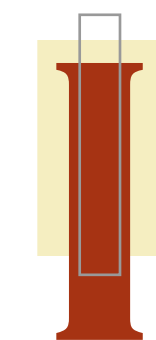




COUNSELING
THE SMALL
PUBLISHER
CLIENT

BY LEONARD F. CHARLA

I N D E P E N D E N T
P U B L I S H E R S N E E D
C A R E F U L A D V I C E F R O M
T H E I R A T T O R N E Y S



Independent publishers comprise a large group of potential clients. Thousands of these publishers are small businesses offering limited numbers of titles. Bringing a book to market puts the publisher in contact with a broad array of legal and business issues. Any of these issues could cause serious difficulties if not properly addressed. This article discusses some of the more common problems independent publishers face.

The term “publisher” includes one who publishes the work of other authors and an author who self-publishes his or her own work. Every book published provides an opportunity for the lawyer to advise the book’s publisher concerning legal aspects of its publication and marketing.

The size of the publishing market in the United States is vast. Huge numbers of book titles are on the market in the United States.¹ The demographics are compelling. There are almost 300 million Americans, and scores of thousands of these are authors, or would like to become authors. While some independent publishers belong to the Publishers Marketing Association (PMA), or to the Small Publishers of North America (SPAN), most independent publishers are not affiliated with publisher associations. Those who are members may be somewhat more sophisticated than their colleagues, but almost all publishers that do not have house counsel could benefit by consulting an attorney.

Finding a publisher willing to publish a new author’s work is exceedingly difficult. Anyone who has gone through the frustrating and exhausting process of locating an agent, having the agent “shop” the book to various publishers, then living with the glacial pace that ensues, knows this. The large New York publishers prefer to publish the work of “lead horses,” that is, established authors or well-known celebrities, in tried and true high-selling categories. Prior to desktop publishing,

many would-be authors had no low-cost, high-quality way to market their work.

Desktop publishing and its corollary, self-publishing, developed with the advent of the personal computer in the mid-1980s. It has flourished. Now, each year, about 70,000 writers do become first-time authors of books. It is now possible to produce a visually acceptable, book length print product without the difficult agent search, publisher acceptance, manuscript, type-setting, and galley proof protocol. Instead, the self-publishing author or small publisher provides camera-ready copy directly to the book manufacturer. These combine cover printing, text printing, trimming, and binding services under one roof. In effect, they offer a small publisher one-stop shopping for production of the finished book. Michigan is an especially friendly venue for independent publishers since several book manufacturers are located here.

Attorneys can help the small publisher client by converting the conventional two-step vision of writing and printing into the more holistic and commercially successful three-step vision. The third step is one of continuous distribution and marketing. A

sound distribution and marketing program is a necessity before publishers can achieve continued business success.

The typical independent publisher faces numerous administrative and legal issues. These include copyright, trademark, libel, right-to-privacy, right-to-publicity, providing required information for the book, author relations, vendor relations, business plan, cash flow management, collections, and marketing.

COPYRIGHT

If the book is a work created for hire under written contract or a self-published book, the publisher usually holds copyright. If the book is not self-published, since copyright arises in the work as it is created, how the publisher obtains rights to the work is a matter of negotiation between the author and publisher. Others who make creative contributions to the work, such as the cover designer and the illustrator, also have copyright interests, and it is advisable to make certain that work made for hire agreements are in place with contributors prior to commencement of activity.

FAST FACTS:

A SOUND DISTRIBUTION AND MARKETING PROGRAM IS A NECESSITY BEFORE PUBLISHERS CAN ACHIEVE CONTINUED BUSINESS SUCCESS.

PUBLISHERS CAN BE FOUND LIABLE FOR UNTRUTHFUL WORDS OF AUTHORS PRINTED WITH MALICE OR IN RECKLESS DISREGARD FOR THE TRUTH.

MOST BANKS AND INVESTORS WILL INSIST UPON A WELL-CRAFTED BUSINESS PLAN BEFORE THEY WILL CONSIDER LOANS OR EQUITY INVESTMENTS.

In any event, copyright still needs to be perfected, or registered, with the Copyright Office. Notice of copyright must be placed in the “front matter” of the book. The front matter is usually found behind the title page, and contains information that identifies the book, its several components, and various rights associated with the book.

While it is not difficult to notice and register copyright for a work, publishers must take care to follow Copyright Office guidelines, and to provide necessary copies of the work’s best edition in existence at the time the work is copyrighted. If the author or other intellectual property (IP) contributor is someone other than the publisher, the publisher needs to obtain representations and warranties from other IP holders. These assure the publisher the work is original and authorize the publisher to publish it.

TRADEMARK

Trademark law affords protection to the owners of marks, names, designs, or logos that identify particular items or goods and differentiate them from similar items or goods produced or created by others. Service marks, which are similar in concept, are used

for protection of proprietary services. A notice placed in the front matter of the work that all trademarks and service marks used in the work are the property of their respective owners will provide a good deal of protection to the publisher.

RIGHT TO PRIVACY

Care should be taken, especially in books on biography and current events, and in fictional works, that the rights of individuals to privacy are not transgressed. Generally, publishers should avoid printing material about private citizens unless the citizens are themselves newsworthy or they have become involved in newsworthy events.

In fictional works, a notice in the front matter to the effect that the work is a work of fiction, and that the names of all characters are fictional, with any relation to actual persons living or dead being entirely a coincidence, can be protective to the publisher.

RIGHT TO PUBLICITY

Publishers should be cautious about using names or images of persons, such as sports celebrities, without first obtaining written permission to do so. Circumstances regarding the right to publicity are highly fact specific.

LIBEL

Publishers can be found liable for untruthful words of authors printed with malice or in reckless disregard for the truth. A strong line of prevention includes fact-checking, obtaining representations by authors that their work is truthful, carefully reviewing text that appears controversial, and making good faith efforts to publish only that which is independently verifiable.

INFORMATION

Books published in the 21st century have little credibility in the marketplace without appropriate identification. These include:

- International Standard Book Number (ISBN);
- Library of Congress Catalog Number; and either
- EAN Bar Code marking (for books marketed in bookstores); or
- Universal Product Code (UPC) marking (for books marketed in other venues).

Depending on budget considerations, the identification process can be performed by the attorney, the publisher itself, or provided by for-hire vendors. Many book designers can provide an EAN bar code as part of the cover design process at little additional cost. Copyright can be readily obtained by the publisher, or, at client request, by counsel. Required information should appear in the front matter of the book.

AUTHOR RELATIONS

If the work is not self-published, the publisher must deal with the book’s creator. Authors usually license publishers to publish their books. Other business models exist in which the author assigns all rights to the publisher, or produces the work as a work for hire. The publisher client should be apprised of the various advantages and disadvantages of these models. Author-publisher contracts tend to be long and complex. A number of good forms exist, and these can be a point of departure for the attorney negotiating such a contract.

VENDOR RELATIONS

Publishers deal with many vendors. Usually, the publisher utilizes the services of a

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book designer. The publisher typically purchases printed copies of the work from the book manufacturer. Each of these vendors is responsible for output that affects the “look and feel” of the final product. Product quality can be affected by specifications, and prices vary widely in the book manufacturing industry. Careful publishers should use a comprehensive request for quote (RFQ) for all design and print work and insist on written estimates. It is also useful for publishers to meet with designers and book manufacturers during the design/manufacturing process to check on progress of the project.

BUSINESS PLAN

Many new publishers need advice on the usefulness of business plans. Typically, these plans list assets, liabilities, projected funds flows, and marketing plans. The best plans are straightforward, forthright, and avoid hyperbole. Most banks and investors will insist upon a well-crafted business plan before they will consider loans or equity investments. More importantly, book distributors and wholesalers want to see such plans. The lawyer can add considerable value to such plans. They should contain full disclosure of liabilities, claims, and lawsuits pending against the publisher, its principals, or both and pre-existing debts of the business or any or all of its principals.

CASH FLOW MANAGEMENT/ COLLECTIONS

New publishers will often ask what capital requirements are necessary for a publishing venture. There is no single answer, but many publishers feel that bringing out a book involves about as much money as the purchase of an automobile. Obviously, that analogy encompasses a broad range of funding, but it is nonetheless apt. There are bargain-priced book manufacturers and many storage and distribution options available. A great deal of elasticity exists in book design, physical dimensions, binding, and page size parameters. Each of these choices affect cost and cash outlay. All must be considered carefully. A portion of the projected budget should be set aside for contingencies.

The American book business runs on a 100 percent return model, which means that bookstores can return their entire unsold portion of the book order for full credit. This model wreaks havoc with small publishers. It means that many publishers need reserves of cash to cover periods when they receive returned books instead of anticipated revenues.

The attorney should review the business plan to make certain that adequate provisions have been made for management of cash flow. In like manner, debts should not be allowed to become old, and a system should be installed to monitor accounts receivable.

MARKETING

This last topic is not least important. Indeed, it is the most critical component of a publishing plan. Many authors and publishers are clueless as to what constitutes a successful marketing program. The attorney can provide valuable service to the client by making certain that a sustained and sustainable marketing plan is in place prior to publication. Such a plan includes without limitation:

- regular and consistent print publicity
- an uncomplicated, low-maintenance web presence
- media and personal appearances, where appropriate
- extremely focused and targeted advertising, where budget permits
- unflinching dedication to keeping the title “out in front” of potential purchasers

The plan needs to be executed continuously, and re-examined and refreshed periodically. For example, many publishers use a regular, six to twelve mailings annually, “key contact” protocol. This targets 100 to 200 key decision makers and other contacts. They receive news about the publisher and its title or titles. Becoming a professional speaker is a great way to market books and related products.

Websites are also great marketing tools. An uncomplicated website, with links to

book retailers, is a great way to drive sales. Use of complex sites, involving webmasters, elaborate designs, sophisticated graphics, lengthy download time, and the need for constant updating, should be avoided. Care should be taken, when the publishing client is considering a website, to make certain that design of the website is a work for hire under written contract between publisher and website designer so that the website designer does not wind up owning copyright in the website.

CONCLUSION

Thousands of independent publishers are bringing books to market annually. Most of these are both small and new to the business. They need effective legal advice and counsel on a variety of problems, including copyright and other intellectual property concerns; contract negotiations with content providers and other vendors; establishment of sound business plans; management of cash flow and collection processes; and design and implementation of effective marketing plans. Individual circumstances of each publisher client can result in a plan of effective legal counsel at reasonable cost resulting in great value to the client and a potential continuing stream of business to the attorney. ◆



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FOOTNOTE

1. SPAN, Evergreen, CO.