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# Writers, Take Warning

## *Things Every Writer Should Know Before Signing a Book Contract*

BY JESSICA FRIEDMAN

Under the publishing agreement you signed for your latest book, you are most likely responsible for any legal claims that might arise out of it. Among other things, you “represent and warrant” to the publisher that the book won’t defame anyone, won’t invade anyone’s right of privacy and won’t tell readers to do things that are dangerous. You also agree to indemnify the publisher, which means to pay the publisher’s legal fees if anyone claims that your book *does* do any of these things. If a claim goes to trial, you could be on the hook for your legal fees and your publisher’s, not to mention damages if you lose—a lot of money either way.

If your book is a work of nonfiction, a memoir, or a novel based on real events, and it is being published by a large or medium-size publisher, it probably will go through a prepublication review, or a “libel vet.” An attorney who represents the publisher will read the book, identify legal risks and work with you to remove or change the relevant text to minimize those risks. This process can reduce the risks of a suit, but it also comes late in the game—sometimes too late to fix certain problems that the publisher considers deal-breakers. If that happens, the publisher is entitled to pull the book and, depending on your contract, demand that you pay back your advance. Rather than waiting for the prepublication review to identify and correct potential legal problems, you should try to anticipate and avoid them before you start to write and while you’re writing. Here are some things for you to think about.

**Libel and privacy.** Not all potential libel and privacy claims are obvious. Watch out for separate statements



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that, taken together, create a risk of a libel claim. For example, let’s say you say in chapter 1 that you were staying at an ABC Hotel during a recent trip to Brooklyn, and you say in chapter 4 that at three o’clock in the morning during your stay, the hotel lobby was full of prostitutes. Even though you are not identifying the hotel as an ABC Hotel in chapter 4, since you identified it that way in chapter 1, you are inviting a claim by the ABC Hotel company about what goes on, or does not go on, in its lobbies at three o’clock in the morning.

Also, avoid “throwaways.” These are statements that do not add anything to your narrative but raise a

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big red libel or invasion of privacy flag. For example, if in a biography of X, you mention that once in high school, X went on a date with Y, who was a victim of child abuse, and Y is never mentioned in the book again, the description of Y as a victim of child abuse is a throwaway.

You may need to disguise certain characters in order to reduce the risk of a libel or privacy claim. Memoirs about abuse or violence present a special challenge: since the events that are most likely to give rise to a defamation or invasion of privacy claim are crucial to the story, the *only* way to reduce the risk of a claim is to disguise the characters. Changing someone’s name from Jean to Jane is almost certainly not enough. Choose a name that starts with a different letter, has a different number of syllables and sounds different. Change your character’s profession, location and physical profile as much as you can within the framework of your story. Camouflaging an investment banker as a mortgage banker is probably not enough, but recasting her as a lawyer might work. If possible, try to set the story somewhere that will prevent read-

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ers from identifying the real location—the farther away, the better. If your story took place in northern California, don't just move it to Los Angeles. Move it to another state entirely. The point is to make changes that will prevent a reader from saying, "That woman sounds just like that investment banker I know in San Francisco," or "Those people sound just like that family that lived around the corner from us in San Antonio."

**Negligent publication.** If you're writing a how-to book, you want to do everything possible to avoid a claim for negligent publication, which means giving advice that, if followed, could hurt readers and result in a lawsuit against you and the publisher. If the book is based on your own experience (as opposed to investigative research), make that clear to the reader. Don't recommend that your readers do something that would violate any laws or even website terms of use.

**Releases and permissions.** Under the typical publishing agreement, it is the author's responsibility to obtain and pay for interview and photo releases. The time to obtain a release is when you conduct the interview or take the photo. If you wait until the reviewing lawyer says you need it, you may find that even subjects who initially said they would sign releases are no longer willing to do so; or you may find that someone is willing to sign a release only on the condition that you give him the right to approve the sections of the manuscript that mention him. (One of the biggest mistakes an author can make from the publisher's point of view is to give someone the right to approve the manuscript.)

The release you use should give you the rights you need. For example, if you are an academic author, a university release form that talks only about publication of your work as "scholarly research" does not give you the right to use the results of your research in a trade book. Be especially careful with "canned" release forms that you find online. One popular online photo release form prohibits the disclosure of any personally identifying information about the photo subjects. That may be fine, or it may create real problems for you down the line, if for example, you have your heart set on captions that name the quirky and interesting people in your photographs. Going back to photo subjects for additional permissions may not be possible within the constraints of the book's production schedule, and your editor may not appreciate finding out at the last minute that you need to revise a great deal of material because you obtained the wrong kind of release.

Unless your publishing agreement provides otherwise, it is also your responsibility to obtain and pay for permission to use third-party material. Bear in mind

that publishers' practices with respect to the review of permissions agreements differ. Whatever permissions you submit may be reviewed by editorial, contract or other staff, instead of by the legal department, unless there is a question about the proper interpretation of a permission form, and the primary responsibility for ensuring the adequacy of the form is yours in any case. Make sure up front that you can afford the permission fees for the number of copies your publisher plans to produce in your first few print runs. If your book is successful, you don't want to have to go back to the rights owner for permission to print more copies. Also,

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make sure you and your publisher can use the material in all the media in which the publisher plans to publish. Be wary of forms that allow you to "use" third-party material, without specifying what "use" actually means. Also, it's useful to know up front whether the rights holder has any special restrictions that could affect your publisher's exercise of the rights you've granted in your publishing agreement.

Even if you are republishing material you yourself have published somewhere else, you need to be sure you have the right to do that. Many an author assumes that she owns the rights to stories she previously wrote for a newspaper or magazine, only to discover during the prepublication review that she does not and that she must now seek permission from her earlier publisher. Sometimes that's no problem, but other times it can be a real hassle. (Also, don't assume that because you think it's fair for you to use certain material, your use constitutes "fair use" under copyright law; "fair use" is a specific defense to infringement that requires consideration of four specific factors and whatever other factors the court deems appropriate.)

To avoid problems with both releases and permis-

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sions, *before you start writing the book*, ask your editor to connect you with a lawyer in the publisher's legal department. The publisher's lawyer may be able to provide you with sample release and permission forms and review your prior publishing agreements (assuming they're not confidential) to see if you need permission to reproduce your own work. Publishers with a legal staff are often glad to provide that kind of help, but keep in mind that the publisher's lawyers (and any outside counsel retained by the publisher) represent the publisher, not you. They cannot do everything that an attorney of your own could or would do. That means that if your publisher's lawyer gives you a release or permission form, it's for illustrative purposes; it's unlikely that the lawyer will have the time to revise the document to suit your personal preferences. And even if you do use a form that the publisher gave you, you are still responsible for the representations and warranties that you have made in your publishing contract.

**Facilitating the prepublication review.** It may help the lawyer conducting the prepublication review if you can provide the following documents and information along with the manuscript for review:<sup>1</sup>

- A list of people named in the book who are deceased
- A list of people who have given releases
- Copies of those releases
- A list of changes you made for the purpose of disguising characters
- The name of anyone who is likely to object to publication

But be forewarned: some lawyers won't want this information in writing, and some editors may not know what to do with such a list if you send it along without being asked. See if the editor can put you in touch with in-house counsel directly, so that you are not guessing about what will expedite the legal review process and what might cause additional problems or delays.

You may not agree with some of the ways in which

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1. If your publisher requires that permissions go through the legal department, then permissions should be on this list also.

the attorney doing the prepublication review interprets statements in the book or with all of the changes that the attorney recommends. But the goal is to prevent lawsuits against you and the publisher, and most publishing contracts require authors to cooperate in the legal review, so it's to your advantage to be as open-minded and flexible as possible.

There is no way to guarantee absolutely that no one will assert a legal claim based on something in your book. But taking the steps described above can go a long way to reducing the risk of that happening. ♦

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## The State of the Book Business

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lowed a downhill course much like that in the U.S. and U.K., with incomes dropping 27 percent since 1998. While much of this may be due to the familiar confluence of factors, Canadian authors face an additional threat: a 2012 law that extended fair dealing (Canada's equivalent of fair use) to mean that use of copyrighted works for education does not infringe copyright. The Supreme Court of Canada, O'Connor pointed out, has interpreted the law to mean that incidental copying of one or two pages to supplement instruction would be covered by the educational fair dealing exception.

That sounds harmless enough, but following that decision, Canada's Association of Universities and Community Colleges published "fair dealing guidelines" that were widely adopted. The guidelines claim that up to 10 percent of a copyrighted work—including entire chapters, entire short stories, entire articles and entire poems—can be made use of freely in an educational context. As a result, Canadian authors' licensing incomes have been crippled. The year 2013 saw a 27 percent decrease in K-12 book sales. A publishing industry study predicts a \$30 million loss per year to Canadian content producers.

In response to the question of how things ended up this way, O'Connor answered, "Relentless lobbying and really bad math." And the way forward? "Relentless lobbying and *accurate* math," she said. A test case has been filed to push back on the fair dealing exception for education, O'Connor said, and the Writers' Union continues "to work with government to find a way forward to ensure that writers are paid and that schools have access to high-quality texts written by and for Canadians." ♦