



# Beyond the Book<sup>®</sup>



## JAN KARDYS

F: Welcome to the 2007 ASJA Annual Writers Conference. You're about to hear panel number two, Contract Preparation and Negotiation.

LITTLEJOHN: Good morning everybody. Glad to see you here. I'm Maureen Littlejohn. I'm a ASJA member, and today we're doing a panel here all about contracts, which is very important, I think, for everybody probably in the room, from both first-timers to seasoned experts. We've got a couple of wonderful panelists here. Actually, I'll give you a little bit of background.

We've got Jan Kardys, and she's been sort of a contract expert for more than 20 years. Worked with a lot of the big publishing companies, Time Warner, Doubleday. She's now with Scholastic. She has been with Google. And she has all sorts of insights as far as the behind-the-scenes kinds of things that people need to be aware of. In particular, she says – she talks about a cautionary note, and that authors should always be very aware of all the nuances that they need to sort of go through and check and be aware of, because a lot of people aren't. You've said that you've seen some terrible things happen in the marketplace, so we want to address those terrible things today, and make sure that everyone's prepared so it doesn't happen to them.

Also, if you've got questions, we're going to have a Q&A at the end, so we can share some of the peoples' experiences as well.

And then we have Chris Kenneally, who's going to be our sort of – Well, I'm the moderator, but he's going to be doing sort of the interview Q&A aspect of our panel this morning. And he's with the Copyright Clearance Center, and he does – it's Beyond the Book, which is a series on CSPAN and also Book Television in Canada. And he's an award-winning journalist and author, and he will be leading Jan with some questions that I'm sure we're all going to be really interested in hearing about and getting to sort of the heart of some of the major problems and questions that people probably will have.

So, I'm going to let Chris take over. I'll be sitting over there, and then afterwards, we'll have the questions and we'll work with one of the mikes off the desk. So thank you very much.

KENNEALLY: Well, thank you very much Maureen, and thank you all for joining us this morning. As Maureen mentioned, the way we want to try to do this is to have a conversation so we don't talk at you but kind of with you, and while there will be a separate section at the very end for questions, if there's something that isn't clear from the start and you want to get some clarification, Jan would be happy to take that kind of a question.

And we should say that if you haven't already picked them up, you should pick up the handouts that are in the back of the room there, as a number of those will be referred to during the discussion this morning.

Maureen mentioned a cautionary note with regard to publishing and signing contracts and so forth, and Jan was just telling me a funny story that she gave a similar presentation not so long ago, and afterwards, someone came up to her and said, thanks to you, I've decided I'm going to publish my own book. And she said, I didn't want to scare you that much. But in fact, he published his own book, and then it got picked up by a publisher later on, so there are a variety of ways to do this and to approach your work.

Let people get the handouts there in the back.

We also have something here, Jan is working on a book about this very subject, and if you want to be among the first to hear about its publication, she has an address book here. You can put your name, e-mail, mail address, whichever you prefer, and she'll keep track of that and let you know when the book is going to be out.

I'll also give you my e-mail address, which is easy enough to remember. It's simply `chrisk - C-H-R-I-S-K - @copyright.com`. The Website for Beyond the Book is `beyondthebook.com`, and we have a podcast series there, so if you are enjoying that sort of thing - and I find those very interesting - please go to `beyondthebook.com`, you see how to sign up for that.

Why don't we get started. And I suppose the first thing to ask, so we have a sense of the room, is how many people here have actually ever signed a book contract? Likewise. So about half the people in the room.

Now, our first important question is, do you know where that contract is? Do we all know where our contract - we think we know where it is. We're sure we know where it is. I think I know where mine is. The funny thing about that, and why we wanted to bring it up at the beginning, is to point out that it's perhaps the most exciting part of this whole process, because before you actually have to write the book and do all that work, you get to sign the contract and think about all the ways you'll spend those two or three figures that are in it.

And yet, the minute we've signed the contract, we cash the check, and we lose track of the contract. I think it's one of those things that's really - that's the first

cautionary note is that we should know what's in the contract, and at your happiest moment when you're there sort of flush with the success of having gotten the contract, you should really be certain that you know what it is you're signing. I think, Jan, that's your first note.

KARDYS: Essential.

KENNEALLY: Essential. And keep track of that contract, because as we're going to go through the life of a book here, what we'll realize is that the contract will be something you may refer to numerous times throughout the lifetime of that book, and that even means when the book expires as well.

So let's start then, Jan, and I'll sort of let you discuss the first important part of this, and that is about all the neglected and forgotten clauses that can make substantial differences. People look at the amount of the advance, and how it's going to be paid, and that sort of thing, but there's lots of other elements in the contract that are worth taking note of immediately. So tell us about those.

KARDYS: Well, how many – this would be very helpful for me in this group. How many people here have literary agents when you signed your book contract? Is there anyone here that signed a book contract without a literary agent? OK. That's going to be extremely interesting.

KENNEALLY: Just to say for people, because I know we're recording this, about half of those who signed a contract had an agent and about half didn't, which is, I think, a surprising ratio.

KARDYS: It is. Because most major publishers today, the big publishers, generally won't even look at a manuscript unless it comes through an agent. And it's interesting that four people or five people here didn't have an agent. I'm curious, did you go through a friend, or how did you get in to the publisher? You went right to the publisher. Oh, you knew the publisher.

M: (inaudible) three or four years, and they approached me to write a book.

KARDYS: OK.

F: In my case, the books that I've done without a contract were all travel guide books, and as far as I know, none of the writers who work for Frommer's have agents.

KARDYS: So it was a work-for-hire type of situation?

F: Yes.

KENNEALLY: We will talk about work-for-hire agreements, actually.

F: I walked in the door and asked if they'd like a book (inaudible)

KARDYS: Oh! That's great. Well, first of all, do you know – does everyone in this room know the difference between a work-for-hire agreement and a signed contract? I gave you in your handout a work-for-hire agreement, which is in the back of the room, and it's an original document that I drafted, and I made it extremely protective of the publisher, but it will give you an idea of how essentially all your rights are given away to the publisher. You will not have your name on the copyright page of that book. And it's generally a flat fee. Rarely, you might get a little bit of royalties, but you really have no rights when you sign that type of an agreement with a –

KENNEALLY: Can I just ask. It's not uncommon – increasingly, sad to say – it's not uncommon for freelance journalists to sign such contracts in serials and newspapers and so forth, but is it becoming more common in book publishing as well?

KARDYS: In my company now that I'm working at, at Scholastic, and also at Warner Books, when I was the director there of contracts, we did have work-for-hire agreements, because we developed a series, and we wanted to control the series, and so it was much easier for us to do a work-for-hire agreement.

KENNEALLY: So there in a sense you're just a hired gun for that particular brand, really.

KARDYS: Exactly. And publishers are very concerned today with developing a brand, a series. That's a trend that I've seen increase over the years.

KENNEALLY: And is that – I mean, we know that's true in trade publishing. Immediately think of all they dummy books and so forth, the chicken soup books and so on. Is that also true in academic and text publishing?

KARDYS: In academic and text publishing, it's not as favorable to an author or writer.

KENNEALLY: In the first place, even.

KARDYS: Yeah, in the trade publishing. And I worked at Prentiss Hall and also at Harcourt Brace Jovanovich, and in those cases, the contracts – the authors give world rights in all languages to the publisher, and the copyright is in the name of the publisher, not the author, and the royalty rates are generally lower.

Trade publishing, because it's more competitive, the contracts that you would sign with a Doubleday or a Simon and Schuster or Random House, you will have the copyright in your name. You will have better royalties, and I would say generally, the advances would be higher.

KENNEALLY: Something, and we'll talk about it in more depth later, but I wanted to bring up with relation to this ownership of rights, particularly with textbooks or works that are sold in schools or universities. Those are commonly revised over time, so after a certain period of time, there's a new edition. So even if you're the writer in the first instance, there's no sense that – or no guarantee, if you will, that you'll remain the writer for the lifetime of the book or anything like that. Because the publisher owns the rights, they can assign the revisions of the book, which you may think of as yours, to another writer.

KARDYS: Correct, correct.

I guess maybe we should go through some of the clauses that I think you should really be aware of, and if you please remember the book that's circulating to put your e-mail. I have a PowerPoint which basically goes through the contract and dissects it and gives you some helpful information to help not only you but your agent.

Of course, the most important clause is the grant of rights clause, and that's essentially the clause where you are giving the publisher the right to print and publish. But if you read that clause very carefully, they can take your book in whole or in part in a derivative work. Does everyone here know what a derivative work is? Sort of?

KENNEALLY: Sort of.

KARDYS: All right, well, we did a book at Warner Books by James Redfield called *The Celestine Prophecy*. Now, that book was interesting because that book was self-published, and he became sort of a cult figure, and Warner approached him. He got a great deal of money for that book. And we did *Celestine Prophecy*. It did very well, and then we did another book called *The Tenth Insight*, and we decided we would do a mini-version, so we sort of condensed the entire book. And it was about this size, so that's considered a derivative work, a spinoff.

Another author we had at Warner, she did a book called *Simple Abundance*, and there were all sorts of interesting derivative works, calendars, journals. So just be aware that, when you do sign your contract, that the publisher really has the freedom to do what they want with your book.

KENNEALLY: Unless you reserve the right.

KARDYS: It's very difficult to reserve a derivative work, but what you should do is you should put in your subsidiary rights clauses, which are your book club, all your ancillary rights, that in the event your book is adapted, altered, or condensed, it's subject to your approval.

I would also highly recommend – and in fact, I just put this into a contract recently – because of permissions, that you provide a contact phone number and e-mail address. Put that right in your contract, because the permissions department at large publishing houses and your subsidiary rights departments – and there could be two, one for domestic rights and one for foreign rights – they are under a lot of pressure all day to make deals, especially in permissions, and if you have that contact information, their contract is scanned in, they can get to you very quickly. Yes?

M: (inaudible) very difficult to (inaudible) to (inaudible)

KARDYS: Yes. Well, I mean, they do – if I was an author, what I would do is I would make that a part of the discussion, your agent. We want full approval rights over how you're going to rework my book in any format. There'll be certain rights you can just – don't even fight about. Large print rights, a book club right, paperback rights. Those are traditional rights that will be given. But if somebody takes your book, and your book goes into an anthology, and it's condensed, you absolutely must fight for that right to get an approval.

And I would, as an author – my best recommendation, because I used to be in permissions and I also was in sub rights, is find out who is the sub rights director at your publisher. As soon as that contract's signed, send them a little gift, send them a note, tell them how delighted you are to be with that publisher. Find out everybody in that subsidiary rights department down to the assistant, the managers. That's really important. And I don't think in my 25 years of publishing, I probably got one note from an author thanking me, and I have to tell you, because of that note, when I was selling sub rights, I went out of my way to help that author with his book.

M: What's the best way to find out?

KARDYS: Well, there's the *Literary Marketplace*.

F: Can I just interrupt for one second? Because we're taping this, what we have to do with questions is we have to use the mike, and I was hoping –

KENNEALLY: Or I can even repeat the question.

F: If you could do that, that would be great.

KENNEALLY: So the question again was?

M: (inaudible) charge?

KARDYS: Of the sub rights department?

KENNEALLY: So the question, just to repeat for the audience at home, is how do you find out? And I suppose I'd start with the Website, but you would ask you agent to inquire as well.

KARDYS: Yes. Or your editor. Your editors, and the *Literary Marketplace*. I wouldn't say this 100% of the time. It generally will list the director of sub rights. Sometimes publishers don't want to put in who everyone is on their Website. They'll maybe put just the publisher's name, because they don't want to be inundated. But that's a name. When you become friendly with the editorial assistant who will be taking your phone calls, as them who the sub rights director is.

KENNEALLY: And if I can say, Jan, I think one of the points that's kind of coming across here already is that when we talk about copyright or the contract, it's a bundle of rights. There's not one single right there, but there's a variety, a spectrum of them. I didn't want to stop you from continuing, but that's an important concept, I think, to kind of hold in your head as you are looking at the contract. There's a variety of rights here, some of which are compensated very explicitly, some of which are not.

KARDYS: Well, for example, sub rights –

M: Do you see what I mean?

KARDYS: Oh, if it's –

KENNEALLY: Again, just for the audience at home. The question has come about, in a condensed version, who does such condensing? It would be some editor, perhaps your editor, perhaps another editor.

KARDYS: Yes. Is this for a textbook?

M: No, no. I was –

KARDYS: A trade book?

M: It was a generic question.

KARDYS: Oh, generally. Well, actually, it would depend. It could be, as Chris said, someone in-house, or they might even have a freelance person. I know at Simon and Schuster or Prentice Hall when I was there, they like to take college textbooks on similar subjects and sort of condense them and reissue them in a new book.

M: So they would not typically hire the author to come up with a skinnied-down version of the book.

KARDYS: Sometimes they would do it. I'm not going to say that publishers are rigid all the time. Your relationships with your editor and the people you work with in the publishing house are really important. And my advice to you just from working with people over the years is, when you contact your editor or anybody in permissions or sub rights, make sure you have all your questions so you don't call them back five or six times, and have your e-mails be very concise and right to the point, because they have so much on their plate every day, they really would appreciate that.

KENNEALLY: Perhaps since the questions are coming hard and fast, and we kind of thought there'd be a lot, maybe to get through some of the basic points here, we'll ask you to kind of hold onto those questions, unless there's something that's just an immediate clarification, you don't understand what Jan says. We'll save those questions to the end.

F: I got confused about compensation, and a subsidiary right is not covered like paperback rights would be. A condensed version, do they not have to pay you?

KENNEALLY: So the question is about the fees for various rights, some of which are outlined; paperback, there's a traditional split. But for something like a condensed version, that would be negotiated upon the decision to publish such a work.

KARDYS: It's most likely covered in the sub rights. In the handout I gave you on sub rights, they'll put it – they'll either have a separate clause and they'll say abridgements, condensations. They might put that in the reprint cause. And you'll have first and second serial rights. But generally, a large publisher, if they have their own paperback division, they would want to do the paperback version themselves, and obviously do the hardcover edition. But if for some reason they don't like your book for paperback, they will try to license it. So the split will be for paperback 50/50. You will get 50%. But that's only after your advance has earned out. And I'm curious. How many authors here have had their advance earn out?

KENNEALLY: That's good. That's good.

KARDYS: That's good.

F: (inaudible)

KENNEALLY: That's still good. Absolutely.

KARDYS: That's excellent. Yes. Would you like more information on sub rights and what you can get approval on and what you can't? OK, well, there's large print rights, a library edition, deluxe edition. I would never give approval on any of those rights if I had been asked by a literary agent. I would only give approval if the large print publisher was going to condense or abridge or change your book.

And I can tell you, most contract people in the business, of the major houses, would never give approval. They just wouldn't.

You're in a stronger position if, before your contract is signed, your literary agent does a deal memo to your publisher. And you – for your book, you'll have to think about what's really important to you. They can design a special clause for you. Let's say for some reason you don't want a deluxe edition, a leather-bound edition of your book. Make that a deal point when your agent is selling your book. And I've seen all sorts of really interesting clauses over the years, because the agent brought that right up front to the editor. And believe me, they'd rather have a good author and put in a clause about deluxe editions that lose you. So that's when you're in the strongest position.

If you try to ask for these clauses later, after your contract – after the deal has been made between the agent and the publisher, and then even if you get a copy of the contract, you're going to be dealing with a contracts manager or director who will just beat you down, unfortunately, and only protect the publisher. So it's at the moment of enthusiasm and passion when they really want you that you're in your strongest position.

KENNEALLY: What about some other neglected, forgotten clauses, Jan, that you want to be sure to bring up?

KARDYS: Well, there's so many clauses. The non-compete clause, if you've looked at that in your agreement, they're extremely restrictive. Read the language carefully. Do not be intimidated, ever, by a contract. Read every word. I think the most difficult contract negotiation I ever had in my life was at Macmillan, where the author did not have a literary agent. She came in, she wasn't prepared, I felt sorry for her and I said, go home, read the contract. It took three days, because she asked questions. What does remainder mean? What happens when my book goes out of print? What does non-compete mean? I wish people would fight more sometimes about those things.

The non-compete clause is very important, because you're really restricted. Some of them will say for the entire life of when your book is in print. They won't allow you to do a spinoff book. They won't allow you to do a similar book on the same topic.

KENNEALLY: How strictly do they define that? If you've written a book on Massachusetts, are you allowed to write another book about Massachusetts?

KARDYS: Well, you would have. If they find out about it and they feel it competes with the book that's already out there – now, if your book is out of print, your publisher will pretty much release you. You won't have to worry about that. But if your book is still in print, your book is doing well, you do a similar book, you should get clearance.

I have worked through situations where there have been authors that are writing three books at the same time, and they could be on a similar subject. One would be doing it for an academic publisher, one would be doing it for a trade publisher. We've put in the contract, with the exception of this book, which will be published by the Free Press. So it's better right up front, if you think you can sell sort of a spinoff or a derivative work, to disclose that.

KENNEALLY: And I suppose that's increasingly common in a time when journalists and writers are more specialists than generalists, so that your topic of expertise could be a very narrow one, and if the publisher chose to define non-compete in a very strict way, you could find yourself with your hands tied.

KARDYS: Yes, yes.

F: I have a question. What about ghostwriting? If I were to write a book on one topic and ghostwrite a book on a similar topic with someone else's name on the cover, would that be considered a competitive work?

KENNEALLY: Just for the audience at home, the question is whether or not ghostwriting on the same topic, not with your name attributed to the book, could be interpreted as competing with your own book.

KARDYS: Well, my question would be, is this with the same publisher or another publisher? If it's the same publisher, you wouldn't have to worry, because they would be aware of it. But if you did a similar topic with another publisher, there would be restrictions in your – probably a work-for-hire agreement, unless you're getting royalties. Did you sign an agreement where you got royalties?

F: This is still somewhat hypothetical, but yeah, both would be involving royalties.

KARDYS: OK. So whether it was a regular contract where you're a ghostwriter getting royalties, even though you won't have copyright credit, that would be something you should be concerned about. But on the other hand of the coin, I've seen books that have been slightly similar, and they did help each other. But you do have to let your publisher know, because that will really tick them off if they see you doing that.

KENNEALLY: Can I ask you then, what would happen? The contracts are legal documents, and that's something important to keep in mind, of course. Suppose something came up that were to be interpreted by the publisher as in violation of the contract, such as this example we're just describing where someone's competing with their own book, essentially. What might the publisher do? I suppose you could be sued, but just discuss that for a moment.

KARDYS: OK, well, if it was an ironclad non-compete clause, and Random House was publishing a book and Simon and Schuster decided to issue a similar book, if Random House, the other publisher, would contact the other publisher and as well as the author and would say, essentially, you can't publish this book. We feel this is competitive.

I've been in a situation – and this is another clause that's very important in the return of advance clause. You have a delivery and acceptance clause in every publishing agreement. It's solely at the publisher's judgment whether or not they will accept your book. The only thing you can put in that contract is sort of a duty to edit or a clause where – and just say duty to edit. They'll understand what that means. What you want in that clause is you want the right to revise your book, with detailed reasons why it's unacceptable, and really be given a chance to cure.

KENNEALLY: Right. That's an important part you mentioned. A period that would be defined, not only what your responsibilities would be, but a certain period of time to do it.

KARDYS: Yes. But I have unfortunately seen, through the years, publishers leave, and a new publisher comes in, and they don't like your book and then you're cancelled. That's unfortunate for you, but that's – with a duty to edit clause, you have a little bit more protection.

KENNEALLY: What about a kill fee? Does that come up? It certainly comes up in freelance journalism. In book publishing as well?

KARDYS: Actually, it depends on the publisher, but they have to accept it. There are some publishers that, in that clause, if you've delivered and they feel it's acceptable, they might pay you the second portion of the advance, but they will just decide not to publish. That has happened before.

M: I just have a quick question before we get off non-competes. In the employment context generally, there are some very tight restrictions on the enforceability of non-compete clauses. Is that the same in – I know nothing about non-competes in the publishing world? Is there actually case law that this stuff is – that the courts will respect these things?

KENNEALLY: Well, again, just to paraphrase the question, it gets back to that point about the legality of contracts and how far people are willing to go to enforce them. What is common practice, as the questioner was referring to? If you're talking about the corporate world – and depending upon where you are on the corporate ladder, they can be very strictly interpreted and very – it could be very costly. What about in book publishing?

KARDYS: I'll give you a perfect example. One of the publishing houses I worked at half the day – this was when I was young – my job was to go after authors who

either didn't deliver a manuscript or delivered an unacceptable manuscript. And I had one book where it was unacceptable. It was a legitimate case that it really was unacceptable, because I got the manuscript and I saw the comments from the editor. And then one day, I opened *Publishers Weekly*, and there was the same book by the same author. Now, he was still under contract to the publishing house that I was working at. He had no right to sell this book to another publishing house. And if I hadn't read *Publishers Weekly* that day, never would have known. So I got a copy of the book, called up the contracts director at that publishing house and said, this author is still under contract to us. And within three days, we got a check.

So publishers will fight when they see something like that. But they don't like to get bad publicity about something concerning a non-compete clause. They wouldn't want that spread throughout the Authors' Guild, or they would try to work it out with the author first.

M: And so if there was a decision by the publisher that it was unacceptable, the author should ask for the rights back or in some way (inaudible)

KENNEALLY: And that would be in the contract, would it not? There's clauses about what happens when this occurs.

KARDYS: When I send you – as long as you put your e-mail down there, I will send you a PowerPoint presentation.

KENNEALLY: And by the way, it's about a hundred plus slides long, so it's very detailed. That's why we didn't provide it for you today.

KARDYS: Basically, in the return of advance clause, which you want, the best thing you could get – which you won't get. It's very rare to get this. It's something called an open first proceeds clause. And what that means is, regardless of whether or not your book is unacceptable, your advance that you were paid on signing, or whatever amount of money you were paid on signing, will only be returned to the publisher if your book is resold. And there are very few literary agents that are able to get that clause.

The second compromise for you would be a first proceeds clause, if your manuscript is unacceptable, that you will have six months in which to resell the book, even though you're still under contract to your publisher. The second you're told your book is unsatisfactory, you could go out the next day and submit it to another publisher through your literary agent. But if you don't sell it within six months, you have to repay the publisher the money due on signing.

So it's six months would be one compromise, 12 months, or 18 months. In reality, you'll get a cancellation letter, and it will be a demand for money back. In reality, publishers realize that authors don't have a lot of money, and there'll be either an attorney or a contracts manager or director negotiating with you a repayment plan.

KENNEALLY: What about something else you referred to in that reminiscing about your life hounding authors? I'm making a joke with that, but authors being late is rather like the sun coming up in the east. You can pretty much count on it. Can contracts specify penalties or any kind of arrangements if, for example, a book is late for a legitimate reason?

KARDYS: Well, there is force majeure clause in your publishing agreement, and that is any acts of God, or fire, whatever. You could put that in your contract too. You could ask for that. In fact, I would put that in the manuscript delivery clause.

Publishers – at one publishing house I worked at, which was probably the Tiffany of publishing, Doubleday, and this was way back in the '70s – they were so organized that they had a printout of when the manuscripts were due, and if the editor didn't get the manuscript in, part of my job was, well, you have two choices. Either extend the manuscript due date, or we're canceling. So then that was a publisher – but remember, this is the '70s – that was very tough.

A lot of times in that clause, you might see something that says, time is of the essence, so it's really better if you're honest with your editor when you're making the deal to give them a really realistic manuscript due date. And if you know you're going to be late, ask for an extension, because you don't want to get yourself in trouble. Publishers plan carefully their pub schedules. If you want your book to come out at Christmas, when people love to buy books, make sure that you have your manuscript in early so that you can hit the season correctly.

KENNEALLY: And their schedules may seem ludicrously in advance for those of us who don't live our lives planning out a year or more, but those are something that they've worked and lived with for years, so they do understand that the manuscript needs to be here today to be published December, 2008.

What I'd like to try to do – we could have plenty of time for questions if we get through a couple of other pieces that are related to your handout, and then Jan will be delighted, I'm sure, to answer any questions you care to ask.

We have a handout on permissions, Jan, both granting them and obtaining them. And you feel this is important to understand at least in the latter case, obtaining permission, because increasingly, that's the burden of authors now, and it's specified in the contract. So do you want to talk about that?

KARDY: Yes. It's the handout that says Obtaining Permissions and Releases. I think this is what has always, I guess, upset me at times with authors is that they don't clear permissions. If you're using material from another source, you're using a picture from another source, please, please, please get your paperwork in.

KENNEALLY: It could even be quoting lyrics from a song.

KARDY: Yes. Yes. Yes.

M: My book was in production (inaudible)

KARDY: Yes. So what I did was I gave you a wonderful little checklist of all the things you need to think about, and this will save you time, because if you're writing to a publisher and you want to use substantial work, these are the kind of things that they care about. They'll want to know the title of your book, the name of your book, who's the publisher. Sometimes they might even ask the cover price, the number of pages in your book. You'll save them time if you Xerox the pages from the other publisher's book that you want to use. Now, if you're going to adapt something, they want to see that too.

So this is a very detailed checklist. I also gave you a sample permissions license, which will give you an idea. Another thing you have to think about is, remember, you're clearing permissions not only for your initial hardcover. You're clearing it for everything. That means electronic rights. That means all the sub rights. That means for a book club. That means for any foreign edition. It becomes extremely expensive, permissions for an author, to make sure those rights are cleared.

KENNEALLY: And I think the experience that I've heard about is that it depends on the type of book. It shouldn't be intimidating necessarily. If your book is mass market trade, it'll be one level of fees. If you're talking about something that's more of a scholarly work or limited publication, many publishers will recognize that. They'll certainly see the potential as far as the license.

Some owners of copyright can be – they can expect the moon, and others will see a publication and go, well, I'm not going to charge or I won't charge very much. It does really range in that way. But the point you're making is, do it now, because trying to get it later once the book's either been published or in production can be extremely costly.

KARDYS: Yes. And you can negotiate these fees with the permissions managers or directors at a publishing house. Don't think that you have to accept their fee. They understand that most books today are going to be in an electronic version so they're used to that.

But if you want to, you can clear, for example, limited rights. You could only clear for the US and Canada and North American territory, and then later on, if your book sells in the foreign market, you could clear those rights later, or negotiate for your foreign publisher to clear those rights and pay for those fees. But I think that's a murky area, because most authors realistically do not clear for world rights in all languages. They only clear for the US and Canada.

KENNEALLY: Before we move into some questions, so you're talking here about obtaining permission. Can you talk briefly about what's involved with granting permission and how that may be outlined in a contract?

KARDYS: OK. If you're granting – do you mean from the point of view of an author granting or a publisher granting?

KENNEALLY: Both.

KARDYS: Either? Well, if you had your rights back, for example, you have a book that's published and your rights are back, the first thing I would do is make sure you call the permissions director and everybody in the permissions department at that publisher, because actually, those are on the bottom of the heap. You want them to know that you're willing to grant permissions even though your book is out of print. It still could be in a library somewhere.

The checklist that I gave you would also be helpful when you're deciding to grant permissions to someone else. You want as much information as possible. If possible, ask for the money on signing of the permissions license rather on publication of this author's book.

KENNEALLY: You mentioned about rights coming back to you. Perhaps before we do get to questions, that would be an aspect of the contract that most authors don't want to anticipate when they do have that wonderful moment of signing the contract, but it's entirely possible and probably likely that the book will eventually go out of print. And there are two pieces about that if you wanted to discuss, I think. One is, about to go out of print, and actually going out of print.

KARDYS: Right. Publishers for your book, if it goes out of print, there'll be two states, OSI, about to go out of print, or OP. This is a clause I really feel is neglected. Some agents fight for it, but a savvy contracts director will wear the agent down. The agent doesn't really care that much about the out-of-print clause, because the book is out of print and they're not going to be getting any money. And as you know, agents take 15%.

So what can you do to protect yourself in the out-of-print clause? I gave you a checklist again about the out-of-print and the reversion of rights clause. See if you can get them to define, number one, what does out of print mean? In most publishing agreements, it will say, if there's an outstanding subsidiary rights license, your book is still considered in print. In reality, most major publishers – and I can't say that this is true for the smaller publishers – if your hardcover and your paperback is out of print – and maybe there's a book club license and a large print license, even an audio license – they would give you your rights back in the reversion letter, with the exception of the outstanding licenses.

What you want to ask in your contract – and this is – you have to get your agent to ask for this – is that they cannot renew the outstanding licenses. So if there's an audio out there or a large print, they can't just automatically – the publisher can't automatically renew those. If you can, try to exclude – and this will be difficult for you – that if your hardcover and your paperback is out of print, regardless of whether or not there are outstanding licenses, you won't be able to get your rights back. That will be very hard to get, but try.

KENNEALLY: And then what about when the book has actually gone out of print? You need a letter stating that, and you can request such a letter, too.

KARDYS: Yes. This is essential. As soon as you know your book is out of print – and you will know your book is out of print – immediately write a letter to the director of the contracts department or ask your editor who handles reversions of rights. There's usually one person who does that all day.

What authors are unaware of is there's a very, very long process to getting your rights back. It has to go back to your editor. They have to decide whether or not they want to put that book back in print. And I have seen books put back in print.

KENNEALLY: Just because they sort of generated by that letter.

KARDYS: Yes. They suddenly say, wow, we forgot about this book, and let's get it back. It will go to the marketing person, the sales person, the publisher, inventory. There could be six or seven people signing a form before they decide that they'll give you your rights back, and subsidiary rights.

At Doubleday they were very aggressive and active when they got that request from the author about trying to resell the sub rights. They gave it one last shot, which I think was good for the author. But most publishers don't really have the time. If the book is out of print, they believe that no one else is probably going to want it, and most people want current books.

KENNEALLY: This is all complicated today by print on demand and small run printing. In the past, the commitment to keep the book in print was a reasonably costly one, and the printing costs and the warehousing and so forth, and today it's a lot more economical to keep something in a small quantity. Does that mean you ought to try to define a certain sales level that kind of below which –

KARDYS: You could try. Publishers will hate that, and they will fight you on that. My best advice is, right upfront, ask for your copies if you want to buy your remainder copies, because your book will get remaindered or – I hate to say this – just shredded. Try to get in your contract the best remainder price. Try to get a definition of out of print. Try to exclude electronic version, but maybe have a threshold for the electronic version of the book that's out there.

It's been my experience generally, if a book is really out of print and the publisher's not making money, they will give you your rights back. What's unfortunate is that it's very time-consuming for you, because you could send a letter and you have to keep harassing your publisher to get those rights back. But getting your rights back is really important, because you can take your book, you can rewrite it, get a new copyright, and then try to sell it to another publisher in a different format. That's really important.

KENNEALLY: And that's not a pipe dream. That does actually occur.

KARDYS: No, that does happen.

M: (inaudible) same format (inaudible)

KARDYS: Well, you could sell in the same format, but people today – it depends on what kind of book it is. If it's a novel, you've probably grown as a writer and you suddenly say, gee, I could really take this novel and spruce it up and make it more exciting, and make it a much better book, and make it more commercial. If it's nonfiction – and depending on what area it is – for example, if it's a cookbook, you could really enhance your cookbook with pictures and charts and etc.

KENNEALLY: And in that case, it becomes an entirely new work.

KARDYS: Yeah, and it's a new book, and there'll be a new copyright, and publishers will look at it as a different book.

KENNEALLY: I have a feeling we have a lot of questions and we have about 20, 25 minutes left, so we can perhaps turn to the questions from the audience here. And what I'm going to ask you to do, because we are recording this for the audience at home, is to come up and ask the question as close to that extra microphone as you can, and as an incentive to get over the potential embarrassment factor, I've got a CD, three CDs for the first three such people who will venture forward to that microphone. So if we could ask you to do that, it is reasonably painless and there's your prize. This is a CD related to Beyond the Book. We have a podcast series, and you can get all of this free online as well, but we have these packaged.

So why don't we do this, too, because let's make this as much a conversation. Say who you are, perhaps if you have a book, what your book is, OK?

OPPENHEIMER: Stearns Oppenheimer. I'm a member of ASJA, and I've published about eight books, including some I published myself. And I was going to ask about insurance, liability insurance. Publishing houses all have such insurance, and most of them include the author's work in their insurance, but the thing that you've got to watch out for is, there are exemption or the amount that – let's say they have a policy, insurance policy, and the first \$100,000 they take care of. And then, if

something goes wrong, they can stick you with that \$100,000, and I want to make sure that that doesn't happen. How do you do that?

KARDYS: Well, the only – you can't get your publisher, unfortunately, to do anything about that other than – your only protection – and if you're doing a medical book and you feel you're going to be sued, for example, is take out your own insurance, and then talk to one of the attorneys at your publishing house to see if that's possible. That would be my only recommendation, because the publisher's not going to make a change on that for you, unfortunately.

KENNEALLY: And I can imagine that that would apply to more than just medical books. There was the famous occurrence at *Gourmet Magazine* where they put the wrong ingredient in and made the recipe that was otherwise like mint tea cakes into something potentially poisonous. So it's something to be aware of. Probably not to be frightened by, but to be aware of.

F: (inaudible)

KENNEALLY: The question is regarding liability. Jan, if you want to perhaps talk about that briefly. There'll always be a clause in there warranting the publisher about certain aspects of the book, that it's your book and so forth. Do you want to mention that?

KARDYS: In your publishing agreement, in your warranty/indemnity. There'll also be another clause that you can ask for. Occasionally a publisher will include the insurance language to just say that you will be covered. You can ask for that. Occasionally a publisher will do that. But read your warranty/indemnity clause very carefully, and make sure that you can agree to it, because I've seen authors – and the return of advance example was a great example – that your work is original, that you're not stealing something from someone else. Be very careful about that clause.

Publishers, by the way, do not like to alter the warranty/indemnity clause. One of the only things you could probably get is that if you are sued, you can have your own attorney at your own expense join the defense of your publisher. Publishers are protective of authors if it's a frivolous case, but if you've committed copyright infringement, they're not too happy with you. So be careful about that. That's why permissions are important.

KENNEALLY: Our next question, and again, if you would, say your name and perhaps something about your own work.

KANIGEL: My name is Robert Kanigel. I'm the author of five books, including a new book called *Faux Real: Genuine Leather and 200 Years of Inspired Fakes*, which is just coming out.

I like to take my time with books as I'm writing them, and in my last book, I negotiated with my publisher for a 30-month due date. And this actually turned out – this was the most contentious issue, believe it or not. I think they wanted 18 months. I finally got two and a half years, and I'm still scratching my head as to why they would care. Why would they care about when –

KANDYS: When you deliver?

KANIGEL: Yeah, from the time of signing the contract.

KANDYS: Because every editor has a list, and they juggle their list on the books that they're going to buy. And they have pub schedules that they're managing. They'll have X number of cookbooks, X number of nonfiction books. And I hate to say this, but they like to slot you in a list. There's two lists a year.

And also, it's the marketplace. They feel this would be a good book at this particular time. The longer you wait, they have to worry about competition, and you're under contract to them. So if that's the case, if that's how you work, you're better off writing the entire book and then trying to sell it.

KENNEALLY: That's a catch-22 though, of course, because how do you pay for it? But I think the last point is very much the compelling reason for the editor to try to keep that as short a window as they can, because the decision to purchase the book is based upon how well they think the book is going to sell, and the marketplace is just liable to so many changes and so many different forces that – and it may be that they're capitalizing on the exposure of a great fakery in art – I'm just making this up – to publish your book, and the news level of that will have kind of died down by five years from now.

We have another question. Again, if you'd use the microphone and your reward is the CD.

BORINGS: I'm Cathleen Borings. I've written six books and have six more as a ghostwriter. I'm finishing up two at the same time. Getting schizophrenic a little bit. And I have two questions.

One, you were mentioning being in contact with your editors and so forth. I had a really not positive experience with a large publishing house, in which our editor changed three times during the process, and it was really very, very difficult to deal with them. I wouldn't deal with them again. Do you have any comments on that?

KARDYS: That's really unfortunate. That does happen a lot. The only thing you can do is try to be as savvy and accommodating and positive as you can with a new editor, and hope that they love your book. When you do have a new editor, write them a wonderful letter, something meaningful, and hope that they share your enthusiasm. I mean, if you feel that this new editor is really not going to be positive, you can

always approach them and say, I think I would like to get out of my contract. I'll pay you back the money, and I'm going to have my agent try to resell it. If you really feel you don't want to be with that publisher. And I have seen that happen too.

KENNEALLY: It's probably rarified air, but I know at certain levels, some writers decide to publish with a certain publisher because of the editor, or they'll follow the editor from house to house. Can contracts ever provide for the editor you're going to work with, or is that something that you just can't get?

KARDYS: That is, yes, the editor's clause. I've seen it happen rarely, but it has happened.

Another clause that's very important is your option clause, and I shouldn't say this, but it's true. I've seen it happen, and I was also married to a famous literary agent, so I can tell you that it has happened. The option clause, if you have to deliver the next book, and you've decided you really hate your publisher with a passion, I've seen agents tell an author, OK, I want you to write the worst book possible and we're going to get out. I have seen that happen. But if you really, really are upset, publishers are very proud, too, and if they feel you really don't want to be with them, I would say a good 90% of the time they'll let you out of the agreement.

KENNEALLY: That's kind of like saying, I want a divorce and someone saying, no, no, you can't have a divorce. Well, you can get it if you want it.

We have another question? Oh, I'm sorry. You had a follow-up.

BORINGS: The second half is about permissions. And I don't even know if you can answer this, but I'm working on a book right now where we want to use some medical drawings that were published in the British medical journal in 1962. The journal no longer exists. The author – I guess the question is about due diligence. I know the author is still alive. He's 90-something years old, and we can't find him. And it's never been published in the US, and I just don't even know where we go to get permissions.

KENNALLY: This is a subject they call orphan works. It's something that the Copyright Clearance Center has actually been involved with talking to the Library of Congress, the copyright office about.

1962 sounds like an important year, and I can get back to you on that, but there's a certain break, up to a certain time – some works are in the public domain prior to 1923, I believe. Between 1923 and about 1960 something, early '60s, there's a period where works had to be renewed, so that if you registered the copyright originally, you had to renew it. If it did not get renewed, it fell out of copyright. And then after that, automatic registration was not required. So it's something to be very attentive to.

I would be concerned enough to look for an alternative, frankly. This is an area that's become increasingly sensitive for all kinds of copyright owners, individuals as well as publishers, and it is such a gray area. Some of the legislation proposed now does sort of outline what due diligence is, how certain damages may be charged, but that has not been passed, and until it does ever get passed, someone could come along – the heirs even. Even if that particular author is dead, the heirs could come along and sue you for some copyright infringement.

BORINGS: So could it be a solution to simply have an artist reconstruct these in a different way?

KENNEALLY: I would suggest that you create a new work if you're not clear.

We have – can we also – I've run out of CDs. I'll send you one, or you can go to [beyondthebook.com](http://beyondthebook.com) and just click on any of the various programs we have, but we do still want you to come up to the microphone, so if you could do that. And we've got about 10 minutes left, so we'll take these three here, just because my hand's going that way. Is that OK? You'll go. OK. We'll go around. We'll do that, but we'll just limit it to those three.

F: Mine has to do with the permissions. If a book about millionaires is being written, and then it seemed like a good idea to have quotes, like to a companion book of quotes from those millionaires written at the same time and then sort of come up with the idea of having both books at the same time, would those quotes have to be gotten permission for each of those quotes?

KENNEALLY: Jan?

KARDYS: Well, it depends. In that particular situation, I would have to look at what it is and where you're taking them from. There is fair use, but it is going to be an entire – it sounds like an entire book. But I would go to the permissions director and ask them those kind of questions.

KENNEALLY: I would be alarmed for two reasons. One is that there are millionaires involved here, and they can afford lawyers. Maybe you can't.

The other aspect is that this is for commercial purposes. If you're quoting from something Trump has said recently, or Conrad Black, or anybody as part of your own speech or a book, I think that's probably one thing, but a collection of famous quotes by rich people would certainly send red flags up for me.

A question here, and again, if you would approach the microphone for the audience. And say who you are and what kind of work you do.

O'HARA: My name is Neal O'Hara. I'm basically a financial journalist, so I've never published a book, but I happen to find myself about halfway through a novel at the moment. My question really, though, doesn't relate to that at all. It's a more general question on permissions, and really kind of who pays for – who pays for the permissions. And a little bit, if you could clarify for me a little bit about the intersection between fair use, what is fair use and when do you need permission? So you've got that checklist, but I'd just like to understand a bit more about that intersection.

KARDYS: Well, as far as permissions, the US Copyright Office, if you go on their Website, it's extremely helpful. It will give you a lot of information.

KENNEALLY: Right, just to say, they will define it. And there are some sort of tests that apply to fair use and to other things. They are at [copyright.gov](http://copyright.gov), just to make sure that we're clear. [Copyright.com](http://Copyright.com) is a not-for-profit private business, so we're [copyright.com](http://copyright.com). The copyright office is [copyright.gov](http://copyright.gov). But Jan, go on.

KARDYS: So, yes, it can depend on what's in the publishing agreement. I have seen publishers pay for all the permissions. They've said, we're going to give you \$10,000. In addition to the advance we'll give you \$10,000 to cover your permissions. Or they'll just – in a few rare cases – at one house it was a motion picture tie-in, movie tie-in. The author hadn't cleared the permissions, and I ended up clearing them for the author so that we could get the contract signed. So it really depends. Sometimes you can get a grant. You can get 50%. And again, that's really your agent, how good your agent is, but definitely bring that up with your literary agent.

KENNEALLY: The fees can come out of your advance as well.

KARDYS: Yes, they could come out.

KENNEALLY: And the other thing I would say, I know from having friends in the film business, if you get your heart set on a certain piece of music as being almost the sort of leitmotif for a character and so forth, I would be cautious about that and have a fallback position, because it may be that the copyright holder thinks this is his ticket to a fine house in the country, and you don't want to have already made the film or have the script – or even in the case of a novel – use this particular lyric as the leitmotif and then find out you don't get the permission for it.

F: I might add one thing to that from personal experience.

KENNEALLY: OK. If you do, why don't you do that, and then we have our last question here.

F: This is not a question.

KENNEALLY: Real quick, yeah.

F: This is not a question, this is a comment from a book I've been working on, and I wanted to use the title and lyrics from a Bruce Springsteen song, and I didn't even know if I'd get the book published, but I wanted a publisher to know that I had that arranged already because of the title. And what I ended up doing, I went online and found out who was the management group for Bruce Springsteen, and I called and talked to somebody there who had me fax a letter, and within 48 hours, I had their permission in writing to do it. It turned out to be so easy that I was almost astonished. I expected it to be some big thing and I expected fees and everything else, but they sat down in a meeting and went through the information that I sent, and they said OK and put it in writing.

KENNEALLY: I think the point there is that you – the best thing to do is to ask in advance. It would have probably been a different story had you had a million-copy seller on your hands.

And our last question here, if you'd come to the microphone. I appreciate everyone joining us for this program. Jan Kardys, I hope, has struck that cautionary note but not so to the point where you want to give up writing and start truck driving. Our last question.

GOLDEN: My name's Stephanie Golden, and I've written two books of my own and also for collaborations. I'm working on the fourth one now.

First, I wanted to make a small comment about fair use. I think it is important to defend fair use. Sometimes the publisher wants you to get permission for every little quote, which I think is a mistake because fair use is an important principle.

And my question has to do with that phrase, to the best of writer's knowledge. A couple years ago I was negotiating with Blair at Penguin. I had been hired to help finish writing a book by two expert authors, and the collaboration agreement was trying to make me liable for everything, so I whittled it down to just not having violated any laws or plagiarized, whatever the standard warranty is, and I put in, to the best of writer's knowledge, and she wouldn't accept it. She said that invalidates the whole thing. She said, we never accept that clause. She was like stone. I couldn't move her. So I was hoping you could comment on that, because I know people do get it inserted in contracts all the time.

KARDYS: Well, not – no. They don't get it in all the time. But I have seen it put in. But if they were – it would depend on who the person was you were probably working with, what publishing house. I know certain publishing houses, that is just a no-no. But if you raised a red flag about permissions with them, that's probably one of the reasons.

GOLDEN: I didn't.

KARDYS: No, you didn't? So it was just – was this a work for hire, or were you a ghostwriter? You were –

GOLDEN: It was basically a work for hire, because I wasn't getting any royalties. I wasn't getting – I had no copyright stake in it. I was just brought in at the last minute because they had –

KARDYS: All right, in that case, with the actual author of the book, you should have done an agreement with the author to cover you. That would have been a – you would have been protected in that way. Maybe sign the work for hire agreement, but then have an agreement with the author that they're going to make sure all the permissions or anything that you are deeming fair use, that you're covered.

GOLDEN: That was two separate issues. The permissions has nothing to do with this. It was a question of what I was writing.

KENNEALLY: Or rewriting, if I can just clarify the question. So I think, Jan, the answer still stands that if it were possible to do, to get an agreement that the author – the original author of the book would, if you will, indemnify you, that – if you're rewriting, you're basing your rewrite upon his or her manuscript.

GOLDEN: But what they do is they always put in something that says anything I bring to the book which is not what the author brought to the book, and I say, I'm not bringing anything to this book.

KARDYS: I would bring that up with the publisher, then in that case, and sidetrack the contracts department.

GOLDEN: Oh, good. Thank you.

KENNEALLY: Well, again, I want to thank the ASJA. Maureen, I don't know if you have any closing words you want to say.

LITTLEJOHN: Yes, I want to thank you very much, Chris and Jan. I think you've enlightened us quite a bit today and I think we all appreciate the cautionary tone. And it's always good to share and hear people's stories and find out what's going on in the marketplace right now, so I really want to thank you very much.

KENNEALLY: Thank you.

(applause)

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