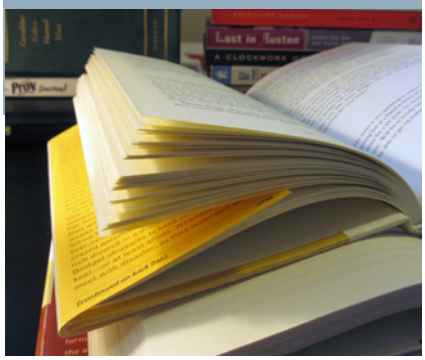
Publishers Association of Los Angeles
EDUCATION • NETWORKING • RESOURCES

INSIDE:



UPCOMING MEETINGS:

EBOOKS - PART OF YOUR PUBLISHING REPERTOIRE

Wednesday, February 15, 2012
7:00 pm - 9:00 pm

Not a week goes by without some new story about e-books and how they are changing the face of publishing. Readers are embracing them and publishers are racing to deliver them.

Speaking from a perspective gained from working in digital media over the past 20 years, our February meeting speaker, David Wogahn, will inform us about the issues facing today's publishing professionals when it comes to e-books.

He will cover topics such as
- A state-of-the-market overview, including current hot topics
- Planning and design considerations unique to e-books
- How to simplify the conversion process
- An overview of the conversion process and various services
- E-book distribution channels
- E-book-specific marketing options

He will also discuss navigational considerations, linking to Internet-based content, how to handle footnotes and indexes, and metadata.

OUR SPEAKER
DAVID WOGAHN is a 20-year veteran of digital publishing and the founder of the e-book agency Sellbox.com. He was a cofounder of Times Mirror Multimedia and the FANSonly Network (now part of CBS Sports). David published his first e-books in 1991 and has worked extensively in both business and consumer media and across a range of delivery types, including websites, CD-ROM, syndication, and e-books (Mobi and ePub) as well as print.

WHERE: Felicia Mahood Senior Center 11338 Santa Monica Blvd., West L.A. (About 3 blocks west of the 405. Parking is available on the street or in the public lot on the corner of Corinth and Iowa.)

COST: $5.00 for PALA members; $15.00 for nonmembers. Advance admission can be purchased until the day before the program with PayPal on our website: www.pa-la.org.

QUESTIONS: Sharon Goldinger, Program Chair, pplspeak@att.net, 949-581-6190.
Please follow PALA on Facebook at tinyurl.com>PALA-Facebook and Twitter at twitter.com/#!PalaPub
Please visit our Web site for updates at www.pa-la.org.

SAVE THE DATE: March 15
How to Make and Use Videos for Your Marketing

PUBLISHERS ASSOCIATION OF LOS ANGELES (PALA) <http://www.pa-la.org>
President: Gary Young (artsy12@earthlink.net)
Vice-President: Sharon Goldinger (pplspeak@att.net)
Secretary: Gemini Adams (gemini@liveconsciouslynow.com)
Treasurer: David Evans (teddytravelerbear@earthlink.net)
Programs/PMA Liaison: Sharon Goldinger
FACEBOOK: 360829964913@groups.facebook.com **TWITTER: @PALAPUB**

PRESIDENT'S MESSAGE:
MORE PARTICIPATION

As our New Year's resolutions melt away, I am sharing one homily with you, as well as some goodies.

Simple, but so easily turned away from--try hard to communicate better than ever in your business and in your personal life, to listen better than ever, to really take the time to hear what is being said to you, and try hard to see the positive side and enlarge it. Don't give in to negative communication or inertia. See the good stuff. Nothing earthshaking here, but therein lies the beauty.

The new year is bringing some changes and challenges as always. Along those lines, we are encouraging our membership to take a more active role in our organization. We have made a few changes that will encourage this, which you will see in the upcoming months. But now is the time to throw your hat in the ring, even if it's only for a small, finite task. We'll find a job that fits your interests and time frame. We'll all benefit.

We are looking for more university participation. If you know students or professors who may be interested in publishing on any level, from writer to vendor, let's communicate about these folks. We are offering a student/professor membership/ attendance package.

We are also looking for university students who might want to gain free membership and resume credit through work-study with PALA or similar perks by helping publishers with book graphics for children's books, helping with newsletter layout, and getting the word out about PALA, to name a few choices.

Finally, if you know of an accountant who has experience with nonprofits, we have a very simple system that could benefit from the advice from a *pro bono* accountant. Not much time would be needed, but getting professional advice would be an important plus for us.

Gary Young
PALA President

PUBLISHING UNIVERSITY RECAP(1)--TEN TIPS FOR SUCCESS

by Janiss Garza

My biggest problem with IBPA's Publishing University? Too much good stuff! There was something for everyone: self-published authors, indie publishers, start-up publishers, digital publishers. Sounds great, doesn't it? But I am a little bit of everything--a self-published author (and a traditionally published author too), an editor who is starting up a small publishing company so that I can help other writers get their books out there, and someone who is very focused on working in the digital book world. I wish I could have cloned myself three times over. I would have found useful knowledge in just about every breakout session.

Since the technology to clone myself was not yet available, I decided to focus on just one aspect of my publishing identity and that was Start Up Publisher. It encompassed enough of my other identities while getting into the meat of the publishing knowledge that would be meaningful on the other levels. My decision was solidified right away with the opening keynote, "The Great Debate: Are Publishers Irrelevant?" As you might have already guessed, the answer is a resounding no! Although there were debaters--Randy Shur of Square One Publishers, Cursor Founder Richard Nash, Daphne Kis of SheWrites.com and Smashword's Mark Coker--I think there was no debate, really. There will always be a need for publishers. The face of publishing is in flux and now there is more room for indies and start ups (like me!), but as long as there are books in physical or digital form, there will always be a need for companies to oversee releases, understand their niches, and nurture talent.

The session that was of the most interest to me on day one was "Ten Tips for Start-Up Success." Ocean Publishing's Frank Gromling, Mitch Muncy of the Alexander Hamilton Society and (once again) Randy Shur led us through the details of the following very practical tips:

1. *Get--and stay--educated*. This means not only continuing to hunt out conferences, webinars and other means of learning, it means vetting your sources to make sure you are getting quality information.

2. *Do the numbers*. Publishing is a business, which is why there will always be publishers--only a limited number of authors really want to deal with this aspect of writing. Have a business plan, know the costs, have a publisher-specific accounting system, use IBPA's discounted subscription to Bookscan, etc.

3. *Publish what you know and what you love*. To me, this was a no-brainer. Why waste time in a business like this with stuff you don't like or find boring? Passion shows.

4. *Create a good publishing agreement*. Be fair and be thorough. Know your rights and your author's rights. Understand your contract. I love what Randy Shur said: "Our contract is written in plain English." I've seen and signed several contracts as an author--and paid a lawyer to make sure I was getting what I wanted--so I appreciate his words!

(continued on page 3)

PUBLISHING UNIVERSITY RECAP(1)

(cont'd from page 2)

5. *Learn how to get book sales in advance*. Knowing your audience and where they go and what they do that might involve having your book available to them. Who serves your niches? These are the keys for advance sales. This is why #3 is so important--it gives you a head start on understanding your niche.

6. *Build media relationships*. Learn the proper way to get reviewed in *Publishers Weekly, Library Journal, Foreword,* and other publications. Find out how to put together media kits and pitch the outlets. Radio is different from magazines, and different again from online outlets.

7. *Work your marketplaces*. Know who buys your books, and why, and get authors out in front of them! Promotion is important, and authors often need help in this area.

8. *There are no silver bullets*. To survive in the publishing world, it's important to keep developing your company, yourself as a professional, and your niche.

9. *Give back*. It's especially good to give to a cause to your niche.

10. *Know your endgame*. A shocking number of people plunge blindly ahead into the publishing world without knowing what they want to accomplish. How many books do you want to sell? How much money do you want to make? Where do you want to position yourself in your niche? What is it going to take to get you there? Figure out a plan, take action, and visualize the outcome.

One breakout session and already my head was spinning, in a good way! And that was only partway through day one. There was more to come.

Janiss Garza has been a journalist, editor and photographer for over 20 years. She is coauthor of *White Line Fever*, the autobiography of heavy metal icon Lemm Kilmister, and is editor of two books on cat advice written by her cat, the award-winning blogger, Sparkle the Designer Cat (http://www.sparklecat.com).

PUBLISHING UNIVERSITY RECAP (2)--E-Books, ebooks, e-books, or EBooks? by Julie Orlov

There are as many thoughts about e-books as there are ways to spell it. Of course, e-books were a noteworthy topic at last year's Publishing University in New York. While print books still out sell e-books, e-book sales are climbing at astronomical proportions. E-book readers are coming down in cost and with the popularity of the iPad and iPhone, downloading your favorite book is only a click away.

There were presentations from Amazon and Smashwords representatives, both of whom shared a lot of valuable information. So what was my takeaway? If you don't have your book already converted into a digital format--be it pdf, e-reader, or Kindle--do so now. You don't want to get passed up by your competitors. And you may be missing out on incredible revenue and online promotion and publicity avenues.

There are many options to handling your books' conversions--you can use an e-book distributor such as Smashwords (an e-book publishing and distributor service, www.smashwords.com) to handle your conversion, pricing, and placement of your e-books, or you can find an independent converter (I would recommend getting personal referrals from sources you trust) and distribute your e-books independently.

A multitude of online stores where you can independently open an account, upload your e-book, set your price, and start collecting sales revenues are available. The most popular sites are Amazon, I-Store, and Barnes & Noble, but an increasing number of independent online book stores are reaching more and more people. Some of these may have niche products, so do your homework if you want to be your own distributor.

Other e-book distributors from which to choose are also available--again, a simple online search will get you started. While for the most part you can name your price, your profit percentage may vary from site to site. This percentage depends on which online company you are dealing with, the price, and the specific policies of the online company. For example, if you list your e-book price under a certain cost (e.g., $3.99 or 4.99) your percentage of profits may be different than if you set a higher sales price per unit. It behooves you to get advice on the proper pricing for your e-book. Some people will suggest that a lower cost will yield a greater volume of sales. Others suggest that a slightly higher price will still yield sales as well as yield a higher profit percentage. One can argue it both ways. At the end of the day, you will need to decide what price best fits your product and your marketing needs.

So put your elitist attitude aside. While most authors still hold dear the feel and tradition of the printed word, e-books are here to stay. Resist not. There's a new world waiting for you.

Julie Orlov, MAOL, MSW, LCSW, is a psychotherapist, speaker, and author of *The Pathway to Love: Create Intimacy and Transform Your Relationships through Self-Discovery*, www.julieorlove.com.

UPCOMING EVENT:
Publishing University on the West Coast

Mark your calendars for IBPA's Publishing University--on the West Coast. The 2012 IBPA Publishing University will be held in San Francisco on March 9 and 10, 2012, at the beautiful Sheraton Fisherman's Wharf. Visit www.ibpa-online.org for more information.

All of the PALA Board and officers have attended Publishing University. It is an invaluable and worthwhile experience. If you have any questions, feel free to contact any of us.

ANNOUNCEMENTS

Rosemay Cohen is pleased to announce that her new book, *The Mother of Jerusalem Is Crying*, was launched on January 22, 2012 in a private reception. For more details about her new book, contact Rosemary at 310-552-3518 or rosemary@atelierdeparis.com.

Charlie Barrett, The Barrett Company, has two announcements. First, his company, The Barrett Company, Book, a TV and film publicity firm, marked its 20th birthday last September, which was established following his long stint with NBC and Johnny Carson's *Tonight Show*.

Since its creation 20 years ago, TBC has gone on to represent best selling authors such as John Locke (www.donovancreed.com) for Amazon (www.amazon.com), Carla Malden author of Globe Pequot Press' *Afterimage*, producer Marty Jurow (*Breakfast at Tiffanys*) author of *See In Stars* as well as Emmy winning TV shows such as CBS' *The Amazing Race* and motion pictures starring Pierce Brosnan, Kevin Costner, Joe Mantegna, Tatum O'Neal, Sting, Mark Ruffalo and many other authors and screen personalities.

The Barrett Company opened its doors on September 6, 1991 representing a handful of clients including Larry O'Daly and his seminal comedy series on A&E, *An Evening at the Improv*, followed by *Comedy on the Road* hosted by comic John Byner. TBC also represented Ed McMahon and his popular *Star Search* series, which some TV critics claim is the forerunner to today's *American Idol*. Barrett opened TBC after serving as President of the TV department at Beverly Hills PR firm, Guttman & Pam. From the 1980s to 1990, Barrett was the NBC network staff publicist for Mr. Johnny Carson and his *Tonight Show*.

Barrett joined NBC in 1979 after serving as a department editor of *The Hollywood Reporter*, preceded with executive PR posts with Capitol Records, 20th Century Fox Film Corporation (New York), Elektra Records and Mercury Records where he publicized Rod Stewart, Buddy Miles and other artists on the label in the early 1970s. He began his show biz media career as a staff writer for *Billboard*, basing in New York. In the late 1960s upon his graduation from college--Barrett joined The Associated Press in New Haven, CT, as a broadcast news writer and also went on to work as a bureau chief for *The Hartford Times* newspaper. Barrett is a native of Connecticut.

Charlie would also like PALA members to know that he has authors come to his firm looking for publishers and many are very talented such as ones that made recent deals with non-LA publishing houses such as Ben Bella Books, Moneky Press in Denver and many others. If you are a publisher and are interested in new projects, please contact Charlie directly at barcopr@earthlink.net.

Do you have news to share about your company? We're all ears! Let your PALA colleagues know if you have a new book, made a rights sale, signed up with a distributor, won an award or have any other good news. Do you know of an event, seminar, panel discussion, festival or other gathering that would interest PALA members? Please share it here. E-mail it to pplspeak@att.net for inclusion in a future newsletter.

Legal Issues for Publishers

(Transcript of 6/13/11 Meeting)

I'm going to be talking tonight about the moving target that is publishing law. The publishing industry is moving at an ever-greater velocity. As markets change and as publishing media change, as technologies change, the things you need to know and the things you need to do to protect yourself from a legal point of view also change.

The single most common problem that's presented to me as a practicing attorney is a publishing situation for which there is no contract. People come to me because they're collaborators and they've fallen out with each other, but they have no collaboration agreement; they have a problem over a permission, but they have no permissions agreement; they may have even published a book without a publishing agreement. The absence of a signed, written agreement is the single biggest risk you can take as a publisher.

It is always prudent to talk out, negotiate, draft, and sign an agreement with the people you work with, people from whom you acquire content, and people who provide you with services so that if anything does go wrong and you do have to address a problem, you have a starting point. I got a call last week--it's a very common call--of failed collaboration, and the person said, "My collaborator is in breach," and I said, "In breach of what? What did you expect this collaborator to do that they're not doing, and where can you point to where that obligation was taken on?" If it's not in a contract, then it becomes kind of a scavenger hunt through e-mails and letters, and maybe it can't be proven at all. So that's one takeaway. From the ideal point of view of the world as the lawyer sees it, it's best to have a contract.

The contract has to be right. It can't just be the contract that you found on the Internet or the contract you've been using for twenty years or the contract somebody else shared with you. Things are changing; contract terms are outmoded at a much faster pace than they ever used to be. Contracts didn't change much, I would say, between the turn of the twentieth century and the middle of the twentieth century. After the 1970s, they began to change a lot. And now, in our recent memories--not our lifetimes, just the last few years--it's changing at light speed.

Where you get your contracts is an important issue to consider. It's easy to find things online, and even lawyers do that. Lawyers sometimes look around online for forms to see what's going on and how to attack a certain problem or how other lawyers have attacked a certain problem. But the issue is, it may be an old contract; it may be an inexpertly drafted contract; it may be a fine contract, but not the contract you need, not the contract that meets the deal you're doing. So contracts really should be thoughtfully drafted, and since I'm a lawyer who makes my living drafting contracts, I think you should go to a lawyer with experience.

Look at what lawyers call *the four corners of the book* or the book project in its entirety--everything that's in or around that book. Ask yourself, where did I get the right to use what I see in my book? And I'm not talking about just the obvious things--obviously, the manuscript of the book is pretty fundamental. You have to get the right from the author or authors of the manuscript. If the interior pages have illustrations, photographs, charts, an index, a preface, or a foreword, ask yourself, why do I have the right to print this material? But there's much more beyond that too--the cover art, the graphic design, the advertising copy, the jacket copy, the catalogue copy, the blurbs. If you've put blurbs on the book cover, where'd you get the right to do those blurbs? I'm not going to try to convince you that you need a negotiated, drafted, and signed contract for every single minuscule element, but you do need something you could point to that says "this is how I got the right to use this material." I'll give you a common example.

Not very many publishers contract for blurbs; they don't send out blurb contracts. But it would be really, really smart to send out an e-mail to the person who provided you with the blurb that says "thank you for providing us with the blurb for so-and-so's book; we're going to make good use of it in advertising and promoting the book." What does that prove? Well, it proves that you are intending to use this blurb, that the person gave it to you voluntarily, that they understood what you were using it for. That permission could be withdrawn (that's not a binding contract), but it is something that creates a paper trail, and a reliance--the right for you to rely legally on the understanding as you've stated.

If you get an illustration--a common problem nowadays, and, I'm as guilty of it as anybody because I do online writing now, and with blogging, you're responsible for getting your own illustrations. There's no more division of labor, and so I do what everybody else does; I go to Google Image, I find an image and often use it. How did I get the right to use that image? That could be copyright infringement, and the question has to be asked and answered. You can't pull something off the Internet and use it. You have to analyze: Is it in the public domain? Is the use you're making of it a fair use? Do you need permission? If so, whom do you ask for permission? And these are all decisions that you need to make up front to avoid legal risk.

(continued on page 6)

Legal Issues (cont'd from pg 5)

Q: Along that line, a while back, people who owned the New York–New York hotel in Las Vegas built this replica of the Statue of Liberty and evidently put an image of the head on the Internet. When the postal service was printing up some new stamps, it inadvertently took that image instead of the one of the actual Statue of Liberty. From what I understand, there are changes that an expert could tell right away, but that the average person would not. Would there be a possible copyright infringement there?

A: That's a very interesting question, and a good illustrative example. If I got access to the Louvre with a camera and took a picture of the *Mona Lisa*--the *Mona Lisa*'s in the public domain, because hundreds of years have gone by--and I put that camera right on the *Mona Lisa* in realistic lighting and true colors and took a picture of it, the black-letter law of copyright says that I'm the copyright owner of that image. I'm the photographer who clicked the shutter, framed it, and made the lighting decisions. I clicked it; I'm the owner of the copyright. But what you have to ask yourself is, what kind of copyright do you get in taking a hyperrealistic, faithful, accurate picture of a public domain image? And the courts have really said there is no copyright here. If I had processed that image, if I had color adjusted it, if I had manipulated it, texturized it, those added features *might*--if they're sufficiently different than the original--achieve some sort of copyright protection. And so there is the rub. You could see an image on the Internet that you might assume is a public domain image, but if something has been done to manipulate that image or if it's in fact not the image of the Statue of Liberty itself but is some model of the Statue of Liberty, you might run into a problem.

I want to concede to you that you could be so exacting--I have a client who's just this way--so meticulous that you never get published. This client has never turned on the presses because he's always got something that he wants to clear. And I always say to my clients, "If you want to have a risk-free publishing business, don't publish anything." There's always going to be some risk. Fair use is risk. Fair use is *not* an affirmative right. Fair use is a defense that you raise if you get sued for copyright infringement. You need fair use to publish, and you make (hopefully!) informed decisions, and maybe with the advice of an attorney, but it's always a matter of odds. It's not a sure thing.

If you answer the question that I've posed to you, how did I get the right to use this material? The only definitive answer- I get a signed, written contract with the person who owns that content or I don't use the content at all. "Either cut it or clear it" is the way I put it. But you might make a decision in between, which has to do with a fair use position. This is a pretty fundamental issue, this is not a new idea, but the reason I emphasize it in this class is that you live in a media-rich environment, where all kinds of content are so readily available through the Internet that there's a *huge* temptation to just use it and then worry about it later. And unfortunately, when you do that, you take some measure of risk. clearly right in the mission statement.

If I say to you, either clear it or cut it, unless you're willing to tolerate the risk of determining if something's in the public domain, or taking a fair use position, or some of the other strategies that are available, the question then becomes (and this, again, is affected by all of these high-velocity changes in the market), what permission do I need exactly? Let's say I found an image that I want to use on the cover of my book, and I found the person who I believe owns the rights to that image, and I'm going to ask them for permission, and I'm going to follow Jonathan Kirsch's advice and get it in writing in a contract that's signed. But the question then becomes, what am I asking permission to do?

An old and valued client of mine, a great publisher of a lot of bestsellers, had a travel book, and he calls me up and says, "I'm looking at a complaint, a summons and complaint, in federal court, for copyright infringement on photographs that I licensed for my travel book. Why are they suing me? I have a license!" I said, "Send me the license." The license was a photographer's invoice.

Not every contract, not every legal document, is a fully drafted, negotiated, and signed document. In this case, it was a commercial photographer. The client called the photographer and said, "I need six images of such-and-such a place in the world for use in my book." The photographer sent the images and sent an invoice. And the invoice had a dollar amount ($1,500), and the client wrote the check. What the client didn't do is read the invoice because the invoice said "one printing only." What had the client done? He'd used those six pictures in the first printing, and the book was successful. 2nd printing, 3rd printing. Revised the book, first printing, second printing, third printing. Revised the book again, because it's a travel book, and travel books need to be revised. Three more printings. He used it for nine printings. So he said, "Go ahead and offer--what is it, $10,500? Nine times $1,500?" The plaintiff said, "No, that's what you pay when you ask permission. What you pay when you don't ask permission is $50,000." Because then it's not like a parking meter--you don't just keep feeding the meter. You've now committed copyright infringement. So the point is, ask yourself, what do I need permission to do? ***(continued on page 7)***

Legal Issues (cont'd from pg 6)

I was on a panel just yesterday, and I was talking about the fact that none of the books that I've written and published in print that were later made into audio books have the same cover on the audio book. Not one of them. Why is that? It's a very simple answer. When the publisher of the print edition of my book wanted to get a cover image, they didn't want to pay for *all* uses. They wanted to pay only for the uses they were actually going to make of my book, so they got print rights, which means that when they licensed the audio rights to the audio publisher, the audio publisher had to go get their own cover, so they made their own cover. The British publisher had to make their own cover because there are limitations on what those rights are. This is not news. This has always been the case. But the reason this is such a treacherous issue now is that the book is no longer one thing. The book is no longer printed on paper, bound between covers and put on a shelf so people can buy it. At a minimum, there will be a book edition of that, and there probably will be not just a print edition, but a print on demand edition, which is a little, slightly different thing, legally speaking. It's not identical. And there may be an audio book edition, and that's just the beginning of the checklist.

I have a client who called me last week and said, "I want my contracts to give me the right to slice and dice the books." I've heard this phrase a million times. What does he mean by *slice and dice*? It means he wants to be able to use the content of the book in a cell phone app, in an interactive online format, on calendars, on games, on anything he can think of to squeeze a little more income out of this book. And he said, "I want you to draft the contract so that I'm paying a royalty when I sell a book, and I'm paying a royalty when I license the audio rights, and I'm even paying a royalty when I sell or license the e-book rights, but when I slice and dice, I don't have to pay anything. I want that to be a non-royalty-bearing transaction." You can write a contract like that; there's nothing illegal about that. The deal is the deal. You hope that the author is competent to read a contract or maybe get some expert advice. Otherwise, that author may have a rude surprise. But the point is that the range of uses for what starts out as a book has expanded fantastically. It's beyond our ability to checklist it, and it's much more than it ever used to be.

Q: I'm dying of curiosity about the example you gave earlier, about the excessive use of the photographs. With the measure of damages, was it the contract damages or true copyright damages?

A: Well, like everything else, it settled. It settled for more than what would have been paid for a license, but less than what was demanded. It was between $10,500 and $50,000. But the decision making was under threat of litigation. And I have to say, I admire what this plaintiff did. He didn't screw around with demand letters and negotiations. He filed his lawsuit. And once that lawsuit was filed, the pressure to settle is huge. You have a twenty-day clock in a federal contract infringement case. You either have to go out and hire a lawyer and file an answer or settle the case, one way or another.

Q: He didn't go for an injunction?

A: He did not go for an injunction. That would have cost him too much money. So you notice that everyone's playing a little game of chicken there. But that was how it settled.

This proliferation of book media has rendered obsolete a lot of contract forms that were commonly in use. And I don't mean contract forms that have been in use for a hundred years. I'm talking about cutting-edge, visionary, state-of-the-art contract language that might be five years old or ten years old, and it's already been obsolete. And let me give you an example.

I'm going to give you a copyright basic. This is a very fundamental concept. In other words, this is not cutting edge; this is Copyright 101. Copyright is not *a* right. Copyright is what lawyers like to call a bundle of rights. You could imagine copyright as being a bundle of sticks, and each stick in the bundle is a separate and different right.

If I sit down and write a manuscript on the word processor at Starbucks drinking coffee, and I finally reach the end, and I write "the end" and I save it down to my hard drive, and I print out a copy, at that moment, copyright springs into existence, and I own all of it. What do I own? Well, I own all the sticks in the bundle. One of those sticks is the book publishing stick--the book publishing rights. I can go to one of you fine publishers and sign a contract whereby I, the author, give you the book publishing rights. I could call Steven Spielberg and sell him another stick in the bundle, which is the motion picture rights. I could go to some playwright and say, "Would you like to make a play based on my book?" Those are the dramatic rights. And by the way, the number of sticks in this bundle is limited only by your imagination.

(continued on page 8)

Legal Issues (cont'd from pg 7)

I like to tell the story about how I went to Dutton's Bookstore, and I noticed they were selling tins of cookies that had on them the famous image from the cover of *Midnight in the Garden of Good and Evil*, which was on the hardback bestseller list for three years. It was a phenomenal bestseller. So what I realized then was that there are cookie rights too. I have commonly seen grand opera rights in contracts; I've seen amusement park ride rights in contracts. And you can sell these rights separately. As the original owner of the rights, you can break up the rights and sell each stick separately. Or you could sell them all.

When you look at a contract, the language is one of the key variables. There are many, many key variables. But one of them is this: what rights are being conveyed by the author (who owns the copyright) to the publisher (who is acquiring the right)? If you're able to get it, it's in your advantage as a publisher to get all rights. That makes it a very simple contract. All rights, title and interest in and to the work, including all rights under copyright in any and all media now known and hereafter devised, in any and all languages throughout the world, in perpetuity--that would be good news for you. Nowadays, it's harder and harder to get authors to sign contracts like that because they're savvier. And they're more guarded. And so, more likely, that contract's going to have a whole list of rights, and some of them you're going to get, and some of them they're going to keep.

What do you need as a minimum? Do you need that book publishing stick? Yeah, you do. But look at that book publishing stick carefully because that stick, called *book publishing rights*, is itself a bundle of sticks: the right to publish in hardcover, the right to publish in trade paperback, the right to publish in mass market paperback, the right to publish in print on demand, periodical rights, serial rights, excerpt rights, abridgements, omnibus rights. There's just no end to the ways you can subdivide those rights. As a book publisher, you need, on day one, all of those rights--all book publishing rights and all book media--because you do not want to publish a book, if you can possibly avoid it, where the print edition is available from you, but the e-book edition isn't. You're competing with another publisher in what is, in today's market, perhaps the more valuable right. So nowadays, I would say, most publishers *must* have (although there's debate about this) print publishing, audio publishing, e-book publishing. That would be my argument.

But here's where it gets tricky. If you look at a contract that was drafted five or ten years ago, you might see one category of rights--one stick in the bundle--that says "electronic book rights," or "e-book rights" and a different stick that says "multimedia and interactive rights." And I have been practicing long enough to know that at one point, during the dot-com era, publishers were paranoid that they were going to lose a valuable right. They didn't know what an interactive or multimedia right was, but they wanted to have it. And I would commonly see publishers or represent publishers wanting that right. We want print publishing rights and we want e-book rights and we want audio book rights, but we also want interactive and multimedia rights. And then I lived through an era where at least some publishers were saying, "We don't need those rights. We don't know what those rights are, and they don't really add up to anything; we can't do anything with them. If the author says he wants them, fine, give them back to the author." And so in the contract, that right would be reserved to the author.

However, all of a sudden, we're beginning to see discussion of something called *enhanced e-books*. An enhanced e-book is a book that consists of something more than just the literal text of the book displayed in a static image on the screen to be read like a book. If you pick up a Kindle, you can highlight, you can annotate. In some e-books you can hyperlink, there may be embedded content, you may even be able to communicate online, in real time, and comment about this book to some other reader in another time and place. Well, that's an enhanced e-book. It means an e-book that is more than the static display of the original contents of the print edition.

Those are interactive and multimedia rights. So if you have given interactive and multimedia rights back to the author and now you want to license an enhanced e-book, you've got an awkward position. You might have a fight on your hands. I'm not going to say it's a slam-dunk fight one way or the other, but it is a fight.

Q: Where does the phone app or an iPad app fit in?

(continued on page 9)

Legal Issues (cont'd from pg 8)

A: That's a good question. It depends on the specific contract language. You know, from time to time in history, I've noticed that publishing lawyers will grasp a particular brand. There's a children's electronic publishing format called LeapFrog, and I began to see that the children's publishers were saying, "We want the LeapFrog rights," which is very narrow; it's brand specific. If you're a good lawyer, you would say, "We want the LeapFrog format and comparable formats from other publishers." You try to get it to be a generic right, not just a brand-specific right. But everything depends on what words, phrases, sentences are used in the contract as to whether an app is covered or not. It might not be. Some of the electronic rights clauses, including some that I drafted, are rambling. There's an air of desperation in these contracts, where you're trying to figure out, how do I get it all? I want to get it all. And those might very well encompass applications for mobile devices. But there in itself is some key phrasing. You don't want it to say *cell phones*. Many of these things are not cell phones. They're something more than cell phones. So I say *mobile digital devices*. I mean, there are terms of art you can use, and they're terms of art, frankly, that don't originate with lawyers. They originate with the industry. But my point is that now those distinctions have crossed, and now you need to be thoughtful in the drafting of your contract. This is a concrete reason why, if you go on the Internet or you borrow a contract from a friend of yours, and the contract is a few years old, maybe not well drafted to begin with (even if it was well drafted, now it's a few years out of date), it might not get you where you want to go. And that's the challenge of this changing market.

Q: There's talk now of putting video in e-books. Would that also be in the purview of multimedia?

A: Absolutely. These are not well-settled terms of art, but I want to share with you an experience that I recently had. There's a funky old term that appears in older contracts that refers to books as *volume rights*. My understanding, based on research, is that volume rights meant the right to print something on paper and bind it between covers so that it had the appearance of a volume. It was a book right. Just recently, I was presented with a contract where the term *volume rights* came up in the drafting. The agent said to the publisher, because he wasn't a hundred years old, "What are volume rights? What does that mean?" And some lawyer for the publishing company wrote "defined as loose pages held together in a loose-leaf binder." There are some legal publications that look like that, loose-leaf bound, but I'm confident that this word became so antique that nobody even understood what it meant, so someone made up a new definition for it that means *loose-leaf binders*. It's a matter of what standard usage is, and standard uses changes. I'll give you another example of that. When print on demand entered the trade publishing world, up until then, some publishers said, "I don't want the interactive rights. I don't even know what they are. You can have them." There was a lot of arrogance about POD. The big New York publishers thought, POD? We don't do POD; POD is for self-publishers. We're not doing POD, we don't need POD rights. And then they woke up to the fact that it's a very convenient thing to be able to do on-demand publishing and short runs and keep books available as needed, instead of printing 20,000 units and not being able to sell them.

So the question is, how do you get the right to do a POD edition? Is a POD edition included in book publishing rights or print publishing rights or volume rights? And I made an argument that print on demand was really a hybrid of the print right and the electronic right because the book resides on a server. The book is in an electronic format, but when you are actually going to sell a copy, then you print a print product. So the end product is print. So I would make the argument to people that, unless your contract specifically says "I have print on demand rights," then it has to include both print rights and electronic rights, or else you don't have all the rights you need to do POD. I no longer feel that way because I think that the standard--the custom and usage--of the publishing industry now recognizes that POD is just another form of printing.

There wasn't a time when you either got letterpress rights or offset rights. The contracts were neutral about what kind of printing press you used. And I believe that now the custom and use of the publishing industry is neutral on POD as well. And there may come a time when I say that if you acquire enhanced e-book rights, you've got everything you need. You don't need interactive rights anymore because it's now well understood. But if your contract distinguishes between e-book rights and interactive and multimedia rights, you have to ask yourself, what does that mean for an enhanced e-book?

(continued on page 10)

Legal Issues (cont'd from pg 9)

And I'll give you a concrete, recent example of how this can bite you. It was--and I would say, still is--conventional wisdom in the publishing industry that an audio book is something different than either a print book or an e-book, and that right can be separated out, segregated out, separately acquired, or separately reserved by the author. So let's say the author comes in and says, "I'll give you my print rights, I'll give you my enhanced e-book rights, I'll give you my POD rights--you can have all those rights. But I want my audio rights. I'm keeping my audio rights." And now you do a Kindle edition. Do you know that the Kindle edition has a speak-aloud function? Well, if the speak-aloud function creates an audio book, then you have breached your contract because the exclusive audio rights went to someone else. There was a case about this, and Kindle agreed, so if a particular book has restricted audio rights, then we disable the speak-aloud function because the audio rights are encumbered by somebody else.

But this is another example of how you can get tripped up on these fine points of detail in a contract, and I think the conventional wisdom among publishers is--and it's certainly true of e-book publishers--that functionality is everything. Functionality is what makes an e-book a more attractive. Well, I would also say that price makes it more attractive and the fact that you can download it anywhere in the world. All those things make it attractive. But functionality is king. So they're always trying to pack more and more function. If they have to start disabling functions because of a glitch in the contract, you won't be as competitive. You won't sell as many e-books.

I will predict--this is not a legal prediction, but a market prediction--that we haven't even begun to see all the enhancement of e-books that we're going to see. And video is an obvious example. Just think about how easily you jump from whatever it is you're reading to something else. I read the *New York Times* online, and every third word is a hyperlink to go somewhere else and read something else or view an image or see a video clip. It will not be too much longer--if it hasn't happened already--that not having that functionality in your online reading product would be like the days when they sold books that you had to manually cut the papers. You know, people are not going to do it. They'll say, "I want the easy one and the rich reading experience, not the restricted one."

I want to go to another issue that's very closely related. The law, our law, Western law, English common law, American law, enshrines the concept of contract. Contract is a very important concept. That goes very deep into the values system of our civilization. There are countries that have code laws, statutory laws, where rights are established because the codebook, the book of laws, says you have these rights. We have a system that's more based on what the contracting parties agree are going to be the rights, so a contract is king in our legal system.

There are some things in the American legal system that are established by statute and cannot be changed by contract. The framers of the Constitution understood that when you're just starting out as an author, you're so desperate to get published that you'll sign anything. You'll pay them money, right? Authors want to get published. And so they're likely to make really bad deals just to get published.

When I signed my first publishing contract, in 1976, I was in law school. I was not yet a lawyer, but I was in law school. And I did not read the thing. My agent sent it to me, and I said, "Where do I sign?" Why? Because I wanted to be published. I didn't care. I just wanted to get my name on a book. The Founding Fathers understood that, and so they said no matter what the contract says--in perpetuity, for the duration of copyright and all renews, restorations, and extensions thereof, whatever it says--you have the right to cancel that contract. If the book's been in print a long time, and the publisher's raking it in, and it's still a valuable property, at a certain point, you can pull the plug on that contract. And if the contract says "the author waives his statutory right to terminate this transfer," that's not enforceable. That's an example--*rare* example--of where the contract is trumped by the statute, but it is there. If you do acquire rights, one stick or a bunch of sticks or all of the sticks, and it says "in perpetuity," it is not in perpetuity. It can be terminated under certain circumstances at certain times.

The story I love to tell is that I gave the termination of transfer for Aldous Huxley's *Brave New World*, originally published in 1932. The contract with Harper was subject to termination, and I terminated it. What that meant was that the book came back to the heirs of Aldous Huxley, and it could be resold. What does that mean for you guys? Well, because the term after which the termination right arises is very long--thirty years--you may not say, "I really don't have to do it, I really don't have to worry about what happens thirty years from now. Most books, thirty years out, are long gone and forgotten."

(continued on page 11)

Legal Issues (cont'd from pg 10)

Most publishers don't worry about it, but if you did worry about it and wanted to defeat the termination right, there is one way to do it: acquire the work, not by an assignment of rights or a license of rights, but under the form of conveyance called *work for hire*. Work for hire defeats the termination right of the author. Under most circumstances, you don't need to worry about this, but there are some specific things where you could reasonably worry about it. Let me give you a good example, although it's an antique example. I apologize for that.

If you were the publisher of the *Encyclopaedia Britannica*, which has been in print for a hundred years, you don't want to lose the right to any of the articles in the *Encyclopaedia Britannica* because that is like a database; it's something you will use and reuse and want to be able to keep in print indefinitely, and it's a lot of different contributors. You don't want to have to keep track of who owns what and what's been terminated, and every day a new termination notice comes in, and you have to tear something up. A publisher might say, "The contribution to the *Encyclopaedia Britannica,* I want on a work for hire basis because I don't want to ever have to worry about termination."

Q: However, in the state of California, does not work for hire have implication of worker's compensation being paid, et cetera?

A: It does, and it's an issue where I've done some very creative drafting. There is this crazy statute in the labor code, which is the bane of all IP lawyers' existence because it's an outlier. It's like a booby trap. And it says that if you make someone sign a work for hire agreement, then no matter what you say--independent contractor, whatever you say--they are employees. And it is, specifically, I believe, for the worker's comp and unemployment insurance.

Let me tell you the second reason why you want work for hire. If something is going to be a series, a franchise--the Superman series, the Batman series, the Star Trek series--you want to have comprehensive, exhaustive ownership with no fear of termination, and for that reason, you might want to do work for hire. Whenever I draft contracts to get artwork that's going to be used as a logo, it's going to become a trademark (a trademark could last hundreds of years), I always get that artwork on a work for hire basis because you don't want the artist to terminate that transfer for the Coke logo.

Here's how I solve the problem. Whenever I do a work for hire agreement, I always do--and most lawyers do this--a *belt and suspenders* approach. Paragraph one says, "The parties agree that this is work for hire" and paragraph two says, "If for any reason this is not eligible for work for hire, then it's an assignment of all rights." And that's a belt and suspenders because there's a lot of technicalities that apply to work for hire, but it's not easy to make something work for hire, and some things can never be work for hire, even if you say they are. So then you put in a backup clause that says, "Well, if for some reason I'm wrong and it's not work for hire, then you're giving me all rights by way of assignment." In the back of the contract, I put in an independent contractor clause, which says, "This contract is entered into by independently contracting parties dealing at arm's length for the disposition of intellectual property rights, and no employment, agency, trust, franchise, joint authorship, or other relationship is created between them." And then I say, "If, under California labor code section such-and-such, or any comparable statue, the work for hire status of the work is deemed to create an employment relationship, then paragraph one, the work for hire agreement, is deemed to be of no force and effect, and the rights pass solely under paragraph two, which is an assignment." So if anybody screws around with the labor code, we'll just unplug that work, ok?

Q: Then it's subject to termination of transfer.

A: Yeah, that's correct; you've got it. Then you forfeit that. I did this for a client who's hyper, hyper--she's a big publishing business, she publishes a lot--but she's very fearful of employment relationships. That was her bigger fear. So, that's who I fixed it up for.

There's another termination clause that's a standard in all publication--well, most publishing contracts. And that's what we used to call, in the old days, the *out of print* clause, and this was just the publishing model. It's the business model for publishing. If you published a book, and you stopped printing copies, and your inventory ran out so there are no more copies in the warehouse, the book was considered to be out of print--it *was* out of print. It couldn't be sold--and the rights reverted to the author. This was not thirty years out; it could be in a year, it could be in six months, it could be whenever. The out of print clause, in many ways, is a completely obsolete concept, but it's still in many contracts, except that we have to tinker with it because we don't print books, or some books are not printed at all.

(continued on page 12)

***Legal Issues** (cont'd from pg 11)*

In my drafting, we don't call it an out of print clause anymore, we say *unavailable for purchase*. But the mechanism is still the same. If the book is unavailable for purchase in all editions, then the rights can revert. There are more bells and whistles to that clause. Usually, the author has to give notice, and the publisher has a chance to put it back on the market. But eventually, if you can't buy a copy for love or money in any format, then the rights would still revert. But depending on how the clause is drafted, if it's available only for single copy sales in an on demand format or a POD format, it would remain available for sale, and the rights would not revert.

What you'll see coming back in the other direction from the authors (especially if they're represented by agents) is they'll say, "Well, that's not fair, because you might be paying zero royalties for thirty years, but you still own the rights." Usually, there's some sort of threshold. You have to have a certain number of copies sold in each accounting period or on an annual basis, or you have to have paid a certain amount of royalty--something has to happen. If it's zero, or if it's a flat line, then the rights will come back. And if the agent is really aggressive, you might say, "It is not deemed available for sale if it's not available in a print edition." In other words, you make that a condition for the publisher to keep the rights. A fair number of cases come to me of authors who are unhappy because their book is basically moribund and they can't get it back, but they want to get it back.

Q: "Available for purchase"--does that assume only new books? As opposed to used books?

A: No, it would say "available for sale in the publisher's edition" or "from publisher, in a publisher's edition" (publisher or a licensee). It doesn't mean resale of a used book because under that test, nothing would ever be out of print.

Q: Our contracts for many, many years have always said if the book is unavailable, the author has to ask for reversion of rights, and we have six months to either put it in print or revert the rights.

A: Absolutely. The publishers hire the lawyers to draft these contracts, and they don't make it easy on the authors. It will normally say, first you have to realize that it's out of print or unavailable for purchase. Then you have to give notice in a particular way, then you might not only have six months, you might have twelve months. And the publisher could usually satisfy that, either by publishing its own edition or licensing. So if it's under license, you would defeat the reversion as well. And then, just to add insult to injury, very often it says, "If all of these hoops have been jumped through, then we will issue an instrument of reversion," which means they have to take an affirmative act, and you have to be pounding on the publisher's door, saying, "Wait, where's my reversion?" If I represent the author and I'm able to do it, I want to say that it will automatically revert to the author. I don't want to have to get an instrument of revision. That's what makes the world go 'round.

Q: A couple weeks ago in Parade *magazine, some recipes for barbecuing were published, and they were copyrighted. What is the practical effect of that? Am I violating the copyright if I follow them?*

A: Well, here's the conventional wisdom on recipes. The list of ingredients, the measurements of the ingredients, and the function instructions on how to combine the ingredients cannot be copyrighted. Everybody's recipe for making pancakes is going to look pretty much like everyone else's, and you cannot withdraw that. The reason is a very technical reason, which is that copyright does not protect ideas and information. It only protects particular *expressions* of ideas and information. You can't copyright the idea of a civil war novel; you can only copyright a specific plot, characters, dialogue, and setting, and anyone else could write a civil war novel too. If there's only a certain number of ways to describe it--you know, crack three eggs and whip them in a bowl; how many different ways are you going to say that?--those words and phrases are so functional that they cannot be copyrighted. The basic rule you'll hear people say is that recipes cannot be copyrighted. However, you have to be cautious because if the author has embellished, put in an anecdote, told a joke, used colorful, metaphorical language--that could be copyrighted and protected. So you can't say as a flat rule that every recipe ever written is in the public domain.

In the Google settlement, two private litigants were rewriting copyright law under the color of a private dispute. It was a class action suit, so it involved a lot of litigants, but it wasn't the Congress of the United States writing these copyright laws; it was these litigants. And the judge got intoxicated by this, and everybody got intoxicated by this exciting idea that you could word search every book ever published just at the keyboard. What an exciting idea! But somebody called afoul on this and said that this is not how you rewrite copyright law. The private settlement cannot affect the interests of people who are copyrighted under the copyright act. And the reality is, procedurally, the judge has disapproved the settlement.

(continued on page 13)

***Legal Issues** (cont'd from pg 12)*

The parties could try to go back to the drawing boards and come up with a new settlement and go through fairness hearings and take comments, and the judge might approve that. Or they can put the gloves on and go in the ring and duke it out, in which case it might go up to the Supreme Court. Or they might walk away, I don't know.

Q: There was a considerable smell of collusion, in which the plaintiffs were going to get some baksheesh, and Google would get a colossal monopoly on everything.

A: Yes, that is one view of it. And during my active Google years, when people were actually asking me for advice on it, every once and a while people would call me up and say, "I want to file my own lawsuit. I don't want to be in this collusive settlement." And a few people did opt out. Not a few, probably hundreds of people. But there were tens of thousands of people in the class, maybe hundreds of them. That is true, it was collusive, and it would have given Google a great advantage. In response to that, there was some tinkering in the settlement that would have let companies other than Google have access to the database. Google would be scanning, but everybody could get nonexclusive licenses to the database. At least that was proposed.

Q: If we approach an expert in our field and say, "Claim an idea for a book that you specifically are prepared to write. We'd like you to send and sign an NDA." Is that enforceable? What if the guy says sure and signs the NDA, and then says, "You know what? I think I'll go with Simon & Schuster instead."

A: Well, first of all, an NDA is a nondisclosure agreement, and it's a contract, and contracts are enforceable in our society. And here's an interesting thing. Copyright won't protect an idea. An idea cannot be copyrighted, cannot be patented, cannot be protected under intellectual property law at all. But I can sign a contract with you where I promise to keep your idea secret and not to use your idea, and that will be enforceable, but it's enforceable under contract. If the person violates the promise, your only remedy is to sue them for a breach of contract, so the NDA may not have a very attractive remedy. But what you've said makes a very interesting point for the publisher because a lot of authors come to me and ask how to keep the publisher from doing the opposite of what you did. I come to you and say, "Here's my idea for a great book." I pitch it, you say, "You know, that is a great idea for a book, but I don't want you to write it. I'm giving it to this other writer." Can that be vindicated--the theft or misappropriation just of the idea? I haven't written anything, it's not copyright infringement, but I've given you an idea that isn't protected by copyright. What I always say to my author clients is, "Well, in theory, you could say to the publisher, 'I've got a great idea, and I'd like to pitch it to you, but I won't until you sign my NDA.'" You won't get to pitch very many books that way because publishers won't sign it.

Just for the sake of completeness, there is a theory of law called *idea misappropriation*, and it's based on implied contract. If I come into your office and I pitch you a story idea, the law will presume that you and I had an understanding--that I wouldn't be there pitching the idea unless I knew that you were going to pay me to use it. And that's what is called an *implied in fact contract*. It's not spoken aloud, but it's implied in the circumstances. And we do have a body of law--it's not statutory law, it's case law--that allows people to sue for idea misappropriation. The problem is, it's a terribly inefficient, ineffective claim. It's hard to prove, it's hard to prevail, and it doesn't really add up to much. So they won't sign a nondisclosure. A publisher shouldn't sign a nondisclosure. And the weakness of the idea misappropriation claim means that those ideas are very hard to protect.

Q: On the same level, if a small publisher--like, the book is not completely published yet, but it has printed samples, then one of the studios takes it. Can they take your idea and make a movie?

A: Yes, absolutely.

Q: How can you protect yourself?

A: Well, it's like a law school examination. You've played with the facts so it makes the answer a little harder. I once litigated an idea misappropriation case, and it was a very unpleasant experience. The studios and the studio executives and the studio lawyers think of anyone who makes an idea misappropriation claim as scum--as blackmailers and extortionists. One of the reasons I stopped doing it is that I just did not like to be treated that way. The lawyer on the other side of the case said to me, "There can be no idea misappropriation in this fact setting because the ideas were embodied in your client's book, which anyone could have purchased. It was sitting on a bookshelf." And the law says if it's a published book and all you copy is an idea and not protectable expression, then there's no remedy. My way around that was to say, "Your client didn't see that book. Your client didn't buy that book. Your client got the pitch from my guy, and that's under the implied in fact idea misappropriation premise." But that's a very technical argument. The answer to your question is that if the book is published, you have no more protection for the ideas or the information that's in that book, under most circumstances.

(continued on page 14)

Legal Issues (cont'd from pg 13)

I'm trying to be cautious because there are some things about a book, about information, that could be protected: selection, arrangement, coordination of information could be protected; certain kinds of formatting could be protectable. But basically, the plot or the theme or the insight or the technique is not going to be protected once it's published.

Q: Like you told us before, even the title of Gone with the Wind *is protected.*

A: There are three or four bodies of law that protect intellectual property. One is trade secret or nondisclosure. Patent is one. Copyright is one. And then there's trademark. Trademark protects things that are not protected under copyright. For instance, it's a fundamental truism of copyright law that copyright registration doesn't protect the title of the book. The book's title is not copyrighted because copyright doesn't protect short words and phrases. So if you're going to get any protection for a title, it has to be under trademark law. There's another rule: the title of a single creative work is not a trademark and cannot be protected under trademark unless and until it has acquired meaning in the minds of the public as a source identifier. So *Gone with the Wind* is protectable because it's so darn famous. Margaret Mitchell's title was not protectable as a trademark on the day of publication.

There's another way you can get title protection for a trademark: if you publish a series, the series title can be protected. Let me give you a wonderful example, and it's a case that I was involved in. Way back when, a couple of writers came up with this idea of doing a novel that would set in the modern world the events of the Apocalypse, the Book of Revelation. And they pitched this book--I think it was Tyndale House, a Christian publisher. And the title of this book--just one book--was *Left Behind*. Now there are forty-five books in the Left Behind series. On day one, it was not protectable as a trademark. When it became Left Behind, volume two, it was protectable. You didn't have to get to volume forty-five. Volume two will do it.

Here's what happened, my friends. The contract was silent on trademark rights in the title, as most publishing contracts still are--not my publishing contracts because I learned my lesson from the Left Behind series. My contracts say, when I'm representing the publisher, that the title of the book as published by the publisher is a trademark owned and controlled by the publisher. And I also say that the format, the trade dress, the graphic design, and so on is all owned by the publisher.

When I'm representing the author, I like to come in and say the opposite: "I want you to agree that this belongs to the author, and we're licensing it to you." What happened in the Left Behind series, and it's happened to more than one of my clients, is that by the time the authors woke up to the fact that there was a series and that the title had trademark value, when they went to the trademark office, they found that the publisher had already registered it. And that's a little bad faith there. But I like to tell my author clients, "Before you pitch this book, if you think it has potential for a series, file an intent to use trademark application in the Patent and Trademark Office," and magically, the issue goes away. Because at that point, the publishers can recognize that there is a perfected intellectual property right that they have to deal with. That's a very astute question, because most publishers think in terms of copyright, and not in terms of trademark, but trademark can be a very valuable right.

Q: So you've got a book trailer, and you've got an author. The author's doing the book trailer; presumably they're doing it themselves. They want to use music.

A: You look at everything that's in, on, or around the book, and you say, "How did I get the right to use it? There's music on the trailer. How did I get the right to use the music?" The answer is, you need to license that right. Fair use, when it comes to music, is very thin, and music copyright owners are very vigilant and very aggressive. So this is a no-brainer. You license that music.

Q: That's what I thought. I listened to something this morning, and that's why this question came up, and it said "Copyright Disclaimer under Section 107 of the Copyright Act, 1976: allowance is made for fair use"--all this was, was music. There was no text on the thing at all. It was a guy talking. No, it was just a song and pictures. "Allowance is made for fair use for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. Fair use is a use permitted by copyright statute that might otherwise be infringing. Nonprofit, educational, or personal use tips the balance in favor of fair use." But it was all music, and--

(continued on page 15)

Legal Issues (cont'd from pg 14)

A: I write what I call *fair use disclaimers*, and that's what that is. That one sounds to me like they just went online and found the Wikipedia article on fair use and just copied it. I have written self-serving disclaimers in which I announce to the world that we're using a portion of a copyrighted work, we're using it without the endorsement or sponsorship or affiliation of the copyright owner, we're using it pursuant to the Copyright Act. I cite the statute because it looks so impressive to cite a statute. I recite the approved purposes--commentary, criticism, scholarship, instruction. I've done all those things. But that's just a position. And the music company lawyers will be laughing all the way to the courthouse. That's not fair use.

And here's the counterexample: Prince sued some mother who put up a video of her baby dancing to a Prince song, and the whole point was, how cute is this baby who dances to Prince songs? It was a little documentary moment, and he sued her for that. He sued her for copyright infringement.

Here's my advice: don't use music unless it's public domain. There are two copyrights implicated, not one. There's the copyright in the song: the composition, the lyrics and music. That's one copyright. And there's a copyright in the performance, the recording. I'll give you another example. There is a certain publishing industry, trade association, whose name shall not be mentioned. Every year, they put on a convention, usually in a hotel. And all kinds of events go on at that convention. One day, ASCAP sent a letter to this publishing industry association saying, "Our investigators have ascertained that you held a convention at such-and-such a hotel between such-and-such dates, at which the public was invited to attend. Was any recorded music or live music played at that event?" ASCAP was trying to troll for an infringement case against this industry association. Because they say, "People often have dances, they play background music, they do things with music, and we want our royalties."

Q: How do you respond? Or don't you respond?

A: You have to take a perceptive position. By the way, if you do have a convention and you do want to play music, ASCAP will happily sell you a license. That's what they want. They'll take money.

Q: Right, anything you're doing, if you're doing it in any context, if you have more than fifteen people, you have to buy the rights.

A: It's not just fifteen people; that's the problem. There are exceptions for broadcast music. It's very complicated, and I'm not a music person. I don't get involved with that. But here's another corollary to that, and this is probably in the top ten of the questions I get asked: "I've written a novel, and I'm too lazy or not talented enough to evoke the time and place by powers of narrative, so I want to quote song lyrics in my novel." I did it myself in my first novel. It's the lazy novelist's approach to evoking the scene. You say, "In the background came the strains of such-and-such." That's not fair use. And you can get sued for that.

Q: Can you still take pictures off the Internet and put them on your blog?

A: Well, I'm very artful about it. And I'll tell you how I do it. First of all, I write book coverage, so I try to find an illustration from a book, and then in the caption, I put a little blurb--it's not a review exactly--about the book, a newly published book. And I think that's fair use. The other thing I do, which I think wouldn't really stand up, is use that cool tool that you get on the computer where you can take a fraction and just crop it so that I'm not using the whole image, but just a little detail of it. I can get caught. It could be $1,500 per use.

Thank you all very much; it's been a great pleasure.

PUBLISHERS ASSOCIATION OF LOS ANGELES (PALA)

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

FACEBOOK:

360829964913@groups.facebook.com

TWITTER:

@PALAPUB