

COPYRIGHT PRIMER PART 2:

Publishing agreements

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As part of a project to update the Writers' Guild of Alberta (WGA) website, I revisited the Intellectual Property FAQ page. While brevity is a virtue on any FAQ page, this column is a venue for more expanded explanations. Here, and in the previous and subsequent "Write/Right" columns, I will focus on and update questions appearing on the WGA's FAQ page.

Here is a set of questions relating to publishing agreements:

1. What should I look for (or look out for) in a publishing contract?
2. How can I make sure a publisher is not asking for my copyright?
3. What does it mean if a publisher asks for "first rights"?
4. What does it mean if a publisher asks for "exclusive rights"?
5. What other rights may a publisher ask for?
6. What are moral rights? Are these different from copyright? Can a publisher ask for moral rights?

The principles underlying the answers to these questions are:

- **Copyright** protects a creator's economic rights in a work. It is conceived not as

a single right but rather as a bundle of rights, with each right being envisioned as a strand in the bundle. Such strands as they relate to a literary work include the obvious: the sole right to copy the work. Other strands include the right to publish; to translate; to license the use of the work and to appoint an agent to license the work; and to turn the literary work into a dramatic or cinematographic work. The individual rights can also be circumscribed by time, territory and language. For example, the right to translate the work into German and publish the work in Germany, Switzerland, and Austria for the next five years. When viewed this way, the number of strands can be infinite. The work's creator is the first owner of them all. Copyright can be transferred to another, like any other property right.

- **Moral rights** protect a creator's non-economic rights in a work. The concept of moral rights originated in civil law countries like France, and therefore became part of Canada's federal law, unlike in the United States (among other countries). The following moral rights exist in Canada:
 - Right of paternity—the right to have the author's name on the work, to use a pseudonym, and to remain anonymous



- Right of integrity—the right to prevent another from changing the work in such a way that it would be prejudicial to the creator's honour or reputation
- Right of association—the right to prevent someone else from using the work in association with a product, service, cause or institution

A creator cannot sell or assign his or her moral rights to anyone but can waive any one or more of them.

With this background, let's analyze the questions relating to publishing agreements.

A publishing contract is an agreement in which the creator of a literary work allows another party, the publisher, to deal with one or more strands within their bundle of rights. Typically, that strand is the right to publish the work. Publishing contracts are complex agreements that typically contain provisions addressing the grant of rights (what rights does the author grant to the publisher); the compensation the author will receive in exchange (usually royalties); delivery by the author to the publisher of the manuscript; the publication details; representations and warranties (the author's promises regarding the manuscript, for example, the originality of the work); and sometimes termination rights.

WHAT SHOULD I LOOK FOR (OR LOOK OUT FOR) IN A PUBLISHING CONTRACT?

The most important provision to look for is the grant of rights. Would an author knowingly part with their entire bundle of rights? Only if the compensation is very great indeed. Therefore, it is crucial to read the grant of rights provision carefully (see below for a fuller discussion). Another provision to look out for is the clause setting out the representations and warranties, where the author is often asked to over-promise on the content of the work (for example, guaranteeing the work is not libellous). Another provision to look for is reversionary rights: there should be a provision whereby the rights granted to the publisher “revert” to the author if the publisher fails to publish within a certain time frame or goes out of business.

HOW CAN I MAKE SURE A PUBLISHER IS NOT ASKING FOR MY COPYRIGHT?

The grant of rights clause should read: “the author grants the publisher the right to publish the work.” Ensure the grant of rights section does not contain language whereby the author “assigns” or “transfers” to the publisher “their copyright” or “all of their rights” in the work. That would be equivalent to selling the entire bundle of rights to the publisher, instead of giving permission to use one or more strands.

WHAT DOES IT MEAN IF A PUBLISHER ASKS FOR “FIRST RIGHTS”?

The publisher is asking to be the first to publish the literary work. When this language appears in connection with an article that will appear in a serial publication such as a newspaper, that sometimes allows the writer the freedom to publish it elsewhere once the first publication of the work has appeared.

WHAT DOES IT MEAN IF A PUBLISHER ASKS FOR “EXCLUSIVE RIGHTS”?

The publisher expects it will be the only party able to publish the work, which is often what the author intends in any event. However, it can mean the creator is not allowed to publish excerpts of the work on the creator’s own website. It is therefore important to clarify that point.

WHAT OTHER RIGHTS MAY A PUBLISHER ASK FOR?

Along with the right to publish, the grant of rights clause may often list other rights, sometimes called “subsidiary” rights, such as the right to translate or abridge the work, or the right to turn the work into a cinematographic or dramatic work. A careful reading of these additional grants is worthwhile to ensure there are no surprises. Other commonly requested rights are “electronic rights.” That term is so vague that it arguably covers all future forms of publication. An author would be prudent to reword that phrase, therefore, so it means solely the right to publish the work as an “e-book.”

WHAT ARE MORAL RIGHTS? ARE THESE DIFFERENT FROM COPYRIGHT? CAN A PUBLISHER ASK FOR MORAL RIGHTS?

While copyright protects a creator’s economic rights in a work, moral rights aim to protect non-economic rights: the right of paternity (to be named as author, use a pseudonym, or remain anonymous), the right of integrity (to prevent modification of the work in a way that harms the creator’s reputation), and the right of association (to prevent the work from being used to promote a certain product, service, cause, or institution). A publisher could ask for moral rights, but technically, they cannot be sold. They can only be waived. Even if a creator sells the copyright in a work, they will often refuse to waive their moral rights. ■

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