

## **RIGHTS 101: What Writers Should Know About All-Rights and Work-Made-For-Hire Contracts**

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American Society of Journalists and Authors  
prepared by the ASJA Contracts Committee  
(somewhat out of date, so no longer on the ASJA website,  
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"All rights" and "work made for hire" – these contract terms sound simple enough. But what does it *really* mean when writers sign contracts containing them? Bottom line: in most cases, work-made-for-hire and all-rights contracts are a rotten deal for writers. If publishers want additional rights beyond first print rights -- exclusive or non-exclusive -- they should pay for them. If publishers want "all rights," they should pay a substantial premium or be willing to share with the author any additional income they get from sublicensing. Writers offered all rights or work-for-hire contracts in any form should ask that contract terms be modified to make them more acceptable. They should demand a *substantial* compensatory premium whenever waiving control of subsidiary rights.

The terms publishers offer often confuse writers. Here's a primer on the difference between "first North American serial rights," "all rights," "non-exclusive [all] rights" and "work-made-for-hire" and their practical implications for writers.

### FIRST NORTH AMERICAN SERIAL RIGHTS

As recently as the mid-1980s, most periodical publishers sought only "first North American serial rights" (FNASR) from the writer. Under a FNASR contract, the publisher licenses a one-time right to publish the article first in the North American market. The author retains all other rights to his work, including the right to re-license its use as a reprint ("second serial rights"), to publish it in foreign markets, to license a movie or product spin-off, and so on. Recently, however, publishers have begun asking for more rights (usually for the same amount of money).

### "ALL RIGHTS" CONTRACTS

When a writer signs over "all rights" to his literary work, he is essentially conveying the entire bundle of rights that makes up his copyright plus any common law rights he may have in the work. Whether the writer has effectively transferred his "copyright" is open to debate and may depend on the contract's actual wording. But clearly the ESSENCE of his copyright -- the bundle of rights copyright represents -- is gone.)

By conveying away "all rights," the writer gives up the right to re-license his work to a reprint magazine, foreign periodical, electronic database, anthology, or business publication, for example, or to re-use the work in a future book. For many writers, subsidiary rights like these represent a considerable annual source of revenue. The Internet, where content is king, has also substantially expanded resale possibilities. Signing an "all-rights" contract (or its equivalent) hands that income over to the publisher.

### "NON-EXCLUSIVE RIGHTS" AND OTHER VARIATIONS ON THE ALL-RIGHTS THEME

Although less blatant as a rights-grab than "all rights" contracts, "first right to publish" or "non-exclusive" agreements can achieve virtually the same result for publishers via the back door. These agreements often begin with a benign-sounding FNASR clause and then tack on

extremely broad (though "non-exclusive") rights to use a writer's work in perpetuity in various media. The writer may still technically own the property, but the publisher may continue to re-use the work whenever it wishes -- for no additional fee.

Granting "non-exclusive rights" to a publisher may sound less onerous to a writer than signing an all-rights or WMFH agreement, but the apparent safeguard may be deceptive. These non-exclusive rights clauses may also allow publishers to profit from the work through their own network of sister publications, syndication contacts, and resale markets without sharing that income with the author. The loss of potential income can be substantial. Think about the size of the potential market among corporate purchasers, for example. (How would you feel if Microsoft buys 10,000 reprints?) How would you feel if the article for which you sold all rights later becomes a film? (Think "Saturday Night Fever.") And if you plan to include your article "Why Eating Chocolate Makes You Live Longer" in your book "Surprising Foods That Keep You Healthy," do you want your article to become part of a competitive nutrition book the magazine throws together?

### WORK-MADE-FOR-HIRE

As if all-rights contracts weren't onerous enough, "work made for hire" (WMFH) contracts have been jokingly called "all-rights contracts on steroids." But WMFH (sometimes called "work for hire") is no laughing matter.

The term owes its existence to a lengthy definition in the Copyright Act (17 U.S.C. Sec. 101 and 201(b)). Under this definition, as one might expect, writings produced by an employee in the scope of his or her employment belong to the employer. In addition to employee-created works, certain works produced by *independent contractors* may also be WMFH *if* the parties expressly agree *in a written instrument* that the works are "work made for hire." But not all types of work by independent contractors will qualify. The work must be "specially ordered or commissioned" as:

- a contribution to a collective work,
- a part of a motion picture or other audiovisual work,
- a translation,
- a supplementary work [to another author's work, such as a foreword, chart, or table],
- a compilation,
- an instructional text,
- a test,
- answer material for a test, or
- an atlas.

(A tenth category, "a sound recording," was briefly added and then quickly removed from the statute after intensive lobbying by recording artists.)

There's a big payoff here for publishers: When a "work made for hire" agreement is entered into for a work in one of these nine "magic" categories, the company or individual COMMISSIONING the work (and not the independent contractor) is deemed to be the "creator" of the work -- and is entitled to copyright protection from the moment the work is created. (But remember: just because a work falls into a qualifying category doesn't mean a writer must agree to write it as WMFH).

In many ways, "all rights" contracts and WMFH agreements are roughly equivalent: both cede a broad array of important rights, and both can deprive writers of valuable sources of income. But there are some differences between the terms.

Sure, *you* wrote that article or textbook. But if you've signed a valid WMFH agreement, you're not its legal "author." From the instant of its creation, the employer or publisher who commissioned

the work is considered its creator. You won't be able to resell the work in other markets -- and won't be entitled to benefit if the publisher resells it. You can't syndicate the material or even put it on your own website without the publisher's permission.

A WMFH deal thus relegates the writer to the status of an employee, minus the usual "perks" of employment such as health insurance, Social Security contributions, retirement plans, and paid vacations. (And to ensure they reap all the benefits without any of the costs, some publishers underscore the freelance writer's status as an independent contractor, with language such as: "The writer is an independent contractor and nothing contained herein shall create or be construed as creating any other relationship between the parties.")

WMFH agreements must be in writing and signed by both parties. But despite the apparent clarity of the statutory list of nine categories, determining whether a particular work can actually be the subject of a work-made-for-hire agreement is sometimes difficult, and the answer may not be clear-cut. Photographs or paintings, for example -- neither of which is expressly mentioned -- are often commissioned as WMFH under the (arguable) assumption that they qualify as part of such "collective works" as newspapers, magazines, company catalogues, advertising materials, and annual reports. Software is also not expressly mentioned but some regard it as a collective work for which WMFH treatment is available. In general, determining whether a commissioned work is eligible for WMFH treatment will require considering both the nature of the work and the context of its intended use.

Even when a work clearly fits one of the nine statutory categories, WMFH treatment is not possible unless the work was "specially ordered or commissioned." In other words, a WMFH agreement cannot cover pre-existing work. (Court decisions have been divided about whether the WMFH agreement must actually be *reduced to writing* before the work is completed. One Circuit Court accepted as sufficient a post-creation written agreement confirming an earlier oral or implied WMFH agreement. But other federal courts have required that the written agreement precede creation of the work.)

### **IF YOU'VE SIGNED A "WMFH" CONTRACT FOR A WORK THAT "CAN'T" BE WMFH, IS YOUR CONTRACT VALID?**

What about books and other works that do not appear on the laundry list of categories? If you've signed a WMFH contract to create such apparently non-qualifying work, is it valid? This is a difficult question to answer.

Be cautious before dismissing a contract as "void" or "unenforceable." Remember that several of the statutory categories are broadly defined. Ultimately, a contract's validity is something that a court must determine, and courts often stretch to enforce the parties' underlying intent even where a contract contains some technical defect. Circumstances and contract language vary widely, so we urge writers facing this problem to speak with a good copyright attorney for legal advice.

Be aware, too, that many publishing contracts now contain what lawyers call "belt-and-suspenders" language. To cover the possibility that WMFH status may not be upheld by a court, many book and magazine publishers now routinely include a back-up "*all-rights*" clause as well, such as: "If a court determines that this agreement does not provide for the creation of a work made for hire, then you agree to give [the Publisher] exclusive publication rights in and to your work, as well as the exclusive rights...including electronic rights, including any derivative works created therefrom, in any manner or medium throughout the world in perpetuity without additional compensation." Under contracts with such "belt-and-suspenders" language, the writer may well be deemed to have transferred "all rights," even if WMFH treatment does not apply.

### **DIFFERENCES BETWEEN "ALL RIGHTS" AND WMFH: COPYRIGHT TERM AND REVERSIONS**

Similar as "all rights" and WMFH may sound in their dismal practical effects on the writer, there are other distinctions between them, involving copyright term and the right to a reversion. Let's begin with the differences in copyright terms:

For most works created after January 1, 1978, copyright protection extends for the author's lifetime plus 70 years. For works made for hire, however (where a business entity is often deemed the "author"), tying the term to a human lifespan is not practical. So instead the Copyright Act calculates the copyright term for a WMFH creation by a different formula: 95 years from the date the WMFH work is first published, or 120 years from the work's creation, whichever is shorter. 17 USC Sec. 302(c)

There are also differences in what are known as "reversionary rights." Copyright law allows an author who transfers his copyright to unilaterally terminate that transfer between the 35th and 40th year following the agreement. (Section 203 of the Copyright Act spells out the steps that must be taken to exercise this termination right). Arguably, this provides potential recourse for a writer who sold "all rights" in a work that later becomes a long-term bestseller. (We say "arguably" because the writer would still have to prove that his "all rights" contract constituted a "copyright transfer" for purposes of the reversion statute -- a point the publisher might contest.)

WMFH agreements, on the other hand, "are forever"; the writer has no such reversionary right that might allow him to terminate the transfer and recover copyright -- in fact, under the work made for hire statute, he never had a copyright in the work to begin with. If your work turns out to be exceptionally profitable or marketable many years down the line, a right to recover the copyright MAY indeed prove valuable. Another important reason to avoid WMFH agreements.

## **THE RECENT ESCALATING RIGHTS BATTLE**

Until recently, most knowledgeable freelance journalists have typically refused to sign work-made-for-hire (WMFH) or all-rights contracts, except for a few situations where potential re-use of material was limited (technical publications, trade magazines, and some corporate writing applications, for example). The consensus was that publishers who demanded such inequitable terms would lose the services of high-level professional writers and would be forced to rely on less capable contributors.

By the mid-1990s, newspaper and magazine publishers started getting more sophisticated about rights -- and grabbier. Many adopted a two-contracts gambit, initially sending an onerous all-rights contract but keeping a more writer-friendly FNASR version waiting in the wings for writers knowledgeable enough to demand it.

With the advent of the Internet, rights struggles took on both new meaning and new intensity. Publishers were quick to discover that Internet content had value -- and slow to offer to pay writers an extra fee for using their material in this new medium (despite happily charging advertisers separately for print and Web advertising). Some publishers tried to claim that FNASR print contracts gave them the right to reproduce the same content on the web and in electronic databases.

In June 2001, the U.S. Supreme Court -- in a landmark victory for writers -- held otherwise. The Court in *Tasini v. New York Times et al.* found that publishers exceeded their print rights and infringed freelancers' copyrights by posting articles in electronic databases.

Decisive though it was as a victory for freelancers, the Tasini case was just the first skirmish in a rapidly escalating rights war. To preempt future Tasini-like claims, publishers simply demanded even more rights from writers right up front -- and not just electronic rights. An increasing number of publishers now refuse to work with writers unless they sign away all rights or agree to WMFH contracts (even when the work may not fit the statutory definition of WMFH). Some contracts

even demand rights to use the material in "any media that may be invented in the future, anywhere in the universe."

Today, the once-standard FNASR contract is looking more and more like an endangered species. Given the current publishing climate, demands for WMFH, "all rights," and similar contract terms can be expected to proliferate. Music composers, photographers, graphic artists, writers, and other creators and independent contractors have mounted vigorous opposition to excessive rights demands. Writers must take a similar stand and must educate themselves about what such contract terms really mean.

## **SHOULD YOU SIGN? POSSIBLE RESPONSES**

Like many other writers' organizations, ASJA has long taken a firm stance against most WMFH or all-rights agreements, especially for independent journalism. ASJA reiterates its fundamental opposition to all-rights and WMFH contracts where such contracts seek to separate writers from the fruits of their creations without appropriate compensation. Publishers' attempts to obtain all rights retroactively (especially without additional payment) are particularly contemptible.

In only a very few situations do we acknowledge that such arrangements may be acceptable: a book "written to order" as a promotional vehicle for a company and/or its products, for example (works in which the publisher has a distinct proprietary interest – and we express no opinion here about whether such materials would meet the statutory test for WMFH.) or certain kinds of corporate writing (such as technical and users' manuals, corporate press releases, or marketing materials, when the writer can foresee little or no potential re-use for the material). But norms vary even for corporate work. Some creative firms and agencies routinely retain rights to material created for clients, for example -- and derive significant ongoing revenue by licensing re-use of the material by the client.

Besides money, what else do you stand to lose? All-rights and WMFH contracts also put decisions about where an article will (and won't) appear beyond a writer's control. One ASJA member who accepted WMFH contracts at a now-defunct consumer magazine, for example, unhappily discovered her articles on multiple websites. Another member found his article gracing a porno site. Still another writer, eager for a prestigious clip from a large women's magazine, accepted an all-rights agreement and later was refused permission to post her own article as a writing sample on her personal website. A bad thing for the writers involved? Sure. But signing away their rights left these writers with little recourse.

When you are presented with a publishing contract that includes an all-rights or work-made-for-hire clause, here are several possible responses:

**(1) OFFER FIRST NORTH AMERICAN SERIAL RIGHTS (FNASR) CONTRACT TERMS INSTEAD.** Point out that most major writers' organizations strongly oppose all-rights contracts as unfair to writers and condemn attempts to coerce writers into accepting such terms as a condition of assignment, payment, or publication. Request a simple FNASR contract instead. (And watch out for attempts to tack on additional "non-exclusive" rights.)

**(2) NEGOTIATE ADDITIONAL PAYMENT FOR ADDITIONAL USES.** If a publisher insists that it needs more than one-time use in print (FNASR), ask that it specify what rights the publication TRULY needs. If the publisher plans to post the article on its website, for example, acknowledge that the Tasini decision made publishers more anxious to nail down electronic rights, and offer to separately negotiate electronic rights for an additional fee. (For example, one writer who makes a substantial yearly income selling web rights to his out-of-print books makes a distinction between readable rights and downloadable rights. He licenses these rights separately, charging a yearly fee, granting rights for 3 years at a time, and getting his payment up front.)

If the publisher anticipates possible reprint, syndication, and/or other reuses in the future, offer to negotiate rights for such re-uses when and if re-use needs arise, or specify in advance the additional fees payable for each specific re-use of the material.

**(3) PUT A TIME LIMIT ON RIGHTS.** Instead of a WMFH or blanket all-rights contract, suggest a LIMITED all-rights contract, with rights reverting to the author at the end of an agreed-upon period. (Syndication agreements, for example, customarily specify a one-year term.)

**(4) DEMAND HIGHER PAYMENT.** None of the previous suggestions has worked, but you're not quite ready to walk away from the bargaining table? If a publisher's desire for WMFH or all-rights terms is truly non-negotiable, demand substantially better compensation. Remind the publisher that freelance arrangements save them the commitment and expense of ongoing employee salaries, benefits, office space and equipment -- costs that freelancers must cover for themselves. "Reasonable" remuneration under an all-rights contract or its equivalent should not only compensate the writer for his current effort and loss of future income from the (often significant) lost potential for future income from the work, but should also reflect the risks and overhead the writer bears as part of his freelance status.

ASJA encourages all writers who feel they are signing away rights under duress to keep a paper trail, documenting their attempts to negotiate more favorable terms and the publisher's responses.

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