E-BOOK 307

LEGAL BRIEF

FOR

FREELANCE WRITERS

COPYRIGHT, CONTRACTS,
LIBEL AND PRIVACY INVASION

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USING THE INTERNET TO EMPOWER WRITERS

TABLE OF CONTENTS

Introduction

When I first attended a Rodale Press workshop on legal issues for editors, I was stunned by how much I didn't know, and by the fact that there weren't more editors and writers serving time in our nation's fine penitentiaries. Then I realized that if, as a freelancer, I hadn't known this stuff, then gosh, maybe the freelancers wanting to write for me didn't know it either. And if they made a mistake that caused trouble, I was responsible.

The blade of distrust stabs quick and red.

The bedrock of a freelancer's relationship with an editor is trust. Anything that softens that trust is bad. Anything that builds trust, like, say, your expert knowledge of copyright permission codes, will make an editor smile—with confidence in you.

Top 10 Questions About Copyright Permissions

Want a good reason to be well versed in copyright permission codes? As a freelancer, it's your job to get permissions. And the editor's rear end if you don't. Editors do not like getting calls from lawyers. Makes their stomach drop and skin prickle. Lawyers never call with good news. Only when there's trouble, the kind that gets you noticed by people with "Senior Vice President" and other such scary titles after their name. If you, the freelancer, are the cause of that trouble, you will be made to pay, one way or another. So, do not let an editor hear you ask any of the following questions:

1. "Does giving full credit in the text substitute for permission?"

Not at all: The law says that copyright infringement is the "unauthorized use." To be authorized, you must have permission before using it, not thanks afterwards.

2. "I plan to write an adaptation of a copyrighted work, do I need permission?"

Definitely: Adding a layer of copyrighted material (yours) to an original work does not negate that original work's copyright protection. This is especially important for screenwriters. An option on a previously published book or life story is essential before adapting it for the screen; otherwise, you could waste a lot of time. Agents and producers usually will not consider or commission a screen adaptation without a signed option agreement.

3. Do works in the public domain require permission?

Sometimes: A work may still have legal protection once its copyright expires. The character of Sherlock Holmes is trademarked; ideas may be protected under contract law; information may constitute a trade secret; and human beings have the right to control how their likeness and name are used. Make sure the public domain work is not protected in any of those ways.

4. Should I wait to get permission until after the manuscript is done and I'm sure that the work is being used?

Definitely not: A copyright owner is never obligated to give you permission, or may charge whatever he or she wishes. Your work could become hostage to copyright permission. You could miss a deadline. You could get chewed.

5. Do I need permission even if my work is for nonprofit, educational purposes?

Yes: In deciding copyright infringement, courts focus on what harm has been done to the value of the copyrighted work, not your motives. Harm can be done by a not-for-profit publication as well as a for-profit one. Unless you are certain that your use falls under the "fair use" provision of copyright law, you should acquire permission. Be conservative: it's better to know than not know that an author disapproves of your use.

6. Do I need to get permission since the work I'm using is now out of print?

Yes. Out-of-print does not mean out-of-copyright. Out-of-print could be a temporary condition.

7. Since I'm using only a small portion, am I covered under the "fair use" provision?

Not necessarily: The courts have no mathematical formula for determining what is and isn't fair use. However, the courts have ruled, "you cannot escape liability by showing how much of [the] work you did not take." The prevailing issue is harm caused by your use, not the amount. Did your use cause commercial harm to the copyright holder? That's the bottom line.

8. The work I'm using is a U.S. government publication. Do I still need to get permission?

No. U.S. government publications are not copyrightable. However, you must provide a full and accurate citation using your publication's preferred style guide.

9. If the work doesn't contain a copyright notice, do I still need permission to use material from it?

More than likely: For works created after 1978, statutory copyright automatically exists when the author first expresses his creation in "tangible form." Before 1978, works published without a copyright notice did indeed risk losing their protection. But not today.

10. Do anonymous works posted on the Internet require permission for use?

Not likely but make sure: Copyright law specifically protects anonymous and pseudonymous works, but posting anonymously in hopes that others will share it is common on the Internet.

In sum: The need for copyright permission can be summarized thusly—When in doubt, don't do without.

What Every Freelancer Should Know About Fair Use

Will you get in trouble for using someone else's work in your own? Depends upon your ability to apply the four-point "fair use test." In a nutshell: Fair use is an exception to the exclusive protection of copyright under American law. The fair use provision permits certain uses of copyrighted material without your having to obtain permission from the author or owner, if your use meets certain criteria. Before we review those criteria—the infamous four-point fair use test—here is the actual statute from the Copyright Law of the United States of America, Chapter 1, section 107. As a freelancer, you should keep a copy of it handy:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
—Contained in Title 17 of the United States Code.
Text revised to July 2001

The four numbered points are the infamous "fair use test"—infamous because its ambiguity allows very different conclusions about the same use.

Working with the Fair Use Test
Each of the test's four factors has its own ambiguities. Convincing yourself that you pass the four factors does not insure that others, especially those whose work you may be using, will feel the same. However, the test is comprehensive and is generally a good indication of what you can and cannot do when it comes to using copyrighted works. Courts must consider all four criteria together to determine which way the scales of justice tip. No one factor by itself can condemn you—or save you.

Factor 1: Purpose and Character of Use
The courts consider three elements when weighing purpose and character of use:

1. if your use was of a commercial or a nonprofit nature
2. if your use involved any of the purposes stated in the statute's preamble: criticism, comment, news reporting, teaching, scholarship or research
3. the degree to which you transformed the original work in your use of it.

Predictably, preference in judgments has been given to nonprofit uses, but a commercial use does not automatically make you guilty, especially if your use involved one or more of the preamble's stated purposes: criticism, comment, news reporting, teaching, scholarship or research. Courts have been clear about protecting your ability to use parts of a copyrighted work to carry out the preamble's functions. The third element, transformation, looks at whether your new work supplants the original (not a particularly fair use) or whether it adds something new: a further purpose, new expression, new meaning or new message that contributes to public discourse. If it does, that tips the scale in your favor.

Factor 2: Nature of the Copyrighted Work
This factor considers a work's worthiness to be protected under the copyright law. Courts look at the original work in question and try to determine where that work falls along the continuum of worthiness.

This factor acknowledges the reality that some works are simply more deserving of copyright protection than others. Court opinion over the years has established a "least deserving" end of the continuum comprised mostly of published works based on facts (the longer they've been published, the better). On the "very deserving" end of the continuum are unpublished works of the imagination that receive the most protection.

Factor 3: Relative Amount

This third factor looks at the amount and substantiality of the portion of the work you used. Some commentators have tried to say that using less than 3 percent is okay, but 30 percent or more and you're in trouble. The fact is, amount usually isn't the core issue.

The critical determination is the value of the materials you used, especially in comparison to your reason for using them. Courts recognize that using a whole work may be fair use in some circumstances (a teacher who copies an entire article for students), whereas using a tiny fraction of a work in a commercial publication may not qualify as fair if you can't justify its use as criticism, comment, review, teaching or research.

So, judgments aren't based merely on "small amount" and "more than a small amount," as some analysts have said. Quality and importance of the copied material must be considered. Some justices have looked to see that "no more was taken than was necessary" to achieve the purpose for which the materials were used.

Factor 4: Effect Upon Potential Market

The last factor considers the extent of harm caused by your use to the market or potential market for the original work. This factor takes into account harm to the original, as well as harm to potential derivative works.

This is the most important factor when determining fair use. If you injure the market for the copyrighted work, the entire scale tilts towards unfair use. The most egregious examples occur if you rob sales from the original, or if you are trying to avoid paying for permission to use the work in an established permissions market. On the other hand, tipping the scale in your favor are such factors as the original being out of print, or the copyright owner being unidentifiable.

The Beauty of Ambiguity

The fair use statute's ambiguity is both a curse and a blessing. As one U.S. Supreme Court Justice put it:

"The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

—Justice Sandra Day O'Connor
(Feist Publications, Inc. vs. Rural Telephone Service Co., 499 US 340, 349(1991))

The genius of United States copyright law is that it balances the interests of copyright owners with society's need for the free exchange of ideas. Central to this exchange is the concept and practice of fair use. Use it well.

Contracts & Copyrights—Yours

It's more important than ever these days for freelancers to become their own experts in understanding and negotiating the copyright portions of contracts, especially e-rights. Here's why.

First, you got your electronic revolution: Since the explosion of the world wide web in 1995, the periodical publishing industry has been engaged in a massive land-grab of electronic rights as they try to launch new e-ventures and drive them to profitability. Unfortunately, many of those publishers want freelancers to bear a substantial portion of the financial risk of these new ventures by demanding a writer's e-rights for free along with print rights. Others have simply stolen e-rights.

In comparison, imagine musicians getting paid only when someone buys their CD, not when the same songs are played on the radio. Or, as another writer put it, imagine building an apartment complex and charging renters only one month's rent for the rest of their life.

Next is the repurposing of content: Today's publishers have found a profitable model for taking previously published content and creating new products to sell, thereby cranking up profit margins on things like special issues, anthologies, foreign editions, CD-ROMs, fax-on-demand, not to mention electronic databases.

And then there's consolidation: Periodical publishing, whether newspapers or magazines, is being done by fewer and fewer, larger and larger corporations. They've got legal muscle and publishing contracts longer than the article attached, with the standard impenetrable legalese to match.

The result: Blithely selling all rights today will make you a publisher's sweetheart and a mortgage company's nightmare. Time to get back to basics: If profits are being made from a work that you created and own, why shouldn't you be getting some? Rhetorical question, of course, but it's amazing how many freelancers don't ask it. Wish I had a nickel for every time I sent a freelancer the boilerplate contract given to me by the corporate legal eagles and got it back signed with a flourish and no changes, giving the company ownership of the writer's work in "all media whether now known or hereafter imagined or created."

Yes, editors and publishers will try to take as much as you give them, just like used car salesmen. So, you'd better know how to read a contract, identify what's valuable, and negotiate to the limit of your self-interest, not the publisher's.

Never Work Without a Contract

Speaking of basics: There are few absolute statements that don't leak worse than a Congressional Sub-Committee, but this one comes close—**never work without a contract**.

Having a contract in place is standard business practice, even among friends. Don't learn the hard way that contracts are like medical insurance: they're there just in case. No one plans on getting cancer. No freelancer expects to get into a dispute. But when it comes to money, disputes are, sooner or later, inevitable.

Thus a contract's first benefit: protection for you in the case of a dispute. A contract gives you a way to resolve that dispute without mediators, lawyers and judges.

Contracts also help you avoid the honest misunderstandings that are the basis of most disputes, whether it was a deadline date or the amount of an expense check. Because contracts spell out expectations on a number of issues, they force you and others to focus attention on all aspects of your business relationship.

Finally, a contract allows the stipulation of "material terms" (those related to subject matter, payments, quality of work and duration of the contract.) Indefiniteness or absence of these material terms could be used to show that a valid contract never existed.

Top 5 Myths About Contracts

Ever heard any of these before?

• Myth #1*: A valid contract must be written*
Some types of contracts must be in writing: The Copyright Act requires all transfers of copyright ownership to be in writing. But as a freelancer writing for periodicals, you aren't transferring ownership; you are licensing your rights. As a result, your publishing contract can be oral, written or electronic, formal or informal. It's certainly best that a contract be detailed and written, but don't believe a publisher's claim that a prior verbal agreement isn't valid because no written document exists.

• Myth #2: *If a publisher sends me a check and I cash it, I have agreed to the publisher's terms.*
Not true. Payment does not constitute a contract. A contract must be agreed upon by both parties in order to be valid.

• Myth #3: *An altered but signed contract is valid.*
Not unless the change is initialed. For any stipulation in a contract to be valid, both parties must agree to it. By crossing it out, you have indicated it is unacceptable to you, but the change must be initialed and agreed to by the publisher or publisher's representative in order to be valid. And vice versa.

• Myth #4: *When I sign a contract, the publisher is buying my work.*
Unless it is a work-for-hire contract, as an independent contractor (freelancer) you own what you write. You do not sell your work; you sell the right to make copies of it: "copyrights." Indeed, a legal term for a publishing contract is an "Assignment of Rights" contract. Only work-for-hire employees sell their copyright.

• Myth #5*: Freelancers who try to negotiate contracts are freelancers soon to be unemployed*
Just the opposite: Continually giving away rights to your work without adequate payment is a much surer way to rejoin the ranks of corporate drones.

What Should a Contract Contain?

As a general rule, more rather than less. To be specific:

1. Names and addresses. Official contact info so nobody can claim that they didn't get something because you didn't send it to the right place. And vice versa.
2. Dates. For which the contract is effective; necessary for the contract to be legally valid and enforceable.
3. Your status. It should be clear that you are a freelancer or independent contractor, not a work-for-hire employee, if that is not the case.
4. Title of the work. Can be a working title.
5. Due date(s). Can include a schedule of deadlines.
6. Grant of right clause. Rights being purchased and the media to which they apply.
7. Compensation. Get what you want now or forever hold your peace.
8. Payment terms. When your compensation is due—standard is "net 30 days" (full payment within one month). This section can also include a schedule to allow for an advance, etc.
9. Late payment penalties. Standard business practice. Also consider giving a reward for early payment: If the agreed-on fee is $1,000, lower it by 2 percent to $980 if paid in 15 days. You can make up the $20 by paying your own bills on time.
10. Writer's obligations, liabilities and warrants. Publishing companies have a right to protect themselves, just as you do, from the unscrupulous. These clauses normally deal with the quality of your work and its legality, especially plagiarism.
11. Termination conditions. Stipulation of payment of kill fees or cancellation fees if the contract is terminated before completion.
12. Expense reimbursement. Expenses should be payable within 15 days of submitting your expense invoice and receipts.
13. Byline or tagline. How you wish your name to read as well as any associated credit line, e.g., "Head Writer" instead of "Writer."
14. Contributor copies. Should be provided to you free.

Getting Them Rights, Getting Them Good

The heart of this financial exchange called a contract is item #6 above: the "grant of right" clause that describes what rights you are licensing (not the same as giving) to the publisher and for how long you are licensing them.

The first thing to tell yourself is that, as copyright owner, you have a bundle of rights that you may assign in any manner you choose. Before beginning

negotiations, it's helpful to make a priority list of rights from that bundle that you "must keep," "would like to keep," and "don't expect to keep." The "must keep" list usually consists of dramatic, broadcast and merchandising rights. "Don't expect to keep" usually includes second serial rights and book club rights. The rest is probably negotiable to some extent.

The second thing to tell yourself is that, as a freelancer, you go into a contract negotiation owning all the rights and the licensing of them. You are in control. You have something that somebody else wants. You have some leverage. The law of supply and demand is at work. You are the supplier. Here's what you have to sell:

• All rights

This license leaves you with very few: no reprint or anthology rights, no digital or other media rights. In fact, unless your contract states that rights revert to you at some point, an all-rights contract can mean that you may not use your work again for a long time. All-rights contracts are common for many smaller departments and fillers, where your chances of reselling are slim anyhow. Beginning freelancers are often forced to accept all-rights contracts in order to nail those crucial first bylines. Later in your career, especially with longer pieces, there is usually little reason for a freelancer to give up all rights to his or her creations. Nonetheless, ask if a phrase can be put into the contract reverting the rights to you after a period of time.

E-rights

The electronic rights to your work (its digital form that can be published via the Internet on web pages, in email newsletters, CD-ROMs, e-databases and so forth) are now fully protected thanks to several court cases. The courts, including the U.S. Supreme Court, have made it clear that an author's e-rights are distinct from any other copyrights and not automatically granted to a publication unless an author expressly licenses those rights. That said, e-rights are currently being sold for very little, usually 5 percent to 25 percent of the amount paid for first publication rights. At many publications, licensing of e-rights is expected without further compensation.

• First North American serial rights

This is the most common copyright licensed to periodicals. Remind yourself, when reviewing a contract, that FNSR does not include anthology rights, reprint rights, e-rights, subsidiary rights or foreign rights. FNSR means only:

- "First"—you are warranting that the publication you are selling to is the first to publish it and the work has never appeared in any other copyrighted publication.
- "North American"—the agreement includes publications in Canada, the U.S. and Mexico, but not elsewhere.

- "Serial"—publications that appear periodically, as opposed to books.
- "Rights"—the permission to publish your work.

One-time rights
Also known as "simultaneous rights," this clause gives the publisher the nonexclusive right to use your work one time, but you don't guarantee the same work won't appear in other publications. One-time rights are appropriate when selling the same work to noncompeting.

● ***Reprint rights***
Also called "second serial rights." Reprint rights give the publisher the right to print something that has already appeared in another publication. Reprint rights are by definition nonexclusive.

● ***Subsidiary rights ("sub rights")***
Subsidiary rights are those that may be used secondary to print publication: electronic rights, performance rights, audio book rights, book club rights, foreign and translation rights, movie and television rights, anthology rights, merchandizing rights, etc. The licensing or sale of sub rights is usually to a third party and proceeds of the sale go to the publisher and author. If the publisher wants some or all of your sub rights, it is important that you ascertain if the publisher has the means to exploit them. Otherwise, those rights will be tied up unnecessarily and unprofitably.

What Is Libel? How Do I Avoid Trouble?

Good questions. Who's got some answers?

Because nonfiction often deals with real people, the freelance writer needs to understand the restrictions placed by law upon the use of names of people in published texts, in print and on the Internet. How far can you go legally? Can you change the names and be safe? Public figures seem to be fair game, but what about government agencies and their employees?

Such questions touch upon one of the most complex issues that a journalist must face today. It's also an area where you can't afford to make mistakes. For example, it's true that public figures are treated differently, so are public officials. But the differences between the two can be fine.

Luckily there's a good guidebook for us: the "Briefing on Media Law" portion of The Associated Press Stylebook. And if you want to know what it says, you've got to go to the library or pay for it. You can order it online at the AP's web site. Accept no substitutes.

Here is a brief guide to libel and slander as I've come to understand them through cases I've been involved with as an editor (none of which we ever lost):

Libel, Slander and Defamation

Libel can be personal libel or trade libel, which is also known as "product disparagement." Product disparagement can include a product, service or entire company.

Libelous statements, whether against persons or products, are published statements that are false and damaging. Slander is the same as libel in most states, but in spoken rather than written form.

The terms "libel" and "slander" are often subsumed under the broader term "defamation." It is a tort (a wrongful act) to harm another's reputation by defaming them.

How do you know if you might defame someone or something in what you are about to publish? There are three tests which the defamatory statement must meet in order for a plaintiff to prevail in a suit against you and your publisher:

1. **Untrue.** In order to be defamatory, the statement must be untrue. If the statement is true or substantially true, then it is not defamatory, and the case is over.
2. **Damaging.** In order for the plaintiff to prevail, the statement must have caused real and substantial harm to the person or business. The plaintiff must present evidence of the substantial harm done.
3. **Knowingly false**. The plaintiff must also show that the defendant knew the statement was untrue, but published or broadcast the statement despite that knowledge.

From this brief explanation, you can deduce that the best way to avoid a libel charge, or to defeat it, is to: (1) Write only that which is true and can be shown to be true through your meticulous research and note taking. (2) Keep all research for a period of years, depending on the statute of limitations that applies where you are. In sum, you can say or publish just about whatever you wish in our open society--so long as it is true.

Public Official vs. Public Figure

The same liberal rule applies to both categories: To prevail in a libel case against you, in addition to showing that your statement is untrue and caused significant harm, a public official or a public figure must also prove "malice"-

-that you acted in reckless disregard to the facts known to you and with intent to harm.

Obviously, because of this stipulation, you enjoy considerable protection when it comes to public personages, since proving malice (intent to harm) places a heavy burden on the prosecution.

Who are these public people? The status of "public official" is relatively easy to determine from public records. The trick comes in determining who falls into the category of "public figure."

The courts have determined that there are two types of public figures:

* A "general purpose public figure" is someone who enjoys social prominence. Entertainers are in this category.
* A "limited purpose public figure"--someone who has intentionally placed themselves into prominence, such as a vocal activist on a given issue.

The reasoning is that the press has a First Amendment duty to report on such newsworthy people, and therefore published statements warrant such protection.

Who is a private person? None of the above. Now you see why lawyers get the big bucks.

Writer's Resources
Online Libel Bibliography. The Freedom Forum
The Practical Guide to Libel Law. (print book) Neil J. Rosini
The Copyright Permission and Libel Handbook. (print book) Lloyd J. Jassin, Steve C. Schecter.

Big 3 FAQs

1. Do You Need Permission to Use Screen Shots from the Web?

Based upon my discussions about this with lawyers, it is my layman's opinion that, yes, you do need permission to use screen shots even if your usage is for criticism, comment, news reporting, teaching, scholarship or research (the allowed uses according to American copyright law's "fair use" doctrine).

Screen shots, which contain the text and graphical elements of a web page, may include copyrighted work of a number of contributors, and therefore screen shots shouldn't be compared to printed texts.

Remember that "fair use" is a defense in the event you are sued for copyright violation. Believe me, your goal as a writer should always be to avoid that situation by attaining permissions before publication, not legal exoneration afterward.

2. Can I Quote from Another Author's Magazine Article in Mine?

There are two possible answers to your question, only the second one is acceptable to the professional writer:

1. If you're writing for college, the answer is probably yes. This is the sort of thing that often passes for "research" in college writing courses, although some professors do not allow consumer magazines to be used as sources.

2. If you're writing professionally for publication, the answer is no. You should get your own quotes. Quotes from secondary sources are not good journalism, except in a few special instances.

3. Whenever you use a quotation, it should always be sourced not only to the speaker, but also to the speaker's identity and qualifications to speak on the subject.

Example: "According to John C. Fine, author of The Hunger Road and a former U.S. State Department official, 'Over 1 million children starve to death each year, and 6 million live in what the UN describes as absolute poverty.'"

3. Who Acquires Permissions: The Author or Publisher?

Acquiring them is your job, as is paying any fees required by the copyright owner. Usually the publisher supplies the author with guidelines for obtaining permission and blank permission request forms to do so. Furthermore, the freelancer should begin getting the permissions before the manuscript is finished.

When permission is necessary, you should contact the copyright owner or the owner's authorized agent. The copyright owner is named in the formal copyright notice that accompanies the original work. Because official notice is no longer required to obtain copyright protection, sometimes non-book

publications lack the notice or include the name of someone who is not the actual or current copyright owner. Reference librarians can be helpful for finding actual names and addresses of copyright holders.

The Copyright Clearance Center (www.copyright.com) can also simplify the process by acting as an agent on behalf of thousands of publishers and authors to grant permission, but there is usually a cost. Remember that copyright owners have wide discretion when responding to your request for permission. Your request may be granted or denied. If granted, it may be contingent on paying a fee. The fee may be modest or exorbitant. Copyright owners also have no obligation to respond at all. For nonprofit educational and research uses, you will usually find copyright owners to be cooperative. But there are no guarantees.

Before sending the permissions request form, a simple phone call can be helpful to establish exactly who should receive the form. If permission is granted to you verbally over the phone, the permission is valid. But in everyone's best interest, obtain the duly signed permission form for your files.

David Taylor is a former executive editor at Rodale Press, where he worked on a number of magazines, including *Men's Health, Prevention* and *Scuba Diving*. His newest work, **The Freelance Success Book: Insider Secrets for Selling Every Word You Write,** takes readers behind closed doors and into the offices of editors and publishers as he reveals the insider knowledge and techniques for freelance success. The book provides a very different view of magazine publishing—warts, greed and all.

The Freelance Success Book is available at www.freelancesuccessbook.com and online bookstores. Or visit David's web site: www.peakwriting.com.