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**UPCOMING MEETING:****PRINT ON DEMAND  
OPTIONS FOR  
PUBLISHERS**

7PM, TUESDAY, MARCH 17, 2015

The introduction of print on demand technology set off the publishing revolution. Now there are many options for publishers who want to use this technology to print and distribute their books. Evaluating these options can be a challenge. In this teleseminar we'll look at the three main providers of print on demand services: Amazon's CreateSpace and Ingram's Lightning Source and Spark.

Whether you're already using print on demand, just thinking about it, or convinced it's not for you, you won't want to miss award-winning book designer and blogger Joel Friedlander's presentation.

**ABOUT OUR SPEAKER**

Joel Friedlander (@JFBookman) is an award-winning book designer, a blogger, the author of *A Self-Publisher's Companion: Expert Advice for Authors Who Want to Publish* and the recently published *The Self-Publisher's Ultimate Resource Guide*. He writes [TheBookDesigner.com](http://TheBookDesigner.com), a popular blog on book design, book marketing and the future of the book.

**PRESIDENT'S MESSAGE:****NEWSLETTERS  
RETURN**

Greetings, PALA members:

I'm happy to tell you that after a bit of an absence, newsletters are back. You will receive a few newsletters within a relatively short period of time. The newsletter is available to members only, and it is full of great information, most notably transcripts of past meetings. This is a valuable service that I find rare within organizations such as ours.

Why has there been a bit of time since the last newsletter? As you know, we are a volunteer service organization. Our volunteers, as generous as they are, have limits on the amount of time that they can devote to PALA. The board does put in quite a few hours, but we are also volunteers, and we also have limits that the real world places on us.

So we need help!

Your assistance enhances the organization for yourself and everyone else. We never ask our volunteers to do more than might be realistic within the constraints of their experience and time available.

Often, with gentle and careful support,  
*(continued on page 2)*

**PUBLISHERS ASSOCIATION OF LOS ANGELES (PALA)**

<<http://www.pa-la.org>>

**President:** Gary Young ([artsy12@earthlink.net](mailto:artsy12@earthlink.net))

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**Facebook:** [facebook.com/PublishersAssociationofLosAngeles](https://www.facebook.com/PublishersAssociationofLosAngeles)

**Twitter:** @PALAPUB

*President's Message (cont'd from page 1)*

our volunteers learn new skills or tricks that they can translate to their own publishing efforts.

So let us hear from you!

We are at a critical point where we either grow or shrink. I vote for growing.

I look forward to seeing you at an upcoming meeting.

Gary Young

PALA President



## MEMBER NEWS & ANNOUNCEMENTS

### SHARE YOUR BIG NEWS

Have you been on the *Today Show* lately? Published a bestseller? Will you be the keynote speaker at an upcoming conference?

We'd love to share your big news with the group. E-mail Sharon Goldinger, [pplspeak@att.net](mailto:pplspeak@att.net), to get your announcement in the next PALA newsletter.

## BUSINESS OPPORTUNITY

Les Boston is looking for a partner/successor for his small publishing company, Stone and Scott.

It has needs: new titles (including e-books), social media applications. It offers 12 years on the internet at [www.StoneandScott.com](http://www.StoneandScott.com). It can now be found in many ways and places.

Information at [Friday@StoneandScott.com](mailto:Friday@StoneandScott.com) or 818-904-9088. Being close to San Fernando Valley (Los Angeles) would be advantageous.

## CONNECT WITH PALA

Have you connected with PALA on Facebook or Twitter? It's a great way to connect with other members, hear about upcoming PALA events, and keep up to date on important publishing news.

Click the buttons below to follow us on Twitter and Facebook and check out these and other exciting recent posts:



How To Win Sales And Influence Algorithms. #Books <https://davidgaughran.wordpress.com/2015/01/31/how-to-win-sales-and-influence-algorithms/>

Is Book Reviewing a Public Service or an Art? <http://www.nytimes.com/2015/02/08/books/review/is-book-reviewing-a-public-service-or-an-art.html?smid=fb-share&r=0>

CODEX Book Fair--February 8-11,

2015: Finest Book Artists & Printers in the World Coming to the SF Bay Area <http://prn.to/1DvHeSZ>

## NEW PALA WEBSITE

Have you visited [PALA's website](#) since our recent redesign? The new site is cleaner, more user friendly, and definitely worth visiting. You can find details about past and future programs, members-only information, and more.

Once you've visited, please feel free to contact Sharon Goldinger, [pplspeak@att.net](mailto:pplspeak@att.net), with any questions or suggestions.

## PUBLISHING UNIVERSITY

Don't miss the next [IBPA Publishing University](#), April 10-11, 2015, at the Sheraton Austin Hotel, Austin, TX.

The Independent Book Publishers Association's (IBPA's) 27th Annual Publishing University is a must-attend, networking, and educational event focused specifically on issues important to indie publishers and self-published authors.

Educational sessions include experiential learning labs, insightful Keynotes, a gala book award ceremony, and fun networking events. You'll walk away with strategies, connections, and ideas to move your publishing goals forward.

All the PALA board members as well

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*Member News (cont'd from page 2)*

as many PALA members have attended Publishing University during the past 26 years. It is a great opportunity to learn. We guarantee it's worth your time and investment.

If you have any questions about PubU, feel free to contact any of the board members.

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## IBPA DISCOUNT

Thinking of joining IBPA? Your PALA membership is good for a \$30 credit toward renewing your membership in or joining IBPA. If you're already member of both, remember to take the \$30 credit when you renew.

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## PALA LISTSERV

Have a question about publishing, marketing, or printing? Don't want to wait until the next members' only brainstorming session? Then use the PALA Listserv. It's a private group that lets PALA members and guests ask questions and share news, resources and information.

To sign up, go to <http://www.groups.yahoo.com>. If you're not already registered with Yahoo, you'll need to do that first (it's free). Then search for PA-LA (don't forget the hyphen). Follow the instructions for joining the list.



## MEETING TRANSCRIPT

### “LEGAL ISSUES FOR PUBLISHERS” JONATHAN KIRSCH

We're very honored to have Jonathan Kirsch. As you probably know, he's a publishing and intellectual property attorney, based in Los Angeles. He's also an expert witness on publishing industry matters, an Adjunct Professor on the faculty of New York University's Professional Publishing Program, the book editor of the *Jewish Journal*, the author of 13 books, including two leading reference books on publishing law—*Kirsch's Handbook of Publishing Law for Authors, Publishers, Editors, and Agents* and *Kirsch's Guide to the Book Contract for Authors, Publishers, Editors, and Agents*.

Good evening, everybody. I want to thank Gary and Sharon for inviting me back. It's always a pleasure to be at PALA among all my friends in the publishing business. There's a handout—I want to explain what it's about and how I propose to use it tonight.

Those of you who have heard me speak before will find some of this familiar, but there are quite a few new issues that have emerged and are now emerging in the publishing industry, so there's a lot of new material tonight.

This is a list of the topical headings in a typical comprehensive author-publisher contract. That is to say, these are *just* the headings. All of the text has been omitted. And this is meant to serve as a matrix or a checklist to assist you in understanding the scope of legal issues that could and should be addressed in a publishing contract. Basically, this checklist is addressed to the author-publisher contract, and there are many others, as we will touch on tonight.

What goes in the text of the contract, under these headings, makes all the difference in the world. The contract can be written in a way that favors the pub-

lisher or favors the author or strikes some middle ground. There are many different ways to structure the definitions of the rights that are being conveyed and the manner the rights are being conveyed, approvals, control over the content, and appearance of the book. All of that can be negotiated, and the contract can reflect the understanding of the parties. It's a long subject. This will help you understand why the typical book contract might very well be 12, 15, 18 pages long. There's a lot of detail that gets crammed into them.

The contract forms that are used by what used to be the Big Six and are now the Big Five tend to be among the longest contracts you'll see. They might have a page or two pages just defining royalties because they will parse out the royalty rates among the many different categories of sale, different media publications. So you can see that this can be a big task to negotiate that.

I recognize—as someone who makes his living writing contracts for my clients—that you can find contracts without paying me or any other lawyer by going on the Internet or asking your colleagues. And I have encountered over my long career many contracts that have been cobbled together from many pieces of existing contracts. I have to say that there's a real risk in doing this. The risk is the contract you may encounter or find online could be old, outmoded, inappropriate for your transaction, badly drafted, oriented toward one side of the transaction or the other and you're on the wrong side, et cetera.

I concede that I have a self-interest, as a practicing lawyer, in having you hire a lawyer to draft your contracts, and I realize it's a cost item you may feel you can avoid by finding a contract of your own, but a percentage of my practice is addressing problems that have arisen because people have done that and they find themselves in contracts that are really not the right contract. This has always been true, as long as there's been

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*“Legal Issues” (cont’d from page 3)*

Internet, but it’s especially true today.

This is one of the takeaway items from today’s talk—we are approximately in the same place in the publishing industry that the music industry was in maybe 10 or 12 years ago. That is to say, the floor has really dropped out from under our feet, and the landscape of the publishing industry has changed already in fundamental ways and continues to change.

What the product is, what a published book looks like, how it’s used, how it’s sold, how it’s priced, who is publishing it—all of those things are changing, really at light speed, almost day by day. And the law is lumbering along behind, trying to catch up with the technology, the markets, the business models. That’s another reason why old contract forms are especially treacherous. But even if you hire a lawyer to draft a brand-spanking new custom-drafted contract, it’s still a moving target, precisely because of the velocity of those changes.

So one of the most obvious and fundamental changes is that just as you cannot find a record store anymore (except maybe a used record store), and it’s barely possible to find a store that sells CDs and DVDs (except used, as a collector’s item), the bookstore is an endangered species. We used to think that independents were endangered by the chains—but Borders is gone, and Barnes & Noble is downsizing and could very well be gone in its current form in a matter of a few years.

The whole marketplace for books has changed, and most books today are purchased online. The related problem—the other side of that coin—is that what’s being sold has changed.

Publishers are still manufacturing and selling printed books, but a growing percentage of all books sold are now e-books. And the book product itself is changing fast. When I first started drafting e-books clauses—which is not that many years ago—an e-book was basically a static PDF file that consisted of

a scanned page of a printed book, and you just flipped from page to page. And that was your e-book. Today, that’s a dead product. Nobody—at least nobody on a commercial scale that’s in the book trade—is producing and selling e-books that are clunky PDF files. What we have today is called an enhanced e-book. What makes it enhanced? Well, it has functionality and content that the printed book doesn’t have.

When I started practicing, nobody dreamt of the e-book, but let’s flash forward 15 years. When the e-book first came on the scene, most contracts—all contracts—were silent on this new technology. Just to orient you on my hand-out, we are now on the heading “conveyance of rights,” which is, what rights does the publisher need to acquire from the author in order to do business, in order to successfully publish books, however we define books? There was a time when no publisher was getting any e-book rights of any kind because nobody had even imagined them. The only way they might have gotten them was if they had a contract that captured all rights to the author’s work, including rights to media not yet invented. You couldn’t just say, “I, the author, grant you, the publisher, all rights.” It had to say “all rights in any media now known and hereafter devised.” If you were lucky enough to have that kind of contract, you might have e-books rights, but most publishers didn’t have e-book rights.

So there was a very notorious—I would say famous—attorney named Arthur Cavanaugh who glommed on to this idea that there were lots of backless books, evergreen bestsellers from very famous authors who had been signed up in the ‘50s and ‘60s, and that those authors retained those e-book rights because the contracts were written in a way that excluded them. So he went around and signed up a bunch of famous authors, and he was their initial e-book publisher. Today, we need to analyze more deeply and in a more visionary way, what is the essential minimum bundle of rights that the publisher needs to acquire in order

to have a successful publishing business?

If you can get an all-rights contract, that’s a good way to start. That’s nearly ideal from the publisher’s point of view. There’s even a better way, called work for hire, which we’ll discuss later. Very few authors, in my experience, are signing all-rights contracts nowadays.

There was a time when some people wanted to be published so badly, they’d say yes to anything. I was in law school in 1976 when I signed my first contract. It came from New American Library. It was what we called a blue-back. It was on legal paper and had a blue page on the back, like a Dickensian-era legal document. I did not read that contract. I just signed it and sent it back to my agent and said, “Send me my advance.” Because that’s how badly I wanted to be published. There was a time when people might be induced to sign an all-rights contract. In fact, they might be induced to do much more. They might be induced to pay for the privilege of being published. In those days, that was a vanity press. It was a business that made money off authors—not by selling the works of the authors but by getting paid by the authors. It’s not true publishing; it’s really kind of a scam. But they preyed on the urgency that people had to see their work in print.

Today, the weight has shifted in favor of the author. The barriers to entry in the publishing business are so much lower for the author. Kindle will make you an e-book author overnight, for virtually nothing. The infrastructure that you need to enter the publishing business, even with print-on-demand books or e-books, is so readily available and at such a low cost that publishers who are trying to drive a good bargain have a harder time. So to say, “I want all rights”—by the way, “all rights” means not just the rights to publish it as a book, whatever that might mean, but the movie rights, the television rights, software application—anything you can think of falls within “all rights.”

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*“Legal Issues” (cont’d from page 4)*

Nowadays, people are more discerning. Whatever it is you get needs to be carefully considered from your point of view as a publisher. There’s a group of rights called “primary rights.” That generally means rights that the publisher itself is going to exploit. “Secondary or subsidiary rights” generally means rights that the publisher will not exploit itself but will license to others.

Even this distinction has changed fundamentally in the publishing business. In the ‘60s, in the mainstream trade publishing business, the first edition of a book is a hardcover edition. The right to publish it in paperback was considered a subsidiary right, and if the initial publisher acquired it at all (which it might not), it would lay it off to a paperback house. That’s long gone. The publishing houses have long been publishing in all formats. But they may not always issue a book under their own imprint under their own infrastructure in a particular edition. A foreign edition is usually licensed to a foreign publisher. An audio edition is usually licensed to a specialist audio publisher. But you need to make a list of the rights that you want and feel you need.

This is where it gets really tricky. Copyright is sometimes thought of as a thing—an intellectual property asset. But copyright is not one thing. It is many things. And those things change. So it’s kind of phantasmagoric. Instead of thinking of it as one stick, you should think of it as a bundle of sticks.

So what are those sticks? Well, the right to take the author’s work, edit it, set it into type, print it on paper, sell it between hardcovers is one right. That’s hardcover rights. So that could be one stick.

Now, frankly, you may not like that right. You may not want to print in hardcover books. Hardcover books are on their way out. And they’re being murdered by e-books because the price point is so much better. Let’s say you do the same thing, but instead of putting it between

hardcovers, you put it between softcovers, but quality softcovers. Well, that’s public trade paperback rights. Let’s say you print it on cheap paper on a smaller format and put it through even lower-quality paper. That’s mass market.

So, you might say, to be a book publisher in print, I need to control all of these rights. Because clearly, on the day your hardcover comes out at \$29.95, you don’t want to find out that the author has sold a paperback edition that comes out at \$11.99. So that’s an example of how you define what your minimum package is.

But today, this is not nearly enough. There is a new medium, the e-book, but even with the e-book, it’s more complicated than you think. The e-book is not just a PDF; it’s an enhanced e-book. In older contracts, you will sometimes see another stick in the bundle of multimedia and interactive rights. What does that mean? These used to have some pretty clear distinctions.

An e-book was that static PDF file—just a picture of the printed book, page by page, that was neither interactive nor multimedia. It was a screen display of text, and there was no interactivity by the reader. Now we have the enhanced e-book, which will, at a minimum, have interactivity. The reader can enter the e-book and word search it, highlight it, hyperlink out of it, look up the definition of a word, annotate it, e-mail it, e-mail little comments, post comments to Facebook. That’s interactivity.

So if you have e-book rights and the author reserves interactive rights, then the contract is going to prevent you from doing enhanced e-books, or it’s going to create an overlap in rights, or it’s just going to confuse everybody as to what it is you can do exclusively or nonexclusively and what it is the author can do. So the e-book actually includes some interactive and multimedia rights, if it’s an enhanced e-book.

Now, what about software applications?

My craft is driven by what’s new and hot in the marketplace. I went through a period where I got a flurry of calls asking if they had the right to create a software app based on the book that they published. Well, is a software app an e-book in any sense at all? I don’t think so. It depends what words are written in the contract, but most likely it’s not.

An e-book is, in essence, the display of text. It might have added functionality and content, but at a minimum, it’s the text of the book. A software application is usually a tool. The content of the book has been adapted in some way to serve some kind of function other than being read by your reader. So if you want to be able to spin off a software application, you probably can’t rely on your e-book rights. You need something else, and it better be adequately defined in the contract for you to be able to do it safely.

There’s also this thing called POD. Fundamentally, the product when it’s sold is a book on paper, but it doesn’t exist as a book on paper. Until then, it’s a digital file. When you have a purchaser, you press a button and a book is created. That, I believe, is a hybrid between publishing rights and a whole different category that are called electronic or digital rights. E-books are clearly electronic or digital rights. This is kind of a hybrid of both of them.

So these are some of the vagaries of the book publishing business and what it means to be a book publisher. I’ve left audio books off this list because I think that audio books today are still sufficiently specialized—that they constitute a separate right. But you may feel differently. I think that the audio book market is a different market. The buyer is a different buyer. But some publishers would say, “I want the right to do all forms of books, whatever the binding or the quality of the paper. I want to do e-books, including enhanced e-books, and I want to do POD.” I think this is the minimum list, for sure, and some publishers would feel more comfortable to have this, too.

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*“Legal Issues” (cont’d from page 5)*

You can continue to add rights to your list of rights. If you negotiate for them and your contracts are properly drafted, then you can have them. You can have interactive software, various kinds of electronic products. There is a distinction in every contract between the nature of your interest in these rights.

In intellectual property and copyright law—the sticks in the bundle of rights constituting copyright, whether it’s the whole bundle or several sticks in the bundle or just one stick in the bundle—if you’re a specialty audio publisher and you just do audio books, that might be the only right you get. That could happen. Those rights can be sold or leased. The sale of ownership of the right—a right or more than one right—is done by language of *assignment*. I *assign* you these rights. That means that the ownership of rights is passed from the author, who starts out owning everything, and invests in the publisher, who is paying for an assignment.

You can also just lease the rights, and the language of conveyance is *license*. The author *licenses* the right to the publisher. There’s a legal distinction there. In practical terms, it doesn’t have huge meaning, but licensing means that the ownership of the right remains with the author, but the use of that right is transferred to the publisher. Licensing is often for a particular term of years. They’re often for a particular territory, but not invariably. I see licenses that are for a term of copyright, and I see licenses that are for the whole bundle of rights. And at that point, if I give you an exclusive license throughout the world for all media, the difference between that and an assignment of rights is pretty technical. It doesn’t amount to a whole lot. Publishers generally like to own something. If you own that right, you’re going to use language of assignment. If you’re content with using the right, you can use language of licensing.

In some transactions, there is still a common usage that licensing is favored, and in other aspects, there’s still a common

practice where assignment is favored. In my experience, most publishing contracts between authors and publishers in the United States are assignments. That’s not invariably true, but in my experience, it’s mostly true.

To give you another example, when the publisher licenses the right to do a foreign-language edition of the book, that’s usually done as a license, as opposed to an assignment. It’s usually for a term of years. So you might give the worldwide Spanish-language right for seven years to a particular publisher. And that means they can publish their book within the terms of that license and once it’s over, they have to stop.

All of these sticks can be changed. They can be split into smaller and smaller sticks, and they proliferate as new markets and media emerge. For example, you could, in theory, license the trade paperback rights to a book that you acquired to a Spanish-language publisher in Spain, a Spanish-language publisher in Mexico, and a US publisher for a Spanish-language edition in the United States. In other words, you can break that stick that we would call “Spanish-language book rights” into smaller and smaller sticks.

Sometimes you’re able to extract more value from one of these subsidiary rights by doing that. One of the other developments is that these markets are globalizing. It’s not quite as meaningful to say, “Here’s a book. You can only publish and sell it in a particular country.” Spain is now part of the European Union. Are the rights for Spain or for the EU? With e-books, which do not take the form of a physical product, these territorial boundaries are harder to enforce, and they make less sense economically.

Although, I have done deals where Amazon—and Amazon will honor these deals—will sell one edition from its site in the United States and has to sell another edition from its site in other countries. And Amazon will do that. It will honor those restrictions. Those are

restrictions of territory. You can have restrictions of language. You can have restrictions of media.

All rights that are licensed can be licensed exclusively or nonexclusively. *Nonexclusively* means that you have the right to do something, but the author can give the same right to someone else. You might get exclusive US rights, but the author reserves rights to grant other exclusive licenses outside the United States. There used to be a concept of an open market, which was a market in which multiple editions of the same work, originating with different publishers, could all be sold at the same time. Certain regions of the world might be called “the open market.”

*Q: Can licensees sublicense the rights?*

*A:* Very astute question. There is case law, in copyright, that says unless the license expressly provides that the right may be sublicensed, it may not be sublicensed. And this goes to what I would call another fundamental takeaway of tonight’s program. If you want the right to do something, if you want the author to be under obligation to do something, whatever it is, make sure that it is in the contract in a way that you can understand it and the author can understand it.

There’s a lot that may be implicit in the contract. There is this concept of custom and use, that there’s certain things that are standard in any given industry that are understood and don’t need to be spelled out meticulously in the contract because everybody in that industry understands that.

But it’s treacherous to rely on custom and practice because you might think it’s one thing and they might think it’s quite a different thing and because custom and practice may change—and has changed. So it’s better to spell it out.

A contract that is explicit has the advantage over a contract that has implied terms because you can point to some-

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*“Legal Issues” (cont’d from page 6)*

thing and say, “This is what our contract provides.” If a client says to me, “Does my contract provide that I can do X, Y, and Z?” and I can’t point to a plain English sentence that says so, we might add a sentence that begins with “by way of example” and just say in plain English what we want to do. And this is an interesting test in a negotiation because if the other side comes back and says, “That’s not necessary. You don’t need that line. It already says that,” then you have to ask yourself, why are they pushing back against a clear, illustrative example if they think it already says that? It’s sort of a test of their good faith.

A contract provides what it provides, and if the lawyer can’t convince you that it’s already provided, it’s worth saying that.

I want to sidestep away from this contract matrix that we’ve been talking about, which focused on author and publisher because the reality is—and never more so than today—the author is unlikely to be the only content provider.

If you publish a novel, and J. K. Rowling has written this novel from beginning to end, and that’s all it is, just words on paper, then you might feel comfortable saying, “I’ve gotten my rights from J. K. Rowling, and these are the only rights I need.”

But if you widen the lens a little bit, I think you’ll see that even in that situation, that’s not all you need. Here’s another takeaway—what I recommend to my clients is to look at the publishing project at the dummy stage or at the mock-up stage—even at the conceptual stage, but it’s much more useful when you have actual page proofs—and say, “As to each thing my eye falls upon, I need to ask and answer the question, how did I get the right to use this?”

So what am I talking about here? Well, if it’s J. K. Rowling’s next bestseller and it starts at page 1 and ends at page 300 and it’s all text, and you say, “How did I get the right?” the answer would be under an author-publisher contract that I

negotiated with her, and she signed and I signed, and now I have the rights to what my contract says I have. That’s a good answer.

But let’s look a little more deeply. Is there any illustrative material in this work? Are you putting calligraphy on the cap initials on the chapter headings? Are you putting key illustrations on the chapter openings? Are you using an author photo? What’s on the cover? Is there an illustration or a photograph on the cover?

Every single thing that’s perceptible to the reader or perceptible to you also must be answered: How did I get the right to use this? And there’s nothing that’s excluded from this process. Suppose you have some nice blurbs on the back cover. How did you get the right to use those blurbs? Who wrote the flap copy and how did you get the right to use the flap copy? The catalog copy? For each one of those questions, you need to have an answer. Otherwise, you may cruise into a publication for which you do not have all the rights you need.

By the way, this question—How did I get the right to use this?—is highly ramified. I’m going to give you an example. But at a minimum (by the way, you don’t always need a contract), you might say, “Well, I have a quote from *Publishers Weekly* that I want to use on the book, and that’s fair use, so I don’t need anybody’s permission. How did I get the right to use it? Fair use.”

That’s a reasonable business decision. You don’t need to write to *Publishers Weekly* and say, “I’m going to use a sentence from your published review of the book on the back cover.” That is custom and practice; it’s fair use, and you can probably safely do that. But it’s not invariably true.

I had a client call me up. She had published a book that had something to do with the empowerment of women. She happened to be at a public event where Hillary Clinton was speaking, and as Hillary Clinton passed through the

crowd, she held up the book and said, “Hillary, Hillary, this is my book!” and Hillary looked over and said, “That’s great.” And my client called me up and said, “Can I put on the cover of my book ‘Great!’—Senator Hillary Clinton?” What do you guys think? I don’t think so.

A *Publishers Weekly* review that’s been published? Yeah, I think the assumption is that you could run a blurb from its reviews. But there are restrictions on that, too. I wouldn’t change the review from a negative to a positive, I wouldn’t quote too much of it, I’d make it clear that it was a published review, not a blurb by the reviewer. But I said to the client, “There is no way that this exclamation in a chance encounter in a corridor is a blurb that you could argue is an implied permission. There’s nothing implied about this; she just sort of made an expression of enthusiasm with no particular intent.”

Well, sometimes people don’t listen to their lawyers, and my client put it on anyway. She asked my opinion, but she didn’t like the answer she got. So what happened? She got a demand letter. Lo and behold—Hillary Clinton, as Secretary of State, has lots of things to worry about, but she had enough motivation to get her personal attorney to send a demand letter saying, “I never authorized this. This is false attribution of endorsement, it’s wrongful, damaging, stop doing it, shred the books.”

And so my client changed the covers, and that’s all it took. She didn’t have a lawsuit and didn’t have to pay damages, but she could have. So even something as seemingly innocuous as a blurb needs to be analyzed. That doesn’t mean that you need a contract, but it does mean that you need to have a rationale that’s reasonable and rooted in reality and rooted in the law.

What does that really mean? What I will say to my clients is, if someone gives you a blurb for your book, at a minimum,

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*“Legal Issues” (cont’d from page 7)*

write back and say, “Dear Senator Clinton, thank you for providing me with the following blurb, which I will use on my book cover and in the related advertising.” Put exactly what you intend to do and then say, “I appreciate your support.” Is that a contract? No, not really, it’s not a contract. It doesn’t elicit anything from her that says, “Yes, I agree.” It would be better if you could get her to write back and say, “Yes, I agree, you can use it.” It’s even better to have her sign something. You can’t always do the perfect or ideal thing, but at least a confirming e-mail is something you can point to later on and show your good faith.

I should spend a minute or two talking about fair use, although it’s not a contract thing. Fair use is not an affirmative right that you have. Fair use is what lawyers call “affirmative defense.” If you get sued for copyright infringement or trademark infringement, you can defend against that lawsuit by saying, “I’m not an infringer because I confined my use of copyright to the so-called fair use doctrine.” And there are a lot of elaborate tests as to what constitutes fair use. Every fair use case is decided on its own merits, it’s decided by a court, and you either win or lose. If you rely on fair use, you are always inevitably taking some degree of risk. It may be such minimal risk as to be a nonissue. It may be elevated risk but enough risk that you’re willing to take it. But it’s never risk-free.

Let’s look at author’s representations and warranties. It is standard, in publishing contracts, for the author to guarantee to the publisher that the work will not expose the publisher to liability. There’s a whole laundry list of things that a standard representation or warranty clause will provide, but one of them will include that it doesn’t infringe copyright, it doesn’t infringe privacy, it doesn’t defame anybody. Very often, these clauses include that there’s nothing about it that’s unsafe or would cause injury to the user of the book. Nowadays, it’s very common to say that the book is true and accurate and based on some research so that people don’t end up publishing fic-

tion and passing it off as memoir. These are all promises—guarantees—that the author makes to the publisher. This is the least-often changed clause in any publishing contract. You might negotiate what you’re buying, how much you’re paying for it, what royalty rate and what territory and what degree of exclusivity. But it’s very rare that the publisher would be willing to forego these guarantees.

The next item is publisher’s reps and warranties. It’s very, very rare that there are any. Mostly, publishing contracts have a set of author’s reps, warranties, and indemnity, and nothing at all for the publisher. That’s how most publishing contracts have been written. I have a client who says, “The author wants to qualify their reps and warranties with a ‘best of knowledge’ clause—to the best of my knowledge, this doesn’t invade privacy, it doesn’t infringe copyright.” That’s a huge concession to make.

Let’s say the publisher publishes the book and there is a lawsuit, and now you want to go to the author and say, “Well, that’s your problem, author, because you promised me there wouldn’t be a problem.” And the author has a “best of knowledge” clause. The author comes back to the publisher and says, “Well, you’re halfway there. I represented and warranted to you that it wouldn’t be copyright infringement, and now you’re being sued for copyright infringement, but I didn’t know it was infringement. You have to prove that I had knowledge that it was going to be infringing.” That’s very hard to prove. So that’s the reason why these kinds of promises are not often tinkered with.

The one place where I’ve often seen this change, at the request of the author, is that the author may say, “If you, the publisher, insert something into the book and *that’s* copyright infringement, that’s going to be your problem and not my problem.” That’s perfectly fair and makes a lot of sense. I never argue about that. It’s not a standard clause, but it’s not unreasonable.

I handled a case where the author of the book sent the book to the publisher, and the publisher printed the book and then wrote the copy for the catalog and defamed somebody by suggesting they were a mob affiliate. The author never said this in the book, ever. The author was sued, and the publisher was sued. The author was able to get out of that case by saying that the catalog copy was the publisher’s fault, not her fault, and she never guaranteed that. If she had said in her book that this person was mob affiliated and the publisher put it in the catalog copy, it would have been a different result. But the point is, you can allocate responsibility between the author and the publisher as to particular things, and that’s usually done in the negotiating process, and the drafting can be made to reflect that agreement.

There are reps and warranties, and there are indemnities. Reps and warranties are promises. Indemnities are obligations. The indemnity clause generally says that if you, the publisher, are sued for something that is a breach of my reps and warranties—if I say, “There’s nothing in this book that’s infringing on copyright” and we get sued for copyright infringement—the author pays the fee for the defense of the case, for the settlement of the case, for the judgment. That’s what an indemnity is.

The most common reaction to the indemnity clause among inexperienced authors is, “What do you mean? I’m protecting Random House? Random House is huge! I’m just an individual. Why aren’t they protecting me, and do they really expect that I’m going to pay their million dollar bill for their lawyers if we do get sued? I’m not going to be able to pay for that.” And as a practical matter, that’s true. Most authors can’t do that, for an indemnity. But you want the author on the hook.

What you don’t want the author to do, if you’re sued for libel, for example, is to make a separate deal with the plaintiff and say, “Oh, I’m going to hang this pub-

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*“Legal Issues” (cont’d from page 8)*

lisher. I’m going to go to the plaintiff and say that I’ll give them information that will get the publisher in trouble, but I’m only going to do it if you’ll dismiss me from the case.” Well, a publisher doesn’t want to see that happen. They want the author to be on the team—a unified defense. Even if they don’t have any prayer that they’re going to get money for this indemnity, they want the author to be obliged.

*Q: As a practical matter, is the publisher usually able to enforce a “hold harmless and defend” clause, that sort of thing, against the author?*

A: The indemnify clause typically says that the “author shall indemnify, defend, and hold harmless the publisher.”

*Q: Is this something publishers will ever negotiate on?*

A: Very rarely. There are little tricks that they can do. For example, they may say—and agents often ask for this and they often get it—to the publisher, “If you have errors and omissions insurance, we want you to put the author on that policy as an additional insured. We want you to look to the proceeds of that policy to satisfy the indemnity.” Most publishers, in my experience, will say, “We’ll do that if we elect to buy insurance. We may not elect to buy insurance.” I’ve never heard any publisher say, “Yes, I will contractually oblige myself to buy insurance” because some projects aren’t insured. They aren’t going to do that. But they will often say, “If I get insurance, sure, I’ll put you on that.”

But there’s a catch there, too. The policy that’s issued to the publisher covers the risks of being a publisher, and the scope of coverage on the publisher’s policy may not afford any defense to the author because the author’s doing a different thing than the publisher. That’s not always the case, but it can be.

The other thing publishers may do is say, “That’s fine. We will look to the policy if we have one for amounts in excess

of the deductible and up to policy limits.” So these big companies might have a \$100,000 deductible or more. That might mean you get a bill for \$50,000, for half the deductible. And then if there’s a policy limit, and in theory, if the costs of defense or judgment goes above the policy limit, you’re obliged to that as well.

*Q: I’ve also known publishers to say, “You want us to publish this book? You go get insurance.”*

A: Exactly. Part of my practice is vetting books for this, and I am hired by authors. I am not hired by publishers. It’s prudent to say, “We want you, the author, to assure us that we’re not going to get sued, so you’re responsible for getting permissions when you’re using third party content, getting releases and waivers when you’re interviewing people.” It’s not unusual for a publishing contract to have standard forms or at least reference standard forms that the publisher will provide for the author to use in securing permissions.

This is a convenient time to go back to where I started, because it’s a good, illustrative example. The exercise we were playing out was, “How do I get the right to use this item of content?” and we talked about images, blurbs, the interior content. There might be a quote in the body of the book from a magazine or another book, and the publisher may say, “Did you get permission for that quotation?” and the author says, “Oh, that’s fair use. I don’t need permission.” Well, fair use is not for everything. If it’s a long quotation, it may not be. If it’s an unpublished letter—if you’re writing a biography and the author has gotten access to unpublished writing, that may not be fair use. The question about clearance is not decisively answered by fair use.

*Q: What if, in your book, you’re critiquing a commercial that you saw on television? It’s very short, but you want to do a critical analysis of it. Do you have to get permission for it?*

A: This gets us into fair use. There are four statutory tests for fair use. One of them is, What is the nature and purpose of your use? How are you using it? Commentary, criticism, history, reporting, and analysis are highly favored for fair use—more likely to be fair use. Using something for ornamentation, for entertainment, style? Much less likely.

I’m going to give you two examples. I used to be the pro bono counsel for something called the Center for Media Literacy, which creates curriculum for classroom instruction on how to make children critical consumers of advertising and media—how to recognize when they’re being manipulated, for example, how to recognize when they’re being told that smoking is cool. And I said to them, “If there’s anything that’s going to be fair use, it’s your use. That’s fair use.” Because what they’re saying is, “We are serving a higher public purpose by educating young consumers about how to consume media in a thoughtful way.” That’s commentary, that’s criticism, that’s instruction.

By the way, one of the subsets of commentary is parody. Parody is highly protected as well. So the answer is yes, I think you have a lot of latitude in taking examples from media and advertising and critiquing them.

*Q: It’s several words. It’s the whole commercial.*

A: I can make an argument that you can do the whole thing, and there are cases that allow the whole thing. But it’s prudent not to do the whole thing because there’s a test called the amount and substantiality test.

*Q: But if there’s a print ad that says we won’t hurt anyone, and later it’s found out that they did indeed hurt someone—*

A: I think an argument can be made. Keep in mind what I said earlier: no lawyer can say in advance, “Yes, that is fair use.” I think it’s highly likely to be fair

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*“Legal Issues” (cont’d from page 9)*

use, and it’s commonly done. It’s very common to reproduce things for the purpose of commentary and criticism.

Now, I want to give you the other common example. The first book I ever wrote and published was a novel, written in the ‘70s, set in the ‘60s. Every once in a while, I’d throw in some song lyrics to set the mood and set the tone and set the time period. The publisher said, “That’s very nice. Get permission from every song lyric.” Now, why? One reason why is that song copyright owners are notoriously vigilant and aggressive. They look for these things, and when they find them, they do something. So in the publishing world, it is very common for publishers to say, “No song lyrics. Forget it.” And the other thing they don’t like is poetry. Poems are short, song lyrics are short, and the amount and substantiality test is problematic.

The publisher didn’t articulate it this way, but one of the reasons they were right to tell me not to use a song lyric in a novel just to set the scene is that that’s not commentary or criticism or instruction or reporting or any of those things. It’s just ornamentation.

I have a client, a publisher, who is working with an author who’s doing an unauthorized biography of a famous person, and the copyright owner of the artist’s body of work has said, “We want to do our own biography. We’re not going to let you use any illustrations.”

Now, they can’t stop anybody from writing an unauthorized biography—that is not within anybody’s rights to control. But they can stop us from using images to which they own the copyright, unless we can make a fair use argument. This is a very tough call for us. The biography is a favored use. It’s a form of history, it’s a form of commentary. We’re explaining who this artist is, this artist’s significance in history, and to illustrate that with images is defensible under fair use. The questions are going to be, How many images? Are the images reproduced in their entirety or just in detail? What size

are they reproduced at? There is a very strong argument under fair use that it’s proper.

Let me give you an example of a very big case. There was an author and a publisher who were doing a biography account of the career of the Grateful Dead. And to illustrate this—it was in the form of a time line, a chronological account. And they ran a literal time line with dates of events along the bottom of every page. They wanted to use some of the famous posters of the Grateful Dead appearances at the Fillmore.

And they went to the Bill Graham Archives, which owns the copyright to these posters and asked for permission. They did what I recommended. They said, “How can I get the right to use these posters?” and they asked for them. And Bill Graham wanted a chunk of dough—more money than they could afford. The project would not be economically viable if they had to pay those permissions. And so they huddled with their lawyers and said, “We’re going to take four illustrative posters, we’re going to reduce them to thumbnail size, and we’re going to put them on the time line as illustrations.” The Bill Graham Archives sued for copyright infringement.

That’s where you need to have the courage of your convictions. You can say, “OK, I’m willing to take the risk,” but to take the risk means you have to stand up in court. And this case was held to be fair use. They didn’t use a detail of the image, which would have been more defensible under fair use, under that amount and substantiality part. They used the whole poster. But they used it in a very small scale. And the court said that qualified as fair use.

There’s another very interesting case on the same rationale. There’s a magazine called *Perfect 10* that shows pictures of naked women whose bodies have not been surgically altered. They’re naturally beautiful women who have not had any plastic surgery. That’s their claim to fame. There was a search engine that was

pulling up these images from the *Perfect 10* site as indexing images for search engines. So you can find your way back to the original site. All they were showing was this little, tiny thumbnail image in the search results. And they said, “It doesn’t hurt the market because that image is so small that no one could actually use it for any of the purposes for which you’d license it.” And *Perfect 10* came back and said, “What about cell phone screen savers? We sell these images for cell phone screen savers, which are very small. So when you make that thumbnail image available, you are precluding a market for us.” And that was their argument as to why it was copyright infringement.

*Q: What if you have a photograph or you are a photographer who takes a picture of a piece of sculpture or a painting or some work of art? Can you then claim that the photograph is a separate piece of art and you can use that?*

A: It often arises when the artwork that’s being photographed is public domain and belongs to nobody, like the Mona Lisa. And yes, in theory, there are two copyrights in existence—the copyright in the work of art and the copyright in the photograph of the work of art. If that work of art that has been photographed is copyright-protected, the photographer needs permission from the copyright owner to take and sell that picture. In other words, one of the rights under copyright is the right to prevent the copying of our copyrighted work.

So if the original work of art is under copyright, the photograph needs to be licensed by the owner, and if it is licensed by the owner and the owner gives permission for the taking of that photograph, then that photograph is itself an independent work of authorship—it’s called a derivative work because it is derived from a preexisting work—but it has a copyright in and of itself. Under that scenario, if you copied that photograph without permission, you’d be infringing two copyrights—the copyright

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*“Legal Issues” (cont’d from page 11)*

of the original painting and the copy-right of the new photograph.

Something that comes up in my practice a lot is that somebody has gotten—through surreptitious means—an image of a public domain work of art that’s sitting in the Louvre or sitting in someone’s museum, and the museum says, “We control who gets in and photographs our collection, and that photograph is our photograph, and you can’t use it” because photographs are protected by copyright.

There is case law that says that if all you’ve done is set up a camera and take a head-on picture of a public domain work of art, you have no independent copyright because there’s nothing new or original. You’re just reproducing the image that is already in the public domain. You can’t drag it back into copyright by taking a picture of it. But it depends on exactly what the photographer has done. If the photographer lit it in a particular way, composed the photograph in a particular way, textured it, colored it—even though the underlying image is public domain, those could achieve some copyright.

*Q: Can you comment on the concept of work for hire?*

A: Let’s break this down. Work for hire is a concept under federal copyright law. It’s a federal law that says that under certain circumstances, if something is work for hire, then the person who actually made it is not the author. The employer or commissioning party is the author.

The reason that’s a significant legal relationship is that the copyright also says—and this is an interesting takeaway—that if you acquire rights under copyright by assignment, or by license, that transfer of rights can be terminated, no matter what the contract says, after 30-35 years. There’s a window that opens and closes. That’s long in the future, and no one really thinks about it at the time they’re signing contracts, but if you’re aggregating content—like you’re a news-

paper publisher or an encyclopedia publisher, or you’re building a comic book franchise, or you’re making a movie that has many contributors—you don’t want to take the risk that someone’s going to wake up 30 years later and take away your copyright. So work for hire is useful for that reason.

For example, in the motion picture industry, the script, the director’s services, and the actors’ services are usually done on a work for hire basis so that there’s no risk of a termination. It’s not required that they be paid. There are requirements to establish work for hire relationships, but paying somebody is not one. I could create a work for hire contract with you that’s royalty based. And you may never get a royalty because we may never sell a copy.

*Q: But you need it in writing?*

A: If you’re acquiring from an employee working in the course and scope of employment, you don’t need a writing. If it’s an independent contractor, you need a writing, and it needs to be signed in advance of the completion of the work. It can’t be done retroactively. And if it’s an independent contractor doing work for hire, it has to fit into certain statutory pigeonholes. It can’t be just anything.

So the federal work for hire law can arise under an employment relationship or under an independent contractor relationship. There is a provision in the labor code in California that says that anybody who creates work that vests in someone else as work for hire is deemed to be an employee.

Even if you go to great trouble to sign an independent contractor agreement where everybody acknowledges that there’s no employment relationship, the statute says you’re going to be an employee anyway. A client of mine, who was phobic of these kinds of relationships, asked me to look into this. I talked to many lawyers of long experience. I did legal research. I looked at the cases. I looked at the annotations to the statute. I could not find

a single instance where somebody who was contracted as an independent contractor was later held to be an employee by virtue of a work for hire relationship. I never found it.

But for my client who cared about it, I crafted a very beautiful clause—it hasn’t been tested, but I’m really proud of it—that says, “This is a work for hire agreement between independently contracting parties.” That’s Clause A. Clause B says, “If for any reason the work is not eligible for treatment as work for hire, then all right title and interest in all media now known, et cetera, is assigned irrevocably to the publisher.” So Clause A is work for hire, Clause B is assignment. Later in the contract, I have a very standard clause that says, “This contract does not create an employment relationship, a joint venture, a partnership, a franchise, a joint authorship. However, if the work for hire nature of the contract is deemed, under California Labor Code such and such, or any other comparable law, to create an employment relationship, then the parties agree that Clause A shall be of no force and effect whatsoever and all right shall pass, pursuant to Clause B.” That sacrifices the work for hire benefit, arguably.

Now, I’ve already told you that some rights can be terminated, even if it says it’s an assignment for the duration of copyright. The author may—unless it’s work for hire—have the right to terminate. But this is a different form of termination.

Under the old traditions and customs and practice of the publishing industry, the life cycle was, you signed the contract, you acquired the rights, you exercised the rights, but if you stopped exercising the rights and the work is now out of print, under specified circumstances, the rights go back to the author. That’s not the termination of transfer. That’s a contractual reversion.

In the old days, whether a book was out of print or in print was very easy to de-

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*“Legal Issues” (cont’d from page 11)*

termine. You’d go to the warehouse, and if there were printed copies sitting in the warehouse, and if those copies were in the catalog and could be ordered, not just gathering dust, it’s in print.

But we now have technologies where there might not be a book in the warehouse—maybe it’s purely POD or maybe it’s purely an e-book. There are many books nowadays that are published only as e-books—they do not have a print edition—and some that are audiobooks. So the question is, What triggers a reversion of rights in the digital age, since “out of print” no longer means anything?

Well, the first thing that I’m noticing is that we don’t use the phrase “out of print.” (Or I don’t, some people still do.) I prefer the phrase “unavailable for purchase,” which is more meaningful. If the book can no longer be purchased, then that, under specified conditions, will trigger a reversion. Since an e-book can be purchased at any time, it can just sit on the server forever, and since a POD book can be purchased at any time, this is inherently unfair—I would argue—for the author because there’s no meaningful occasion where it would revert, unless the publisher willingly gave up its rights.

So what I’m seeing mostly is a clause that says, “If it’s available in a printed edition, we’ll rely on the old model, which is, if there are copies in stock to fill orders, then it’s in print. If it exists only as an e-book or a POD, then it will revert if fewer than X copies have been sold in X counting periods or months or years.” I’m seeing 250 to 300 a year. I have seen written contracts where, when I’m writing for the publisher, I jump over this problem and say, “If at any point there are zero sales, the publisher can keep the rights by paying a new advance.”

I had a publisher—we had a very low threshold, maybe 50 copies of the e-book—who said, “That’s OK, for that many copies, I’ll just go on Amazon and buy them myself.” And you know what I did? I went back into my “out of print” clause and my “unavailable for purchase”

clause and wrote “at least 50 copies sold to any purchaser” because I think there would be a good argument that if it didn’t say something like that, a contrived sale like that would not preserve the publisher’s rights.

This is where the devil is in the details. But the point is that we are in this transition period between these well-settled old business models and these new business models that are changing at a very fast pace. We are trying to bridge the gap with the “out of print” clause and keep the model that these contracts are really for permanent copyright, and they can result in reversion. And it’s not a comfortable posture for either party.

There are lawyers who have “practice limited to complex litigation” on their business cards. And when I started practicing, I said, “I want a business card that says ‘practice limited to simple issues’” because I didn’t want the complex parts.

*Q: I have clients who have books that were first published in the ‘80s and ‘90s. Their agents aren’t around anymore, and they can’t find their contracts. It’s not on Amazon, but when they contacted the publisher, the publisher would not give them their rights. Do you have a suggestion? From what I’m learning tonight, they get it after 30-35 years.*

A: That’s right. Well, they have to go through some stuff. They have to give statutory notice. It’s not so easy. The notice provision—it’s not automatic.

*Q: But short of waiting 30-35 years, is there any—*

A: Well, let me answer your question this way: It has been my invariable experience that the book that the publisher regards with total indifference, doesn’t think about, doesn’t sell any copies of, doesn’t care about—the minute you say, “I want my rights back,” suddenly it’s got all this value, and they say, “Oh, no. We can’t give you those rights back. You can buy them back.” And these “out of print” clauses typically are not automat-

ic, either. They don’t say that if it’s out of print, the rights automatically revert. They typically say if it’s out of print and you wake up to that fact, (we don’t have to tell you) and you serve us a notice and we don’t print it within six months or a year, then you get the rights back. And even then, it’s not automatic. It’ll say, “And then we will revert the rights to you.” First of all, the publisher usually—it depends on the contract—gets this second bite at the apple. They can gin up a new edition, a new printing, and defeat you that way. They can often just sit on it and not do anything. Or you can’t find the person to ask.

*Q: Would you say it’s just not worth it to pursue?*

A: No, the publisher first of all should give the author a copy of the contract.

*Q: Is that required? Can you demand that?*

A: Sure. I do this a lot because I have a lot of clients who have lost their contracts. I have publishers who have lost their contracts. It may not have any digital rights. This is the problem with not having the contract. If you don’t have the contract, you just don’t know what rights they have, what the “out of print” clause says, what the terms are. You have to get the contract. If you don’t have it, and they do, you have to ask for it. If they don’t have it and you don’t have it, then you’ve got a kind of stalemate situation where they can’t enforce it. You still have to negotiate it or do some relief action or do something.

By the way, I’ve been emphasizing book rights, but these contracts often include periodical rights, the rights to abridgments, the rights to excerpts, the right to publish the work in all or in part. You need to look at your contract. It may allow you to do what you want to do.

*Q: I know that federal works are in the public domain. Are there any significant exceptions to that and does the same apply to works created by the state or other gov-*

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*“E-Books” (cont’d from page 12)*

ernment agencies?

A: You have to be sure that the work is a work by a government agency or an employee of a government agency within the scope of their employment. Because the government may contract with a private party, at arm’s length, and that would not be a government contract. It can sometimes be a little tricky to go to a government website and discern what is public domain by reason of government authorship and what is a third party work of authorship. For example, I have a client whose business is creating and publishing pamphlets and brochures on health topics for the VA. So those things are available through the VA site, but they are not government publications, and they are not public domain.

*Q: I didn’t hear any numbers mentioned, as far as royalties, time, ballpark figures—*

A: I’m often asked, “What is a standard royalty?” This is a very common question. And I’m going to answer it in a very evasive way. There was a standard royalty in the good old days of publishing. It was 10 percent of the first X-thousand copies, escalating to 12.5 percent for the next X-thousand, escalating to 15 percent for all copies thereafter. And, in the good, good old days, that royalty was applied to suggested retail price, which is a number that the publisher never actually realizes. They’re always selling at some sort of discount. I still see those numbers in some contracts, but they are almost always limited to such a narrow range of sales. In my practice for the publishers that I represent, the most common royalty structure is a flat 10 percent of net on all categories of sale because the smaller publishers, which are what my publishing clients tend to be, are not running the software and don’t have the accounting infrastructure to comfortably and inexpensively do multitiered royalty accounting. They want to have a simple, transparent rule-of-thumb account.

Thank you all very much.

**MEETING TRANSCRIPT****“HOW TO PUBLISH E-BOOKS” BRIAN FELSEN**

We’re honored to have Brian Felsen here. He’s spoken for me before at the Independent Writers of Southern California, and you’re in for a big treat. He’s the president of BookBaby, CD Baby, and HostBaby. BookBaby digitally distributes the works of independent authors, poets, memoirists, and publishers, making their e-books available to digital retailers worldwide, including the Apple iBook store, [BarnesandNoble.com](http://BarnesandNoble.com), Sony’s Reader Store, and [Amazon.com](http://Amazon.com). And CD Baby is the world’s largest online distributor of independent music. I’m sure we’ve got lots to learn from Brian, so let’s get started.

I’m here to talk about e-books. I can also talk a little bit about print and print on demand. I can talk about social marketing, and I can talk about getting multimedia in your e-books, even website design. I can give you some basic principles. I can talk a little bit about apps and extended e-books as well.

E-books are really just a part of what’s happening now. We’re in a very strange time in the industry now. Bookstores are going out of business, major publishers are consolidating, and Amazon crows about how most of its sales are in e-books. And that’s true for Amazon, it’s true on the Internet by and large, but in the real, physical world, print books are still very, very big. The way I see it, print books will start to go away perhaps for some of the romance novels, genre fiction and the like, where works are more disposable. And yet, they will prevail and continue for coffee-table books, for business books, for things where you want a beautiful book, like art books or a totemic object. I like to highlight and write stuff in the margins, so for me, print books are never going to go away. But for the stuff that I’m more embarrassed to read, my guilty pleasures, I like to buy that in the privacy of online because if I

go into a bookstore and buy it, people are going to see me buy it and they’re going to see it on my shelves, whereas if I buy it on Amazon, only Amazon and the NSA are going to know what I’ve purchased. But even though it’s a hard time for publishers, where Borders is gone, Barnes & Noble is going, and a lot of the major publishers are struggling, it’s not because of e-books.

What’s carrying the day now are YouTube and purchases on Amazon of whatever, from books to lawn mowers to game apps. So when you talk about things like how should I price my title, how should I market my title, how should I sell the title, you have to realize that you’re not competing with print books. You’re not necessarily competing with the big publishers. You’re competing with YouTube, endless amounts of free content, cats playing pianos, and game apps, like Angry Birds or Plants vs. Zombies. So when your book is for sale on a device or read on a tablet or consumed in that fashion, you are selling your work not necessarily in the bookstore, but you’re selling it in the zombie store. That’s why I’m less bullish on apps than I am on creating the best possible reading experience on the apps that are bundled with tablets.

People are buying books where they’re buying books, and there’s not a whole lot you can do about that. And if you’re really selling your book in an app store, you’re selling it in a *Plants vs. Zombies* store, and when you’re pricing your title, if things are free on YouTube—endless amounts of content—and if I could spend 99 cents on an app or I could have an immersive multimedia experience in which I’m going to get lost for dozens of hours, for 99 cents, you have to start thinking, “How can I charge \$14.99 for a bunch of black dots on a page?” The answer is, perhaps you can, but you have to realize that your competition is not the long tail of self-publishers or independent publishers. Your competition is not the big publishers; your competition is everything that’s out there to be consumed for infotainment, edutainment, and guilty pleasures.

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*“E-Books” (cont’d from page 14)*

What this means for large publishers is that there’s less loyalty to them. Nobody goes out and buys a book put out by Penguin anymore. There’s loyalty to genres, sure—so much loyalty, in fact, that romance writers will create multiple pseudonyms because they don’t want to confuse their readers, who are saying, “Oh my goodness, they released an erotic historical romance instead of a contemporary vampire romance!”

And vampire romances are so passé anyway. Right now it’s dinosaur porn that has taken over. Have you guys heard this? It’s \$2.99, and it’s a whole series of pterodactyl love and T. rex and me and all kinds of things. You laugh, but we are in a crass age where the quick laugh at a \$2.99 monetization is what’s ruling the day. It’s kind of a shame, but that’s the way it is. Is there room for brilliant, long-form masterpieces? Absolutely. Will that feed your families? How much does it have to feed your families? That’s another question. I mean, if you can be here on a Wednesday night in an air-conditioned, fluorescently lit room listening to me, you’re feeding your families.

So the question is, how much do you want or expect your money to come from somebody paying for your content when they don’t necessarily have to pay for content at all? And the major publishers are consolidating, and bookstores are crumbling because they don’t have it figured out either. Most books that they release are flops, and most of them are not original. The downside of that is that they’re giving up their support of the niche artists, and they’re looking for only monster hits. That leaves a big opening for self-publishers and small, independent publishers. And that’s a good thing. The question is how to play it.

Many of the biggest monster hits of the past year have been self-released or published by independent publishers—Barbara Freethy, who sold millions of romance novels; Amanda Hocking, who likes to write about trolls; Bella Andre; E. L. James, with *Fifty Shades* 1, 2, and 3, and the rest, and soon the film; James

Altucher, *Choose Yourself*; and of course Hugh Howey. They’ve taken the world by storm, and they’re getting to keep most of the money that they’ve earned.

Now, traditional publishers do a great job at many things, but before you aspire to be them, you need to think, what value am I, as a small publisher, adding? They can offer marketing support for larger titles, which requires a lot of money. They can turn a book release into an event. But again, that requires a lot of money. The days of the 60-city book tour are over. They can offer editorial support, they have expertise with physical distribution and relationships with the remaining stores and mom-and-pop bookstores overseas, and they have authority in certain genres.

So, primarily, if there’s a release that’s an event or if there’s an author who does well, they’ll want to get a speaking gig, they can add value. But the question is, what value do they add? What value will you add to your authors? Because the economics don’t always justify it. If there’s a book that’s for sale for \$13, and if there’s \$9.10 after the retailer’s cut, if you distribute it as an e-book through someone like BookBaby or some aggregator, what you end up with is your \$9.10. There are other companies that will take a cut here and there. We take zero, but there are other companies that will take a cut but charge less up front. There are different models. But you get to keep all or most of what you earned, whereas a larger publisher will get 25 percent of the net, and that would be 25 percent of the \$9.10, which would be 27 cents. That’s great if they add value. It’s great if they can turn your book into an event. But how do they do that? They market to bookstores.

Whenever I go to conferences, I see the authors and they’re still having to market to readers. The bigger publishers are not marketing to readers. All of these people that I mentioned have worked their posteriors off, doing website content generation, writing blogs, attending conventions, making promotional materials,

doing Facebook contests, and tweeting. So by being a small publisher, where you can add value without huge budgets, you’ve got a faster time to market. You don’t have big, New York real estate to support large staffs, so you can get your books out quicker.

What that means is if you’re releasing a title about technology or something, you won’t finally be coming out with somebody’s Gesamtkunstwerk about the rise of MySpace. You actually will be able to do something. You can go home and release a whole cultural study on the genre of dinosaur porn before midnight. You can get the books out there. It also helps that you can get into smaller niches as well. Something that would be a big hit for you would be a major flop for a big New York publisher. And there are a lot of niches, which are small niches, which are underserved, which you could corner and help out and really dominate in a way.

It doesn’t hurt to release a title yourselves and then try to sell it or get other representation later anyway. There are a lot of authors who do exactly that. *The Celestine Prophecy* sold over 100,000 copies that way, as did John Grisham’s *A Time to Kill*. We had an author, Tom Watson, who went by Stick Dog, who had two of the top five most downloaded books in the children’s section for the iPad in the iBook store, and he got picked up by major publishing who took the books down, slapped on a new cover, did some light editorial, and put him right back up there. So there’s no stigma to releasing something yourself. It’s not an either-or. It really helps you develop your platform because as you come to find in life, the best way to get someone to want to engage with you is to no longer need them. It’s totally true. It’s true in love as well. It’s frightening in a way.

There’s also a hybrid model. There are people like Bob Mayer and James Rollins who will do some of their stuff traditionally and they’ll do short stories themselves. So we’re in a very weird space, and

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*“E-Books” (cont’d from page 14)*

it’s a really good time for small publishers if they’re working in genres with limited mass appeal. That doesn’t mean like totally bizarre, but smaller genres—memoirs, histories, things that won’t sell a kajillion copies but would do well for you, with less overhead, if you can network within that genre.

So that’s just an overview of where I see things going.

*Q: So essentially, what you’re saying is with the release of an e-book, for example, we have to be careful about what platform or what venues we release it through because that will determine our pricing. We’re not competing with the print books, but you said if we were to release a book through a game app platform or YouTube, we’d have to release them for free, or \$2.99, but if we release it elsewhere, what is that elsewhere?*

A: As far as being careful about your platform and where you’re releasing it, all I’m saying is that you need to be realistic in your pricing expectations and the sales expectations that you would have for an e-books because you should view as your competition the tremendous amount of competition that’s out there in all forms and formats. That does not mean that you need to be careful of your platform where you release it because it’s my philosophy that you should release it everywhere.

What you should be careful about are predatory companies that charge too much by selling authors and small publishers on a dream of marketing and promotion by charging multi-thousand-dollar marketing packages and distribution packages. You’ll be able to recognize them when they say “call for quote” on their website and then a team of salesmen will call you on the phone and harass you for eternity. I know authors who have taken out mortgages on their houses to chase a dream that doesn’t even fit them. These companies will provide a service of PR, but it will always end up with, “Well, I talked to the *New York Times* or *USA Today* and they were interested, but ultimately they decided not

to go with it.” Or they’ll make you lots and lots of books that will end up propping up a coffee table. Or they’ll charge to exhibit with them at conferences that really won’t help you. So it’s not that the services are bad. It’s that they’re making a lot of money selling a service that doesn’t ultimately provide value to the purchaser. That’s what I would be wary of, but I would not be wary of releasing it on any particular platform or another.

Conversion—my take on conversion is, it’s like changing the oil in your car. You could do it yourself, but why? I’m going to give some thoughts on how to do it yourself, but basically, we have authors do it themselves, but it’s better if they just send us a Word document. You can convert something to EPUB yourself, using Calibre or Sigil or Atlantis. Pages will even save as an EPUB, and it will look great on your iPad, but then we’ll try to distribute it to dozens of retail stores and libraries all over the world, and it will fail EPUB check and unmanifest file check and all kinds of other things at these places. Also, you’d have to convert it to MOBI and AZW4 for Amazon, and then you’d have to set up accounts with all the online stores.

Not every retailer all over the world even accepts individual authors, so there are disadvantages to doing it yourself, but it’s totally doable. Apple has a free tool called the iBooks Author OS X app. It won’t work on the iPad, but you can do it on a Mac, and you can author an iBook, which will get you for sale on the iBook store and nowhere else. It’s a helpful thing for you to use. It does have a learning curve, but it’s quite elegant. But it doesn’t make an e-book. It makes an iBook, good for Apple only. Which is what tablet makers do—all these great minds got together to create the EPUB 3 standard, and the tablet manufacturers decided to put up their own walled gardens and go their own way because it’s in their economic interest to lock down the purchasers of their devices into buying from their app, in their proprietary format, and locking the content in there and not making it transportable. So you

could do it yourself for the iPad only in that fashion.

So I’m going to go through some mistakes that authors make when we work with them and some basic recommendations. Some of them are incredibly obvious, and some of them are less obvious.

One of the incredibly obvious ones is to proofread your file. It sounds funny, but so many times people will send us the book, we’ll convert the book, we’ll distribute the book to dozens of bookstores, and they’ll say, “Boy are there spelling errors in that book!” and we have to pull it down and do it all over again. It’s expensive and it’s time consuming and it’s silly. You need beta readers. You should use spell-check, you should read it carefully with a jaundiced eye, you should give it to others to proofread for you and to advise you on structure, tone, pacing, and all kinds of things. And take whatever they say with a grain of salt, but beta readers are so important. We are, in conversion and distribution, the last step in that.

*Q: What’s a beta reader?*

A: A beta reader is—your book is like a piece of software that’s in beta. And so they’re beta testing your book, so you’re giving it to a couple of very trusted people.

*Q: Beta—can you define that?*

A: Beta means that a product is not an official release yet. It’s a prerelease. All the bugs aren’t out of it. They are testing your book and testing your assumptions that you have a book that’s ready to be released. They’ll give feedback. It’s like a writers’ group. And they’ll give you helpful feedback, and if it’s not helpful feedback, go find other beta readers and take what they say with a grain of salt, but if everybody says the same thing, you may want to really think about that and make your changes before delivery. As I said, they require a lot of manual work and redelivery and costs and perhaps a

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*"E-Books" (cont'd from page 15)*

new ISBN if the changes are significant enough.

A brief word about ISBNs. There's no definitive answer on when you need multiple ISBNs. If you call Bowker and reach different people at different times of the day, they'll give you different answers. So we've been doing it as follows: if you're selling direct to fan, if you're selling a book on your website as a PDF or as an EPUB or something, just on your website, you don't need any ISBN at all. It's your book, your website, do whatever you want. If you need retail distribution on Apple, Amazon, Barnes & Noble, Kobo, dozens of others, then you need an ISBN.

Some people at Bowker will say that you need a different ISBN for every retailer. You don't. But we do assign an ISBN to a type of book, meaning a format. It might be a dynamic e-book—and I'm going to go into what that is—and then we would assign a different ISBN if another edition of that book is substantially different. That could be if another edition had multimedia, if it was version 2, if it had fixed layout or a different layout, if it had massive new chapters and many changes. So those are the instances when we would use a second ISBN. You can get ISBNs yourself, for \$125 or something like that. We sell them for \$20, and that's something that you need for distribution.

*Q: What's the difference between ISBN and Library of Congress?*

A: The Library of Congress number is for physical books only, to my knowledge, and it's not necessary for distribution in retail stores. The online retail stores need an ISBN. They don't need a Library of Congress number. For physical books, I don't know for sure, because we don't do physical book distribution, but for e-books you definitely do not need a Library of Congress number.

*Q: Where do you get an ISBN?*

A: You can buy them yourselves from

Bowker. I think they're \$125, it might be cheaper. We sell them for \$20 with distribution.

*Q: For the average book, how many different programs are there?*

A: There's no such thing as an average book. It could be a chat book, a Unabomber manifesto, Finnegans Wake. Typically, most things that we distribute just have one for the e-book. Most authors don't make a separate fixed layout edition, and I'll explain why. Most authors don't do second editions and third editions. By and large, most of them use one ISBN for the e-book.

*Q: If a person is disinclined to do the conversion themselves, how do they find the right conversion service?*

A: I am an unbiased third party observer to this question. BookBaby does it. We do conversion, formatting, and distribution from whatever format you submit it in. There are other companies out there that do a really good job as well. But avoid the company who's charging in the four or five digits for packages that include marketing, lots of books, press, that kind of thing.

*Q: The last time I submitted an e-book for Amazon, it actually took a Word doc, and it didn't do that before. I went to all this trouble of doing EPUB and it actually just took the Word doc and the e-book looked exactly the same. Does Amazon keep changing its rules with e-books?*

A: Amazon will allow you to go direct to Amazon only using a system using KDP (Kindle Direct Publishing). Amazon incentivizes you with things like Amazon Select to stay exclusive with Amazon. You would set up an account just with Amazon, and then you could do it that way. It has advantages, in that it's free up front and you can do it from a Word doc. It's fairly painless. The disadvantage is that it doesn't get you into dozens of other retailers and libraries in 170 countries and it's going to look as good as it looks. In other words, it's like buying a

car. Your mileage may vary. If you have a simple book that's simply formatted, Amazon's automated solution—and any company's automated solution—is going to take your manuscript, and assuming that it's a very straightforward manuscript, it's just going to suck it up and spit it out, and you're going to get something that doesn't look embarrassing.

*Q: When you talk about these versions, are you talking strictly text-based books? What about something that includes heavy graphics?*

A: Yes, we do that. Absolutely. I'm going to talk a little bit about graphics, but graphics are generally not an issue in making e-books. You can have tons of graphics in e-books. There is a cost attached to them; there are certain rules about doing them.

OK, second tip—which sounds risible but is not—is to read an e-book. A lot of people try to make e-books without having read e-books in their genre. It's important to read lots of e-books in your genre because there are certain standards and norms to e-books in specific genres—the way that paragraphs happen, the way that indentations happen.

You should know how one looks on various devices so you know what to expect. E-books don't look the same on all devices. A Kindle, a Kindle Fire HD, a Kindle app on the iPad, an iPad mini, an iPhone—you should read books on different devices so you know what to expect and you're not surprised. Post your copyright information in the first two pages—name and address, date of publication, ISBN number, collaborative credits—but realize that the concept of page numbers for an e-book doesn't really exist.

On an e-reader, the screen is the page. That is it. The font might be made bigger or smaller, so you can't really refer to page numbers. On most e-books, headers and footers and footnotes and indexes will be deleted. It's doable to have footnotes

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*“E-Books” (cont’d from page 16)*

and indexes, but really, on most legacy devices, they’re not even there.

*Q: Is a table of contents not so necessary then?*

A: The trend lately—and this may change—is to just have the table of contents embedded in the app itself and not printed as actual pages in the book. I did a book of poetry on BookBaby, and I had a table of contents as a first page, which hyperlinked to the various poems because I’m old school. I’m older than a lot of people out there, and I wanted that page to be there. But nowadays, people are just using the table of contents in the app. It’s something created and generated that the converter will do, so that way they will go back to the table of contents button in the app, and from there they can hop around to the chapters.

Fonts—what I would say about fonts could be summed up in three words: don’t get wacky. It’s helpful to use a standard font like Times New Roman or Courier New so that any special symbols will convert properly. If you go too big or too small on your font sizes, when the reader, who might be myopic like me, commits all sorts of malfeasance on your masterpiece. If you’re super big or super small on your font sizes, it might end up with one character on a page. So try to keep it 12-point font and maybe 14 to 18 for the chapter titles. If you use a weird font that a legacy reader can’t understand, the legacy reader is going to guess. So don’t be weird with the font. Same thing goes for tables and inserts and sidebars. On the iPad it’s fine, but on other devices, it’s going to get wacky. Tables and inserts and sidebars in an EPUB 2 format won’t display properly, and that’s what’s supported by a lot of retailers. If you’ve got tables and stuff like that, you should extract the content as ordinary text.

*Q: How do you do that?*

A: Just take the table and make it like text and numbers and stuff. Of you could save the table as an image. Make

an image from the table and put it in as an image instead. There are workarounds. And there are other things, like drop caps. That’s going to be changed to plain text. And multiple columns will be plain text—word art, things like that. It’s the same thing with images.

So you’ve got images. You’ve got words. This is going to be my pictorial rendition of words. Here’s words, and let’s say you’ve got an image. This is my image. Now my image has wrapped text. The text is wrapped around the image. You see that all the time in a PDF. You see that on web pages, like WordPress blogs, and you see it in fixed-layout e-books. But legacy devices can’t display that image that way. And suppose the reader makes the fonts huge. What’s going to happen? Suppose this text up here was talking about gerbils, and this text down here was talking about goldfish, and now someone made that font huge—suddenly you have the first word of this, and now the picture is referring to something else entirely.

On most e-books, the images with wrapped text won’t happen. What is delivered instead would be the words, and then an image, and then words. And that’s called in-line. That’s an in-line image. The wrapped text image is going to be converted to in-line. The good thing about in-line images is that it’s locked to a position in the text. If someone makes the font big, this image will move down and stay in the position it’s supposed to. This whole thing—I call it normal. This is a dynamic e-book, dynamic EPUB, whereas this is fixed layout.

Dynamic layout is our norm. It’s our standard. Dynamic layout is the cheapest, most compatible, easiest e-book to deal with. Dynamic layout can be viewed on any device. It can be viewed on a refrigerator. It doesn’t matter what it is. It’s cheap and easy to make. A dynamic e-book allows the reader to control the experience. They can make fonts bigger, they can make fonts smaller. This is in most cases a very good thing because it’s easy and cheap for you to make and for

us to do. It’s maximally compatible, and it allows the reader to customize the experience. The reader could even change the font from Georgia to South Carolina. The reader could make it from 14 point to 44 point. And I can read a book on the iPad, leave off at some page, and then I could read it on the iPhone and make the font bigger or smaller on the iPhone and be happy with it.

Fixed layout works only on tablets that are also computer with color, things like that. So that could be the iPad, the iPad mini, the iPhone, the Kindle Fire HD—there are others. So the physical, fixed layout book is good for these devices and these devices only. The downsides of fixed layout are that it requires a separate conversion for each one. Each one is a separate—and pricey—conversion. You can’t just cheat and deliver each page as an image. And I’ve tried, and the people at Cupertino tell me that it makes them sad. It looks fuzzy. If you were to look at this as an image, it could still be looked at on a Kindle, but it looks fuzzy and horrible. So don’t do it. And as I said, fixed layouts are not compatible with all formats.

So why would anybody want to make fixed layout? There are good reasons to make fixed layout books. Firstly, if you have a children’s book, you should make a fixed layout because you don’t want things moving all over the place. If you have an art book, a coffee-table book about a lavender farm, certain business books—if you’ve got fancy stuff where you really want to have a layout preserved, you should make a fixed layout. Just like a PDF. Think of a PDF, which is locked on your desktop. That’s what it looks like. That’s all it is. If you want to have multicolumn texts, if you want to do a horizontal format—because fixed layout books are typically horizontal, two to a page, so you would read it like this, and then you would have like two pages, and it would look like a *book* book—if you really have to have that stuff, you should do a fixed layout. Background colors, things like that. You can’t do background

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*“E-Books” (cont’d from page 17)*

colors on a dynamic book. But as I said, because of the compatibility, because of the cost, I recommend against it in most cases. Also, a fixed layout book on an iPhone is almost unreadable because the reader can no longer move to make the font larger and smaller. It would have to pitch and zoom and scroll all around, so the reader is constantly going like that to see anything. If it’s got to be that way, and if you’re happy and OK with it only being read on the Amazon color tablets and the Apple color tablets, then you should make a fixed layout book.

If a book is laid out for the print book, it will never go away for print, and it will stay laid out for the print. There’s no such thing as a dynamic print book. Print books are here, and thanks to print books, they will be the trees of the future. And it’s not an either-or. Some people will do a fixed layout conversion of a book for an iPad, which will require one ISBN number, and then they’ll do a dynamic conversion for everything else, and they’ll say, “Hey, if you’ve got an iPad, buy it on that, it will look more beautiful,” and that will make Apple very happy as well.

*Q: Is there any reason you can’t use a PDF?*

A: No. But it depends on what “use” means. You can use a PDF. There’s no law against it except in Colorado, I think. And you can sell a PDF directly on your website. But you can’t sell a PDF on Amazon or Apple or Barnes & Noble or any of the places where people buy books, and it’s my recommendation that you sell your books in a place where people buy your books.

*Q: Why can’t you?*

A: Because those stores will not accept PDFs. They won’t accept them.

*Q: Will they accept JPEGs?*

A: No, they will not take JPEGs. As I said, it makes them sad. JPEGs, it’s not just that it makes it more transportable. Yes, there is their proprietary format,

but JPEGs—images don’t look great on most devices. On the one hand, you’ve got the e-ink devices, in which case they look fuzzy and, again, you can’t make them bigger or smaller. And on the other hand, with the Apple devices, they’re not always high enough resolution. Finally, text is not searchable within them and that’s very important to Apple that text be searchable.

*Q: So to make it dynamic, instead of having text wrapping, we would just press Enter, have the photograph, and have a new line?*

A: Yes, if you were doing it yourself, you would just hit Enter, place the photograph wherever you want the photograph, and then a new line. That’s exactly how you’d do it.

*Q: I have a friend who has a lot of really good graphics in her book, and she did them all in a dynamic layout, and they still look really good.*

A: Yes, dynamic versus fixed does not at all affect the quality of how your book renders. If you’ve got really good images, it will still look really good on the iPad and the Kindle Fire, and it will look really lousy on the eInk devices. And vice versa. If you’ve got low-quality images, it’s going to look low quality on the eInk devices.

*Q: Just a point of clarification—you don’t have to have an e-reader to read an e-book. You can do it on your computer. There’s free software.*

A: Yes, you don’t have to have an e-reader to read an e-book except—I had given advice earlier to read an e-book so you can see what it looks like. You should read an e-book to see what it looks like on actual e-readers, using the software that comes with the e-readers. Many times we will convert something, and people will not have an e-reader so they’ll open it up on Adobe Digital Editions, which is free software for the desktop, and it will look lousy because everything looks lousy on Adobe Digital Editions. Or it will look

one way on the Kindle reader for desktops and another way on the Kindle reader for iPads and another way on the reader for Android and another way on the Kindle. And that’s just the way it is. So it’s important to read e-books and see what they look and smell like on the devices where people will most read them.

*Q: Since you’re in the business of taking our files and converting them into these different formats, is there something you can do on your end to make sure that they look nice on all devices?*

A: The answer is, mostly. But every device is different. We convert them by hand and we make them look as good as possible on all devices, but there are sacrifices and trade-offs. It’s an art. That’s why I would say that you’re not really getting an e-book reading experience by reading on a desktop with Adobe Digital Editions. That’s not how your book is being consumed. You should think, how is my book being consumed? If people are buying it and reading it on a Kindle, you should look at it on a Kindle. Are people buying it on iPad? You should look at it on that.

*Q: So the reason you’re telling us to read these different devices is so, for example, if we use BookBaby to convert, we’re not surprised to see it on one device?*

A: That’s one reason. Other reasons include so you know what you’re doing, so you don’t submit wacky paragraph indentations where they’re not appropriate, so you don’t put page numbers in there, you don’t put a table of contents at the end of the book or do something weird.

*Q: I have a question about the dynamic format. How dynamic can it be? For the content that I want to share, I would like to have a companion journal or a workbook or some kind of document.*

A: As far as companion journals, not much. The short preview is, not much.

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*Q: So an app would be better?*

A: For stuff like that, yes.

*Q: The Kindle app on the iPad—is that similar in nature to the actual Kindle?*

A: Does the Kindle app look like anything you would see on an actual *Kindle* Kindle? Absolutely not. Nothing like it.

*Q: One last question on the dynamic layout—is a fixed text table considered an image?*

A: For a dynamic layout, any tables will be stripped and made as just text. So if you really cannot re-explain your table in that way, then I would recommend just making an image of the table.

So next thing that authors do is, they don’t use tabs or the space bar to format. Most word processors come with a toolbar or ribbon with buttons on them. Use them. Those are your friends. Use the format paragraph menus, use the alignment buttons or the toolbars of your text editing program. Don’t be trying to align paragraphs with the Space button. Don’t even use the Tab button to start paragraphs. Use the Enter key to start paragraphs. Don’t use the Tab button. Same thing with page breaks. Don’t hit Enter for a page break because, again, the pages and the fonts are going to be different for every size device. On your ribbon or on your toolbar, there will be an “Insert Page Break.” So just use that ribbon and you’re going to be OK.

For images—the specs are on our website for images. It’s a 72 dpi minimum, standard things like JPG, PNG, TIF, RGB color mode. A lot of print people are used to working in sRGB, but that’s for print. Use RGB for this. There are minimum standard sizes. Just don’t be too small, don’t be too big. They’re on our website, so you can just look. Again, for the text around the images, set them inline, don’t wrap them. Resizing images—don’t resize them in the document itself. In other words, don’t bring an image into Microsoft Word or into Pages and

then drag the corners to make it bigger or smaller because these word processor programs are not meant to do that. They don’t have a good resizing algorithm. Do the resizing first, outside of the document, and then reinsert the image. If you want the image to be a different size, delete it in the document, do your resizing out, and bring it back in. And if the large image is humungous and you want to display it in-line, just resize it to 300 pixels high. Other silly things—for file names, don’t put spaces in the file names. Don’t call an image “my really cool illustration.jpg” with spaces in it. Get rid of the spaces. Spaces are bad.

OK, we talked about fixed layout. Now we can talk about enhanced books and apps.

*Q: Is dynamic e-book an industry standard term used to describe this?*

A: Some people say *dynamic e-books*. Some people say *reflowable*. Some say *tomato*. It really depends. As far as industry standards, it’s that way this year, but next year it might be something else.

*Q: There’s a software program called Scribner that can convert your work for EPUB or EPUB venues. I was wondering if you have an opinion on that.*

A: Yes. Scribner can save as EPUB. Pages can save as EPUB. As I say, with all these EPUB things, if you were doing it yourself, be prepared for the fact that it may work but fail out in delivery at the retail sites because it won’t pass EPUB check, unmanifest bio check, and other things. If you are just submitting it to one retailer and want to do that, that could be a good solution. If you’re submitting it to a converter, sending it as EPUB—if you do it correctly and it passes all those checks—could save you a little bit of money. But in over 50 percent of the cases, we wished that the author had just sent us the Microsoft Word document. So it could save you a couple bucks, and it could be used for conversion if you’ve done it right. No guarantees.

*Q: I’ve looked at a Kindle, but I look at a Kindle on my computer, and to me it’s boring. You can’t really do anything very exciting. You said the Kindle on iPad was a little bit better. Are all these EPUBs pretty much like Kindle and they’re very boring?*

A: Well, maybe. To see the words look a certain way for every book you read, you might think it would be boring. I fly a lot, and I always see people reading their Kindles, and half the time, they’re reading *Fifty Shades* of something. None of them look bored. It’s not like I read *Great Expectations* and say, “I really wish I could hear the wind rustling through the trees. Why is it not playing that sound?” or “I really wish that it was done in this certain font.”

There are certain authors who obsess over their fonts and the layouts, and there are certain books where I would need it in those fonts and layouts. There are nonfiction books where I love the layouts and I want to draw in the margins and highlight. But for most books, the beauty of the limitations of text is mirrored by some beauty in the limitations of EPUB layout. By not having everything be so typified and spelled out for you in a specific way, it allows you to fill in the gaps and ego-project into the scene in ways that can provide—paradoxically—more enriching experiences than something that was more fleshed out and particular and spelled out for you. But your mileage may vary.

*Q: Is the cost of conversion so prohibitive? Why would everybody want to do it themselves and not just take advantage of conversion services?*

A: It didn’t always used to be cheap to use a conversion service and a distributor. There are predatory companies out there that want to charge lots and lots of money for it. If you want your book to be available everywhere—we started BookBaby to make it so cheap that it’s a no-brainer. I do think that it’s a no-brainer, but there are people who want to go direct just to Amazon because they

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*“E-Books” (cont’d from page 19)*

really want to save a few bucks and it’s super easy because they’re surfing on Amazon all day and Amazon just says, “Hey, go with us. Go with us alone. Be our friend. Come into our little parlor.” But there is a real advantage for going Amazon alone for authors who already have established that they’re going to sell a ridiculous number of books. At that point, Amazon Select will start throwing out marketing goodies to authors that they would not have had if they did not go direct to Amazon only. It really does not advantage most authors to do that, but there are best-selling authors I know who do that for a limited time—for, say, three months. People do go Amazon Select because if Amazon thinks that it’s going to sell bazillions of books, Amazon will promote it. But for most authors, the value of Amazon Select is a false promise.

*Q: So you happened to mention \$99. Is that a typical conversion?*

A: It’s \$149 and then we take zero on the back end. It’s \$99 if you submit in EPUB already.

*Q: Assume you get an e-file. Then the author gives you a mock-up of the book on paper, and it shows where the text goes and where the artwork goes, and the author also has separate artwork he gives you. Can a conversion service take an e-file and combine it with physical artwork and set it up according to a mock-up on paper?*

A: You’re asking if the author submits an electronic file plus physical artwork plus a mock-up of the book, would we be able to handle it? The short answer is, when you’re talking about mock-ups, you’re talking about a fixed layout book, essentially. There are companies that do that well. That’s not our forte. Why we can do fixed layout so inexpensively is that an author or a publisher will come to us with design files or they’ll come to us with a PDF where they’ve already made a book and it’s already laid out, and we can work our hardest to preserve that formatting, which is a real challenge. That’s what we do. As far as the type of layout that you’re talking about,

you would want to work with a book designer. There are a lot of good book designers out there, but that’s really more of a book designer’s forte than what we do.

*Q: But would a book designer work with you or work with a conversion company?*

A: Yes, with an asterisk, meaning, we are friends with book designers. There are people I know who do really good work and we cross-promote with each other. Book designers refer us and vice versa sometimes. But typically, when a book designer works with a converter, that conversion house is getting some percentage and working as a middle man but not providing a ton of value. You can go out and get a book designer and see samples of their work and see what they’ve done. It’s not something that we would add a lot of value to, and I would hate to take a cut for that.

*Q: You mentioned conversion and distribution. How does the distribution work on that?*

A: Distribution works where you send us your document, we convert it and format it so it looks good on all the devices, and we distribute it to all of the online retail stores and libraries all over the world. We get paid per their various schedules. There’s typically a waiting period at the beginning, meaning that Amazon will pay at the end of the third month following receipt of the book. It could actually be 90 days until you see a red cent from Amazon. They each pay us on a different schedule, typically monthly. We pay out to the author 100 percent the day we get it. The day we get it, we pay it. That’s it. You have a central account in Dashboard where you can see all your sales.

*Q: How do you get paid?*

A: There’s the up-front money for the conversion. We charge \$19 a year after the first year so we can keep converting and distributing it to all the new stores that I sign and in all the other countries,

plus we do cover design and we have other services—web hosting, all kinds of other things.

*Q: So the money from Amazon doesn’t come direct to us? It would come to you?*

A: It comes direct to us, and we would pay it out immediately, all of it. Amazon and the US stores typically take a 30 percent cut, but that varies. Overseas, it’s typically 50 percent, sometimes a little bit more. It really varies all over the map.

*Q: Can you tell us how your service with BookBaby is different than LSI’s system?*

A: LSI has a new e-self-service platform. LSI is Lightning Source. It’s one of the two major print-on-demand companies. The other is CreateSpace. CreateSpace distributes to Amazon. It does print on demand to Amazon. It’ll distribute outside of Amazon, but it takes an absurd amount of money for doing so. LSI is one of the major players. Lots and lots of other companies do physical book distribution but actually broker through LSI and keep a chunk of the money. LSI takes a cut on the back end. That’s one of the primary differences. It has a reasonable network. I don’t know the quality of the work because it’s a new service and I haven’t tested it out, but it takes 30 percent on the back end or something like that. You can go to the website and check it out.

*Q: LSI is affiliated with Ingram, so it has its tentacles everywhere, like you mentioned. You’re doing 170 countries worldwide for distribution. What’s the power of BookBaby in distribution versus Ingram?*

A: Ingram is an interesting company. It distributes all over the place. It has a larger distribution network than we do. It also takes a large percentage of the money. Its distribution to the expanded network is, in many cases, even higher than 50 percent. A lot of the stores that it distributes to, I wouldn’t even sign deals with them because it didn’t seem like a viable business model. Ingram is just

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*“E-Books” (cont’d from page 20)*

signing with everyone, racking up stores. Whether you will sell books in Joe’s Retail Store in Zambia is an open question.

What our authors are finding is that after you get beyond a certain number of stores, major ones, and a certain number of territories, Western Europe and others and some of the library networks, it trickles down to approaching absolute zero after a certain point. The other problem with LSI is that it has an all-or-nothing model, Ingram does, in terms of where you distribute. For example, we distribute to Kobo, which is a major retailer that is huge in Canada and Spain and other countries. Kobo has tablets for sale in Rite Aids. It makes nice devices—it has a good retail store, based in Toronto.

Right now, we pass on 70 percent to the author, but if we went through Ingram, it would be 40 percent or 45 percent. If I signed with Ingram, I couldn’t exclude the major ones. I would have to go to its whole package, and then the authors would receive a lower payout on the stores that mattered. We’re very close to signing deals with the subdistributors who take a more fair percentage and will get into practically as large a network as Ingram. Right now, we have a very large network, and I’m confident that it’s more than enough.

*Q: Would you talk a little bit about e-books and retail stores? My impression of e-books is that they’re available to all of us simply by going online. Why is it that we would go to a store to get an e-book?*

A: Why would anyone go to a store? There is no answer to that. Barnes & Noble had hoped—because people weren’t going to Barnes & Noble for anything other than as a showroom to buy books on Amazon and to get a Frappuccino. You would walk into a Barnes & Noble and there would be this Orwellian book booming over the speaker saying, “Buy our Nook, buy our Nook.” And it was a very nice place to be at the time because you had the store to yourself, and it was really cool.

For me, the demise of the retail store is sad because I don’t believe that online stores have done a great job at discovery. Amazon has a nice “Look Inside” thing, and it’s a cute piece of software, but if there are 100 books on Greek mythology, I would like to spend an hour in that section of the bookstore, flipping through the book and hearing the author’s tone and seeing what they have to teach before I light upon one. It’s hard to do that online. But there’s no good answer to this one.

All right, there are a couple ways of doing enhanced books. One is an app or through some other app. And that’s really the very best way. You can do all kinds of stuff in apps. And they’re amazing. You can take notes, you can have Q&A sections, you can have interactive form fields, you can take advantage of the GPS on your device and have location-specific content, maps, and integrate Google maps, you can have animations pop up and play. Boy, are they cool!

But I hate them because, first, they’re really expensive to make. I mean, no-joke expensive. Just donate the money to a homeless shelter or to Meals on Wheels—do something other than make apps because there’s more good that you can do with your wallet in this world, in most cases.

And that’s the most opinionated you’re going to hear me. Otherwise, I’m just going to say that everything’s good, except for the companies that are predatory on authors. Second, apps have a long time to market. There’s a whole production cycle and a back and forth to apps that takes longer to make than you would think or want or hope. You’re going to have an intimate and not-always-pleasant relationship with the app maker. And third, there’s that issue of discoverability, to which I have alluded. When the iPad first came out, it was cool to have book apps, and they did well. It was like, “Wow, *Alice in Wonderland*. Look, you turn the iPad upside down, and Alice falls down into the well!” And I did this for the first day I had the iPad. I didn’t

even play with the rest of the iPad, I just kind of turned it upside down over and over to watch Alice fall. And then the app store became huge for games, and now we’re a million apps later, where people buy *Plants vs. Zombies 2*, and soon it’s going to evolve into something else, where people will be able to buy *Plants vs. Zombies 3*.

So the point is that they’re not going to the app store to buy books anymore. But those are the three major disadvantages to apps, to my mind—the cost, the time to market, and discoverability. Now if you want some of the enhanced features in an e-book, you can do it, still in the reader that comes with the device. That would include audio and video and bookmarking and highlighting. The reader can still do that. Internal links and external links, searchability, table of contents, and even social sharing, in many of them, especially in the Kobo devices.

With enhanced books, there are similar compatibility issues. You can’t do the type of journal thing that you had asked about, in terms of companion stuff. What you could do in that case, and what I would recommend, would be to offer in your books, say, “Hey, you have a code to this special thing on my website where you can download a PDF and print it out and write in it.” It’s old technology, pencil and paper, but by golly it’s a beautiful technology.

Issues with enhanced books include, aside from those three, device compatibility. It works with the Nook tablets, it works with the iPad, it works with anything that looks like a computer without keys, they’re not going to have audio and video on a Kindle Paperwhite. It’s just not going to happen. They can play MP3s, but they can’t play it inside of an e-book, which is very strange, but true. It’s like there’s two separate operating systems in there. For costs, they’re not that expensive. You figure maybe \$2 a page, combining it with fixed layout. Cost is not particularly an issue. As long as you don’t make an app, for maximum

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*“E-Books” (cont’d from page 21)*

file size, that’s another thing you have to think about.

This summer, I wanted to make a multimedia app. I was in Turkey for the protests, and I got a lot of footage of this, and I wanted to make a multimedia book. I realized that when you deliver to app makers, like iPad, they want you to have high-def video in there and when you do, you can suddenly have gigabytes of file size in there. The truth is, the maximum file size is 2 GB, but in most cases, no one’s going to want to download a 2 GB book. They’ve got limited storage on their iPad. I was being tear-gassed and ran out of storage on the device, so I’m standing there, with my mask and goggles on, and I was deleting *Zombiewood* and all of my child’s games on the thing so I could film more. So when you’re making a multimedia e-book, you have to really respect the download time and the storage capacity of the users.

*Q: How about that external link part, like a blog or something like that?*

A: You could put links in any e-book that you want, including dynamic—with an asterisk. The asterisks are as follows: if you put links to Apple in a book that we deliver to Amazon, Amazon is going to pull it down and yell at me. And vice versa. Companies don’t like links to other competitor websites or YouTube links. The stated reason that Apple would say is that it wants users to be able to have the video embedded, so that way if they lose the Internet connection or they’re reading it on a plane, they could have the full experience. The people who were telling me that—their noses were growing as they were saying that. They don’t want links to YouTube in the book. Links to your website are good; links to competitors (including Google) are less good.

*Q: So they’ll actually physically remove the link from the e-book?*

A: No, they don’t go into e-books and remove links. They remove the e-book.

*Q: Some years ago, my wife’s children’s book*

*was put out on e-books. They were broken down into smaller sections. And unfortunately, the company went out of business. Is there—other than trying to get the people who ran and owned the company—any way of retrieving that information? There are e-books out there that are my wife’s books, and we have no idea where they are.*

A: The company that released the e-books went under, right? So do you have the e-books?

*Q: No, we’d like to retrieve them.*

A: Retrieve them from where? Where do you want to retrieve them?

*Q: Exactly. I’m trying to get a hold of them, but it’s been impossible. I thought there was some magic wand, but obviously not.*

A: I’m sorry. There are authors that fight for their backlist. I speak to authors who have sold tons of books, and the publisher will have the digital rights for seven years, and then after that, the authors want their backlist back. That way they could upload it to BookBaby and keep all their money because they realized the publisher wasn’t adding value to them. There was one case where the publisher printed up 10 books and released them in Croatia or something and it renewed for another period. So authors have to fight tooth and nail, and there are lawyers who do nothing but try to help authors get their backlist back. As far as people who have gone under, I have no idea. Private investigators maybe? There’s not much I can recommend.

*Q: So what are some of the ways to become a best-selling e-book?*

A: Now we’re getting into the social marketing thing. I’ll buzz though some social marketing tips. First, define your USP—your unique selling proposition. With all this content out there, think like a marketer. What’s your unique selling proposition? Why would people want to spend their time and money on you? First, it could be to be an outlier—be so incredibly amazing that you’re like

a world historical figure. You could have clear and compelling ideas. That could be your USP—to be easily explainable or to have a prolific and predictable brand. I just saw Philip Glass’s *Einstein on the Beach* the other day, and I loved it, but Philip Glass had a predictable brand. He made what he had made over and over, as did Andy Warhol. Do things over and over again and again, and suddenly you’re in your Blue Period and you’re the new Picasso. That’s how Homo sapiens work. It’s really depressing, and there’s nothing I can do about it. But it is a way. And, like Angela James, the head of romance publisher Carina Press says, you need to have a business where you can go and satisfy audience expectations, whatever they are.

Second, really think like a marketer about discoverability. There’s a mystery writer, Joanna Penn, who runs a blog called *The Creative Penn*. It’s a great blog. She’s a great social media guru in addition to being a good writer. She gave a PowerPoint at the London Book Fair on discoverability, which you can download from her site. I highly recommend it. But the punch line of what she’s saying is, think about all kinds of ways in which you use keywords. Brainstorm keywords for your book title. What are keywords? Think about why someone would ever search for your book. Why would someone ever search for this and bump into it? You can promote, promote, promote, but your best promotion is someone bumping into it.

So why would someone bump into it from a search? How would they search? They search by keywords. Where do they search? They could search on Google or they could search on Amazon. If you start typing in a Google or Amazon search window, you can type a word, and it’s going to make other suggestions for you. So if you start typing in “job,” all these things come up: “how do I find a—” or “career advice” or “jobs for people who are left-handed” or whatever. That will give you clues as to what you might want to put in your book title,

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in your metadata, in your description for your tags, and on your website and articles and blogs and social networking. Think about keywords. There's a Google keyword tool, you can check on Amazon. Look for cover design trends. Within each genre, there are cover design fads. We do cover design. They did my book, they did my son's book, and I'm very happy with the work that we do, but you can get cover design other places. However you do cover design, check what the current trends in your genre are so you don't look out of date. Also, think about discoverability on reader sites, like Goodreads and other places like that.

Third social marketing tip: corner underserved niches. In other words, if you can't compete in mainstream contemporary fiction, you might be able to write the greatest book ever written about people who play the banjo while standing in a bag of Jell-O. Whether you think that's a big market or not, that genre has a felt need that is underserved. And they're out there. There are organizations, there are magazines, there are events and conferences. They've got blogs and forums and websites. You can do Twitter searches of them and set up Google Alerts for them and check other Amazon book reviews for them. You can write Amazon reviews on books similar to yours and sign it with your name and book title.

The point is, whatever your niche is, if it's underserved, you should really think about working in that niche. And when you're tweeting or doing social media, you should not be spending more than 20 minutes a day on it. You should spend the rest of your time doing good, such as writing or living or playing chess or dancing or traveling or talking to your family or volunteering or something other than social media self-promotion. But in that 20 minutes a day, you don't have to be an extrovert and be like "buy my book, buy my book, buy my book." It's more like in that Jell-O banjo niche of yours, whatever it may be, if you interact with the thought leaders, see who's doing well, who has the most followers. Talk to them. Ask them questions, answer their

questions, retweet, and then as a part of that complete package, say, "Hey, and I've got a book." And if you're writing a mystery thing, you can blog about it and write about forensics or something like that. Focus on a specific genre that's not being served currently, such as dinosaur porn, and I mean no joke by that.

The fourth tip is to start with your own website. Even though social media is king, your website is your hub where you get to control the design, control the brand. Above all, capture e-mail information and contact information. Sell direct to readers and push and pull content from your social media website. We have websites with [hostbaby.com](http://hostbaby.com) where you can do direct fan sales, have an event calendar, steam video, have your own blog and social media integration, and all sorts of fun stuff.

The fifth tip is to engage your fans. As I was saying, you can blog exclusive content, serialize your novel, and open up the creative process, such as post pictures of your cat sitting on your laptop. You can ask questions, solicit feedback, and do some live steaming and readings, even direct to reader sales.

Finally, don't forget e-mail. E-mail sounds so 1990s, but what we've found and what our authors have found is that e-mail gets the best response. It gets much more response than all of the "Likes" and friends and followers on Twitter and Facebook in the world. If you can capture e-mail addresses in exchange for exclusive content, harvest e-mail lists from your niche. Put out a newsletter. We have a free e-mail newsletter thing that comes with HostBaby. You can reach out to them and engage them. Again, don't spam people, but engage them to interact with you.

Becoming a best-selling author involves all those things, plus luck and timing, plus talent. There's no particular magic bullet, and there's no particular genre that will work. Whatever it may be, you know that doesn't help you because the people who do well are people who

really have an authentic voice. I don't think that the great successes in this world—successes by conventional standards, the Oprah Winfreys, the Michael Crichtons, the Steven Spielbergs—I don't think they were faking it. I don't think that they were saying, "Well, what will be big? I'll do that." I think that that's their authentic voice and that they happen to be phenomenally talented, lucky, hardworking, and focused and all the other stuff that you need. I don't think that you can fake that sort of stuff.

What I always tell authors is, think about why you're doing this. If money is what it's about, you're really better off selling shoes. If fame is what it's about, you're better off doing anything other than this. This is not the era of the Algonquin Round Table, of James Herbert and the celebrity author. This is an era for people to get their voice out without trying to please the gatekeepers. When I was a kid, if you wanted to get your book out, you had to be picked up by Waldenbooks or these places that had a grand inventory of 20 books. Now you can be sold in the same places as the biggest authors in the world, all over the world, for \$100. It's incredible! The downside is that there's a ton of content out there. So do your social marketing as part of a complete breakfast. But remember why you're doing it. Convert your work, get it distributed elsewhere, self-publish it first and release your work, and find your niche and develop your platform. Just truly engage the people in your genre and your heroes, stemming from your website newsletter. One of the great joys that I've had in the industry is being able to interact with some of my writer heroes on the social networks, and I've actually gotten to meet them and hang out with them when I go to conferences or overseas. I never would have been able to talk to those people when I was a kid. It just never would have happened. So those interactions and the ability to get anything out there to the world and distributed everywhere—my own original voice, without it having to sell hundreds of thousands of copies and waiting to

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please a gatekeeper—I find that incredibly liberating and beautiful. As long as you’re feeding yourselves, you are, in the words of Charlie Sheen, winning.

Thank you.

*Q: You’ve done a great job, but I feel like I’m a medieval monk, working as a scribe sitting at a conference on typesetting.*

*A: I would suggest that, as a fellow poet, because that’s very poetic, I feel ya. One of the reasons I started BookBaby is so you don’t have to sweat the technology. You don’t have to wait; you don’t have to know all this stuff. My whole professional purpose of being is so you don’t have to think about this stuff, and if that’s the case, I’ve succeeded. If you have to change the oil in your own car, then I don’t need to exist. Then you don’t need me. So the point is not to sweat the technology, not to sweat the gatekeepers. Just to get your stuff out there, do the best you can, communicate with the people who are in your niche and in your genre.*



## RECORDINGS OF PAST MEETINGS

If you missed a meeting or need to hear the information again, we have recorded each of our meetings in MP3 format.

If you would like to receive a copy via e-mail, please contact Gary Young ([artsy12@earthlink.net](mailto:artsy12@earthlink.net)) with the subject line: PALA RECORDING.

Please indicate which *date* AND *program* in your e-mail. He will get back to you with the simple procedure.

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