

Editors Only.

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Contracting with Freelancers

Possible provisions to consider for your freelancer contracts.

By Lawrence Savell

If there is any one piece of legal advice that holds true in (virtually) all situations, it is this: "Get in it writing!"

The point is that in the event of a dispute, the best way to prove that the terms of an agreement were as you say they are is to have

a contemporaneous written memorialization of those terms signed by the parties involved.

Having drafted and reviewed numerous magazine contracts, I have compiled a non-exhaustive list of some provisions you may choose to consider for potential

adaptation based on your particular circumstances and needs (subject, of course, to the advice of your in-house or outside counsel, if you have one).

Subject and Length

You might want to protect yourself against finding out at deadline that the writer's understanding of exactly what he or she was writing about was different than what you were expecting. You might also want to minimize the need to cut (or, worse, add) significant amounts of text by specifying a length range or approximate word count.

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Contracting with Freelancers

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Deadline/Format

When do you want it, and in what form? In addition to hard copy, to avoid retyping (and typos), do you prefer disks or electronic transmission via e-mail (specifying virus-free, to put the onus on the writer to insure it)?

Payment

Some contracts specify that payment of the agreed amount to the writer is premised on the editor's or publisher's final acceptance of the work. Delivery of an unacceptable manuscript should not automatically require payment. If you choose to provide a "kill fee," the terms (and limits) of such should be spelled out.

Rights Conveyed

The September 24, 1999 decision by the United States Court of Appeals for the Second Circuit in *Tasini v. New York Times Co.*, involving electronic rights to print articles written by freelancers, held that, under federal copyright law, publishers are not entitled to place the freelance content of their periodicals into electronic databases and onto CD-ROMs without first securing the permission of the freelance writers involved. (The case did not involve the efforts of employees, which should be

covered by standard "work-for-hire" employment agreements.)

Publishers contemplating on-line publication may — as their more prudent counterparts have already been doing for some time — protect themselves by requiring that freelancers enter into contracts clearly and comprehensively granting the publishers the rights they desire, designed to constitute consent to and allow electronic republication of works without additional compensation.

How It's Done...

This can be accomplished in one of two ways. The first way is to structure the arrangement with the author as a "work made for hire" under the Copyright Act. If an article is specifically ordered or commissioned for use in one of certain ways set forth in the Act, and if the parties agree in writing that the article is a "work made for hire," the person who commissioned the article owns all rights in it.

The second option is to have an agreement with the freelance

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writer that specifically grants *all rights* to the publisher. Basically, it should provide that the writer assigns and sells to the publisher, and the publisher purchases from the writer all right, title, and interest in and to the article.

Beyond such broad *all rights* language, the agreement's provisions may also contain "including but not limited to" language, designed to maintain the broad scope but still enumerate certain examples of specific matters subsumed within that broad scope.

If you're willing to accept less than (or are not willing to pay any demanded premium for) all rights, be very careful how you narrow the scope of what you are purchasing. Before agreeing to a very narrow grant, think carefully about what non-print uses you might want to put the article to down the road, and make sure that you have acquired the right to so use it.

Reimbursement for Expenses

Some contracts note that adequate documentation and receipts are required for reimbursement of expenses. Many set a maximum amount unless prior approval beyond that is specifically given.

Representations and Warranties

You may want to protect your interests by having the writer make certain formal representations and promises regarding fundamental elements such as: that he or she is or (if the article has not yet been written) will be the sole

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author of the work. Other provisions may include that the article is or will be original and not in the public domain; that the article contains or will contain no libelous or obscene material; that the article does not or will not infringe upon or violate any copyright, trade-

mark, or other intellectual property right, right of privacy, or any other right of any person, firm, entity, or corporation, and is not or will not be otherwise unlawful; that statements in the article are or will be true (unless it is described in the contract as a work of fiction); that the work has never before been published or used in any form in any medium for any purpose (unless you don't mind); and that the author has made and will make no commitments with any others with respect to the article or its use or ownership (unless you don't mind).

Indemnification

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warranties by stating that he or she will indemnify (reimburse) the editor or publisher for all loss, damage, and/or expense (including reasonable attorneys' fees) arising out of or related to the author's breach of any of the representations or warranties. Some go even further and specify that those protected include the publisher's related entities and individuals (officers, directors, employees, and agents), and that coverage includes both adverse verdict awards and (often enormous) defense costs. The obvious caveat to all this is that writers usually have "shallow pockets" — limited financial resources — and that it will usually be the magazine who ends up having to pay a successful plaintiff and/or a defending law firm.

Right to Edit/Modify

Although it is understood that editors have the right to edit, some

contracts affirmatively specify that the editor or publisher has broad power to edit, abridge, revise, augment, title, or otherwise change the article. Some contracts further provide that the author agrees to rewrite or make such changes in the work as the editor or publisher may reasonably request. Some also note that the actual publication or use of the article is solely at the discretion of the editor or publisher, and that the magazine is under no obligation to publish or use the article at all.

Promotion

If you plan to publicize the article or the issue containing it with reference to its well-known author, you might want to record the writer's agreement to having the publisher or a third-party use the author's name, biographical information, photograph or other likeness in connection with the advertisement, publicity, and promotion of the work or the publication or other forum in which it appears.

Title Suggestions

Some contracts require authors to provide title or headline suggestions from which the editor can choose. Contracts including such a provision may also provide that the editor or publisher is under no obligation to use any of these titles.

Author as Independent Contractor

Other provisions seen in some contracts have particular legal (and, to a non-lawyer, not always obvious) significance. One example is a statement that the author is not an employee, agent, or partner of, or joint venturer with the publisher or its related entities, and has no authority to bind the publisher or its related entities in any respect.

This reduces the risk of the editor or publisher being held responsible for some independent act or omission by the writer.

Choice of Law

Some contracts recognize the potential cost savings and strategic benefits of requiring that, in a dispute, the local law of the publisher's home state will apply (unless you decide otherwise). A related provision records the parties' agreement and consent to the jurisdiction (the ability to handle the case) of courts of the publisher's home state or county.

Entire Agreement

To avoid claims that the clear language of the contract is affected or nullified by some other agreement or promise, some contracts specifically provide that the contract sets forth the entire understanding of the parties concerning the article, and that it supersedes any and all previous memoranda, agreements, and oral negotiations by and between the parties. A related provision states that no subsequent agreement or modification of the contract shall be valid unless it is in writing and signed by both parties.

Restrictions on Assigning Author's Obligations

Some contracts bar the writer from transferring to another his or her obligations under the contract, except with publisher's prior written consent in each instance.

Take a Look at Your Practices

Many publications continue to use no written contracts at all, or continue to use those that are in severe need of being updated in light of changing situations and technologies. If you don't use written contracts, consider doing

so; if you do, examine carefully the language that you use. Like many legal matters, an ounce of prevention may well be worth a pound of headaches and lawyer bills.

Bear in mind that contract drafting is something of an art. Moreover, contracts, by necessity, often vary greatly in light of myriad considerations such as the particular publication or publisher involved, the scope of rights it seeks to acquire, the level of compensation it is willing to pay, the applicable law — and what the parties are able to negotiate. No one contract fits everyone or every situation.

Finally, you should make an effort to keep an eye on what the person across the table from you is doing. Freelance writers are increasingly focusing — and organizing their efforts — on the issue of

contract negotiation and content. Evidence of this trend is apparent from a review of two leading writers' groups' websites: the American Society of Journalists and Authors (www.asja.org) and the National Writers Union (www.igc.apc.org/nwu). Their websites provide extensive contract negotiation advice and resources to members — i.e., many of the writers with whom you will be dealing. The ASJA site regularly reports on contract negotiations and disputes with specifically identified magazines.

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