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Law and Authors: A Legal Handbook for Writers (Introduction)

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**Law and Authors:
A Legal Handbook for Authors
(Introduction)**

Jacqueline D. Lipton

Introduction to Law and Authors: A Legal Handbook for Writers
(Jacqueline D. Lipton) (Cambridge University Press, 2020)

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Law and Authors

A Legal Handbook for Writers

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Writing a book is always a significant undertaking, involving not only a time commitment but a real passion for the subject matter. This book, for me, was born out of a passion to bring some (hopefully) accessible legal information to those who need it, in an area where accurate and user-friendly legal information can be hard to come by. This is no fault of anyone working in the area. It's just that the laws related to publishing, and to writing more generally, can be complex and can change significantly over time. The rise of digital technology is both a blessing and a curse here; it provides more information than ever before, but much of the information is inaccurate, out of date, or based on particular situations and not applicable to other contexts.

Attempting to explain "the law" to authors is no easy task and there's no one right way to do it. It was a challenging decision for me to even try, and I'm grateful to those who supported me on the way by discussing initial ideas for the book, helping me draft and redraft, and helping get the proposal and the final manuscript into the hands of those who could bring it to its intended audience. Thanking particular people is always a risk because I'm sure to leave someone out, but, at the risk of offending others, I'd particularly like to thank Cynthia Leitich Smith, Nova Ren Suma, and Bethany

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Introduction

Setting the Stage: A Primer on the Law for Writers

In the early 2010s, paranormal romance writer J.A. Saare¹ was hitting her stride with two separate series of fantasy titles, alongside a number of popular romances published under the pen name Aline Hunter. The romance titles, published by the independent press Ellora's Cave, comprised the bulk of her sales, while her self-published work was achieving a growing fandom—notably, a vampire romance series, *Rhiannon's Law*. When she initially published the third book in that series, she included an author's note explaining to her readers that, due to the increase in digital piracy, she was considering ending the series prematurely. It didn't make financial sense for her to keep writing the books when she couldn't control the piracy.

Subsequently, Ellora's Cave hit some money problems of its own and eventually closed down, removing one of Saare's more reliable income streams. Ultimately, she got her rights back from Ellora's Cave, and she later found new publishers for most of her work. However, her challenges in the publishing world were not unusual, particularly when it comes to self-publishing, or publishing with a smaller or less established press. And Saare had an advantage over many other authors because she understood her legal rights and knew how to get her rights back from her publisher.

Not all authors, agents, or even editors have a thorough grasp of the legal landscape of the modern publishing world with its increased digitization and globalization. This is not surprising. The laws related to the creative arts have always been complex, often providing little clear guidance in any given situation. The sudden rise of digital technology in the early twenty-first century only added to the confusion. Even lawyers have a hard time with the finer points of digital copyright law, fair use, digital contracts, and rights related to free speech and defamation, so it's no surprise that authors get confused.

The book you're holding in your hands (or reading on your device) is a simple resource for writers and other publishing professionals who want to know more about their legal rights and responsibilities. As a regular speaker on these issues, I've realized that writers, in particular, have surprisingly few places to go for answers to basic legal questions. Some of the most common questions include the following:

Can I quote song lyrics in my novel?

(How much) am I allowed to write about real people?

Can I protect an idea for a story I haven't written yet?

Can I trademark my book title?

When and how should I register copyright in my book?

Do I have to include a © notice on my work?

Is fanfiction fair use? What about parody? How about educational use?

If you find yourself embroiled in a serious legal battle—and I hope you never do—you may need formal legal advice or representation. However, if you're simply going about your writing business, and concerned about how the law impacts you on a day-to-day basis, this book will give you information, and hopefully also some comfort, about the kinds of things you should and shouldn't have to worry about.

A BRIEF NOTE ON LEGAL JARGON

It's virtually impossible to write a book about legal issues without occasionally using some technical legal language. I'll do my best to avoid jargon, but whenever I do introduce a new legal term, I'll put it in italics and include a user-friendly explanation.

Law should never be an excuse for not writing, or an impediment to writing what you want to write. Legal issues can usually be dealt with somehow, at some point in the publishing process, so don't let fear of the law be one more excuse for not getting your butt into the chair and the words onto the page. There are so many distractions that keep us from getting the writing done: housework, socializing, day jobs, family obligations. Don't let the law be one more distraction for you!

For many writers, particularly those who self-publish, the law seems like a minefield blanketed with fog in the dead of night, an area where you should abandon all hope upon entering. It's true that the laws that may impact writers can be complex and confusing, even to lawyers. Sometimes legal representation (or at least legal advice) is necessary to avoid or resolve a sticky situation. In other cases—like copyright registration, basic rights reversions, or learning how to avoid a defamation lawsuit—the law is pretty straightforward, and you can typically handle the matter on your own. Throughout this book, I'll flag the situations where you might want to consult a lawyer, and suggest ways to find effective, knowledgeable, and affordable legal assistance in those cases.

It's important to understand up front that not all lawyers specialize in the kind of law you might need help with. Lawyers are a bit like doctors in that sense. A general practitioner usually can't help you with a rare condition; likewise, your local lawyer who drafted your will may not be the best

LITERARY AGENTS AND LAWYERS

Literary agents can be a great help with commercial, contract, and legal issues if you're publishing via the more traditional route—securing representation by a reputable agent and then having that agent submit your work to publishers. While most literary agents are not legal experts or lawyers (some are), they are generally experts in the terms you would expect to see in a standard publishing contract, and also in how to negotiate a publishing deal that will be of the greatest benefit to you.

Your agent's commission is based on your success, so they can be worth their weight in gold in negotiating, handling the money side of things, and generally protecting your interests. Sometimes matters will arise outside the expertise of your agent and, at that point, she—or you—may want to call in a legal expert. Many agencies retain contracts experts who vet their clients' publishing contracts. Not all of those experts are lawyers, but they all typically have significant experience with publishing contracts: for example, they may have previously worked for a contracts department at a publishing house.

person to help with a tricky copyright problem. However, they may be able to give you a referral to someone who can help. Your local lawyer may be of use in other ways, too—for example, by helping you incorporate an LLC (limited liability company), the most popular form of company for a writer to set up. An LLC can simply be a single-person company that you use for your writing business. Of course, you may not need to operate your writing business through a company. If you choose to do so, setting up an LLC is something most people can do relatively cheaply and easily on their own by following the guidelines on their state government's company registration website. Accountants can also help with this, as well as with organizing

your company books. There may be tax benefits in your particular state to operating your writing as a business, through an LLC, and your accountant can certainly advise you there.

FINDING YOUR WAY AROUND THIS BOOK

I've organized this book so that you can dip in and out of different chapters without having to read the whole thing from cover to cover. If you're interested in whether parody is fair use, for example, you can dive right into chapter 5. If you have questions about social media marketing and copyright issues, you can turn straight to chapter 11. If you're considering using someone else's photograph in your book, but have concerns about permissions, take a look at chapter 12.

Because this book is intended as a basic handbook, rather than a comprehensive guide to all the law that could ever conceivably affect your writing career, there are some things that are covered either not at all or not in any detail. For example, I've taken the view that tax and accounting issues are best left to accountants and to books on accounting. Also, questions of corporate law and company formation are pretty simple issues that your local small-business development office or accountant can help with—or your state government website, as noted above. These are issues generally applicable to anyone who wants to start a company. If you're a beginning author, and wondering whether to start a company to limit your legal liability, yes, it's a good idea. But for most tax and accounting purposes, you likely won't be treated any differently than if you were writing and running your business as a private individual. By the time you're a best-selling author and you seriously have to worry about these issues, you should be able to afford a good accountant and attorney! (And you'll probably have an agent as well.) In any event, chapter 13 includes a list of further resources to help you with issues beyond the scope of this book.

My purpose in this book is to provide simple explanations for the most common questions people have about the laws related to publishing, including questions about copyright, fair use, permissions, trademarks, defamation, privacy, and the most common publishing contract clauses. While concepts introduced in later chapters will build on those of earlier chapters, I've also cross-referenced everything important, so you don't have to read from the beginning to understand it.

The early chapters explain the basics of copyright law and the fair use defense in cases of copyright infringement. The reason for starting with the difficult copyright stuff is that it's what most of your legal rights as an author are based on. Once you understand what a copyright is, and importantly what it isn't, you'll have an easier time understanding later chapters about contracting with agents and editors around your rights—the rights you're giving them and the rights you may be withholding to sell at a later time. For example, you might give a publisher North American rights to your book but reserve rights in other countries to sell to another publisher, if you (or your agent) think you'll get a better deal that way. Chapters 1 to 5 cover the following questions and more:

What is a copyright?

What works does it cover?

Do I have to register my copyright to protect my work?

Will copyright protect an idea for a book I haven't written yet?

What is a work for hire, and who owns its copyright?

What is copyright infringement?

Can I use snippets of other people's work in my book, like song lyrics or lines from a poem?

How is copyright infringement different from, and similar to, plagiarism?

What's the difference between the public domain and Creative Commons?

What is fair use, really, and what does it cover?

Once we understand the copyright basics, we'll turn to questions about how you can deal with your copyrights, including contracting with agents, editors, and self-publishing platforms like Amazon's Kindle Direct. Chapter 6 is focused on traditional publishing contracts (whereby you submit your work to agents and editors) and chapter 7 looks at self-publishing contracts (whereby you publish directly to your audience, using a platform like Kindle Direct). These chapters cover ways in which you might divide up your rights (e.g., book rights vs. television/movie rights vs. merchandising rights; North American vs. foreign rights) with publishers and others, as well as potential liability issues related to published work, including defamation, copyright infringement, and trademark infringement.

The rest of the book covers other legal issues that may affect writers, including trademarks and branding of your work (chapter 8); privacy and defamation, which may be of particular relevance to those writing memoir, biography, or historical fiction (chapters 9 and 10); laws that might affect marketing and publicity (chapter 11); photographic permissions (chapter 12); and suggestions for finding effective and affordable legal assistance when you need it (chapter 13).

Throughout the book, I make comparative comments about laws in other countries so that you'll be aware of those that differ significantly from American law. For example, privacy and defamation laws tend to have a lot more bite in European countries than in the United States. Memoir author Edmund White noted that for one of his books he had to make seventy-four changes requested by an American lawyer to avoid concerns about defamation law in the United States, while, for the British edition, he had to make 134 changes to avoid concerns about defamation.² The fair use defense to

copyright infringement in the United States is also quite different from the corresponding laws in many other countries. If you're publishing in foreign markets, it's a good idea to understand such legal differences, and hopefully you'll be able to get the specific advice you need from an agent, editor, or lawyer for any particular foreign market you may want to explore. If you have an agent in the United States, she'll usually have colleagues in other markets who can help with this—another benefit of working with an agent.

If you're still reading this, I'm guessing that I haven't scared you out of the legal minefield but rather offered my hand as a guide to lead you through it, or at least the bits of it that are relevant to you. A little knowledge of the law can go a long way for writers, and that includes knowledge about when you actually do need to hire a lawyer. In many cases, you can easily anticipate a legal issue in plenty of time to deal with it yourself, or alternatively to recognize what kind of help (and how much) you might need, and know where to find it. Recall the earlier example of J. A. Saare. She knew enough about how copyrights work to get her rights back from a defunct publisher, which freed her to make deals with a new publisher and get her writing career back on track.

You don't have to be a lawyer to deal with legal issues. You don't even have to *have* a lawyer. This book will help you understand when a lawyer (or agent, or accountant, or other professional) may be useful or even necessary. I'll also give you lots of tips about dealing with many issues on your own, so that you don't have to worry about finding a lawyer.

And now, into copyright law . . .