownership and control?

What termination provisions does the contract have? Do you have the absolute right to terminate and recover your rights at any time?

If these matters are not clear in the contract form, they should be specifically negotiated with the company and made explicit in the contract.

If you are unsure how to interpret the contract, that's when you contact a publishing lawyer. It's much better to pay for an hour or two of a lawyer's time before you sign the contract, than to pay for many hours later in what may be a vain attempt to get out of a contract you previously signed.

Advice given in this column is general and brief, and is not based upon a thorough review of facts and considerations in any given instance. You should consult your attorney if you need personal legal advice.

Bob Stein

Bob Stein counsels and represents people at all levels of the entertainment industry from writers to film producers. He has represented David Baldacci and Janet Evanovich and spent 13 years in-house at Random House, Simon and Schuster and Warner Books before entering private practice.

Please send your legal questions for Bob to mhannanmandel@yahoo.com

CORRECTION - Last issue's legal question included the mention of a 20% fee for an agent. Agents typically charge 15% for representation with foreign rights, etc. negotiated at a different rate. We apologize for any confusion caused by this error.

May/June 2008 – ASK THE LAWYER

Dear Bob,

I have a publisher interested in publishing my novel. The contract will be coming soon and I am wondering how best to approach this. Should I get an agent or would it be better to just deal directly with the publisher and save the 20%? I'd appreciate your advice.

Without an Agent

Dear Without an Agent:

You should not deal directly with the publisher. If you do not get an agent, you should hire a lawyer familiar with book contracts to review and to negotiate the boilerplate contract for you.

But an agent may be even better than a lawyer, since, if the agent likes the book enough, he or she may offer it to other publishers to see whether it is possible to get a better offer than the one you already have... and, if not, the agent may still be able to persuade the first publisher to raise its offer.

The problem with getting an agent after you already have an offer, is that it can be difficult to tell whether the agent really likes your work, or whether he or she simply wants the easy commission on a book that has, in effect, already been sold.

It may be worthwhile to ask the agent whether he or she likes the book enough to offer it to other publishers (although, if it has already been submitted to and rejected by several mainstream publishers, the agent will probably pass), or whether he or she will also be willing to represent your next book (here again, it would not be unreasonable of the agent to say, "let's wait and see whether I like that book as much as like this one"). The goal is not to get a binding commitment from the agent, but rather to see whether the agent shows some enthusiasm for your writing.

An agent who believes in you is the very best thing that can happen to a writer, and, if the offer you already have will help you find such an agent, that is a very good thing.

On the other hand, an agent who simply sees you as a quick and easy payday, a literary "one-night stand", is a waste of your time and money. In that case, you're probably better off with an attorney.

Best,
Bob Stein

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February 2008 – ASK THE LAWYER

Saw your column in the latest issue of The Noose and thought I'd ask you a question regarding copyright on short stories.

I have had short stories published with and without contracts. Some were for royalties, some were one-time stipends.

My question is: can I resell a published story? Is there a time frame after which it becomes permissible to do so? And am I allowed to compile and sell my own anthology of stories I've sold throughout the years? In that regard, I assume I would list the publications and when the stories appeared.

Thanks for your advice,
Curious in N.J.

Dear Curious in N.J.:

Where you had contracts for publication of your stories, the answers to your questions lie in the contracts. I have no access to the contracts, so I cannot even guess at the answers. You need to review your contracts and see what rights you granted to the publisher(s).

With respect to stories written after December 31, 1977, where such stories were published without contracts, the publisher cannot prove that it received grants of exclusive rights, and so has no right to prevent you from either reselling non-exclusive rights in the story, or from publishing it yourself, in an anthology or otherwise.

This is because the US Copyright Act of 1976, which took effect on January 1, 1978, required that any grant of exclusive rights be in writing and signed by the grantor in order to be effective. Otherwise, the grant is necessarily non-exclusive.

The same legislation also changed the rules for works-for-hire, requiring that the creator of the copyrighted work either be an actual employee of the party claiming work-for-hire copyright ownership, or else that the creator sign a written document explicitly agreeing to work-for-hire copyright status, in which the “employer,” rather than the actual creator, commissions the work and owns the copyright therein. Even with such a written document, only certain kinds of copyrighted works qualify for commissioned work-for-hire status, and stories and novels generally do not qualify.

If the stories were written without contracts prior to 1978, then it’s your word against the publisher’s, as to who owned what rights for what period of time. Unfortunately, the publisher has more money to spend on lawsuits than do most writers.

Another factor to consider is whose name appeared in the copyright notice when the story was published. If the publisher copyrighted the story in its own name, and if you let that stand without contesting it in court or in the Copyright Office, then the publisher has extra ammunition to claim perpetual ownership of the story. If the only copyright notice appeared at the front of the magazine or anthology, and applied to the collection as a whole, then one would have to check the on-line records of the Copyright Office (www.copyright.gov) to see whether the publisher claimed ownership of all contents of the magazine or collection (even then an argument can be made that the publisher held the copyright "in trust" for you), the actual copyright owner, or just of the selection and organization of those contents.

I wish it were simpler than that, but the Copyright Act is actually quite complex, and, besides, how else is a lawyer to make a living?

Best,
Bob Stein

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January 2008 – ASK THE LAWYER

Dear Mr. Stein,

I write different types of novels. One is a cozy, one is a historical and I've also written a literary novel. I want to sell all three and wondered if it's ethical or practical to send each novel to a different agent or publisher independently and simultaneously. In other words, is it OK to send my work to different places at the same time? I also wondered if I would need to use a different author's name for each book.

Or, should I just find one agent and get him/her to sell everything for me?

Yours in doubt,
M

Dear M,

You should use only one agent to sell all of your novels (unless the agent specifically agrees that he or she doesn't handle a particular genre or subgenre and that you should use another agent for that genre, and further agrees to communicate with the other agent so that each has the full picture of what you're up to).

Any agent is likely to be greatly offended if you do not disclose your intention to use other agents for other genres, since otherwise the efforts of each agent to sell your books could mutually interfere. In addition, no agent can give you effective career guidance if that agent is only aware of a limited aspect of your career.

Some agents ask their writers to sign agreements specifically stating that the agent will be the writer's sole and exclusive agent during the term of the agency agreement; I believe that most or all agents assume that will be the case, whether or not the agency agreement so states.

In addition, most publishers' contracts have provisions which require that the book covered by their contract will be the next book you write, contract for, or allow to be published, under your own or any other name. For example, Bantam Dell's contract states, "18. Next Publication of Author's Work. The Work will be the Author's next published work (whether under the Author's own name or under a pseudonym or in collaboration with anyone else) and the Author will not, prior to delivery of the complete manuscript of the Work, write or contract with any other publisher to write any other work for publication in book form without the written permission of Bantam Dell."

Among the reasons why publishers often insist on such provisions are concerns that no book you are working on for other publishers:

- (i) should interfere with your ability to deliver their book by the contractually required date.
- (ii) should bomb, and so harm your reputation before their book is published, thus damaging their sales.

- (iii) should satisfy readers' cravings for your writing, so that the readers will be less likely to purchase another book published soon thereafter.

While (ii) and (iii) could be avoided by the use of different pseudonyms for each publisher, (i) would remain a concern to your publisher notwithstanding use of different pseudonyms.

As for not telling each publisher about the existence of multiple pseudonyms, that would be both unethical and a breach of the provision set forth above, which would permit the publisher to cancel publication of your book and to sue you for the return of its advance and for reimbursement of any other sums it had expended towards publication of your book.

Good luck,
Bob Stein

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DECEMBER 2007 – ASK THE LAWYER

Dear Bob,

I see novel writing contests on the web where the writer is supposed submit part or all of a novel and then the membership of the site read and choose who will go on to the final round. At that point, famous writers judge the work. The prize is publication.

I have two questions to ask about this process:

Is it safe to put my work on an open website like that? The rules say that the novel belongs to the site until it loses. Can't someone just take my work and use it for themselves?

How can I tell if a competition is legitimate?

Sincerely,
Confused but hopeful

Dear Confused:

I'm a bit confused myself: you say that "The rules say that the novel belongs to the site until it loses" ... who do the rules say owns the novel if it wins? Do the contest promoters own the copyright of the winning novel? That would be dreadful! Or does the website owner merely have the contractual right (and obligation, I hope) to publish that novel, and the author retains the copyright? I'd have no problem at all with that. What if the contest is postponed or cancelled? Is ownership of your novel (which has not yet lost the contest) then in perpetual limbo?

Unless you transfer ownership by contracting it away (as per the contest rules you mentioned), your work is protected by copyright from the moment your pencil, typewriter or laser printer records your words on paper. All you need to be able to do is prove they're really your words and that you wrote them before the infringer did (such as by mailing a copy to yourself or a trusted friend and never opening the postmarked package until it is used as evidence in the trial).

Registering the copyright (which involves downloading and filling out a two-page form from www.copyright.gov and mailing it to the Copyright Office in Washington, together with a check for \$45 and a copy of the manuscript), entitles you (1) to sue the infringer and (2) to recover statutory damages (which is much, much easier than proving actual damages) and to recover your attorney's fees if your suit is successful.

There is no sure way to tell whether a contest is legitimate. Full disclosure: I was outside counsel to the short-lived Sobol Literary Award contest last year. We had arranged for Simon and Schuster to publish the top three novels, and to pay very substantial advances to the winning authors. The contest was also going to pay huge prizes (up to \$100,000) to the top prize winners, over and above the S & S advances. The rules of the contest had been drafted with fairness very much in mind and were posted on the website for everyone to see. Some big-name publishing people had signed on to be contest judges for the final round. Nevertheless, distrustful bloggers who disliked the fact that there was a fee (\$75, I think) to enter the contest (which fee would have paid the early-round readers to read numerous entries) destroyed the contest by claiming it was an obvious fraud... when it in fact was not. The result was that too few submissions were received to satisfy Simon & Schuster's requirements, and the contest had to be cancelled.

So, I would first study the rules of any contest, and see whether the contest required a greater transfer of rights and/or copyright than the typical publishing contract... and whether the contest entrants or winners would have to option or give up any rights in their subsequent novels. If so, I would run away very quickly.

I would also look at the people sponsoring and recommending the contest... do they have a solid reputation in the publishing industry? Or any reputation at all?

Does the contest require you to pay to have your novel published? Or for anything else? Is the contest really a "vanity" vehicle?

How will the winning novels be published? Will they be published by a specified date? Will they be published only in e-book form or in print-on-demand editions? Or will there be bookstore distribution? While there is nothing wrong with e-books or POD publishing, they will not build your reputation as an author in the mainstream publishing world.

Those are some of the factors I would consider in trying to determine the legitimacy of a contest.

Good luck,
Bob Stein

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Please send your legal questions for Bob tomhannanmande@yahoo.com

Fall 2007 – ASK THE LAWYER

Dear Bob,

I have just received a letter from an agent who is interested in representing my first book, a masterpiece called, *Only With My Socks On*, but he wants me to sign a one year contract, renewable and the contract says that he has a right to represent all the fiction I write. Should I sign?

Sincerely,
Perplexed

Dear Perplexed:

You might consider asking him or her to limit the contract to book length fiction. Agents cannot make enough money from the sale of a story to justify much effort, and there is no reason why they should take 15% if you, rather than the agent, sell the story. Similarly, for non-fiction, I would also exclude textbooks, since most agents do not handle them well, or at all in many cases.

While I prefer an agency contract to specify the book or books covered by the contract, I see no real problem with a contract which covers all novels you write and sell during the term of the contract, so long as you have the absolute right to terminate the contract with

respect to any books which have not been sold by the end of the year (or the end of the renewal year, as the case may be).

Beware of references to option books or to books which are sold after the termination of the agency agreement, having been offered or negotiated during the term of the agency agreement. Option books should not be commissionable, and post termination sales should only be commissionable if sold within 0-4 or -6 months after termination, on terms substantially similar to those negotiated by the agent during the term.

Advice given in this column is general, and is not based upon a thorough review of facts and considerations in any given instance. You should consult an attorney in depth if you need legal advice.

Best,
Bob Stein

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