

GET IT IN WRITING

A TEMPLATE FOR PUBLISHING CONTRACTS

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DISCLAIMER # 1

- The information in this presentation and any sample documents are intended for educational purposes only, and do not constitute legal advice. Attendance at this session does not create an attorney-client relationship. Specific legal questions should be addressed to an attorney familiar with the laws in your jurisdiction. Statute and case citations were correct at the time of writing, but should be checked for accuracy. Neither the presenter nor American Horse Publications are responsible for use or misuse of information and/or sample documents. The opinions expressed may not represent those of American Horse Publications.

DISCLAIMER # 2

- **RULE OF THUMB:** If a deal matters, get the terms in writing.
- Publications, writers, and visual artists should have contracts, preferably in writing, but if the deal works out as planned, the existence of a contract is irrelevant because both sides go away happy. Most deals work out as planned.
- A contract that can be enforced in court if necessary matters only when a deal goes bad. Oral contracts generally can be enforced, but the process is more complicated.

DISCLAIMER # 3

- This discussion of publishing contracts has little relevance for magazine writers, illustrators, designers, and photographers who are employees of the publication. Copyright law provides legal protection for “authors,” which sounds straightforward but is not. “Author” includes writers and visual artists (photographers, videographers, illustrators, and so on).
- For staffers, your employer is the “author” for copyright purposes and is the copyright owner for everything you create in the course of your employment. Any rights you might have in your work will depend on the terms of an employment contract or relationship and not the terms of a publication contract.

THE *LOS ANGELES TIMES* RIGHTS GRAB

- Earlier this year, owners of the *Times* floated the idea that the paper's employees should be required to give the newspaper rights to any books or other creative work produced by the employee outside of their usual journalism work—as a requirement of employment.
- The Los Angeles Times Guild, a union representing the paper's staffers, strenuously objected.
- As of this date, there has been no resolution.
- For staffers—read your employment contracts!

DISCLAIMER # 3 (CONT'D)

- For publishers & editors:
- A contentious issue sometimes is the employment status of an individual—employee or independent contractor? Prominent trainer Chad Brown, for example, owes \$1.6 million for mis-classifying his backstretch employees as independent contractors.
- Employees are employees
- Freelancers are independent contractors, unless they aren't

DISCLAIMER # 3 (CONT'D)

- For publishers & editors:
- California legislation, Fall 2018, changed the definition of independent contractor. Result was that many independent contractors were reclassified as employees and entitled to be treated as employees. Unintended result was that many California freelancers lost work because publications and content clients didn't want to be responsible for employee benefits. Reuters was the first, others followed.
- California also has odd “work for hire” provisions that extend employee status to freelancers who sign work for hire contracts.

CONTRACTS AND CONFLICTS

INTEREST--THE PUBLICATION

- Serving the readers

INTEREST--THE FREELANCER

- Serving the readers

CONTRACTS AND CONFLICTS

INTEREST--THE PUBLICATION

- Serving the readers
- Making money

INTEREST--THE FREELANCER

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CONTRACTS AND CONFLICTS

WANTS--THE PUBLICATION

- Serving the readers
- Making money
- Flexibility—obtaining the most expansive rights for use and for reuse without additional cost

WANTS--THE FREELANCER

- Serving the readers
- Making money
- Resales—transferring the least expansive rights at the start to allow profitable resales later

CONTRACTS AND CONFLICTS

WANTS--THE PUBLICATION

- Serving the readers
- Making money
- Flexibility—obtaining the most expansive rights for use without additional cost
- Protection from lawsuits by shifting liability to freelancers

WANTS--THE FREELANCER

- Serving the readers
- Making money
- Resales—transferring the least expansive rights for profitable resales
- Protection from lawsuits by eliminating all liability (unlikely) or by limiting liability as much as possible

CONTRACTS AND CONFLICTS

- Neither approach is wrong, but a contract that meets all of the publisher's needs will be in conflict with a contract that meets all of the freelancer's needs.
- The goal for both parties is to meet somewhere in the middle.

CONTRACTS AND CONFLICTS

PUBLISHER: RIGHT TO USE WORK

- All rights, encompassing current needs and formats (typically print and electronic media), plus every other need and format that might arise in the future.

FREELANCER: RIGHT TO USE WORK

- First North American Serial Rights (FNASR)—literally the right to publish the article (or use the image) once, in print and electronic media distributed in North America. All subsequent use subject to negotiation.

CONTRACTS AND CONFLICTS

- Reasonable rights compromise: Many contracts include use in print and online publications, reprints, promotions, and electronic/digital media for an exclusive period of 30-90 days, with rights reverting to the freelancer thereafter. Additional rights then can be negotiated if necessary.
- NOTE: A “work-for-hire” contract means that the publisher owns *all rights* to the work and should be paid accordingly. A “transfer of all rights” accomplishes the same thing/
- NOTE: Without a written contract, courts generally rule that the only rights transferred are FNASR. Written contracts are important for both parties!

CONTRACTS AND CONFLICTS

PUBLISHER-PAYMENT

- Payment triggered by first publication
- No payment due if article is never published
- Payment due 60-90 days after publication
- No kill fee

FREELANCER-PAYMENT

- Payment triggered by acceptance
- Payment due whether or not article is ever published
- Payment due 30 days after acceptance
- For payment on publication, percentage of agreed fee due if work accepted but not published within specified time period

CONTRACTS AND CONFLICTS

- Reasonable payment compromise: Payment on acceptance as defined in contract (many contracts define as: “meets reasonable industry standards” language), with reasonable period of time (30-60 days?) allowed for payment. A kill fee as defined in the contract (1/3 -1/2 of contract fee?) if the article is not published within reasonable time.
- NOTE: “Reasonable” is a term of art that courts use to create a definition when the contract doesn’t have one. If the contract is silent about a term, courts generally will determine what is reasonable based on industry standards.

WARRANTY AND INDEMNIFICATION

PUBLISHER

- Warranty and indemnification for infringement of any third party rights by freelancer
- Includes frivolous lawsuits
- Includes publisher's attorney fees

FREELANCER

- No warranty and indemnification for third party claims

CONTRACTS AND CONFLICTS

- Reasonable warranty and indemnification compromise: The freelancer warrants (guarantees), to the best of his/her knowledge and belief, that the work does not infringe on the rights of a third party. The freelancer agrees to indemnify the publisher if and when the freelancer's liability is established in a court of competent jurisdiction after all available appeals. The freelancer has no liability if a negotiated settlement is reached between the publisher and a third party without the freelancer's participation in the negotiations.
- Occasionally, although not often, a publisher will agree to include a freelancer on the company's commercial liability policy as an "also insured."
- NOTE: Liability insurance for a freelancer is expensive and hard to obtain.

OTHER CONTRACT TERMS

- **Publisher bankruptcy** (more applicable to book contracts than magazine contracts):
- EX: In the event of bankruptcy, all rights to the work will revert to the author.
- Problem: Sounds good—publisher goes out of business, you get rights to your article/book back—may not have any effect.
- The rights to your work are potentially valuable assets of the publisher. When bankruptcy petition is filed, the bankruptcy trustee takes control of all the assets and has a legal obligation to protect the publisher's creditors. Selling the rights to a book or article to a third party may be the best way to do that. This obligation outweighs the contract language.
- If the publisher owes you money, you'll be an unsecured creditor. They get paid last, if at all.

OTHER CONTRACT TERMS

- As publishing becomes international, contracts often ask the freelancer to waive all “moral rights” but usually don’t explain what those rights are. In Europe, basic moral rights are:
 - **The author’s right to be identified**
 - **The author’s right to prevent alterations to the work**
 - **The author’s right to prevent publication**
- Moral rights are not the same as copyright. Moral rights belong to the author and not to the work.
- In the US, moral rights are extended only to visual artists—good news for photographers and illustrators, bad news for writers.
- The US Copyright Office recently completed a study to determine whether to expand moral rights in the US. The conclusion was not to do so because the system already works well?

RESOURCES

(FOR INFORMATION ONLY, CONFIRM WITH ATTORNEY)

- The ASJA Guide to Common Contract Questions (handout):
<http://asja.org/LinkClick.aspx?fileticket=1c28PmZY02k%3d&tabid=150&portalid=0>
- “Standard” magazine contract, National Writers Union (handout):
<https://www.law.columbia.edu/kernochan/keep-your-copyrights/contracts/model/standard-journalism-contract>
- Sample contract, Columbia Law School: <https://www.law.columbia.edu/keep-your-copyrights/contracts/samples/13>
- Science Fiction and fantasy Writers Model Magazine Contract, Version 3.1:
<https://www.sfwaweb.org/member-links/committees/contracts-committee/model-magazine-contract-version-3-1/>

QUESTIONS?

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