THE BOOK EDITOR CONTRACT

IVAN HOFFMAN, B.A., J.D.

If you are an author or a publisher contemplating using an independent contractor book editor to work on your or your author's manuscript, there are a number of legal issues that you need to address in a written contract with that editor. If you are that independent contractor editor, you must face these same issues and it may be in your best interest as well to reduce your understanding to a written contract. In any business arrangement, it is always best to have the complete arrangement between the parties expressed in a written contract before any work is done so that both sides know where they stand and confusion is reduced to the greatest extent possible.

The parties should have a written, signed contract with each other that is sufficient to cover the varying complexities in the relationship. When dealing with rights to intellectual property—and the manuscript is intellectual property—without having a valid, written and signed contract, the author and publisher run the risk of seriously clouding and confusing ownership rights that deal with that intellectual property. Without a written agreement, the author and publisher cannot acquire exclusive rights to the editor's copyrightable contributions (see discussion below). This may in turn impact severely upon the author's or publisher's ability not only to publish the book without claims from the editor, but may as well restrict or even prohibit the author's or publisher's ability to further exploit the rights the author or publisher may have to the book.

The contract between the author or publisher and the editor must spell out the detail about what the editor must do, how long the editor has to do what the editor agrees to do and other such issues. Thus it is also to the editor's advantage to have such a written contract since that way the editor knows what the editor is to do and, perhaps more importantly, how much the editor is to be paid and when that payment is due. But let me focus in this article solely on the issues dealing with the intellectual property rights of the parties.

SOME OF THE ISSUES TO BE FACED

The editor may perform tasks that go beyond merely moving around sentences, editing spelling and the like and may instead involve some original writing. Therefore, one of the first issues to be faced is whether or not such contributions constitute work that is capable of being copyrighted.

Section 102 of the United States Copyright Act, states in part:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship... (emphasis added).

Should the work performed by the editor contain such original writing, the parties risk confusing their rights unless there is a written contract explaining those rights. The definition of "original works of authorship" is quite broad and the threshold for originality quite low. This means that often contributions that seem quite small quantitatively but may be the subject of copyright protection on the part of the creator. And if these contributions turn out to have some value standing alone, and no one can know that in advance, then without a valid, written and signed agreement, ownership rights to those contributions may be clouded. What, for example, might be the legal rights if an editor had contributed only 3 short words but which became famous such as "Call me Ishmael?"

The next issue is that if such contributions are capable of copyright protection, the contract must state who owns the rights to that material. The United States copyright law says that, absent a written, signed contract transferring exclusive rights to copyrighted material, the creator owns all rights subject only to some unclear, non-exclusive set of rights that may pass to the author or publisher. This means that the editor would own the rights to the copyrighted material contributed by the editor and the author would not have the exclusive right to use that material without a written contract. The book might then be owned in part by the editor and in part by the author. That is a terribly confusing situation and one that should be avoided if at all possible. This may actually prevent the author from entering into a publishing agreement since that agreement almost always requires the author to grant the publisher exclusive rights to the material. It may prevent the publisher from exploiting the material since most licenses such as foreign publishing deals also require exclusive grants. But without the written contract, this can be the effect.

Moreover, if the contributions of the editor and the author are sufficiently "indistinguishable" one from the other, meaning that the parties intended to have their seemingly separate contributions merged into a single manuscript, then the parties may be considered by the United States copyright law to be "joint authors." If they are deemed to be joint authors, then in effect the editor becomes the partner of the author in the rights to the entire book. Thus, without a written contract spelling out the rights of the parties, the author may unwittingly end up giving away perhaps half the rights to the book!

Now it may seem unlikely that the author and the editor intended that the editor's contribution and the contributions of the author be merged into an inseparable part of the whole of the book. However, the purpose of a contract is to avoid any potential misunderstandings and frequently even reasonable people can differ about what their intentions were. Therefore, rather than run this risk, it is far better to have a written contract spelling out exactly what the intent of the parties is.

HOW TO HANDLE THESE ISSUES

The editor's contribution can perhaps be the subject of a work made for hire contract since it is likely that the author "specially ordered and commissioned" the editor's work, that the editor's work may fall under one of the legally acceptable categories of work made for hire situations, and that the contract is sufficient in language to qualify as a work made for hire. But preparing a work made for hire agreement requires certain very specific language and you should read "Work Made For Hire Agreements."

Under any circumstances, the contract between the editor and the author must be sufficiently broad to include language transferring all the rights to the editor's work to the author, if that is the intent of the parties.

There are of course other variations on the theme of the rights of the parties. They can agree that the editor will be paid more than a flat fee and perhaps receive some royalty. There can be other clauses as well. I have not intended this article to be exhaustive of all those possibilities but have wanted to merely emphasize some of the areas of concern that should be addressed.

CONCLUSION

Authors, publishers and editors frequently approach their relationship without the benefit of a written contract. As long as there are no claims made against the work, perhaps this seems acceptable to the parties, although it is highly inadvisable, for no one can predict what the future may hold for the book. If the book is a stiff, then it may never matter. But in the instance where the book becomes successful, all parties immediately run to their attorneys, scanning for how they might make money off of the success. Indeed, in many instances, perhaps the worst thing that can happen is that the book becomes a success! And in such an instance, you simply cannot count the number of claims that are likely to arise.

Thus, without an agreement the author and publisher end up in lose-lose situation. They lose if the book is a failure. They lose if the book is a success.

The reason any business person would enter into that form of deal is completely unclear to me since this situation can be avoided quite easily by some simple exercise of sound and wise business planning in the form of a written contract. Have vision.