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Essentials of a Publication Agreement

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Publishing Agreements

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Publishing Agreements: Today's Learning Goals

- What are the parties in a publication agreement doing? And why does this matter, and to whom?
- What laws are involved in a publication agreement?
- Why do librarians need to know this?
- How to talk to your constituents about their author rights within a publication agreement?
- How do you apply this knowledge into your scholarly communication and open access advocacy efforts?



Intro notes about publication agreements

- Publishing agreements are negotiable
- The provisions can be confusing, but often have similar features
 - Today we will breakdown some common provisions
- Authors often have certain mandates they must follow regarding their publications
 - Funder mandates, Open Access/Institutional repository policies, etc.



Review of Contracts

- A valid (aka enforceable) contract is a legally binding obligation to do something in exchange for something else, either another promise or return performance (sometimes forbearance from doing something)
- An enforceable contract must meet all the elements: ***offer, acceptance, and consideration.***
- Consideration is a core of an enforceable contract. It is a “bargained-for exchange”
- If there is a written document, courts will look to it first – and maybe only – to determine what the agreement includes



Review of Licensing Agreements

Introductory Provisions:

- Preamble, Recitals, and Words of Agreement: who's contracting with whom, why, and what do they agree to?

Definitions and Defined Terms:

- What is the meaning of things that will appear more than once throughout the contract?

Action Sections:

- Who's doing what, how, under what conditions, and when?

Endgame and General Provisions:

- How does this agreement end? For a renewable license, how and when does it renew?
- What are “boilerplate” provisions?



Review of licensing agreements, cont'd

- Action Sections are where the main subject matter of the performance provisions occur
- Answer questions of:
 - What is the consideration, ie. what are the parties exchanging? financial, non-financial (performance-based)
 - “Follow the cash:” who, how much, when, how, and what triggers the payment?
 - Terms of license: relationship of contracting parties? An actual date or an anniversary term to end?
 - Is there an “evergreen” provision: auto-renew? And what notification rules?
- Representations & Warranties = Statements of past/present truth and a guarantee of truth | Language = Represents and Warrants
- Covenants = Promises / Obligations | Language = “Shall”
- Conditions = Conditions to what? Must relate to an action provision | Language = If X, then Y
- Discretionary Authority = Gives a party a choice or permission to do something | Language = “May”
- Declarations = define contract management policies



Today... publishing agreements

- Invoke:

Copyright of the author

Transfer, or “assignment” of one or more of author copyright(s)

By a legal instrument, here, a contract

Additionally, that assignment may involve a second legal instrument: a license

- Involve:

Two sets of laws: Copyright Law and Contract Law



Copyright: Basics

- What is copyright?
 - A property right the law gives to authors over their **creative works**
 - Patents protect **inventions (useful items)**
- Copyright starts with the Constitution
 - Art 1, sec. 8, cl. 8. of the Constitution gives Congress the power to create copyright law
 - “To promote the progress of science and useful arts, by **securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries**”



Copyright: Basics

- Today, the law protects the author's copyright in works that are:
 - **Original**
 - **Creative**
 - and **Fixed** in a tangible medium of expression
- You don't need to register, deposit, use the © symbol, or do anything else to “get a copyright”
 - All you need to do is create
 - BUT, registering copyright with the US Copyright Office offers some benefits



What does copyright protect?

- [17 U.S.C.102](#) lists 8 categories of works that copyright protects:
 - Literary works
 - Musical works, including words
 - Dramatic works, including music
 - Pantomimes and choreographic works
 - Pictorial, graphic, and sculptural works
 - Motion pictures
 - Sound recordings
 - Architectural works



What *doesn't* copyright protect

- Copyright *does not* protect
 - [17 U.S.C. 102\(b\)](#): copyright *doesn't protect* any idea, procedure, process, system, method of operation, concept, principle, or discovery”
 - Copyright *doesn't protect* facts
 - Copyright *doesn't protect* titles, words, and short phrases
 - Copyright *doesn't protect* works of the federal government
 - Copyright *doesn't protect* works not created by human authors
 - *See* [Naurto v. Slater](#) (the Monkey selfie case)



The Idea/expression dichotomy

- **The idea/expression dichotomy**
 - Copyright does not protect **ideas**
 - Instead, copyright protects the **specific expression** of those ideas
- **Example**
 - Copyright does not protect the idea of a story about a boy wizard who goes to school with other wizards and fights bad wizards
 - Copyright *does* protect the specific story about Harry Potter, Hogwarts, and Voldemort.



What is the copyright “bundle of rights”?

- Instead of 1 right, it’s often best to think of copyright protection as a “bundle of rights”
 - Copyright gives authors control over several different ways their works may be used, by excluding others from using them without either permission or an exception
- 17 U.S.C.106 gives authors the right to control
 - Reproduction
 - Creation of derivative works
 - Distribution of copies
 - Public performance
 - Public display
 - (for sound recordings) Performance by digital audio transmission



Copyright protects authors, first

- [17 USC 201\(a\)](#) says that, under normal circumstance, copyright initially goes to the person who created the work -- the author(s)
- But, 17 USC 201(d)(1) permits authors to transfer their copyrights
 - Authors can only transfer their copyrights using written document
 - Oral agreements can only be licenses
- Further, 17 USC 201(d)(2) allows owners to transfer any or all of the bundle of rights
 - (2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title”



Now let's turn to publishing agreements

Copyright Assignment

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Manuscript Number:

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IP *transfer* provision : Consideration

Author



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ALL copyright, and “Related rights”

How?

Assignment

How long?

Whole term of copyright (life of author + 70 years)

Where?

Worldwide



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What IP rights does the publisher *need*?

- What IP rights does the publisher need?
 - Ability reproduce the work
 - Ability to distribute the work
 - Ability to display the work
 - Right to first publication
- Does the publisher needs the full copyright of a work?
 - No.
- How can you negotiate the IP transfer/license provisions?
 - The [SPARC \(Scholarly Publishing and Academic Resources Coalition\) addendum](#) can help you secure your rights while providing the publisher what it needs



What are “moral rights”?

- “The Author(s) hereby waive or agree not to assert (where such waiver is not possible at law) any and all moral rights they may now or in the future hold in connection with the Contribution .”



What are “moral rights”?

- Moral rights are things like:
 - Right to attribution
 - Right to publish anonymously
 - Right to the integrity of the work
 - (maybe) right to withdraw the work
- Moral rights are primarily recognized in civil law countries (U.S. is a common law country)
 - The US recognizes limited moral rights in the Visual Artist Works Act (VARA), [17 U.S.C. 106A](#)
 - VARA gives rights to some visual artists to
 - Attribution
 - Protection from distriuction
 - Prevent misuse of name (right to integrity)



Rights reversion

- “If the Contribution is rejected by the Publisher and not published, all rights under this assignment shall revert to the Author(s).”
- Can the author get copyright back?
 - Copyright returns to the author, but only if the publisher chooses not to publish.
 - The contract includes no time frame on making this decision.
 - This means you can’t share your work or try to get it published elsewhere, until this publisher makes a decision



Statutory transfer termination

- [17 U.S.C. 203](#)
 - Allows authors to terminate copyright transfers and licenses
 - Authors or their descendants can terminate a transfer 35 years after the transfer was made
 - There are very specific rules for what an author must do to terminate a copyright transfer



Choice of law/choice of venue

- Provision
 - “This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation .”
- This contract is governed by English law
 - This means that any dispute related to this contract must take place in the UK



Takeaways

- Publishing agreements are negotiable
- Publishers only need certain rights to publish
- Publishers often ask for the author's assignment of full copyright, then license certain rights back to the author
 - Pay close attention to which rights you **assigned** and which ones you **retained**
- Publishing agreements are context-sensitive, and will have different implications:
 - Student ETD submission?
 - Faculty peer-reviewed publication?
 - Book vs. journal article publication?



Questions?

We're here to help!

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