



Beyond the Book[®]



Rethinking Author Contracts for the Digital World

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featuring

- *John Silbersack, Executive Vice President, Trident Media Group*
- *Sara Pearl, Vice President, Director of Business Affairs, Trident Media Group*

moderator

- *Christopher Kenneally, Director, Author Relations, Copyright Clearance Center*

Q: Welcome everyone. Appreciate your joining us for what I guess is one of the last sessions today, so we appreciate your sticking with it until the very best at the end. That's what we hope, at least. My name is Chris Kenneally, I am Director of Author Relations for Copyright Clearance Center. I'm also the producer of a program – podcast series we have called *Beyond the Book*. And very happy to have you here today for a program. Taking a look at rethinking author contracts for the digital world. I'll tell you about my panelists in just a moment.

But as I looked into the whole question of loosely called e-books, and I contrast e-books with something I now call tree books. In 2001, Forester Research predicted that e-books would amount to more than 17% of all book sales by the year 2006. What we know, of course, is that the arrival of e-books has been much predicted, much ballyhooed, and really only seems to be approaching today here in 2010. In 2009, while it's true that e-book sales grew by 176% year over year, according to the AAP, to a total of \$169.5 million in e-book sales, that was still a very tiny slice, a thin sliver, of total book sales in the U.S., according to AAP, at least, of \$11.2 billion. I've seen numbers from Book Industry Study Group that may take up far more than what AAP covers in their figures, so something like total sales of \$36 billion. So I'm not sure exactly how thin a slice the e-book world represents in sales. But certainly in 2010, e-books and digital publishing is taking up the lion's share of the media attention, and the attention of people in the publishing world.

And so with that as a kind of introduction, I want to turn to my two guests who are both from the Trident Media Group.



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I want to welcome first John Silbersack, who is Executive Vice-President at Trident Media Group, and has more than 25 years of publishing and editorial experience. Prior to joining Trident, John worked throughout publishing at companies such as Harper Collins, Warner Books and Penguin Putnam. He founded six imprints, including Harper Entertainment and Harper Children's Entertainment. As a literary agent, John's developed a diverse roster of clients, spanning both fiction and non-fiction, and he draws on more than 20 years as an editor to work closely with his clients to develop and refine their proposals and manuscripts, many of which have gone on to become *New York Times* and international best sellers. So welcome, John.

And beside John is Sara Pearl. She is Vice-President and Director of Business Affairs at Trident Media Group, and has more than 25 years of legal experience. Prior to joining Trident, she worked as an attorney at the New York law firm of Wilkie Farr & Gallagher, and at a number of publishing companies important to this audience, several – or at least one, says here, magazine publisher, Gemstar-TV Guide, but also at HarperCollins and Kaplan. She has worked as an in-house attorney at Ogilvy & Mather, the international advertising agency, and as Director of Business Affairs at Trident. She works closely with the agents on a myriad of legal affairs – or issues, rather – affecting the publishing industry. So welcome, Sara.

PEARL: Thank you.

Q: And I want to try to start the conversation here, but at some point we really do encourage you to join us in the conversation, let us know your questions and comments as well. But for you both, if we can start with a kind of look at the year 2010, I brought up those predictions about the e-book world because we've been hearing them for so long now, and it perhaps may be that rather like the weather, it's going to change tomorrow, but how do you view, as agents, as author representatives, the opportunity in this new market, John?

SILBERSACK: (inaudible). Well you just heard a lot of numbers and obviously, you examine those numbers, in one sense you see electronic publishing growing by leaps and bounds. But it's still a tiny, tiny fraction of the book business. Anecdotally and from the royalty statements that I examine, even for those authors who would be considered to be most pertinent authors for this market, I doubt if electronic books sales comprise more than a couple of percentage points of their sales at this point.



So what we're doing now is looking to the future. And it's a future that we fully expect is going to change very rapidly. We've been down this road before, though. I think I remember having my first e-book meeting at Penguin in the mid-'80s.

Q: John, can I ask you, what did they an e-book would look like at that point?

A: Well, we were talking about pure verbatim text and we were talking – if I recall, it's a long time ago – that we thought that the applications would be something that would probably scroll across your computer screen. And computers at that time were just morphing from CPM to DOS and everything was going to look very green on black and it was all very rudimentary.

But even at that time, the vision for this delivery system was one which obviously to some degree frightened publishers, but also excited them and excited authors. Because we're living in the book business with a delivery system that really has its roots in the 19th, even the 18th century. It's an imperfect system, although it's done wonders to bring books to millions of people. It's a unsatisfactory system in this economy, particularly, and when the very notion of e-books came about, it was embraced by publishers long before they could figure out what to do with it.

Right now, we're still at that stage. I think that I've had an e-book meeting or presentation from an e-book publisher – Sara and I both have had – almost every week this year. One company or another coming in and showing their wares and explaining their business model – companies like Vook and –

PEARL: Expanded Books.

SILBERSACK: Expanded Books, and a dozen others, not to mention Amazon and what have you. Rosetta. We've time and again had the experience of having a business model explained to us two weeks prior to any point in time completely change in that interval. So we're not going to solve any huge e-book problems here or the issues or the opportunities facing the industry. But we can talk about what some of them may be and some of the tactics that we, as agents, are taking to set the course for the future.

Q: Right, well, why I wanted to particularly talk to you both is because you are, obviously, representing the authors here, and really have their concerns first and foremost. And I thought what was interesting in that list is the companies that are approaching you, John, and maybe, Sara, you could talk about this, is how it includes now not only publishers but people who we wouldn't have thought of as being anything but distributors, in the case of Amazon, for example. They are –



PEARL: Oh, but they think of themselves as publishers.

Q: Talk about that.

PEARL: The view is that they're creating a new product and what's going on right now, as far as I can tell is, people are looking under backlist to monetize it – what might be left on the ground, what might you be able to make some money off of, and when you get to frontlist, the publishers are very clear now, there's no ambiguity in any of the contracts, that they have verbatim rights. That is – you cannot sell a book without selling electronic verbatim rights.

Now the new thing – the hot new thing is multimedia rights, and a lot of the companies have been coming to us. It's like this new product that is – some percentage of it's verbatim, 20%, 25%, and then the rest is bells and whistles and other things you can do with the book. Those rights tend to be reserved by the author. So it's like there's a publisher and they're coming to the agent to find out whether the author is interested. And it's a new revenue source so people are interested.

Q: But I would imagine even the models there aren't terribly clear, either. When you talk about multimedia, lump that into the category I call enhanced books.

PEARL: It is. And it's not one bit clear. (laughter)

Q: Well, so what are your – I would say demands, if you will, of these companies. What do you want them to make clear for you? What are some sort of business model requirements that you may have on behalf of the authors?

SILBERSACK: Well, initially, of course, our first ask of them is that they explain or demonstrate a model to us which is actually going to benefit our clients. So this begins with a business discussion, not with the contract discussion, but those two things go hand in hand. The things that the agent is concerned with are initially, before you get into how this can be captured in a contractable (sp?) document are what's it going to sell for, who's it going to sell to, how is it going to be delivered, is it going to be good publicity, and do we own the rights? And having determined that we own those rights, we look for a way to craft something that's not going to compete with the author's other platforms, but we hope enhance it.

At this moment, I think a lot of the impetus toward experimenting with some of these forms has less to do – then remember the very small amount of money that's being generated in these deals – has less to do with the advance, because most of these companies are not offering an advance – they're offering high royalties. It has



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to do with publicizing that author's work, positioning that author in the marketplace, and finding some higher level of platform for the author. And many of these companies are coming in and they are selling us not simply the publishing vehicle of their platform, but they're selling us the marketing platform.

Q: They're selling you the sizzle rather than the steak.

SILBERSACK: The sizzle – well, the sizzle, and they help also the steak. And the sizzle that attracts us, as it would attract anybody, if they can deliver on it, is the notion that they can use these enhanced features to somehow reach beyond the book world and find new readers for these author's books.

PEARL: And part of what comes up in the contract is the only thing the author is contributing to it is going to be some piece of the work – the underlying book work. What I'm seeing in the agreements, it's not terribly clear who's contributing the other 80%, and where they're getting it and whose paying for it, and the rights and the compilation, the entire new work versus the rights – keeping your rights and your contribution. So there's all sorts of legal questions that come up in this, too.

Q: How hard can you press them on any of that, though?

PEARL: I'll let you know.

(laughter)

Q: Right. Well, there has been – this is not – as we stated at the beginning, none of this is new, John. You hear it go back to the 1980s and think about that black on green image that we all know. But in the beginning of the last decade, there was the case with Random House and RosettaBooks and so forth, and an attempt there to state, on the part of the publisher, that they have the rights and then a legal settlement essentially, if I read it correctly – correct me if I'm wrong – that they did not have the rights, they had to license those rights.

PEARL: Well, that really – that case is really about a verbatim e-book – taking it – Kindle, basically – and what happened back then was the contracts that Random House had, in my view, didn't clearly give them e-book rights. Apparently, Rosetta agreed, and they contracted with the author to create – to be the publisher of verbatim e-books for the likes of Styron and other big authors. When this happened, I guess Random House saw that a line was being drawn in the sand and they were not going to let that happen, so they sued them and tried to preliminarily enjoin them – Rosetta – from publishing in e-book form. And that's where it sat.



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And then what happened was, in that context, which is just stopping it from happening. It's not necessarily – it doesn't tell you what the law would be, it's just for the moment, you can't publish it. The judge came up with a decision that the words tended to seriously favor the author and not Random House. It looked good for the authors. Rosetta appealed it to the 2nd Circuit – I'm sorry, Random House appealed it to the higher court, who basically said, I hear what you're saying, District Court, possibly I could agree, I might not agree, but the standard for my saying you're wrong is that you abused your discretion. Not that I don't agree with you, the District Court had actually done it – really messed it up. So the higher court said, so I'm going to affirm the denial of the preliminary injunction.

When that happened, Random House had to make a decision, like do we continue and just – with this case and make law, or do we kind of decide we don't want to decide this now, it's not good, it's not looking good for us, so let's license it. So they went for the licensing. But all it did was resolve the problem until the licenses ran out.

Q: Right, which they –

PEARL: Which is today.

Q: Right, and which kind of froze the situation, and then at the end of last year, Random came back with very much the same kind of assertion that they indeed had the rights.

PEARL: Right, they wrote this, for lack of a better word, pushy letter that, in the beginning – the purported reason for the letter was to let every – all the agents know what a good job they were doing for everybody on their e-book publishing program. And then you got to page two, and you saw, oh, that's why they sent the letter, which was an assertion that, guess what, these are our rights, and don't think otherwise. So they put it out on the table again, and from what we understand, this is going to come up again. I know that these publishers, like Open Road, are taking the position that this has already been decided by the court in the favor of the author. So somebody's going to maybe bring this to its head and maybe there'll be law.

SILBERSACK: And if, similarly, Open Road is going to –

Q: Maybe we should tell people just briefly, Open Road is a startup, founded by Jane Friedman, the publisher, of course, and a man from the film world, Jeffrey Sharp, and they are working with the estate of William Styron, at least, and maybe others, to create some kind of enhanced e-book.



SILBERSACK: Well, interestingly, some of those titles by Styron were the titles dealt with in the Rosetta case. So the clock is back to 12:00 and it's all starting over again for those titles. Open Road will not, however, indemnify the Styron estate that if they should be sued, they'll be taken care of. They're insisting, in fact, that the estate warrant that they have those rights. So this is a rather risky proposition for all involved.

Q: But what are the lessons here, then, for those in the audience? There's, as we say, quite a lot of hype, quite a lot of sizzle around the e-book potential. As author agents, at this point, do you see the risks outweighing the benefits or would you say there's a wait and see? How would you describe the situation in terms of approaches by whether it's Amazon or anyone else to make these works available as e-books or in some kind digital form?

SILBERSACK: That's a tricky question. At this moment, except in a few very, very special cases, I don't think that anybody could argue from the agent's perspective or an established author's perspective that this is a battle that needs to be fought right now, on monetary grounds. There simply isn't enough money in this to make this worth spending all your time on right now. However, it's a battle that has to be fought and it has to be decided at some point, and it's not going to happen unless efforts were made to push this envelope and discover what the points of tension are. And I think that Trident certainly, like a lot of other agencies, is beginning to test these waters, without, we hope, risking too much of our authors...

Q: Well, with that, this has been a discussion I've enjoyed having with John Silbersack, Executive Vice-President of Trident Media Group, thank you John, and Sara Pearl, Vice-President, Director of Business Affairs, like wise at Trident Media. Thank you both.

PEARL: Thank you.

(applause)

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