

WRITING IS A BUSINESS

For some writers, practicing their craft is a joy. For some, it is a burden. In either case, writing is also a business—and you, the professional writer, are a sole proprietor. Like any entrepreneur, you need to minimize your financial and legal risks, protect your assets, and make the most of your investments of time and effort. This book is intended to help you make your business a success.

The literary marketplace has fundamentally changed in the decade since the last edition of this book was published, and as of this writing, it is in a state of upheaval. Few of the changes have been advantageous to writers. The traditional print publishers and bricks-and-mortar book retailers that have survived the changes so far are scrambling to adapt their business models to the new economic reality, which is that readers expect instant, inexpensive access to literature. Instead of content being king, it is content aggregators—Amazon, Google, Apple, Facebook, the *Huffington Post*, and their ilk—that reign in today's information industry. Publishers and retailers are cutting costs by squeezing their suppliers, and that means writers. They are more reluctant than ever to take risks on new writers or to try to develop a fledgling or midlist writer's career. They are neither able nor willing to invest in marketing most of the books they publish or sell. With the exception of the handful of blockbuster writers who perennially have

at least one title on the bestseller lists, even prolific published authors often have to keep their day jobs because advances have shrunk dramatically. Freelance assignments have dried up and print media companies cannot offer the same fees that they used to pay.

On the other hand, the advent of digital delivery systems offers writers new ways to reach a paying audience. Thousands of writers now deal directly with online retailers to sell their work as an ebook, print-on-demand edition, “quick read” or “short,” effectively cutting out the middleman, i.e., traditional publishers.¹ Many others are in effect self-publishing by setting up their own blogs and some are even earning a bit of income through advertising. Of course, without a publisher, a self-published writer has to provide her own editing, marketing, and promotion.

Whether you publish through a traditional publisher, directly through an ebook or print-on-demand provider, or in another medium, it is important to learn how to protect your legal and financial interests and to license your intellectual property. There are many reasons why you should do this. To take a common example, when a commercial publisher finally offers its standard contract to a writer who has been looking long and hard for a deal, she will undoubtedly be tempted to sign it right away, no questions asked. Doing so would be a big mistake, one that could haunt her for a good part of her career. Publishers’ so-called boilerplate contracts are typically biased in nearly every way in favor of the publisher and against the writer—but they are also negotiable. Within reason, publishers are willing to accommodate many requests to change their terms. Before you sign any contract offered to you, you owe it to yourself and to your work to understand what it means so that you can negotiate what is important to you. If you do not, there is a good chance you will come to regret it.

Operating on a “handshake basis” presents legal pitfalls as well. Copyright law, which is explained in the next several chapters, creates default terms for transactions between parties who do not enter into a contract. If two people work together intending to create one work, for example, the copyright law gives them both equal and independent ownership and control of the work. If a writer contributes to a periodical based on a verbal assignment, the publisher is presumed to have certain limited

¹ Amazon’s spokespeople have taken to calling traditional publishers “legacy publishers.” It is not a compliment. See chapter 14.

rights to reuse the contribution. If a publisher heavily edits your work, you could be sued as legally responsible if the revisions contain a defamatory statement. But all of these results can be changed by agreement. The first aim of this book is to give you the knowledge to understand your publishing deals and make them work for you. A second goal is to help you avoid defamation, copyright infringement, invasion of privacy, and tax problems.

Even if you have a literary agent, you need to be able to understand and work with the relevant laws. Without a doubt, a good agent can be a tremendous ally for a writer. Some agents are lawyers, and many others are experts at finding and negotiating the best possible deal for their clients. But any honest agent would tell you that no writer should abdicate responsibility for her assets and career interests to another person, no matter how trustworthy. A professional agent has interests beyond, even in conflict with, any one client. For the sake of their other clients, agents must preserve their relationships with publishers, sometimes to the detriment of an individual client.² You can and should discuss your licenses and contract terms with your agent, but you should not expect her to be a copyright or defamation or contract law expert. An agent markets and sells her clients' work and accounts for the payments; she is not retained to give legal advice. *You* need to be able to spot the issues so that you can seek out legal advice or take protective measures. Finally, it is a fact of life that authors and agents sometimes decide to part ways. If your agency relationship is terminated, you will have to understand your rights and obligations regarding both the agent and your publisher(s).

This book is intended to be a legal reference for anyone who writes literary works for publication in print and online: nonfiction writers, novelists, journalists, freelance contributors to newspapers and magazines, poets, children's book writers and illustrators, and textbook and academic authors. It is structured to cover the legal issues a writer faces in roughly chronological order from the time she begins creating a written work for publication: understanding and securing copyright, avoiding defamation and invasion of privacy, accessing government information, negotiating various kinds of publishing contracts (including the "deal point memos" that precede many

² Moreover, no license is required to set up shop as an agent and represent authors. Chapter 15 will explain how to find and retain an ethical and appropriate agent and detect poseurs.

negotiations), finding and retaining a literary agent, taxes, and estate planning. It will explain how to get the best possible deal for the various ways a work of literature can be exploited using new technologies, including those as yet unknown. Even if you are writing for purely personal and not financial reasons, or to promote yourself, or your business, or a cause, you can still use the information here to protect your work from piracy and distortion and to minimize your legal risks.

BASIC ADVICE AND INFORMATION FOR NEW WRITERS

Every professional or aspiring writer should join a writers association. Some of the most prominent organizations are described in Appendix A, but you can easily find others, including local groups or branches of national groups, by doing a little research.

Writing is an isolated endeavor. Joining a writers group offers you many benefits that offset the negative effects of working alone. By connecting with other writers, virtually and in person, you become part of a community of people who share your professional interests and from whom you can learn current relevant market information. As the chapters covering contracts illustrate, information equals power in any negotiation. Membership in at least one writers organization will improve your knowledge of the legal and business environment and thereby help you enhance your negotiating position. Even the most successful writers with powerful agents gain from being part of a writing community, and most bestselling authors belong to at least one of the associations listed in the Appendix.

There are numerous organizations for published and aspiring writers of every genre. Each offers varying benefits, such as substantive feedback on ongoing projects, practical advice about the market, writing competitions and awards, networking opportunities with agents and editors, current payment rates and industry information, legal advice and individual advocacy, lobbying for writers' interests, health and liability insurance group plans, website- and blog-building software, self-promotion advice, and discounts to services. In general, membership dues are small and can usually be deducted on tax returns as a business expense against your writing income.

RESOURCES WORTH YOUR INVESTMENT

In order to sell your work at the best price, you need to know what the market is buying and how much it is paying. Because aspiring writers are themselves a market, there are many resources available that promise to help you find an agent and a publisher, promote yourself, and understand the publishing industry. When considering various services, keep in mind that there is *absolutely no need* to spend a lot of money on any service or product that makes these promises. The best ones are not expensive, and many great resources are free. A few of the best and most cost effective are listed here, but this list is not at all comprehensive. You can find many more on the web.

PUBLISHERS LUNCH/PUBLISHERS MARKETPLACE

Publishers Lunch (www.publisherslunch.com) is a daily and weekly email newsletter and a database of reported deals written and compiled by Michael Cader, a former publisher and bookseller, on the *Publishers Marketplace* platform. If you want to be part of the publishing business, then you should join the more than 40,000 editors, agents, booksellers, and writers who subscribe. Each free “Daily Lunch” email gathers key stories from the web and from print media, and also has original reporting, all for the professional trade book community. The “Deluxe” version of *Lunch* at *Publishers Marketplace* (www.publishersmarketplace.com) costs \$25 per month. For that, you receive access to resources to help you find an agent or a publisher and learn what the public, and publishers, are buying. Most literary agents and publishers subscribe, and they love to report their deals, proposals, and acquisitions, and that information is all available to other subscribers. Subscribers can search the proprietary database of members’ pages, discover who represents which particular writers, and search descriptions of thousands of reported acquisitions and licenses. No other resource provides this information in one place in an easily searchable format. As a member, you can create a webpage on the database displaying your contact information, career highlights, proposals, and a checkbox to show you are looking for an agent. At a minimum, the free daily *Publishers Lunch* is essential. While you are searching for an agent or publisher, consider the \$25 monthly fee for *Publishers Lunch Deluxe* a very worthwhile investment.

WRITER'S DIGEST

Writer's Digest magazine and its free website (www.writersdigest.com) provides much helpful information about the industry and many resources to help you improve your writing, including an annual list of the 101 best websites for writers. The annual *Writer's Digest Guide to Literary Agents* (www.guidetoliteraryagents.com) includes a blog that is an excellent source of potential agents, especially when cross-referenced against the database at *Publishers Marketplace*. *Writer's Digest* publishes an annual "Writer's Market" series, which lists book publishers, consumer and trade magazines, contests and awards, literary agents, newspapers, playwriting markets, and screenwriting markets. After registering on its website, you will receive frequent emails offering information and registration (for a fee) to webinars and courses that help improve your craft, find markets for your work, and improve self-promotion tools and skills. *Writer's Digest* also publishes several annual references focused on the novel and short story market, which include current pay rate charts. The "Deluxe Edition" of the *Writer's Market* (about \$12 more than the regular edition), provides access to the digital edition of *Writer's Yearbook* featuring the 100 Best Markets, a year-long subscription to *Writer's Digest* magazine online, and other resources.

PUBLISHERS WEEKLY ONLINE

Publishers Weekly, the weekly industry magazine, sends several free weekly emails with industry news. Its website (www.publishersweekly.com) makes a searchable database of major reported deals available to subscribers (about \$200 per year).

REFERENCE BOOKS

The Literary Marketplace ("LMP" to those in the know) lists agents that have at least three references and every publisher currently in business, along with their contact and other information. It is too expensive to consider buying, but it is available in most libraries. Jeff Herman's annually updated *Guide to Book Publishers, Editors, and Literary Agents* is subtitled "Who They Are! What They Want! How to Win Them Over!" The book offers in-depth information about what specific agents and publishers are seeking. The downside to using print resources is that, although they are updated every year, the information in them can become dated quickly.

ESSENTIAL BLOGS

The Book Deal, at www.alanrinzler.com/blog, gives an insider's perspective on how books are published and what is happening behind the scenes in the industry. The author, Alan Rinzler, was an acquiring editor and publisher for more than forty years at several major publishers. His blog describes how writers can exploit the world of digital and print publishing, how books are acquired, developed, and promoted, and how agents and publishers "really" seek the most promising new authors. Experts contribute posts explaining specific aspects of every phase of the publishing process and readers make helpful comments on the posts. The blog also links to numerous articles and posts around the web, casting a wide net to cover many aspects of the industry and the craft of writing.

Nathan Bransford's blog, blog.nathanbransford.com, has dozens of posts by an industry polymath (author, social media manager, and former literary agent) aimed at helping aspiring writers succeed. Posts offer advice on writing well, explain how to seek and query agents, and bring the realities of publishing to life.

LITERARY AGENTS' BLOGS

Nobody understands the book industry better than established literary agents. Many of them publish blogs that tout their writers and also offer practical and accurate insight into the current state of the industry. Several of them focus on advising writers how to increase their chances of getting published successfully and happily. Appendix B to this chapter contains a list of good agencies' blogs.

THE COPYRIGHT OFFICE

The moment you write an original piece of any length, it is governed by the Copyright Act, the law that affects how your work is owned and licensed. The Copyright Office, part of the Library of Congress, administers the Copyright Act by recording registrations and transfers of copyrights, taking deposit copies of registered works, making registrations and transfer records searchable through its website (www.copyright.gov), informing the public about the law, and advising Congress. The Register of Copyrights leads the Copyright Office. Its website offers a wealth of information, including the Office's regulations, registration forms (both online and paper), and numerous circulars and fact sheets that explain specific parts of

the law in user-friendly detail. These items can be downloaded individually and are also available by mail (write to the Copyright Office, Library of Congress, Washington, D.C. 20559). The website also contains frequently asked questions about copyright, the complete text of the Copyright Act, pending and new amendments, testimony of the Register, regulations, announcements, and press releases.

CITIZEN MEDIA LAW PROJECT

If you are self-publishing a nonfiction blog or other news website or are working for an online publishing venture, subscribing to the Citizen Media Law Project (www.citimedialaw.org) is a must. The CMLP is a nonprofit resource hosted by the Berkman Center for Internet & Society, a research center founded at Harvard University to promote understanding of the Internet and help pioneer its development. The CMLP helps online journalists and small publishing ventures understand the law as it relates to news reporting so as to minimize their risks of liability. It has many resources to help train and inform journalists and online publishers so they can protect themselves and their First Amendment rights. The CMLP has five core initiatives: a free, downloadable legal guide for journalism ventures; a database of “legal threats,” i.e., lawsuits, subpoenas, and cease and desist demands; a media legal network that helps match journalists and publishers to volunteer lawyers and legal clinics; a “Research and Response” initiative through which CMLP advocates and litigates on issues affecting online media; and a blog, regular email, and monthly newsletter addressing issues and legal developments important to online journalists.

DO YOU NEED A LAWYER?

This book encourages writers to think like lawyers when engaged in the business side of writing. It aims to help you negotiate better deals and protect your financial and career interests. It will *not* make you a legal expert on copyright, contracts, tax, defamation, or any of the other topics covered. It is not intended to serve as a substitute for the advice of a lawyer or other expert on specific issues, because there is no substitute for the advice of a knowledgeable expert who can carefully evaluate a unique query. Situations might arise in the course of your career that are best handled

in consultation with a lawyer, literary agent, tax or royalty accountant, or other professional.

You should consider consulting a lawyer if:

- ☞ You are negotiating or facing an issue in a contract (signed or unsigned), and you feel you cannot conduct the negotiation on your own behalf.
- ☞ You are being threatened with suit or termination of a contract or a withholding of royalties.
- ☞ You are unsure about the consequences of a document you are asked to sign or do not understand one or more of its provisions.
- ☞ Whenever a large amount of money or other valuable property is at stake in a transaction or dispute.

For questions about the meaning of a contract term, concerns about royalty statements, or problems with a publisher or agent's behavior, the first place to go is to the Authors Guild's Contract Services staff. If you are not a member of the Authors Guild (www.authorsguild.org), then join if you qualify.³ The seasoned publishing lawyers at the Authors Guild can review and evaluate an entire contract, answer your questions and offer advice on how to proceed, and send demand letters to publishers, agents, or other parties on your behalf. Most publishers and agents take a demand letter from the Authors Guild, the oldest and largest association of professional authors in the country, very seriously. If your matter requires legal representation, the Guild can refer you to a qualified lawyer.

Finding the right lawyer for your specific query is crucial. General practitioners and business lawyers do not necessarily have the expertise to deal with the issues facing writers. A good way to find a lawyer with appropriate experience is to inquire of your network of writing colleagues or writers organizations. If possible, get more than one name and interview

³ To qualify for full membership, within the previous eighteen months you must have published at least one book or three freelance articles with established, paying publishers or have earned at least \$5,000 from self-published work. Self-published writers earning at least \$500 within the previous eighteen months and those who have received an offer of a book contract from a paying publisher are eligible for associate membership. Associate members can access all the benefits of membership except for voting privileges. Dues are \$90 the first year and are based on a sliding scale thereafter, but most members continue to pay \$90. The Authors Guild is a copublisher of this book.

each candidate, asking about their fees, experience in matters like yours, and how they intend to approach your matter.

Many lawyers and law students enjoy representing writers and artists more than other kinds of clients. Several law schools have clinics specially focused on representing clients in intellectual property and First Amendment matters, and the Citizen Media Law Project has a legal network of experienced lawyers willing to work at a reduced rate. Many cities have volunteer lawyers for the arts organizations and local bar associations that offer pro bono or reduced-fee legal services to clients who meet certain income requirements. If you cannot afford to pay a lawyer's fees, consider contacting one of these groups. Even if they cannot provide free or low-cost legal services for a specific matter, many of them offer general advice and referrals to knowledgeable attorneys.

DO YOU NEED A LITERARY AGENT?

Most book authors should have a literary agent. If you want to publish a book with a trade book publisher (large or small), or to publish regularly as a freelancer, you are much more likely to succeed if you have a diligent, professional literary agent in your corner. Her primary objective is to place her clients' work with the best possible publisher for the best possible terms and to nurture their professional development. It is the agent's business to understand the industry in depth, which means knowing what editors are currently buying, what publishers are paying, and what new ways to exploit literary works are on the horizon. Your agent will negotiate the financial and other significant terms of your publishing and other related contracts. As explained in chapter 15, your agent is paid a commission, usually 15 percent of what she sells on your behalf, but you are still likely to come out well ahead if she is doing her job.

WHY YOU NEED *THE WRITER'S LEGAL GUIDE*

Successful writers are lucky, as most of them would acknowledge. But they also had a big role in making their own luck. Aside from their years of toil and sacrifice, writers who learn to protect and leverage their property, promote their interests, and negotiate effectively are more likely to succeed. They can earn more income from their work, avoid the waste of time and

energy that legal disputes cause, retain control over their careers and their work, and suffer less anxiety because knowing more allows them to worry less. The authors and publishers of this book hope *The Writer's Legal Guide* will help you care for the business side of your writing career so that you can have more self-reliance, confidence, and peace of mind as you build that career.

DISCLAIMER

This book is not a substitute for the advice of a lawyer, accountant, literary agent, or any other expert who has examined the specific facts of a given situation. While every attempt has been made to ensure that the information in this book is thorough, accurate, and current, the authors and publishers cannot warrant that this is the case, especially because the law, the industry, and publishers' practices can—and do—change overnight. In fact, the publishing industry and the state of intellectual property law are in such a state of flux today that it is likely that some of the information in this book will be out of date by the time you read it. For these reasons, the publishers, authors, and their agents, employees, directors, officers, partners, and representatives disclaim all liability for any loss arising out of or in connection with anything that appears or does not appear in this book.

NOTE ABOUT TERMS USED

This book uses the terms “writer” and “author” interchangeably, although the chapters covering copyright use “author” to mean the creator of any kind of work product protected by copyright. Also, following the current convention in legal writing, this book uses the female pronoun to refer to either sex.