Intellectual Property Basics for Authors

Copyright and related laws may surprise you

By Mark Sableman

Some writers know one thing for sure about intellectual property: copyright is the author's friend. And that's about all they need to know. After all, lawyers aren't needed—there's always the trick in which you mail your manuscript to yourself.

If you are one of those writers, your view of the legal world is simple, comforting, and totally wrong. Intellectual property laws affect writers, and not always in ways you expect.

Let's start with the overall landscape, and a few basic distinctions. Intellectual property, traditionally, has three aspects—patents, trademarks, and copyrights. Patents generally aren't a concern for writers, but both trademarks and copyrights are, as is a related right, the right of publicity.

Copyright law protects creative content. The constitution refers to granting special rights to "authors" for the "writings" but the law extends copyrights far beyond literal writings. All creative content, in text, artistry, sculptures, photographs, music, and movies, is covered from the time it is created. Copyright law, at heart, is an incentive plan—the law encourages creativity by giving creators exclusive rights over their creative works, for some limited time period (though that "limited" time is now quite long).

Trademark law, by contrast, was meant as a form of consumer protection. It recognizes the need for consumers to know who make particular goods and services, so that they can recognize the producers they have come to trust and make wise buying decisions. Trademarks are the symbols of a particular producer, most often in the form of words, designs, or combinations of both. Trademark law helps producers create goodwill and build strong brands. A trademark lasts as long as it fulfills its source-identification purpose.

The right of publicity is the right of a person (usually a celebrity) to control how his or her name, likeness and other personal attributes are used commercially. At heart, it protects against false endorsements, by prohibiting false claims that a celebrity endorses a particular product. It generally does not prohibit references in editorial or artistic contexts, but many battles are being

fought on the margins. For example, the right of publicity has significantly stymied creators of sports-themed video games.

These legal doctrines affect the world of novel-writing. Let's consider, for example, the part of your book that readers see first: the cover.

The cover shows your book's ***title,*** of which you are understandably proud. Those few words convey something about your book, tease the reader, and may contain double or triple meanings. It took effort to develop your title, and you may assume it is protected by copyright. Wrong, unfortunately. Copyright doesn't protect titles. It is sometimes said that titles are too short to deserve copyright recognition, but the real concern is the policy need to allow different authors to use the same or similar titles in different contexts. Congress and the courts have limited copyright in other ways too. For example, copyright protects only particular creative expressions, not the underlying facts or ideas expressed, or procedures, methods of operation, principles, or discoveries.

Back to your book cover. It probably contains some ***artwork.*** That too is creative content subject to copyright. Who owns that copyright? Usually the artist or photographer automatically owns the copyright in his or her creation. But if the artist or photographer created that work as an employee (say, of the publisher), the employer owns the copyright; that's the work-for-hire doctrine. Less commonly, a written work-for-hire contract may provide that the artist's work will be owned by the person or entity who created it. Or the artist may own the work initially, but sell it (an "assignment") or loan it (a "license") to the user. If you are self-publishing your book, you will need to navigate these issues.

Next, your book cover may contain ***trademarks.*** A publisher's name is a trademark (e.g., "Alfred Knopf & Co."). Sometimes the publisher uses other trademarks as well (e.g., "A Borzoi Book"). If an organization or company sponsors the book in some way, its trademark may be part of the cover (e.g., "The AARP Guide to Retirement Investing"). And if the book is part of a series, the series title (e.g., "The Hardy Boys") may have become so well-known to readers that it serves as a trademark, by telling readers that this new book is part of the series that they have come to know, love, and insanely desire. An author who wishes to obtain a trademark for a book series title has a heavy burden to show that the claimed trademark (which may be the same word used consistently in the titles of several books in a series) is understood by the public as a source identifier. Competitors who believe that a trademark registration has been obtained improperly can petition to cancel a trademark registration during its first five years.

Finally, the book cover may contain the ***name, likeness, or personal attribute*** of a person, which may implicate the right of publicity. In most cases, assuming that person relates to the content of the book, this use should fall within the editorial-use exception to the right of publicity. A court dismissed a crime victim's right of publicity claim, based on use of her photo on the cover of a book about the crime, because the photo clearly related to the book's content.

But concerns arise if you use a celebrity's photo, or even an image of an ordinary person, and it is not related to the content. For example, putting Marilyn Monroe's photo on your book cover is sure to boost sales, but if it is not sufficiently related to the text, it would violate her right of publicity. Even using a non-celebrity's photo could raise issues if that person was not materially discussed in the book.

We haven't yet opened the cover of your book, and already we are awash with intellectual property legal issues.

Once we open the cover and examine your text, we'll need to consider not only your own copyrightable content, but also your use of other's content (e.g., text, photos, or art). There are three legal bases for using others' content: the work was in the public domain, you got permission to use it, or your use qualifies as copyright "fair use," a legal doctrine that is subjective and often difficult to predict.

As to your own content, don't assume that copyright protects you. You may have assigned the copyright to your publisher, and if so, your rights are limited solely to whatever the contract provides. (Yes, authors need to take care with publishing contracts, and negotiate them, even when publishers falsely claim that everything is "standard" and unchangeable.)

Trademark and right of publicity issues are less likely to occur inside your book than on the cover, but if you do use trademarks, you'll need to use them in a descriptive, nominative sense, to describe things and activities in the real world, and not in a way that suggests the trademark owner's approval or association with you or your book. Similarly, you can use names of real people in your book, so long as they are related to the content. The names "Fred and Ginger" could be used in a movie title because the movie truly portrayed a couple trying to imitate their dance hero and heroine, Fred Astaire and Ginger Rogers.

One final note. Don't believe that old myth about mailing a manuscript to yourself. Think about it: you could mail an unsealed envelope to yourself, and, after receiving it postmarked, you could later place a manuscript in the envelope and seal it. We lawyers aren't as dumb as you think. After all, as you can see, we are keeping the legal system plenty complicated for authors.

Mark Sableman is a lawyer with Thompson Coburn LLP. He has practiced media and intellectual property law for almost 40 years and has written one book and more than 20 law review articles and book chapters on various aspects of the law of words and images. He has also taught media and internet law and is proud that some of his past students are successful authors who manage to navigate the legal rapids of communications law. His internet and copyright blogs are available at www.internetlawtwists.com and www.copyrightfocus.com.