

THE USE OF ARTWORKS IN BOOK PUBLISHING

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1. GENERAL

Graphic artists, illustrators, painters sculptors and particularly photographers, supply work to the publishing industry. The manner of their involvement varies from artist to artist and project to project.

1.1 An illustrator may be:

- an employee on salary
- a contractor on annual retainer
- a contractor for a book (illustrations and/or cover)
- a contractor for a series of books

1.2 Painters and sculptors are commonly involved through the licensing of the right to reproduce their works either for

- critical or art historical review
- biography
- licensing reproductions of work for use on a cover

1.3 Photographers are regularly involved in all of these styles of relationship.

Given this disparity of purpose, function and relationship, it is clear that the terms of the legal relationships that each artist enjoys with his or her publisher will vary considerably.

Nor do publishers form a homogeneous group. Their internal corporate policies vary considerably as do their commercial needs. The publisher of a school text on physics will take a very different approach to the publisher of an illustrated children's book or the publisher of a biography.

Generally, the principal uses that a publisher will have for artwork is:

- (a) covers
- (b) diagrams charts, maps
- (c) "internal" art
- (d) illustrations (e.g. childrens' books, cartoons)
- (e) decorative borders

What I would like to do is look first at some aspects of copyright ownership and control that necessarily thread themselves between these divergent applications. Then I will examine the principal clauses that define the relationship between the individual artist and the individual publisher.

2. DEALING WITH COPYRIGHT

2.1 Assignments or licences?

Increasingly publishers are realising that demanding an assignment of all rights can be both inappropriate and excessive.

Until the last decade, it was standard practice for publishers to demand an assignment of copyright in respect of published artistic works. It was absolutely "take it or leave it".

Some publishers however still insist on a complete assignment of all rights. This may be perfectly reasonable in certain circumstances.

Generally it is useful to distinguish between commissioned works and existing works.

(a) Commissioned works:

If a non-fiction publisher wishes to produce a text on natural history or the operation of the combustion engine, it may commission an artist to do all the technical drawings for the text.

In such instances it is almost universal that the publisher will retain all rights - both in the artwork itself and the copyright therein.

These publishers consider the artist to be little, if anything, more than a technician. For the artist, this relationship works because he or she would not usually have any other use for the images; on the other hand, the publisher may well recycle the illustrations in reprints, new editions and even other of its publications.

If however the artist were commissioned to provide illustrations for, say, a book of humour, a licence would be quite common. That licence might be exclusive (for say volume rights) or non-exclusive. It all depends on the relative commercial needs and bargaining power of the parties.

(b) Existing works

If the publisher wishes to incorporate an existing work in a book or on its cover, it is more likely to license the work rather than demand an assignment.

It is also useful to distinguish between the intended use of the artwork in order to determine whether assignment or licence is appropriate.

Generally, covers, "internal" art, illustrations are licensed while diagrams; charts, maps and decorative borders are assigned. Of course there are case-by-case exceptions.

2.2 Nature of rights demanded and required?

A book publisher is going to certainly need to obtain rights for

- (a) reproduction in volume form, for
- (b) the territory of the market of the book, and
- (c) the duration of either the rights in the literary work or at least for the period that the book remains

(d) in print.

Whether it needs more, is going to be a matter of explanation and discussion.

As an example of the need to specify the rights that are appropriate, consider the following:

2.3 Rights to characters

Who should own the rights to the author/artist's characters? Other than having the right to publish the work that it has contracted to publish, should the publisher have the right to either control or profit from subsequent uses of the character?

It is commonplace for contracts to be for more than one work or contain an option. Ignoring the desirability or otherwise of this, is it appropriate for a publisher to control the rights in the characters of the work? Should Penguin be able to prevent Leunig from drawing his whimsical little man or Mathew Martin from using his goggles-wearing duck, had the publisher insisted that the artists assign all rights in their works? Unlikely perhaps...but what about Tom Clancy and "The Hunt For Red October"?

2.4 Exclusiveness or non-exclusiveness?

Rights need not be either exclusive or non-exclusive. Often a mix is more appropriate:

- (a) The rights may need to be exclusive for a period of time. Then it may be appropriate for them to either revert completely or be enjoyed on a continuing but non-exclusive basis.
- (b) The rights may need to be exclusive for a number of editions (or perhaps while the book remains continuously in print) and thereafter non-exclusive.
- (c) They may be exclusive for certain uses but either non-exclusive or indeed non-existent for other purposes.
- (d) The rights may be non-exclusive from the outset and remain so either for the length of copyright or until some predetermined event occurs;
- (e) They may be exclusive from the outset...

The combinations are numerous but the point is simple:

Licences are enormously flexible and allow one to take exactly what one needs in order to achieve one's commercial purpose whilst still allowing the copyright owner to keep some economic interest in his or her own work.

2.5 Fair dealing for the purpose of criticism and review.

Many publishers have a very inflated idea of what "fair dealing" permits them to do without permission. In Sillitoe & Ors v. McGraw-Hill Book Co (UK) Ltd (1983) FSR 545 the judge spelled out that for the use to be protected by s.41 the reproduction had to be:

- (a) a fair dealing,
- (b) for the purpose of criticism or review, either of that work or another work, and
- (c) a "sufficient acknowledgment" of the work had to be made.

Fair dealing isn't defined in the Copyright Act. The cases (such as Hubbard v. Vosper (1972) 2 QB 84) seem to

emphasise that what is "fair" will be a matter of fact to be determined in each case. What is the extent of the use in comparison to the supporting text? Has the work been previously published?

The purpose of criticism or review is also often misunderstood. It does not, for example, give the publisher the right to use an artist's paintings when the article or book is about the painter's life generally. The criticism or review has to be of the works themselves. I believe that there is a good argument for stretching that to include the 'ideas behind the works' but eventually there must be a line drawn at the point that the focus of the reproduction is not the criticism or review of the work but of something else.

Sufficient acknowledgment: Many publishers forget that "sufficient acknowledgment" is actually defined in the Copyright Act. Section 10(1) says that in relation to a Work" it means "an acknowledgment identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgment of his name is not to be made, also identifying the author".

3. QUESTIONS THAT PUBLISHERS SHOULD ASK THEMSELVES IN RELATION TO THEIR STANDARD CONTRACTS

No one contract is going to fit all situations. The usual reliance upon the "standard" publishing contract is often inadequate.

Does your company have any standard agreements between the publisher and the creator and/or supplier of artworks or do you just use your standard author agreement for both the written word and all visual works?

Do your agreements

- (a) deal adequately with the rights in artworks (as opposed to the traditional typed and double spaced manuscript)?
- (b) rely on the author of the words to obtain the clearances for the art?
- (c) contain a warranty that the author has obtained all clearances?
- (d) fail to acquire the rights that you need to achieve your commercial purpose?
- (e) seek to acquire more rights than you need for your commercial purpose?

Do you have

- (a) standard documentation in relation to your visual arts authors and contributors?
- (b) flexible format agreements so that the terms can truly fit the circumstances?
- (c) do you do your own clearances or have procedures to check clearances obtained by authors?

4. BOOK ILLUSTRATION AGREEMENTS

4.1 The brief

- (a) what?
- (b) how many?
- (c) what size?
- (d) full colour? B/W? Half tone?
- (e) are roughs needed? (If so, will there be extra fee?)
- (f) by when?

4.2 Payment

- (a) nature
 - royalties (splits between author and artist?)
 - fee
 - combination
- (b) schedule of accounting and payment

4.3 Rights

- (a) which rights are commercially essential
 - usually book rights only
 - additional rights - additional payment made?
 - distinguish between species of book and artist role
- (b) assignments or licences
- (c) period of rights
 - the life of the book may be inherently a short one: e.g. a diary
- (d) territory for which rights are acquired
- (e) ownership of the artwork itself

4.4 Delivery

- (a) schedule for
 - submission of preliminary sketches
 - delivery of one finished drawing showing the technique/style
 - approval or disapproval by Publisher.
 - delivery of all finished Illustrations
- (b) mechanism to deal with the late delivery of work.

4.5 Alterations

- (a) publisher's right to make alterations without consent of the artist or power to demand or request alteration. Dependent upon:
 - sort of illustrations required
 - status of the artist
- (b) disputes mechanisms

- (i) publisher's power to request changes
 - artist's control over any alterations
 - publisher's unfettered discretion to use all or any of the illustrations.
- (ii) delivery by artist of a range of works
 - power of publisher to select

4.6 Exploitation and reversion of rights

- (a) obligation to actually exploit rights
 - failure to produce or release the book within nominated time
 - difference between commissioned and non-commissioned works?
- (b) reversion formula for works that are rejected or not exploited
- (c) original work
- (d) non infringement of copyright or any other right
- (e) not be obscene, libellous or otherwise unlawful.
- (f) be in conformity with the preliminary sketches and finished drawing, as approved.

4.7 Non-delivery

- (a) extension of the delivery period
- (b) termination of contract
 - return any fee already paid
 - ownership of the copyright and property in the Illustrations
 - retention of any rights against the Illustrator for failure

4.8 Credit

- (a) co-author or lesser contributor
- (b) where positioned

4.9 Bankruptcy

- (a) automatic reversion (with built in protections)
- (b) continuing liability for unpaid royalties

5. Loss or damage

5.1 what limits as to value?

5.2 valuation mechanisms?

5.3 Non-assignment

- (a) general prohibition as to assignment of rights in work
- (b) affiliates or subsidiaries
- (c) right to assign any income

5.4 Subsidiary rights

- (a) ownership of
 - characters
 - merchandising rights
 - film rights
 - serialisation
 - abridgment
- (b) payment arrangements

6. BOOK JACKET DESIGN

6.1 General

- (a) greater control than illustrator relationship, (marketing v artistic)
 - subject
 - rights
 - alterations
 - approvals
- (b) considerable use of licensed works for reproduction on cover.