Lorelei Laird

A freelancer's legal primer

What you should know about your rights, and what to look out for in contracts

Going freelance is pretty cool: You get to set your own schedule, work in your pajamas, and laugh at the suckers caught in rush-hour traffic. But if you're a freelance writer, you're also running a business—even if you run it out of your bedroom. You'll have to spend at least a little time on administration, if only to ensure that you can keep writing. And for some writers, one of the most intimidating aspects of running a business is being your own legal department. Alas, it's also one of the most essential, because legal problems can affect how much you make, what work you can take on, and on rare occasions, whether you can work at all. Whether you're new to freelancing or an old hand looking to learn more, it pays to understand contracts, copyrights and legal liability.

This article aims to give readers a very short overview of legal issues that are likely to come up in a freelance writer's day-to-day business. It was not written by an attorney, and you shouldn't take it as legal advice from the author, the magazine or from anyone quoted. If you'd like to know more, there are several wonderful books on freelance writing out there that devote substantial ink to these topics; there are also books on copyrights and contracts. And if you have a really sticky problem, you might truly need a lawyer—and big bucks to pay him or her. So it pays to know how to avoid needing one.

Whose rights are they, anyway?

A copyright gives you ownership of a creative work. It encompasses a set of rights, such as the right to publish the work in Poughkeepsie, N.Y., or the right to publish it electronically, that you can split according to time, geography, media or other ways. You can keep all of your rights, sell them as a group, or sell them individually to different clients. When you sell (or license) your work to a publisher, you're really selling (or renting) a set of rights.

Whenever you write something down, or record it in another way, you automatically have a copyright for it. That's it! (With a big caveat that we'll discuss below.) You can strengthen your claim considerably by filing your work with the U.S. Library of Congress. This costs a little money but is tax-deductible; see www.copyright.gov for details.

Intellectual property and small business attorney Leonard DuBoff of Portland, Ore., suggests that you consider registering a copyright for anything you feel strongly about protecting. DuBoff, the co-author of *The Law (in Plain English) for Writers* and numerous other books, points out that registering a work allows you to demand statutory damages and attorneys' fees in any lawsuit you'd bring—making your case worth a lawyer's valuable time.

Here's the big caveat: You probably don't own the copyright to anything you created within the scope of full-time employment. Unless your employment contract says different, your writing is considered a "work made for hire," owned by the employer. (Things you wrote on your own time are probably safe.) There's an exception called "fair use" that generally allows you to show your work to potential employers in a one-on-one situation. But if you want to put your work on a Web site, you'll have to get written permission. Otherwise, you're better off leaving the work offline, or just posting a list of articles available on request.

Contracts: not that scary

Reading and negotiating contracts is not everyone's favorite task; they're often written in "legalese," and disputing them may seem like inviting a conflict with an editor you're trying to impress. But you absolutely have to do it to succeed as a freelance writer. Sorry.

"Learn how to take apart the language very carefully and to see what it actually, literally says," advises Erik Sherman, a Florida freelance writer and photographer who runs the WriterBiz blog (www.eriksherman.com/writerbiz), which addresses just these types of issues. "If you don't do that ... inevitably, you'll end up panicking over things you shouldn't panic over."

Sherman, who's also the former chair of the contracts committee of the American Society of Journalists and Authors, adds that "95 percent of contracts are just English"; with some concentration and an online legal dictionary, you should be fine.

If you find something you don't like in a contract, you can and should negotiate with the publisher. There are entire books written about negotiating, but in short, it's quite common and no big deal to the client. They may even pull out a different, more favorable contract for you. And if a publisher claims no one has ever had a problem with its contract before, Sherman says, it's "probably horse manure." Beware of editors who act like contract

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negotiations aren't a normal part of doing business.

I'm going to divide the provisions that contracts make into two categories: Normal, expected provisions and red flags. The normal ones outline everyone's responsibilities and expectations. You agree to sell them certain rights to a piece of writing by a specified date, and they agree to pay you by a specified date. You should ensure that your contract specifies, at a minimum, what rights you're selling, how much you're getting paid and when.

These clauses aren't safe to ignore, but they aren't inherently bad. There are no hard-and-fast rules about what you should ask for or dispute. It helps to know what your priorities are—what rights do you want to keep? Do you need a kill fee? This will change, depending on the situation; the resale rights to an article about low-carb diets are probably more valuable than the same rights for a piece of news about your local city council meeting.

The red-flag provisions are things that either open you to unreasonable risks or take too much of your intellectual property. Publishers aren't necessarily evil, but their contracts are written to protect themselves, not you. Keep an eye out for the following:

• **Warrants:** These are the guarantees you make to the publisher. It's fine to warrant that your work is your own, but beware of contracts that ask you to warrant something that's outside of your control, like guaranteeing that a source isn't lying. Don't take that risk.

• **Indemnification:** This means you take the responsibility and pay the legal bills if someone sues over your work. Sherman believes that writers worry more about indemnity clauses than they should, since a client doesn't need one to sue you. But some contracts put writers on the hook for any lawsuit related to the work. Eliminate that language, especially if you're writing about a controversial subject.

DuBoff suggests that you only warrant that the work is not obscene, libelous, etc. *to the best of your knowledge*. That way, you're only indemnifying against violations you knew you were committing. "Without that, you become an insurer," DuBoff says. "If it's to the best of your knowledge, the other side has to prove that you knowingly did [violate a warrant]."

Sherman adds that you should only indemnify what you can warrant; and again, you shouldn't warrant anything you can't control. He also suggests you ensure that the indemnities apply only to American law, to ensure that you have the stronger legal protection writers enjoy in the States.

• **Noncompete clauses:** Some contracts say that you agree not to work for a competitor for some amount of time. Some are written so broadly that they could be interpreted to bar you from working in their industry forever.

"Get them to spell out who they consider to be competing," Sherman advises. "The noncompete should be on the very specific issue they're covering. You're not on staff!"

• **Jurisdiction and venue clauses:** These clauses specify where any lawsuit arising from the work would be heard. This may not seem important, but it could make a difference if, for example, the extra transportation costs make it too expensive for you to sue an out-of-state client who decides not to pay you.

• **Nondisclosure agreements:** This is where you agree not to tell competitors about your client's trade secrets. That's fine on its face, but watch for language that could get you in trouble for swapping information about pay rates and editors with other writers.

• **Rights to your notes:** Some clauses specify that the client owns your notes; a few contracts will specify that your work is a work made for hire, as if you were an employee. Unless the work is really specific, try to limit or eliminate this language. You're not on staff; your research materials are intellectual property that could be used in other articles.

Can you safely work without a contract? Yes, but only for financially secure clients that you trust, and it's still best to have something written down. Sherman says any piece of writing outlining rights and responsibilities can stand in for a contract in a pinch, even an e-mail. If a client refuses to send you anything written, he suggests that you walk away.

In general, the best defense against the legal pitfalls of freelancing is a good offense. Always read and negotiate your contracts, know your rights, and don't work for clients who seem shady. With a little attention to detail, you can be a savvy business owner for a few minutes a day—in your pajamas—and spend the majority of your time on the writing that you really care about.

Lorelei Laird

Lorelei Laird's freelance work has appeared in *InsideCounsel*, *California Lawyer* and *Shojo Beat*. She lives in Los Angeles but is not writing a screenplay. Web: www.wordofthelaird.com.

RESOURCES

HERE ARE some books that cover legal issues of interest to freelancers:

- **Author Law A to Z: A Desktop Guide to Writers' Rights and Responsibilities** by Sallie Randolph, Karen Dustman, Stacy Davis and Anthony Elia
- **Contracts Companion for Writers** by Tonya Evans-Walls
- **The Copyright Handbook: How to Protect & Use Written Works** by Stephen Fishman
- **The Law (in Plain English) for Writers** by Leonard DuBoff and Bert P. Krages II
- **The Writer's Legal Companion** by Brad Bunnin and Peter Beren