Symposium: Free Speech Under Fire
What You Should Know Before Signing an Agent Agreement
Jim Gleick on Strong Opinions and Tricky Subjects
Mary Rasenberger on Resetting the Copyright Equation
Q&A with Tayari Jones
How Copyright Promotes and Protects Free Speech
By T.J. Stiles

Copyright is something that seems, to a lot of people, to be an obstruction to access to culture and knowledge. It seems to be something that creators impose to close people off from access to their work.

It is important for people to understand that when you pay for a book you’re also paying for the next book. You’re helping to pave the way for the creation of new art and knowledge and for cultural enrichment. How does a writer create the next book? Well, you either rely on a patron, which could be an employer, such as a university. It could be somebody who provides you grant money. It could be your wealthy uncle. Or you go into the marketplace. You try to build an audience out of the broad public.

If I’m able to derive income that sustains my work by amalgamating income from a wide range of book buyers, that’s freedom. That allows me to write about what I want to write about. That allows me to write in the style that I want to write in as well.

In an economy that is dominated by large organizations, by corporations and foundations and universities, all of which benefit our society in many ways, we need to maintain the individual voice—the voice of dissent, creativity, fresh perspectives, inventiveness. We must remember that all these things come from individual creators. This is the basis of our whole civilization. To be able to produce new work, we must preserve the individual’s rewards from that work. I think it’s important to understand the value that comes from respecting intellectual property. That value comes from the marketplace, and from respecting an author’s rights to his or her work. It comes from seeing financial as well as cultural value in works that are not produced within the academy but rather produced by independent voices like mine.

T.J. Stiles is the author of Jesse James, The First Tycoon and Custer’s Trials. He is a member of the Authors Guild Council, and has received the National Book Award (2009) and the Pulitzer Prize (2010 and 2016). This article is adapted from Mr. Stiles’s remarks at the Center for Protection of Intellectual Property’s Fifth Annual Fall Conference, held at George Mason University, in Arlington, Virginia, October 12–13, 2017.

Campbell Geeslin 1925–2017

Campbell Geeslin, who wrote Along Publishers Row for the Bulletin from 1994 until his retirement in February 2016, died August 30, in Branford, CT. He was 91.

Campbell was born December 5, 1925, in Goldthwaite, TX. He was the fourth and skinniest of five brothers and played the organ barefoot at the local Methodist church on Sundays. He served in the U.S. Navy from 1943 to 1946 and graduated from Columbia University with a degree in journalism in 1949. In 1959 he received his MA from the University of Texas.

He had a long and varied career as a newspaper and magazine editor, from his first job as a reporter at the Houston Post, on up through a series of editing jobs with the Gannett Newspaper chain. He worked as an editor at People and Life magazines from 1975 to 1989. A spare and meticulous writer, he didn’t like fancy words or long sentences, and he never missed a deadline. He was also a gifted craftsman, carving wooden dolls and puppets for the children of friends and his own beloved grandchildren, which his wife, Lyn, would finish off with cotton costumes.

Campbell published one novel, The Bonner Boys: A Novel About Texas (Simon & Schuster, 1981), five illustrated children’s books—In Rosa’s Mexico, On Ramón’s Farm, How Nanita Learned to Make Flan, Elena’s Serenade and Clara and Señor Frog—and the libretto for a children’s opera based on Nanita that was commissioned by the Cincinnati Opera and widely performed in children’s libraries and community theaters.

In April 2013, at Paul Aiken’s suggestion, he began writing a weekly blog for the Guild’s website; his entries were subsequently pulled together for the next Bulletin. The blog entry was due every Tuesday. Without fail, he sent it in the Saturday before.
ARTICLES

How Copyright Promotes and Protects Free Speech ....................... 2
By T.J. Stiles

Writers Collaborating: Sometimes It Gets Complicated .................. 11
By Jonathan Lyons and Jesseca Salky, Lyons & Salky Law, LLP

Claiming the Royalties You Deserve .................................. 13
By Juli Saitz

Tayari Jones Q&A .......................................................... 15
By Isabel Howe

The Authors Guild Foundation Reboots,
With an Expanded Board and New Initiatives ......................... 18

The Authors League Fund at 100 ........................................ 20

Advocacy News ......................................................... 21

Symposium
Free Speech Under Fire? .............................................. 29

A Guide to Literary Agency Agreements ................................ 50

Literature and Migration 2.0 ............................................ 54

DEPARTMENTS

Short Takes ............................................................... 4

From the President ..................................................... 6

From the Home Office ................................................ 7

Legal Watch ............................................................. 26

Books by Members .................................................... 46

Members Make News ................................................ 48

In Memoriam ............................................................ 50

ABOUT THE COVER ARTIST
Kevin Sanchez Walsh is a freelance artist and longtime contributor to the
Bulletin. He can be reached at kswradiographic@gmail.com.

Copyright © 2018 The Authors Guild, Inc.
SHORT TAKES

Dear Google, That’s Not Me

For anyone who has tried to navigate Google’s “Help” page or reach a live company representative by phone, the saga of New York Times reporter Rachel Abrams’s campaign to have her photo deleted from a Google entry for a different Rachel Abrams will be familiar.

After Ms. Abrams’s father alerted her to the mistaken posting—her online doppelganger was a writer named Rachel Abrams, born in 1951, married to former Under Secretary of State Elliot Abrams and deceased in 2013—she e-mailed Google’s corporate communications team to try to sort things out. She was sent a link to a help page, which led her to a “Knowledge Graph” but no resolution. When she and a cousin asked Amazon’s Alexa “who is Rachel Abrams?” a whole new Rachel Abrams popped up, a sprinter from the Northern Mariana Islands. Times Rachel and her cousin asked Alexa if the sprinter Rachel was dead or alive. Dead, said Alexa. (Not according to Wikipedia; she’s 22 and her personal best for the 200 meter is 13.05.) A friend of Times Rachel googled Google Home; neither Northern Mariana Rachel nor Times Rachel came up.

Times Rachel resumed her mission via Google Help, clicking and guessing her way through a forest of chirpy dead ends. She eventually called Google headquarters in Mountain View, California, and enjoyed 20 minutes of a 1985 movie while holding for a representative. The rep suggested Times Rachel pull up the Google Help Forum, and then proceeded to read the text aloud, while Times Rachel stared at the same text.

Several rounds of unhelpful advice from the Help Forum later, Times Rachel e-mailed Google CEO Sundar Pichai, mentioning that she was writing an article about her week of fruitless pursuit. She did not hear back from Pichai. But a few hours later, her photograph was removed.

Alternative Terms/Forbidden Words

It can’t be long before someone publishes an “alt” dictionary. The question is which will come first: the satire version or a government manual?

The Centers for Disease Control is the latest federal agency to have its standard terminology “tweaked,” the Washington Post reported in mid-December, with a string of standard agency terms banished from budget proposals being prepared for 2019. Out go “science based,” “evidence-based,” “fetus,” “transgender,” “vulnerable,” “entitlement,” “diversity.” In comes “recommendations on science in consideration with community standards and wishes.”

Over at the Environmental Protection Agency, a different kind of word check is picking up steam, the tracking of comments made by E.P.A. employees, followed by requests for any e-mails in which the employees have made comments about President Trump or E.P.A. administrator Scott Pruitt, as well as any messages critical of the Agency that were shared with Democratic lawmakers. What started as a largely in-house check on potential dissenters was outsourced to a Republican research group, America Rising and an affiliated company, Definers Public Affairs, which specializes in “news-tracking.”

Months before they were brought on, The New York Times reported, Allan L. Blutstein, a vice-president of both companies, had been busy filing FOIA requests that targeted EPA employees. “It was mostly a fishing expedition on my part,” he told the Times. “I wondered if they were emailing critical things about the agency on government time and how frequently they were corresponding about this,” he said. “And did they do anything that would be useful for Republicans?”

Definers picked up the baton, but as we went to press, and as critical news coverage of the service intensified, the company announced it was pulling out of its $120,000 contract. It had become a “distraction.”

In Search of New Voices

In an effort to boost both independent bookstores and appreciation of international literature in the U.S., Europa Editions and Other Press launched Bookselling Without Borders, a Kickstarter campaign to raise money to send four to five indie booksellers to the 2018 Turin Book Fair in Italy, the Frankfurt Book Fair in Germany, and the Guadalajara Book Fair in Mexico.

After a modest startup in 2016, when the group sent a single bookseller to Frankfurt—Ariana Paliobagis, from the Country Bookshelf in Bozeman, Montana—Bookselling Without Borders had been looking to establish a permanent fund to “[diversify] the culture of reading by building bridges between the American book world and the international book community.”

Citing the dearth of books published in the U.S. by non-English speaking authors—around three percent of all titles annually—the effort will connect independent booksellers, “one of our greatest cultural assets,” to the global publishing industry.

“Every year,” the organizers explain on Kickstarter, “at international book fairs the world over, authors, publishers, literary agents, movie producers, and editors get together to talk about books... But one essential figure in the book world has been excluded from these bookish gatherings: the American bookseller!”

The goal for 2018 was to raise
$30,000. By October 29, the end of the fundraising period, Bookselling Without Borders had exceeded that goal, raising a total of $31,441.

Second Hand Prose
Publishers Weekly reports that, along with a general increase in print book sales and the ongoing proliferation of independent bookstores across the country, bargain booksellers did well in 2017. Used-book sellers of all sizes, from small-town stores to high volume outfits like Book Depot, saw sales increases of anywhere from 3 percent to 10 percent. Sellers interviewed by PW pointed to a renewed reader interest in print and to business innovations to explain the boom; these innovations include booksellers partnering with publishers, improving store displays, expanding their wares to include non-book items such as games and stationery and shipping to customers outside the U.S.

The bargain bookselling business hasn’t been entirely upbeat, however. Michael Paper, the owner of Bradley’s Books in Pittsburgh, PA, told PW that after Amazon raised its cut of third party sales from $1.35 to $1.80 per book, his income plummeted, and online sales at all 10 of his locations immediately fell by a third. Rachel Greer, sales director at Great Jones Books in Pennington, NJ, notes that while the many new indie bookstores are great for the industry, they are also added competition for traditional used-book sellers.

Fair Use Is Not a Gateway to Unauthorized Adaptations of Classic Novels
On September 8, Federal Judge Jed Rakoff of the Southern District Court of New York ruled that copyright law’s fair use exception does not permit a company to publish illustrated children’s versions of classic novels. The case was filed in January by Penguin Random House, Simon & Schuster, and representatives of the Truman Capote, Ernest Hemingway, Jack Kerouac, and Arthur C. Clarke estates against Moppet Books, whose unauthorized KinderGuides contain condensed, simplified, and illustrated versions of the plots of famous novels, with supplemental pages in the back of each book containing analysis, quiz questions, and background information. The series included versions of The Old Man and the Sea, On the Road, Breakfast at Tiffany’s, and 2001: A Space Odyssey.

The Moppet defendants conceded that their books are based on the novels at issue and admitted that they read the plaintiffs’ novels in preparing their books. In presenting the case that their uses were fair, they maintained that the KinderGuides were transformative enough in nature to constitute fair use because they were shorter than the originals, intended for a younger audience, and contained a few pages of supplemental information in the books’ back matter.

The court disagreed. “Because the ‘characters and events’ in defendants’ KinderGuides ‘spring from the imagination of’ Capote, Hemingway, Kerouac, and Clarke,’ Judge Rakoff wrote, ‘each KinderGuide ‘plainly copies copyrighted, creative expression.’” Moreover, he added, although KinderGuides added supplementary material, these additions do not “convert the KinderGuides . . . into something that no longer ‘represents the original work of authorship.’”

The publishing industry welcomed the decision. “It is terrific to see this important court uphold with such clarity the criticality of exclusive rights and licensing for publishers and authors,” said Maria A. Pallante, President and CEO of the Association of American Publishers, a trade group representing the publisher plaintiffs.

One of the defendants, Moppet Books co-founder Frederik Colting, was also a defendant in a 2010 fair use case, Salinger v. Colting, which dealt with Colting’s unauthorized “sequel” to Catcher in the Rye, 60 Years Later: Coming Through the Rye. Colting lost that case as well.

Was the Proofreader on Lunchbreak?
In an echo of the missing Oxford comma that resulted in a large overtime payout to dairy truck drivers in Maine, [AG Bulletin Summer 2017], the Canadian Broadcasting Company reports that a Newfoundland town may have accidentally sold its water system due to a misstatement in a lease.

Gary Gosine, mayor of the town of Wabana, population 2,500, oversaw the sale of an old fire hall to a businessman, Jim Bennett, and his company, Beachstone Enterprises. The bill of sale accidentally referred to “all buildings and erections” on the property, which happens to include the town’s water treatment system, installed three years earlier at a cost of $300,000.

Bennett noticed the error and promptly drew up a lease agreement asking Wabana to rent the water system from him at a cost of $3,000 per month. Mayor Gosine refused, instead begging Bennett to honor the spirit of their agreement and return the water system to the town. Both sides have brought in their lawyers and continue to negotiate.

Another reminder of the impact of the written word, and a warning that a word or two or three can have an outsized—and pricey—effect. •
From the President

By James Gleick

I asked you last summer for your comments on some hot-button issues that the Authors Guild struggles with daily: how we should deal with Google and other tech companies looking for novel ways to make money by digitizing books; and how we should deal with libraries when they, too, want to digitize books in their collections.

Digitizing books—I can’t write those words without stopping to note how strange they still are, and how fraught with complication. We take it for granted now that a book can be two things at once: a small physical object, paper and ink, to be held in a single person’s hands; and a digital object, weightless, potentially visible on a billion screens at once, everywhere on the planet. The economics of those two things are not the same, to put it mildly. Hence the hot-button issues.

Libraries have a lot of old books, and they envision lending them not just to visitors but to the millions. I asked how you, our members, feel about that. You have strong feelings.

“The idea that libraries or anyone else could seize my books that are ‘out of print’ and lend or give these is so infuriating I have a hard time remaining civil,” writes Jackie Hyman, author (as Jacqueline Diamond) of many romances, mysteries, and comedies. Digitizing copyrighted books is “a violation,” she says. “Who the hell is some librarian, some Google executive or some academic know-it-all (they seem to keep crawling out the woodwork) to determine that it ‘serves the culture’ to ride roughshod over me, potentially harm readers’ perception of my writing, and steal my work to suit their self-righteous sense of entitlement?”

I know she speaks for many of our members. Copyright is central to the Guild’s mission, and we know it’s not just about money. It’s also about control. Our sense of ownership over our work continues after it leaves our pens (all right, our computers) and enters the wide world.

On the other hand, Chris Dickon, historian and author of seven nonfiction books, thinks the rules are changing and we need to evolve. I know that he, too, speaks for many of you. “The long Google fight—”

(Let me interrupt here to remind newcomers that when Google began scanning and digitizing millions of books borrowed from libraries the Authors Guild sued, along with publishers, beginning a saga that can be reviewed in histories and documents on our website, as well as other places. “I also think the Google suit has become tiresome,” writes another member, Valerie Harms. It’s long since over, but still remembered—I know just how she feels.)

“The long Google fight always left me with mixed feelings,” says Chris Dickon, “and ultimately with the belief that the AG needed to rethink the reality in which we live and the full range of the reasons we write books. For my part, I want my books to be Googled, scanned, e-booked however and wherever possible (except the free download offers I get from .ru addresses) because I write the books to develop and share new information and without the realistic expectation that I will make tons of money with them.”

We take it for granted now that a book can be two things at once: a small physical object, paper and ink, to be held in a single person’s hands; and a digital object, weightless, potentially visible on a billion screens at once, everywhere on the planet.

The economics of those two things are not the same, to put it mildly.
From the Home Office

Dear Authors Guild Members,

As executive director of the Guild, I speak at many different kinds of venues, including, on occasion, academic conferences. Although these last are not as obviously related to the work of the Guild, I always enjoy scholarly symposia and find them useful. They take me out of our day-to-day advocacy work and the practical limitations of real life, into the world of ideas and the possible, and that always gets me thinking: What if . . . ?

One particularly thought-provoking conference I spoke at last fall was Columbia Law School’s Kernochan Center’s symposium, “Exploring International Copyright’s Gaps and Flexibilities.” My fellow panelists and I were asked to speak about how authors can be given more of the benefits of copyright within the current international copyright framework—the Berne Convention. The question posed was: “Author-unfavorable outcomes may not be surprising, given both authors’ weaker bargaining position and the enormous changes to business models, creative practice and consumer behavior . . . but what room do [the international Berne norms] allow to improve the economic returns to authors?” In other words, what types of changes could be made within the basic structure of copyright law that would ensure that more of the benefits flowed to authors, and to the companies that publish and distribute their creative works?

Following the basic Berne structure, all contemporary copyright laws have this in common: Authors are at the center of the copyright equation. Copyright—the right to exclude others from using your work—is an author’s right. It vests with the author on creation. And that has been true since the 1710 Statute of Anne, the first copyright statute—it is confounding that authors have so little control and remain at the bottom of the money chain.

We put up with it because if an author wants to monetize her work, she usually needs to cede some rights to a third party, such as a publisher or, these days, a self-publishing platform. In that initial transaction—the author’s grant of rights to a third party—the author often loses control and much of the benefit of her work. Authors, even best-selling authors, have surprisingly little leverage to shape the terms of their deals; publishing contracts look pretty much the same for everyone, except around the margins and they have been that way for at least a century. In the case of self-publishing platforms, authors must click “Accept” on take-it-or-leave-it terms, which are rarely author-favorable.

Generally speaking, authors get the dribs and drabs: what is left over after everyone else—the wholesaler, the retailer or online distributor, the printer, Amazon, the publisher—have taken their share. We think it is standard because we are used to it—that an author might get only $2 to $3 from a hardcover book that sold at $25, and far less for an e-book that retails at $9.99; and much less for bundled products and deeply discounted books. But should it be?

Under most publishing agreements, the author has no control over how his book is sold, to whom and at what price. The publisher may end up selling most books to big box companies and Amazon at deep discounts, for which the author is paid minimal or no royalties. The publisher might allow returned copies to slip back into the stream of commerce, to be sold on Amazon in place of royalty-bearing books. If you think about the fact that copyright is first and foremost an author’s right—and that has been true since the 1710 Statute of Anne, the first copyright statute—it is confounding that authors have so little control and remain at the bottom of the money chain.

Needless to say, I was intrigued by the question posed to the panel: How can we turn this around? How can we put authors back at the center of the copyright equation? How can we give authors more control over their works and the power to receive more of the profit from their books themselves? These questions are always at the top of our minds at the Guild, but we usually constrain our thinking to the pragmatic: what is politically feasible, what will publishers agree to, what can we do around the edges to make contracts more favorable to authors? How can we help them enforce their rights?

1 The Berne Convention dates to 1886; the U.S. signed on to it in 1989
So, it was a rare treat for me to pull back from our day-to-day problem solving and spend some time thinking about what could be, without regard to political feasibility: what changes could we make to our law to more successfully protect authors? Here is a summary of some of the issues I spoke about.

**Collective Bargaining**

The longer I am in this job, the clearer the need for authors to collectively bargain becomes. Contracts will not fundamentally change until authors can stand together. Individual authors by and large have little to no bargaining power. If you say no to an offer, there is always someone else behind you ready and willing to sign. Authors and their agents need to be able to say, “No, those terms are not okay,” without fear of losing the contract. It is difficult to see that day arriving without the ability to collectively bargain. Authors and other freelancers are prevented from negotiating as a group by our antitrust laws. The law treats freelance authors as independent businesses that compete with one another. There is an exemption to antitrust rules for unions, but under our federal labor laws, only employees, not freelancers, can unionize. One of my dreams is to convince Congress that creators should have the same right that employees have, to unionize and bargain collectively without running afoul of antitrust laws.

**Requirement for Fair or Reasonable Compensation**

Germany and the Netherlands have an un-waivable right to “adequate” or “reasonable” remuneration, as part of their copyright laws. The laws require that in all cases authors be paid “adequate” or reasonable compensation in exchange for the right to publish. It would be a tremendous help to authors to have such a provision in the U.S. copyright law. It would give authors a little more bargaining power, in that the conversation would start with what is adequate or reasonable in light of the circumstances. It would also take “free” off the table, making it impossible for publications like the Huffington Post to make vast sums off their writers and yet pay them nothing. U.S. law has a strong bias against interfering with the right to contract freely, but given authors’ unequal bargaining position, freedom to negotiate is often more myth than reality. While it might prove difficult to determine what is adequate, fair or reasonable in any given case, there are ways to create fair standards and make it workable, as has been done in the Netherlands and Germany.

**Termination Rights after 20 Years**

The 1976 Copyright Act gives creators and their heirs the right to terminate any grants they made 35 to 40 years after they signed off. (This is true for grants made from 1978 on; other rules apply to pre-1978 works). This means that if you signed a publishing agreement in 1985 you can get your rights back during the window of 2020–2025 (with at least two years’ notice to the publisher or other grantee.) That, however, is much too late for most authors to maximize the value of their work, and it is significantly longer than the publisher needs to recoup its investment. For most titles, the publisher has finished selling in any numbers within a few years. After that point, it makes no financial sense for the publisher to invest any money in those books, and they don’t. The author, by contrast, has every incentive to get every last cent and read out of the book, and it makes more economic sense to give the author her rights back than to leave them unexercised in the publisher’s hands.

Moreover, a termination right that is several decades in the future provides authors no additional incentive to write and publish. Few creators are motivated by what might happen in 35 years.

A termination right that is several decades in the future provides authors no additional incentive to write and publish. Few creators are motivated by what might happen in 35 years. . . . Twenty years is plenty of time for the publisher to recoup its investment and make a fair profit.

203 of the Copyright Act amended so that rights can be terminated after 20 years, at least for books. Twenty years is plenty of time for the publisher to recoup its investment and make a fair profit.

**Use It or Lose It Copyright Provisions**

For similar reasons, I would like to see a “use it or lose it” provision enacted that would apply to licensees and transferees. Where a termination right applies to all grants, regardless of whether the publisher is still
exploiting the work, these types of laws provide that if a licensee or assignee of copyright is not actively exploiting the rights to a work, they lose those rights. The public has an interest in ensuring the works are available and so does the creator.

Most U.S. publishers do provide this kind of “reversion” right in their standard contracts—at least in theory. But many of these reversion clauses are not working well today. The traditional reversion clause typically says that if a book goes “out of print” and the author notifies the publisher, if the publisher does not bring the book back within six months, the author gets the rights back. “Out of print” has any number of definitions. Traditionally, it meant that the book was no longer kept in stock. But those clauses no longer work, since publishers can keep books “in print” by making them available as e-Books and POD. When an author asks for her rights back, the publisher, who often is doing nothing with the book, refuses, usually because it is possible that someday someone will discover the book . . . and maybe make a movie. (To be fair, some publishers are better about rights reversion than others.) And, even when the contract provisions allow for the author to get her rights back, it can take months and many reminders to get that signed piece of paper back from the publisher that makes it official.

From a policy perspective, the fact that a publisher is keeping the book out of circulation is a problem. While the publisher feels it cannot make enough of a profit from a title to justify investing in any market-

From a policy perspective, the fact that a publisher is keeping the book out of circulation is a problem. While the publisher feels it cannot make enough of a profit from a title to justify investing in any marketing—and doing so might compete with its current list—the author could be making money on the book . . . repurpose it, update it, sell it to another publisher.

From a policy perspective, the fact that a publisher is keeping the book out of circulation is a problem. While the publisher feels it cannot make enough of a profit from a title to justify investing in any marketing—and doing so might compete with its current list—the author could be making money on the book . . . repurpose it, update it, sell it to another publisher.

Collective Licensing

The Guild has long recommended establishing collective licensing for out of print books. Under U.S. law the only way to use out of print books is to find and contact the authors and publishers and clear rights on a case by case basis—which many users have complained is too hard to do. So, instead of seeking permission, users rely on the “fair use” exception to copyright, and courts are sympathetic because they believe that obtaining all those permissions would be near impossible. (It isn’t: The Authors’ Registry locates the vast majority of authors in less than 10 minutes.)

A collective licensing scheme would undoubtedly benefit the public and authors. A true digital library could be created, and authors, publishers and other rights-holders could all be reasonably compensated if they wanted to participate. This would ensure that entire books, not just snippets, could be read online, thereby bringing millions of out-of-commerce books to the readers and researchers who need them most. Readers and researchers have moved online, but older, out of print books have not. If these books are not made digitally available, their usefulness and the accumulated knowledge they hold are at risk.

Library and user groups say they would rather rely on fair use, although there is no basis in the law for providing more than a small excerpt to users right now. The Internet sector and library groups continue to push hard for the ability to digitize and display full texts for out of print works under fair use. They argue that it is important to provide public access to what they like to refer to as “dusty musties,” arguing that since no one
is making money from them anyway, they should be freely available under fair use. Instead it is imperative that we allow these books to be available and for their authors to control and profit from them if they choose. This can be facilitated through collective licensing.

**Taxes**

In an ideal world, U.S. authors would receive more favorable tax treatment than they currently do. Authors should be entitled to income average, as was the case—until the tax reforms of 1986—so that advances get paid at a rate that reflects the fact that the advance is the author’s livelihood for a period of years.

Also, authors should not have to pay a self-employment tax; while it might make sense for some independent contractors, authors are providing a benefit to society and should not be forced to pay extra tax because they are not full-time employees. Finally, I would like to see authors have a tax exemption for tax on the first $30–50,000 of income as they have in Ireland. (I know, especially given the recent tax bills, I am really not holding my breath on this one.) Ireland, for instance, exempts the first €50,000 of income from the sale of artistic works, including books.

So that’s my list for now. In an ideal world, what changes to the laws affecting authors would you like to see? Let’s step out of the mire for a moment and ask: What would make the world a better place for authors, books and readers?

Then let’s start talking about those ideas, because the more we talk about them the less implausible they will sound. The more people hear about ideas, the more normal and even natural they become. Because no matter how technology progresses, there is no better form of learning, of putting yourself in another’s shoes, of acquiring knowledge, than reading a book.

**Onwards,**

Mary Rasenberger

Executive Director

---

**From the President**

*Continued from page 6*

“Imagining Amazon,” Valerie Harms says. “It’s hypocritical when probably most members use Amazon’s services. Booksellers need to learn from them. Times change.”

“Times definitely change, and these are interesting times indeed. Our membership has a wide range of views. The point is not to let that paralyze us. Our diversity of opinion on these complex issues has to be a source of strength, not an impediment to action—which means that sometimes we’re going to do things that you (as an individual member) may not like. At least I can tell you that our Council, with thirty members, reflects that same wide range of views, and our discussions are as animated and passionate as you’d expect.

The challenges to creators in a time of tech gigantism form the subject of two important new books, which I’d like to call to your attention: *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy*, by Jonathan Taplin, former director of the USC Annenberg Innovation Lab and one of the aforementioned members of our Council; and *World Without Mind: The Existential Threat of Big Tech*, by Franklin Foer, national correspondent for the Atlantic and former editor of the New Republic.

Foer argues that the very idea of authorship is under attack. He reminds us that the professional author—making a living from the pen, protected by copyright—is a relatively new creature. Well into the nineteenth century, writing was seldom a career in itself. “It was idealized as a hobby for patrician Men of Letters...” who considered compensation for their learned words to be vulgar,” he writes.

That began to change, in the United States, when Mark Twain, Victor Hugo and others championed effective international copyright laws. Copyright goes back to the days of the colonies and is written into the Constitution, but the modern international copyright regime only began to take shape 1891, when the U.S. and Great Britain entered into a bilateral agreement to protect the copyrights of each other’s citizens. The economics and the sociology of authorship then changed quickly. Writing became a profession. Publishing became an industry. “It’s important to remember how professionalism remade American letters,” Foer says. “It democratized it. Writing became more diverse, more vibrant.”

Our present danger is that writing is devalued. It becomes cheap fuel for the Google/Amazon/Facebook machines. A warning sign for any writer, I think, is when you see your work referred to as “content.” 

"
Writers Collaborating: Sometimes It Gets Complicated
By Jonathan Lyons and Jesseca Salky, Lyons & Salky Law, LLP

While writing is often described as a solitary and lonely endeavor, there have been many famous collaborations in literary history, from the Brothers Grimm to F. Scott and Zelda Fitzgerald, to Steven King and Peter Straub, Neil Gaiman and Terry Pratchett. As modes of communication have become faster and easier, collaboration in writing has increased significantly.

Even the greatest teams can fall apart, however. Both personal and professional conflicts can arise. These are often unforeseen and sometimes unresolvable. With that in mind, authors contemplating a collaboration should be aware of some of the noteworthy copyright cases that collaborations have triggered, and take steps to address potential issues ahead of time, contractually. Think of it as a professional pre-nup.

When determining the level of contribution an individual must make to be considered a joint author, most courts follow the “copyrightability standard,” which requires that each person’s contribution be independently copyrightable. In Childress v. Taylor, the Second Circuit established the de facto rule regarding the copyrightability standard as follows: (1) the authors must intend that each be a joint author; (2) each party’s contribution must be independently copyrightable; and (3) the parties must intend for their contributions to be merged into interdependent and inseparable parts of a whole.

In Thomson v. Larson, the intent requirement established in Childress played a key role in the Second Circuit’s decision that the contributions of dramaturge Lynn Thomson to the play Rent did not qualify as joint authorship. The court emphasized that (1) the writer and composer Jonathan Larson retained all control over the script; and (2) Thomson’s comment that she was “flattered that Larson was asking for her to contribute actual language to the text” meant that she knew that any contribution she provided could be used or not used at Larson’s sole discretion. Taken together, the court concluded that there was no intent for the parties to share ownership.

There may be an exception to the Childress rule, however. In a decades-long lawsuit, Neil Gaiman and Todd McFarlane fought over the copyright interest in characters in the Spawn comic book series. A federal jury ruled that Gaiman held joint copyright ownership to three characters he helped create for the ninth issue of the series, and the decision was upheld on appeal in 2004 by the Seventh Circuit. Relying on the Childress rule, McFarlane argued that Gaiman had no ownership in the characters because he only contributed the idea for characters, and an idea is not copyrightable. Upholding the jury decision, the Seventh Circuit noted that while the general rule is that each person’s contribution must be independently copyrightable, it would be paradoxical to not allow for joint authorship in this instance, because the authors intended to and succeeded in creating copyrightable characters, despite their individual labors likely not having sufficient originality and creativity to be protected under copyright.

A common thread throughout these cases is that the parties failed to have a sufficiently detailed written agreement between them prior to engaging in the collaboration. In Childress, the parties attempted to memorialize their understanding after the collaboration began; in Thomson, the agreement was silent with respect to the issue of copyright and ownership in the final work; and in Gaiman v. McFarlane, the parties relied on an oral agreement that made no reference to copyright at all.

The wisest and simplest course of action for authors considering working together is to enter into a detailed agreement in advance of their collaboration.

Planning a collaboration with your best friend? You might want to think about a professional pre-nup.

1 See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061 (7th Cir. 1994) for a discussion of the copyrightability test versus the de minimis test, first set forth in Nimmer on Copyright § 6.03.
2 Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991).
3 147 F.3d 195 (2d Cir. 1998).
4 Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004).
5 If one author is commissioning another writer to provide writing services on a work-for-hire basis, with limited exceptions, the Copyright Act requires a written agreement to that effect. 7 U.S.C. § 101. While outside the scope of this article, a work-for-hire agreement should address many of the same issues as a coauthorship agreement, with the owner of the copyright typically having exclusive control over the content and exploitation of the work.
The agreement should, at a minimum, cover the following areas:

Ownership. If the collaborating parties intend for copyright ownership to diverge in any manner from equal shares in the entire work, the agreement should establish this clearly.

Control. In the same vein, if the parties intend for one author to have full control over the work and the licensing thereof, that should be set forth in the agreement. Unless otherwise stated, the express and written authorization of joint copyright owners is necessary to transfer all interest in the work or grant an exclusive license. However, any coauthor of a literary work may grant a nonexclusive license to a third party, subject to a proper accounting to the other coauthor(s) of profits.

Profits. Unless otherwise stated, joint copyright owners share equally the profits from the exploitation of the copyright. The agreement should address any adjustments to this split, as well as how expenses will be recovered between the parties, if at all.

Responsibilities. The agreement should establish what each author’s responsibilities are in relation to the work and outline how the parties will interact with each other to fulfill these responsibilities. Each collaboration is different in process, depending on the authors and the nature of the work, and discussing this up front and memorializing it avoids having complication arise in the future.

Credit. The agreement should confirm how the parties intend credit to appear, on the cover and interior of the work, as well as in promotional materials. In some cases, one author might have a higher profile, and the parties and publisher may consider giving that author’s name more prominence to facilitate more sales of the work.

Termination. The collaboration between the parties might end for a variety of reasons, and the agreement should contemplate a range of possible circumstances. For reasons of ego or scheduling, the parties simply may not be able to continue to work together; they might be unable to license the work, or have their work rejected by a publisher. One party may become incapacitated, pass away, or turn out not to have the time or the ability to fulfill his responsibilities. In such instances, an agreement should address whether one party may proceed independently of the other, if one party can use the other’s contribution, and what compensation might be due for such use. In addition, the agreement should address how conflicts between the parties will be resolved (arbitration is a common solution).

Other Terms. A collaboration agreement typically addresses a host of other important issues, such as confidentiality, what jurisdiction’s laws to apply in case of a dispute, representation by an agent, and more.

Some authors might be uncomfortable with the idea of raising some of these issues at the beginning of a collaboration. But a formal agreement can ensure what a handshake can’t—that both parties have agreed in advance to terms that protect them and their project, allowing the professional relationship between them to flourish.

The wisest . . . course of action for authors considering working together is to enter into a detailed agreement in advance.

Jonathan Lyons and Jesseca Salky are founding partners of Lyons & Salky Law, LLP, a boutique law firm that provides counsel in all areas of the entertainment industry, with an emphasis on publishing matters. Separately, Jonathan is also a literary agent and oversees the translation rights department at Curtis Brown, Ltd. Jesseca is a literary agent and co-owner at HSG Agency.
Claiming the Royalties You Deserve

By Juli Saitz, CPA

Finally, the day you’ve been waiting for.

You are now a published author.

It’s time to sit back and watch the royalties roll in.

While this may be the happy outcome for some authors, I have yet to meet an author who can easily determine whether the payments on his or her royalty statements are accurate. And while I have rarely seen an author who actually suspects fraud, I have often witnessed authors who just “don’t know.” The imbalance in power between author and publisher often begins with the complexities of the publishing agreement. Unless an attorney is involved in that process, authors tend to accept the terms set forth in the publishing agreement as standard, without questioning specific terms.

Ideally, royalty calculations should be relatively straightforward. That is, the royalties paid should reflect the royalty rate agreed on in a publishing contract for the per-unit sale, multiplied by the number of books sold by the publisher. But nothing is ever simple in the publishing industry these days. This is necessary to factor in such variables as escalation clauses, different rates for different sales categories or channels, whether there is co-authorship, electronic materials, abridgements, agreed-upon deductions, returns for reserves, and specific definitions of earnings. The calculation of royalties has therefore become much more complicated. Adding to the complexity is the fact that many publishing houses’ legacy reporting systems are not equipped to handle complicated royalty calculations, leaving more of the work subject to human error.

A detailed analysis of a royalty statement, even one performed by an accounting professional, may not help an author determine whether the statement is accurate, since traditional royalty statements rarely include all the information needed. Some of the information missing may be:

- Inventory information related to the printing and ultimate sale or disposal of books.
- Information related to the sale and distribution of electronic content.
- Underlying sales and return records.
- The publisher’s list of all ISBNs associated with an author and clear indication of which of these bear royalties.
- Subsidiary-rights agreements and records of monies received for these contracts.
- Information related to the allocation of components (e.g., a DVD with a book or a study guide with a textbook) included in packaged or bundled sales.

Authors may find themselves in a situation in which the publisher is not providing timely or satisfactory answers to the author’s relevant questions. This can often result in a disconnect between what is reported on the royalty statements and the author’s understanding of how the book is selling. Authors may notice unexplained trends on their royalty statements and discrepancies with respect to units, where books are being sold (domestic or foreign), or types of sales. There may be unexplained deductions on the royalty statements, or royalty payments may begin to shrink with each reporting period without explanation.

What Can Authors Do?

They can continue to accept royalty statements that they don’t understand (and possibly lose money) or they can engage a third party to perform a royalty audit.

A royalty audit is the review of a publisher’s underlying books, records, and systems used to calculate the royalties owed to an author. Royalty audits are performed by specialized auditors, often accountants, who have experience in this type of review. The overall purpose of a royalty audit is to ensure that an author’s royalties have been calculated and paid in accordance with the terms of the publishing agreement. After examining the publisher’s records, the auditor will write a report of her findings—including, if applicable, a calculation of unpaid amounts due to the author. In my experience, royalty underreporting ranges from 10 to 20 percent of an author’s reported earnings.

Authors should select an auditor they trust, with a skill set appropriate to the circumstances. A CPA designation is a good indication of an auditor’s level of skill and training. If the author suspects that there are large amounts of unreported sales, a CPA with a focus on forensic accounting may be needed. If an author believes that the relationship with the publisher may become contentious and/or lead to litigation, an accountant with a background in litigation support and providing expert testimony may then be the best choice. The auditor should always be objective and independent. Selecting such an auditor will ensure that

Continued on page 53
An author website is an essential marketing tool. Don’t have the time or skills to build one yourself? We’re here to help. We’ve been building websites for members since 2002 and have just launched our newest version, which offers a wide range of stylish templates and all the tools you’ll need to keep yours fresh.

- Want a simple home page? Sitebuilder allows you to create a focused landing page for your website.
- Our new layout options are more flexible than ever, letting you add more content to a page. You can change your theme, palette, or sequence with a few simple clicks, anytime you want.
- Editing is easier than ever. There’s no need to hire an expensive web designer.
- You can link to social media on all pages of your site. Your website will render cleanly across all devices, from a phone to a desktop browser, no matter which theme you choose.
- Whether you use Facebook, Twitter, Goodreads, Instagram, Pinterest or LinkedIn, you can direct readers to up to four social media pages with stylish icons that are built directly into your website’s design.
- Add a fully integrated blog to engage your readers with timely posts about upcoming events, readings, and book releases.
- Integrate Google Analytics to track more in-depth information about your site visitors.
- Get dedicated support from our Web Services staff. We’ll build the site and set you up with a personalized domain name so that you can begin to reach new and existing audiences online immediately.

If you’ve been meaning to launch a website, or need to update an old one, give us a call at 212 563 5904 or send us a message at www.authorsguild.net/services/contact/

---

The Guild Welcomes General Counsel Cheryl L. Davis

Cheryl Davis’s professional credentials are all that one might expect in a General Counsel: an A.B. from Princeton; M.S.J. and J.D. degrees from Columbia University; almost thirty years of experience in intellectual property law (having started her legal career at Weil Gotshal & Manges), a partnership at the New York law firm of Menaker & Herrmann, and a long history of pro bono work.

And then comes the bonus: Ms. Davis is also a writer, a long-time member of The Writers Guild of America and the Dramatists Guild, and a winner of a Writers Guild Award and an Emmy nomination for her work on As the World Turns; she is also a playwright with more than 15 plays to her name, including The Color of Justice, Swimming Uptown, Maid’s Door and Child of the Movement, and a musical about Bessie Coleman, the first woman of African American and Native American descent to earn a pilot’s license. (In France, in 1922.) She’s also written essays, which leaves only a few genres left to tackle.

And she is very happy to be working at the Guild. “I know exactly where our members are coming from, and I’m thrilled to be in a position to help writers—and to help others understand why writers’ rights need to be defended.”

---

You Write the Book. We’ll Build the Website.

Cheryl Davis’s professional credentials are all that one might expect in a General Counsel: an A.B. from Princeton; M.S.J. and J.D. degrees from Columbia University; almost thirty years of experience in intellectual property law (having started her legal career at Weil Gotshal & Manges), a partnership at the New York law firm of Menaker & Herrmann, and a long history of pro bono work.

And then comes the bonus: Ms. Davis is also a writer, a long-time member of The Writers Guild of America and the Dramatists Guild, and a winner of a Writers Guild Award and an Emmy nomination for her work on As the World Turns; she is also a playwright with more than 15 plays to her name, including The Color of Justice, Swimming Uptown, Maid’s Door and Child of the Movement, and a musical about Bessie Coleman, the first woman of African American and Native American descent to earn a pilot’s license. (In France, in 1922.) She’s also written essays, which leaves only a few genres left to tackle.

And she is very happy to be working at the Guild. “I know exactly where our members are coming from, and I’m thrilled to be in a position to help writers—and to help others understand why writers’ rights need to be defended.”
Tayari Jones Q&A

By Isabel Howe

Tayari Jones is the author of the novels Leaving Atlanta, The Untelling, Silver Sparrow and An American Marriage, forthcoming from Algonquin Books in February 2018. She has written for The New York Times, Tin House, The Believer and Callaloo. Her awards and honors include the Hurston/Wright Legacy Award for Debut Fiction, a Lifetime Achievement Award in Fine Arts from the Congressional Black Caucus Foundation and fellowships from the National Endowment for the Arts and the Radcliffe Institute.

To start, can you tell us about your next novel, An American Marriage, which will be published by Algonquin Books on February 6?

An American Marriage is a novel about a young couple who have been married for 18 months when the husband is wrongfully incarcerated. It’s not so much about incarceration; it’s about what happens after five years, when he’s released. He’s innocent; his lawyers get him out. How does he resume his life? He hasn’t spoken to his wife in two years. He sees her as the key to getting his life back. She sees herself as a person. What does it mean when someone pins all their hopes on you? What do we owe one another? How do we balance our own lives with our responsibilities to others?

In the news, the story always ends with them getting out, they’re walking out triumphantly, and you just assume all is well now. But relationships are complicated even when no one has been wrongfully incarcerated. What happens when she comes home one day and he’s on her couch?

Let’s dive into the business of being a professional writer: you do a fair amount of teaching, fellowships, judging contests and so on. These jobs are the bread and butter for a lot of writers.

I do it all. I’m an associate professor at Rutgers University at Newark. I’m leaving soon to accept a fellowship at the Black Mountain Institute at the University of Nevada, Las Vegas. And I teach in the summer. I do lots of things, but I try to make all of my outside work writing-related. It’s the way I make a living, but it’s also how I remain a part of the community of writers. Writing is so solitary, but in all the other things I do, I meet more writers. Everything I do in my life causes me to meet another writer.

I judge a lot of contests, but I don’t judge them for the money. For one thing, judging contests does not pay very much money at all. I judge contests because I feel that it’s part of my citizenship as an author, to have my voice register. These prizes can introduce a new writer to the literary world. They can shape someone’s career. The question is, who has a hand in these things? I think we owe it to our peers, and our future peers, to participate in this type of work.

Are there parallels in your work as a teacher?

I think teaching is the same thing; you’re shaping the lives of young writers and bringing them along. Teaching is the thing I do the most. It’s my bread and butter, it’s where I get my benefits, it’s my life. It’s how I support myself. I’m very glad that I’m able to teach creative writing. It keeps my head in the game all the time. Teaching is almost like a refresher course for your own education.

When do you write? Is it possible to become too immersed in the business of being a professional writer?

I’m going to say yes and no. Yes, of course, having a job means there’s time you’re not writing, but that’s true with anything in your life. The world isn’t going to stop spinning for you to write your book. No matter who you are, no matter what situation you have, life beckons. It is challenging, sometimes, to find time to write. But I don’t have to have the whole day to write. If I can write for two or three hours in a day, I can make a lot of progress by the end of the week. Small, workable goals make progress. Even when I’m not writing, I’m thinking about my writing, so I feel like I’m writing all the time.
I think it’s a new thing, this idea that writers believe that doing anything other than writing is an imposition. Art has never been convenient for anyone. No one’s life is convenient. With artists, it seems like more of an outrage that your life is inconvenient. But it can be done.

When we tell people that they must write every day, it makes people who work, people who perform childcare, eldercare, people who have other responsibilities think, “Oh, I can never be a writer.” It makes people feel that writing is for a privileged class of people who, if they weren’t writing, would be eating bonbons. But we make the time.

Developing habits and carving out time is more important.
Slow but steady. A page a day is more than 300 pages in a year.

The majority of writers do things other than write. It drives me crazy when I’m on a panel and someone asks, “Which of you are full-time writers?,” suggesting that those of us who have day jobs are unsuccessful. Or that people who have day jobs don’t believe in themselves enough to quit. This happened just last week at a writing event. I think it comes from some kind of made-for-TV understanding of what it is to be a writer or successful. I say you’re successful based on the quality of your writing, not on whether or not you have a job.

That question really comes up?
All the time! Quite often with the people who are “writing full-time,” it’s not because they’re supporting themselves from their books; it’s that something in their life supports them. Once I was on an all-woman panel and I was the only one that had a day job—but I also was the only one who wasn’t married. Everyone else was getting applauded for not having a day job, and I’m looking like the unsuccessful one who has to go earn her living. It was so frustrating. I wanted to say, I’m not married! That’s how these other people are “writing full-time.” It’s a question people ask all the time.

How will you spend your time at the Black Mountain Institute fellowship?
I’m so excited about this fellowship. I found out about it quite by accident. It’s a year-long residence at the University of Nevada’s Black Mountain Institute, which recently bought The Believer magazine. They have a new festival, The Believer Festival, so I’ll be involved in that. I’m researching a new novel. If faculty members want me to visit their classes, I will, but mostly I’ll be working on my next book.

I admire the work the Institute is doing. They have a special emphasis on international writers and widening the scope of literature. They have one fellow who’s a “sanctuary fellow” from another country, who’s been there for three years. I’m thrilled. I leave in two weeks.

Have you had a writer-mentor?
Oh, yes. I have been so lucky in mentors and I love to talk about my first mentor. I went to college young. I was only 16. I met a writer there, a teacher, Pearl Cleage. She’s a playwright and a novelist. I feel like she set my life in this direction. We’re still close to this day. It’s been 30 years. I just had lunch with her when I was at home in Atlanta and we’re going to launch my new novel there together.

She’s a working writer. When I met her, she was teaching part-time and had all these other jobs, kids, a husband. She modeled for me the way you make your artistic life your whole life, the way you allow it to reach out into so many different directions. It wasn’t an ivory tower model of what it was to be a writer. She was motivated by the joy of story and a sense of literary citizenship. She also ran a magazine at the time. She was my first mentor and her example stays with me to this day.

Is that a role you’ve played with younger writers?
I take my teaching and my mentorship very seriously. I often tell the students I advise at Rutgers that I don’t like to talk about the professional side of writing before they’ve written their first book. Your first book is your time to write innocently, not knowing what the market wants. I tell them, I’m your mentor now and your mentor forever. When you have your book completed, I promise I will talk to you about business, but for now let’s just talk about what’s on the page.

I love that. Knowing too much about the business side can really stress out young writers and even block them from writing.
No one has ever said, “Wow, thank you for telling me that bit about the business; I feel motivated!” People always feel anxious. I tell them they can come back, because they do need that.

What motivated you to join the Authors Guild? What are your goals as a Council member?

I joined the Guild in 2011. Judy Blume suggested that I join, and one does what Judy Blume wants you to do. As a member, I learned about so many resources. Part of what I want to do as a member of the Council is to work on recruitment, so other authors know about the Guild, what it does, and what it has to offer. I live right here in New York and I did not know. I think there are a lot of people who would be excited to join and belong. There’s power in numbers.

With so many of us writers having other employment, we forget that we’re also a united class of writers. I belong to organizations about being a teacher; I belong to three or four such organizations. Writing is so solitary, I often forget that I’m part of that class as well.

What other ideas do you have for the Authors Guild Council’s work?

I think each of us has something else we’re good at. For me, I’m such a people person and I’m plugged into a lot of different communities that may not be plugged into the Guild. I really want recruitment to be my wheelhouse, to make our group bigger, stronger, more diverse.

There are so many people who identify as writers and who are living as writers. In Mississippi, in Alabama, in Georgia, where I’m from. I would love to see us have more regional outreach.

Over the decades, the Guild has addressed many hot-button issues in the publishing industry, such as photocopying, licensing, censorship, the rise of ebooks and piracy. What do you see as a central issue today? What worries you, as a writer?

I always think about the question of access. I am very concerned about people who don’t live in New York, people who don’t have mentors and don’t know the way in. There are so many important stories being written by people who don’t know the way in. That has always bothered me. You cannot apply for or go for things you haven’t heard of.

When I was a little baby writer, I had never heard of so many things. I can’t remember how I found out about the Bread Loaf Writers’ Conference, but I went. Other people were talking about all kinds of opportunities that I’d never heard of. I went to my room and I cried into my hands, because I thought, how will I ever catch up? I’m not from the background that a lot of these people have. I have a story, but I don’t know how to do things.

You don’t even know where to look. I found out about so many things because I bought this book from PEN with grants and awards available to American writers. I would read it every day and circle things and apply for all manner of things. If I hadn’t stumbled upon that book—such a simple resource, that book.

When I was a young writer, back when people used to blog, I had a blog that was all about getting the word out. That was my whole reason for living, getting the word out to people who weren’t plugged in. There are so many stories; so many people have so much to say. There’s no one without a voice. We have to help amplify these voices. That, for me, is my ongoing issue.

The Internet doesn’t always help. There’s too much information out there and people can take false turns. There are so many people scamming on writers who don’t know, who are just trying. I want to be a champion for the people who are outside. Save the young people; save the new people! Save the people who are not young in years but who are young in this career.
The Authors Guild Foundation Reboots, With anExpanded Board and New Initiatives

The Authors Guild Foundation, founded in 1972, is the charitable and educational arm of the Authors Guild. It protects and supports writing as a profession, fostering a rich, diverse literary community across the United States. It does this by promoting an understanding of the value of writers, advocating for authors’ rights, litigating to protect authors’ interests, supporting emerging authors, and educating authors in the business of writing.

Over the last two years, the Foundation has been redefining itself to increase its visibility, its fundraising capacity and public understanding of the importance of supporting authors’ interests. On the fundraising front, there have already been significant successes. Proceeds from the annual benefit dinner have more than tripled in three years, and donations from generous members and other donors have seen a similar increase. The Foundation is now working to define itself more clearly in the eyes of the public as the support organization of the Guild and all that that entails. New educational programs open to all authors are in the works, and we hope that many who participate will become members.

We have also begun offering educational tours, starting with our inaugural literary and cultural ex-
cursion to Cuba the week of November 11–18, which quickly sold out. A second tour was offered for December and sold out just as quickly, with Guild members, spouses and friends filling the 30 available slots. A third trip is planned for February, to coincide with
the National Book Festival in Havana. The tours are curated and led by Charles Bittner, a professor of sociology at St. John’s University in New York and a frequent and knowledgeable visitor to the island. The itinerary is rich and varied: four days and nights in Havana, three in two of Cuba’s oldest and most beautiful cities, Cienfuegos and Trinidad, and a well-paced program of lectures, meetings with local authors, historians, artists, musicians, concerts, dance performances, and a walking tour of Havana’s Old City.

Given the new travel restrictions issued by the U.S. government in November, which once again make it impossible for Americans to travel to Cuba except as part of an organized cultural exchange program, this is a wonderful opportunity.

That the Foundation was able to launch this initiative is thanks to its expanded Board of Directors, and we would like to officially welcome the eight new Board members who have joined us in the past year. They include three writers, Lee Child, Beth Gutcheon, and Laura Pedersen. Lee is the author of the popular Jack Reacher novels. Beth has written ten novels, including the recent Death at Breakfast, and Laura is known for her humorous books for children and adults. Another novelist, Georges Ugeux, is also the founder and CEO of Galileo Global Advisers, an investment company. Hamilton Robinson is the founder of Hamilton Robinson Capital Partners. Three nonprofit leaders have joined the Board as well. Buff Kavelman runs a philanthropic consulting firm that bears her name; Diana Rowan Rockefeller is the founder of Afghan Leaders Connect, which works with women-led nonprofits that deliver services to Afghan communities; and Louise Rosen, a former journalist now the Deputy Vice President of Alumni Relations at Columbia University.

Photographs courtesy of Guild member Bill Birchard and his wife Suzanne, who shared a camera on the November tour and generously shared their cache with us.

A view of the city of Trinidad, taken from the Iglesia e Convento de San Francisco. The tower in the foreground at near left is part of the Trinidad’s Museo Historico Municipal.
The Authors League Fund at 100

In 1916, bestselling novelist Ellis Parker Butler, who had cofounded the Authors League of America four years earlier, learned of a young author’s death, which had left his widow and two small children impoverished and in danger of losing their resident farm. Butler made an appeal to members of the League, and donations from writers began pouring in—$1 here, $5 there, for a total of $2,000 (the equivalent of more than $40,000 today)—enough to save the farm and the family.

That first appeal struck a chord, and in March 1917, the Authors League Fund was officially chartered. Since then, the Fund has helped thousands of writers and dispersed millions of dollars in assistance. On September 12, that track record was celebrated with a cocktail party and fund-raiser at the New York Public Library’s Sue and Edgar Wachenheim III Trustees Room. A total of 115 writers and other supporters from the publishing industry marked the occasion, including Authors League Fund board members Jennifer Egan, Daniel Handler, and James B. Stewart.

In brief remarks, Pat Cummings, president, reflected on how recipients of Authors League Fund assistance are thankful not just for the financial help, but for the sense that the broader community of writers is looking out for them. Sidney Offit, vice president and the longest-serving member of the board of directors, honored the memory of previous presidents and the legacy of James A. Michener, whose generous gifts allowed the Fund to significantly expand its reach into a second century of support.

The Authors League Fund provides direct assistance to professional book authors, dramatists, journalists, and poets who are facing unexpected financial crises, often on account of medical issues. All Authors Guild members are encouraged to keep the Fund in mind and to share its website, www.authorsleague-fund.org, with writers who are in distress.

Save the Date

The Authors Guild’s Annual Meeting will be held at Scandinavia House, 58 Park Avenue, New York City, on Thursday, March 1, 2018 at 6 p.m.
Net Neutrality Repealed

On December 14, the FCC followed through on its plan and voted 3 to 2 to repeal the net neutrality rules, which require Internet service providers to treat all content equally. We are extremely disappointed that Chairman Pai and Commissioners O’Rielly and Carr voted in favor of the repeal despite widespread opposition.

On December 12, we sent a letter to Chairman Ajit Pai—signed by 1,838 Guild members—voicing our strong objection to the FCC’s plans to repeal the net neutrality rules. We believe that the principle of net neutrality is vital for an open Internet. Repealing its protections would hurt content consumers and creators alike. As we have described in prior posts and say in our letter: “Net neutrality has not stifled, but rather promoted innovation by protecting new content while it is still in its infancy.”

“Your proposal would give large companies the ability to control what individuals see and do on the Internet, without effective oversight for the benefit of the consumers.

It even repeals the prohibition against blocking lawful content, a necessity for the free Internet; its removal opens the floodgates to potential abuse.”

—The Authors Guild’s December 12, 2017 letter to FCC Chairman Ajit Pai

up press release ended with a reminder: “The FCC does not have the final word. ‘We the People’ do.”

The Guild on the Hill for Small Copyright Claims

On December 5 and 6, 2017, Mary Rasenberger and Cheryl Davis, the Guild’s Executive Director and General Counsel, visited Capitol Hill with a dozen other members of the Copyright Alliance to advocate for the passage of the Copyright Alternative in Small-Claims Enforcement Act of 2017, known as the CASE Act. This bill, which would establish a “small” copyright claims tribunal in the U.S. Copyright Office, was introduced on October 4, 2017, by Rep. Hakeem Jeffries (D-NY), along with Reps. Tom Marino (R-PA), Doug Collins (R-GA), Lamar Smith (R-TX), Judy Chu (D-CA), and Ted Lieu (D-CA).

The purpose of the Guild’s visits was to seek support from other members of the Judiciary committee; the more sponsors of the bill, the easier it will be to move it to the House floor. Over the course of two days, sometimes splitting up, the group met with the offices of Reps. Chabot (R-OH), Jordan (R-OH), Franks (R-AZ), Deutch (D-FL), Labrador (R-ID), Cohen (D-TN), Poe (R-TX), Gohmert (R-TX), Goodlatte (R-VA), Raskin (D-MD), Issa (R-CA), and Cicilline (D-RI). The Representatives and their staff were all interested and potentially supportive of the bill; they asked insightful questions about the bill and how the tribunal would work.

This legislation would give authors a much-needed tool to combat copyright infringement without having to bear the expense of going to federal court—which can be an extremely expensive proposition for even the most straightforward copyright cases, and one that few authors can afford. If the bill passes, individual creators and other small copyright owners will have the ability to enforce their rights without hiring a lawyer or going to federal court. This could effectively place copyright remedies for the first time within the grasp of an entire class of creators who otherwise could not afford to pursue them.

The small-claims tribunal would allow copyright holders to bring copyright actions without having to hire an attorney. Proceedings would be conducted remotely so that claimants do not have to travel. Damages in such cases would be limited to $15,000 per act of infringement with a $30,000 maximum, meaning that it won’t be available in cases where an
author seeks higher damages; and there would be no injunctive relief. It will nevertheless provide a forum for many infringements of writers’ works, including articles and excerpts.

Under the bill, participation in the tribunal would be on a voluntary basis and would not interfere with either party’s right to a jury trial. Some of the changes made to last year’s version of the bill include the addition of provisions (i) requiring the Copyright Office to expedite certificates of registration (which is a prerequisite to starting a copyright action) for parties with a matter before the small claims court, and (ii) allowing a copyright holder to request a subpoena compelling an internet service provider to disclose the identity of a user accused of infringement. The latter provision would be a boon to authors, among others, in their long-running fight against Internet piracy.

While a small-claims tribunal would not fix all the problems in the current system of copyright enforcement, it is a step in the right direction. Ms. Rasenberger said. “In addition to providing a remedy for small copyright claims Congress, by passing the CASE Act, would demonstrate its recognition that individuals are the backbone of the creative economy. We look forward to doing all we can to see this bill signed into law.”

Authors Guild Signs On To NAFTA Letter From Creator Groups

On August 16, 2017, officials from the United States, Canada and Mexico started negotiations to modernize the North American Free Trade Agreement (NAFTA). In addition to many other potential areas of modification, the summit provided an important opportunity to modernize NAFTA’s copyright provisions to make them more compatible with the digital age.

Last fall the Authors Guild joined 18 other creator organizations in signing the letter to the United States’ principal NAFTA negotiator, U.S. Trade Representative Robert Lighthizer. The letter advises Ambassador Lighthizer about the importance to U.S. cultural industries (and the economy at large) of strong, effective, and up-to-date international protection for copyright holders; the signers also offer to work with USTR on these needed modifications.

The Guild also joined a coalition of business associations and companies that seeks to advance creativity and innovation-based growth, and the protection of intellectual property that sustains such growth, in the U.S. trade agenda. The group, the American Creative, Technology & Innovative Organizations Network for Trade (“ACTION for Trade”), also sent a letter to Ambassador Lighthizer on November 30, 2017, calling for strong IP enforcement provisions in NAFTA. The letter also addresses specific provisions in recent drafts of the Intellectual Property chapter. All of these efforts are particularly important now, in light of extensive lobbying efforts by the tech sector, which is advocating for the loosening of NAFTA’s copyright provisions.

“The Internet’s global reach has made copyright protections and enforcement increasingly important to free trade agreements,” the letter states. “Widespread copyright infringement and unduly broad limitations to copyright protection distort overseas markets and undermine the ability of our members to successfully and fairly engage in commerce.”

Authors Guild and SFWA Reach Agreement with Galaktika’s Publisher on Infringement Claims

On July 20, 2017, The Authors Guild and Science Fiction & Fantasy Writers of America (SFWA) announced that they had collaboratively reached an agreement with a Hungarian science fiction magazine, Galaktika, that for years had been reprinting stories of American and British science fiction writers without their permission. Under the terms of the agreement, Metropolis Media, Galaktika’s publisher, promised to seek permission for any works they use in the future and to compensate the authors whose works were published without permission. Galaktika has agreed to
The authors and agents whose works were infringed in *Galaktika* brought it to the Guild’s attention. “After we realized the extent of the problem,” said Guild executive director Mary Rasenberger, “it quickly became clear that a collective response from the author community was needed to fully address the problem. The Authors Guild exists to take action in situations like this.” SFWA had already been working to resolve members’ claims through its Grievance Committee, but realized that a joint effort by both organizations was more likely to yield results for all affected authors.

Pursuant to the agreement, Metropolis provided the Guild and SFWA with a list of all unauthorized stories that appeared in *Galaktika*’s past issues. It also confirmed its commitment to remove all infringing works from its online media and to seek permission before publishing copyrighted works in the future. Most importantly, the agreement legally obligates Metropolis to offer a reasonable fee for each infringed work, to be agreed to in good faith individually with authors whose works were infringed in *Galaktika*. The agreement does not settle any author’s particular claims, but sets a benchmark for transparency and gives individual authors leverage in pursuing their claims. Moreover, Metropolis Media will not be released from the claims of infringement that the Authors Guild and SFWA might bring until all of the authors’ individual claims have been settled to the Guild’s and SFWA’s reasonable satisfaction. To that end, SFWA will be publicizing the list of authors and estates that are owed money and contacting them individually when possible.

“Metropolis Media was an open and attentive negotiating partner,” said Rasenberger. “We’re confident that it will address individual claims honestly and in good faith. While ignorance of the law is not an excuse, Metropolis’s willingness to compensate the authors whose rights were violated and to respect authors’ rights going forward is a step in the right direction. The Authors Guild will keep an eye on Metropolis Media to ensure that it abides by the terms of the agreement and fairly treats authors whose works they have used and will use in the future.” SFWA, whose connections in the science fiction and fantasy community run very deep, will also be monitoring Metropolis’s commitment to negotiate in good faith.

Cat Rambo, president of SFWA, added, “In today’s complex publishing world, the writers often get overlooked. SFWA is pleased to be working with the Authors Guild in order to represent the interests of writers and defending their rights.”

Authors (or agents representing authors) whose works have been infringed in *Galaktika* may contact Dr. Katalin Mund at mund.katalin@gmail.com with their claims. Authors Guild members can also contact the Authors Guild at staff@authorsguild.org for help negotiating their settlements. SFWA members who believe that *Galaktika* is not living up to this agreement should contact John E. Johnston III at griefcom@sfwa.org.

**In Support of Authors**

The Authors Guild Foundation advocates for authors’ rights to free speech and fair compensation, so that writers of all kinds can flourish across the country. The collective genius of American authors shows us new worlds both real and imagined. It inspires our passion. And it shows us who we might be.

From popular culture to high art, our national heritage is shaped by the same authors whose rights to free expression, intellectual property, and dignified earnings are defended and protected by the Authors Guild.

Donations may be made in the name of a friend, family member, or colleague. Just scroll to the bottom of the [donate form at www.authorsguild.org](http://www.authorsguild.org/donate/) and click “yes” where it asks: “If this is a tribute gift, such as a gift in honor or memory of someone...”

On behalf of our fellow poets, novelists, non-fiction writers, journalists, authors of every genre—and fans around the world—we thank you for your generosity.

To make a gift online, visit:

www.authorsguild.org/donate/

To make a gift by check, please send to:

The Authors Guild Foundation
31 East 32nd Street, 7th Floor
New York, NY 10016
Correcting Copyright Registrations

From time to time authors and other copyright holders need to correct or add to the information they provided when initially registering their copyright. This process—known as supplementary registration—has now gone digital.

On July 17, the United States Copyright Office implemented new online registration requirements for supplementary registrations as part of the ongoing modernization of the Office.

Applicants filing for supplementary registration are now required to use an online form instead of the old paper Form CA. There are exceptions for certain works that will continue to use the Form CA paper form: renewal registrations for pre-1978 works, GATT (General Agreement on Tariffs and Trade) registrations for foreign works, and group registrations for non-photographic databases. The Copyright Office will also have the discretion to grant waivers in exceptional circumstances.

In order to facilitate the transition from paper to an online system, the Copyright Office has provided tutorials and explanations in the Copyright Compendium, which includes a discussion of comments submitted by the Authors Guild and various other interested organizations. These are available at www.federalregister.gov/documents/2017/06/15/2017-12453-supplementary-registration.

Guild members looking for assistance with any type of Copyright Office registration should contact the home office at staff@authorsguild.org.

Google Boots “Open Markets” Team from New America Foundation

The firing of the prominent anti-monopolist Barry Lynn and his Open Markets team from a Google-funded think tank focused attention on the tech giant’s readiness to use its power to suppress criticism and sway the cultural dialogue in its favor.

According to an August 31 New York Times article entitled “Google Critic Ousted from Think Tank Funded by the Tech Giant,” Lynn and his team were fired from the New America Foundation shortly after Lynn issued a statement praising the European Union’s landmark €2.4 billion penalty against Google for breaching antitrust rules. “The story began June 27, when we released a statement welcoming a European antitrust action against Google’s abuse of its monopoly power,” Lynn said in a subsequent press release. “Two days later, we were given two months to leave.”

The New America Foundation has reportedly received more than $21 million from Google, from Google’s parent company’s executive chairman Eric Schmidt, and from Schmidt’s family’s foundation. Schmidt, displeased with Lynn’s statement, reached out to New America’s president, Anne-Marie Slaughter, as reported in the Times. Days later, Slaughter fired Lynn for “imperiling the institution as a whole.”

Lynn previously collaborated with the Authors Guild in our work advocating for antitrust scrutiny of Amazon and its monopsony power as a buyer of books. Notably, he teamed with Guild council member Douglas Preston and his grassroots group Authors United (which has since merged with the Authors Guild) to draft a letter to the U.S. Department of Justice laying out the antitrust case against the online retailer. While employed by New America, Lynn also teamed with several Guild council members (Preston, along with Scott Turow, Susan Cheever and John R. MacArthur, and a number of other writers and thinkers) for a symposium entitled “Amazon’s Book Monopoly: A Threat to Freedom of Expression?” in Washington, D.C.

In fact, the firing from New America led to new opportunities for Lynn, who announced in August that he and the Open Markets team—which also includes Zephyr Teachout, Phil Longman, Lina Khan and Matt Stoller—have successfully reorganized as an independent nonprofit organization, the Open Markets Institute. “We are incorporated, with a board of directors and an advisory board of leading thinkers about the dangers of monopoly,” Lynn said in a statement. “This powerful team will help us continue to produce the vanguard anti-monopoly writing and analysis you all have come to expect from us.”

Open Markets was quick to point to the benefits of leaving New America under such public (and publicity-generating) circumstances. In addition to the Times story, Lynn pointed out, “thoughtful articles and editorials have been published in 300 mainstream media outlets.” Since its founding, Open Markets has presented at a Senate hearing about the Consumer Welfare Standard in Antitrust, and has had its first event, entitled “America’s Monopoly Moment,” which featured a speech by Sen. Elizabeth Warren and a series of panel discussions.

While Google denied playing a role in Open Markets’ split from New America, according to the Times, the incident appears to be the latest in a pattern of suppressing critical voices. The day after the Times published its Open Markets story, Gizmodo’s Kashmir Hill reported on her own experience with Google’s
suppressive tendencies. While working at Forbes six years earlier, Hill wrote an article about Google Plus’s “+1” social button and how the company was using its weight as the dominant search engine by tying search ranking to the button in order to pressure websites into promoting the then-new social network. Hill reported that Google representatives reached out to her, telling her to “unpublish” the story because of a supposed nondisclosure agreement of which Hill was unaware, and despite Hill having independently verified her story with Google’s public relations team.

After continued pressure from her bosses at Forbes, Hill took the piece down and found that the story almost immediately disappeared from Google’s search results, with the exception of a cached version that disappeared shortly after, which Hill found unusual and suspicious. After her piece detailing that sequence appeared in Gizmodo, Google responded, saying that it had nothing to do with the earlier story’s disappearance. In an interview with NPR’s Ari Shapiro, Hill expressed skepticism about Google’s response, noting that, with tech companies, “we don’t know; we don’t get to see inside their companies, their algorithms.”

Google’s disturbing attempts to influence the flow of information apparently extend beyond suppressing voices critical of the corporation. The company reportedly also has a practice of funding research favorable to its interests. The watchdog group Campaign for Accountability released a report this summer that identified 329 Google-funded research papers on public policy matters of interest to Google that were published between 2005 and 2017.

The watchdog group Campaign for Accountability released a report this summer that identified 329 Google-funded research papers on public policy matters of interest to Google that were published between 2005 and 2017.

That, with tech companies, “we don’t know; we don’t get to see inside their companies, their algorithms.”

Google’s disturbing attempts to influence the flow of information apparently extend beyond suppressing voices critical of the corporation. The company reportedly also has a practice of funding research favorable to its interests. The watchdog group Campaign for Accountability released a report this summer that identified 329 Google-funded research papers on public policy matters of interest to Google that were published between 2005 and 2017. The report revealed that Google-funded studies appeared to spike whenever the company’s business model was under threat from regulators or whenever opportunities arose to force new regulations on competitors. Of particular note were Google-funded antitrust studies that spiked in 2012, during the Federal Trade Commission’s antitrust probe of the company, and a surge in Google-funded copyright papers as the company fought anti-piracy bills. These revelations are even more troubling in light of the fact that, despite staff recommendations, the FTC’s Bureau of Competition cut its investigation of Google short in 2015. As the company’s influence continues to grow, the Campaign for Accountability report confirms Google’s position as a corporate Leviathan on Washington, DC’s lobbying scene.

The company’s accumulated power and market dominance, its control over the flow of information and its readiness to manipulate that information in its own favor are matters of national concern. In their book Virtual Competition, Ariel Ezrachi and Maurice Stucke discuss dominant firms’ readiness to manipulate the many levers available to them to affect public opinion as "intellectual capture." “We cannot help but wonder,” they write, “whether competition enforcers and regulators can resist the intellectual capture skillfully propagated by these giants—through media, lobbying, political power, and funding.”

We look forward to continuing to work with Barry Lynn and his team. We’re hopeful that the attention incidents like these bring to Internet monopolies’ control of our information infrastructure and the related harm they bring to the creative industries is part of a growing recognition that regulation of Internet giants like Google and Amazon may be required to keep intact the free flow of information in this country.

How U.S. Translators Are Faring

On December 15, 2017, the Guild released the results of a survey of U.S. literary translators that was distributed last April. Conducted in collaboration with the American Literary Translators Association, the American Translators Association’s Literary Division, and the PEN America Translation Committee, the survey collected information from 205 translators on payment, royalties, copyright, and various other aspects of the literary translation profession.

“Advocacy for literary translators is increasingly important to us. Many of our members are both authors and translators, and with the number of books in translation growing each year, many of which are very high-profile titles, it is important for us to understand the landscape,” said Authors Guild executive director Mary Rasenberger. The Guild’s translator members are currently working with Guild legal staff on a model...
Lessons Abroad: How Access Copyright v. York University Helped End Canada’s Educational Pirating Regime

On July 12, 2017, the Canadian Federal Court released its opinion in the case of Access Copyright v. York University. This decision marks the beginning of the end for university-issued anti-pirating guidelines, and simultaneously validates authors’ arguments against unauthorized copying in the educational market.

Background

Educational Fair Dealing

On June 29, 2012, Canadian lawmakers passed the Copyright Modernization Act, which extended the application of fair dealing laws to education.

“Fair dealing” is Canada’s counterpart to the United States’ “fair use” exception to copyright law. In Canada, fair dealing permits unauthorized copying and use of another’s copyrighted work in a limited number of categories, including the education sector, private research, and study. Although Canadian fair dealing law is applied more strictly than its U.S. cousin, fair dealing nevertheless was the flashpoint for a war between Canada’s publishing and educational sectors—a war that culminated in the case of Access Copyright v. York University.

Until the end of 2010, Canadian universities paid approximately C$3 per full-time student to Canada’s non-profit, government-chartered agency, Access Copyright, which licenses Canadian artistic works to educational institutions, businesses, and other organizations for uses that were not considered fair dealing. Access Copyright would then distribute that money among Canadian writers. In the aftermath of the passage of the Copyright Modernization Act, several early cases expanded what constituted fair dealing under the Act, leading publishing and writing communities in the educational market to worry that the system of licensing revenue upon which they depended was under siege.

One such case was CCH Canadian Ltd v. Law Society of Upper Canada, a 2004 Canadian Supreme Court decision which held that “fairness” in fair dealing depends on the facts of the particular case. Shortly after the Court rendered that decision, the Association of Universities and Colleges of Canada (AUCL) and the Association of Canadian Community Colleges (ACCC) disseminated their own fair dealing guidelines—which essentially advised university faculty and students on how to engage in unauthorized copying: how many pages of a textbook could be photocopied without someone having to purchase it, how much of a copied work could appear in separate “course packets” (i.e., faculty-created anthologies of portions of textbooks and other educational materials), setting out rules for how books could be electronically copied and stored on university databases, how materials could be shared among classmates, etc. These guidelines were later widely adopted by Canadian universities and relied upon as if they had the force of law.

This later became known as the Interim Tariff.

In 2010, in response to rapid changes in the publishing market and the mass digitization of educational reading materials, Access Copyright proposed a licensing fee increase from $3 per full-time student to $45 per full-time student. Over the course of the year, negotiations between Access Copyright and the universities broke down, but after examining Access Copyright’s proposed licensing fee (“tariff”), the Canadian Copyright Board settled the issue in Access Copyright’s favor, adopting the $45 proposed fee for the period of 2011–2013. This later became known as the Interim Tariff.

Following the Copyright Board’s Tariff ruling, more than twenty Canadian universities, including the country’s third-largest university, York University in Toronto, abandoned their arrangement with Access Copyright

“Fair dealing” is Canada’s counterpart to the United States’ “fair use” exception to copyright law... Although it is applied more strictly than its U.S. cousin, fair dealing nevertheless was the flashpoint for a war between Canada’s publishing and educational sectors—a war that culminated in the case of Access Copyright v. York University.
Copyright. They opted instead to define their own fair dealing guidelines, modeled after those developed by the AUCL and AUCC back in 2004. They issued their own guidelines intended to ensure compliance with the fair dealing law, in an effort to eliminate the need to pay for licensing altogether. Almost immediately, Access Copyright and academic publishers saw fees for their services and products drop dramatically, even as those products were being more widely distributed than ever before—thanks to the mass digitization and modern market channels that had necessitated the proposed fee increase in the first place.

The Value Gap
The fallout from this action by the universities has been significant. As documented in Access Copyright’s 2016 Annual Report, royalties distributed to writers by the organization plummeted after the education sector was added to the list of fair dealing purposes. In the first year alone, 2012–2013, distributions dropped from $30.6 million to $23.5 million, and the pattern continued, with royalty distributions declining to $18.6 million in 2014, $13.1 million in 2015, and $12.4 million in 2016. The estimated projection for 2017 distributions is a mere $5 million, a 55 percent decrease from the previous year, largely attributable to the educational sector.

This downward trend is but one symptom of an international phenomenon called the “value gap,” which Music Canada has defined as “the gross mis-match between the volume of music being enjoyed by consumers and the revenues being returned to the music community.” The value gap is recognized in many other creative industries as well, not least in publishing; more books are being enjoyed by larger audiences than ever before, while the percentage of authors facing poverty continues to rise.

Heavy Consequences
Following a 2015 income survey of its members and other writers, The Writers’ Union of Canada (TWUC) reported that today’s writers work more to earn less: “Taking inflation into account, writers are making 27 percent less than they did in 1998 from their writing, while 45 percent of writers say they must do more to earn a living now.”

The same 2015 report found that “The work of writers fuels an almost 2 billion-dollar industry, and yet more than 80 percent earn an income from their writing that is below the poverty line.” The average income for Canadians working in the information and cultural industries was pegged at $60,000, while that of Canadian citizens generally was estimated at $49,000. By comparison, average income from writing was estimated at a mere $12,879, while the median net income was less than $5,000.

Earlier this year, faced with another year of double-digit sales declines, Oxford University Press Canada shut down its school division. In an interview with Quill and Quire, a Canadian book and publishing magazine, OUP Canada’s President David Stover stated that the royalties received from Access Copyright were “a significant factor in making school publishing viable [in Canada], even in the wake of declining sales of the materials themselves,” and that “the more we looked at [the disappearance of copyright royalties], the bleaker the view seemed to be.”

On August 4, 2017, Publishers Weekly posted an article on how Pearson publishing planned “to cut another 3,000 jobs from its educational publishing workforce.” The publishing giant had already indicated that “it sees its North America group as providing one of its biggest opportunities to cut costs.”

The educational fair dealing guidelines set by Canadian universities have compounded the difficulties of writing for academia, even as educational costs continue to rise, and despite the familiar rhetoric that the high cost of educational materials—such as books—is in large part to blame.

Access Copyright v. York University
In April 2013, after three years of receiving no licensing fees from the school under the Interim Tariff, Access

Legal Services Scorecard
From June 16 through December 1, 2017, the Authors Guild Legal Services Department handled 605 legal inquiries. Included were:

- 150 book contract reviews
- 22 agency contract reviews
- 16 reversion of rights inquiries
- 50 inquiries on copyright law, including infringement, registration, duration and fair use
- 15 inquiries regarding securing permissions and privacy releases
- 2 electronic rights inquiries
- 350 other inquiries, including literary estates, contract disputes, contract questions, periodical and multimedia contracts, movie and television options, Internet piracy, liability insurance, finding an agent and attorney referrals
Copyright sued York University. The lawsuit claimed that York had infringed the copyrights of the educational materials being used by its students, that the university owed royalties on the materials it copied, and that the fair dealing guidelines it had put in place were illegitimate.

In its July 12 ruling, the Federal Court handed Access Copyright an important victory and in doing so, held that guidelines that had become wide practice in the educational sector were legally invalid.

The average income for Canadians working in the information and cultural industries [in 2015] was pegged at $60,000, while that of Canadian citizens generally was estimated at $49,000. By comparison, average income from writing was estimated at a mere $12,879, while the median net income was less than $5,000.

According to the court, the university’s fair dealing guidelines were “not fair in either their terms or their application. . . . The fact that the guidelines could allow for copying of up to 100 percent of the work of a particular author, so long as the copying was divided up between courses, indicates that the Guidelines are arbitrary and are not soundly based in principle.”

York University’s guidelines also allowed for copying of up to 10 percent of a particular work without any form of reimbursement to copyright holders, claiming it complied with the purposes of the fair dealing law. The university said that it educated its faculty on the fair dealing law while trying to ensure they understood its guidelines. The court found “no evidence” that the guidelines actually did what they set out to do and labeled the university “willfully blind.”

The Court found that York University had withheld C$800,000 to C$1.2 million a year in royalties from the creators and publishers whose work they had appropriated. It concluded that York owed royalties to the copyright licensing agency, and found that the university’s guidelines were insufficient and unenforced.

Most importantly, the court held that the government-approved “Interim Tariff is mandatory and enforceable against York” and could not be “opted-out” from.

“We’ve always believed that there is a great deal of confusion and misinformation around fair dealing in the education sector,” said Access Copyright Executive Director Roanie Levy. “We’ve also believed that most educators would not willfully deny creators’ compensation for their work. So we were quite optimistic that when we had the opportunity to present the information to a judge, who would look at the facts, that we would get a positive outcome.”

Implications for the Future
In its July 13, 2017, press release, TWUC—which represents thousands of Canadian writers, had this to say: “The Court’s decision fully supports Canadian writers’ right to be paid when their work is copied and used in Canadian classrooms and dismisses outright the education sector’s unilaterally defined ‘fair dealing’ guidelines . . . The decision effectively declares the widespread educational copying guidelines to be illegitimate.”

“This is the win we’ve been waiting for,” said Marjorie Doyle, chair of the TWUC. “For years now, Canadian writers have seen huge amounts of our valuable work copied for free by the educational sector. The court has recognized the value of our labour and ordered fair payment for that work.”

“I believe all Canadian school boards, colleges, and universities have some serious rethinking to do,” said TWUC Executive Director John Degen. “They have been sold a radical theory that collective licensing doesn’t apply to them. The court has now declared that theory invalid. We look forward to rebuilding and strengthening our traditional partnership with education.”

In an article titled “Reviewing copyright? Check the glossary,” released the same day as TWUC’s press release, Degen spelled out some of the problems inherent in the government’s treatment of copyright law in the digital age.

“The weakening of copyright is an act of deregulation, an ideologically driven wealth transfer from one sector to another through the creation of gaps and loopholes. With educational fair dealing we’ve witnessed a dramatic and baffling version of this deregulation income swap. We know where the money was transferred from, but we’re not sure where it’s gone . . .

“We now need to hear from the federal government that it shares our concern about the cultural damage caused by the 2012 changes. We need to hear a commitment to fixing the problem and repairing the damage.”

Continued on page 55
Free Speech Under Fire?

The First Amendment—how it protects free speech and the ongoing challenges to those protections—was the subject of the May 3, 2017 Guild Webinar, our live online series for members. The discussion, co-presented by the Copyright Clearance Center, was moderated by the Guild’s executive director, Mary Rasenberger, who before joining the Guild practiced law for more than 25 years, specializing in media and copyright law; she also served as senior policy advisor for the US Copyright Office and as program manager at the Library of Congress.

Joining her were Joan Bertin, executive director of the National Coalition Against Censorship (NCAC), who is a former legal services, civil rights and civil liberties lawyer and a graduate of NYU Law School; Christopher Finan, the director of the American Booksellers for Free Expression and author of From the Palmer Raids to the Patriot Act, and David Horowitz, the executive director of the Media Coalition and an expert on First Amendment Law. The transcript has been edited for length and clarity.

[Since the panel was recorded, Ms. Bertin has retired, and Mr. Finan has been appointed executive director of NCAC.]

MARY RASEMBERGER: Good afternoon, everyone. Today, we will be doing a survey of contemporary First Amendment issues. Before we start, I’m going to read the applicable part of the First Amendment that we’ll be discussing so that everyone knows what we are talking about.

It says, “Congress shall make no law abridging the freedom of speech or the press.” That’s it. The First Amendment also relates to the establishment of religion and the right to peacefully assemble, but today we are going to talk about the freedom of speech and the press. The rest of the First Amendment has been left to the interpretation of the courts over the years, most importantly the Supreme Court, and we will get a little bit into the history of the First Amendment with one of our panelists, Chris Finan.

The new Trump administration and the media that surrounded his election have raised new First Amendment issues and have certainly renewed interest in the First Amendment, particularly relating to the freedom of the press and access of the press to, for instance, the White House and government information. In addition, as you’ll hear from our panelists, we continue to have challenges to free speech, including some new free speech issues in schools, in school libraries, on college campuses, in publishing, and in investigative journalism.

We have an amazing panel of speakers today, including some of the nation’s top experts on these issues. We are very fortunate to have them and I want to thank them for joining us.

First, we’ll hear from Chris Finan, director of the American Booksellers for Free Expression, who will talk about the history of free speech in the U.S., tracing the growth of free speech after World War I and the development of groups like the National Coalition Against Censorship and the Media Coalition, which support the freedom to express ideas.

Joan Bertin, the executive director of the National Coalition Against Censorship, will talk about a survey the coalition did on book censorship in schools, self-censorship by teachers and what kinds of books are most often challenged.

David Horowitz, executive director of the Media Coalition, will talk about the pressures on investigative journalism today, and about recent conflicts in the law between privacy and speech, and the use of tort law to choke speech.

We’ll start with Chris, who will give us an introduction to the history of free speech in the United States.

CHRISTOPHER FINAN: Thanks, Mary. You know I’m going first here in part because I’m an author, and the Authors Guild knows how to treat its members.
My dues are paid up, and since I’m talking to authors I’m sure you guys will forgive me for plugging my book, From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America. I hope you all run out to your local independent bookstore and ask for it. Now they won’t know what you’re talking about. It hasn’t been on the shelves for years, but they can special order it for you.

I’ve been chosen to speak first because I’m going to give you some background on the growth of free speech in this country. The idea that free speech has grown is somewhat alien to Americans. We grow up hearing about the First Amendment and thinking that we’ve always had free speech in this country and with the implication that we’ll always have free speech in this country, and what is there to worry about after all? But the fact is, there has always been censorship in America.

Just a few years after the Founding Fathers adopted the First Amendment, the Federalists threw a bunch of Jeffersonian editors in jail for exercising the very freedom to criticize the government that was presumably protected by the First Amendment. So, right from the beginning there was uncertainty about how much free speech there was in this country.

Throughout much of the 19th century, local law enforcement, which was pretty much the only law enforcement there was, was used to suppress the free speech rights of people who espoused radical views. People like the abolitionists, who were often mobbed and their presses broken. At least one abolitionist editor was killed. Congress refused to accept anti-slavery petitions from the abolitionists, and you can’t imagine a more direct violation of the First Amendment than the government refusing to hear a petition.

A little later in the century, advocates of equal rights for women, feminists, found themselves being prosecuted under the obscenity laws for advocating such things as equal rights in marriage, birth control and other practices that mainstream America considered to be sexually deviant.

The biggest free speech suppression during the 19th century, however, was directed at the labor movement. Union organizers sometimes found it impossible to meet, to enlist members in their unions and to picket, and they often faced injunctions from the government that suppressed the right to strike entirely. It was commonplace to censor in America in the 19th century, but it didn’t affect most Americans, so nobody really cared.

The civil liberties meltdown that occurred during World War I was a turning point in this history. The Justice Department used the extensive war powers that had been given to it by Congress to deprive anti-war publications—socialist publications in many cases—the right to use the mail. They prosecuted people for speaking out against the government in any way. More than 2,000 people were indicted under federal law, and almost 1,000 people were convicted. Many of them were sentenced to long jail terms, which affected them for the rest of their lives, even though most were pardoned at the end of the war.

The spectacle of a democratic country depriving its citizens of the most basic right, which is the right to debate the wisdom of the government engaging in war, struck a number of Americans, who would become the first generation of civil libertarians, as wrong, and it’s not a surprise that only two years after the end of the war, in 1920, the American Civil Liberties Union was founded.

It was another 10 years before the Supreme Court protected free speech for the first time. Protections for free speech were not increased by the Supreme Court until the 1960s, as a result of conflicts arising from the Civil Rights Movement, which faced a wholesale suppression of free speech in the South, and from the Vietnam anti-war movement.

The one big exception to the growing rights for free speech in the 20th century was material that had sexual content. It wasn’t until the 1950s that the Supreme Court came up with a working definition of what was obscene, a definition that could be used to protect material with serious literary, artistic, political and scientific value from being banned. But as late as 1961, 60 booksellers were prosecuted for selling Tropic of Cancer around the country when it became available from Grove Press.

So, the fact that we now have a handful of groups that exclusively defend free speech is a fairly recent phenomenon. The ACLU, of course, has a very broad agenda. It protects all civil liberties and it has done very important work in protecting free speech. But in the early 1970s, as an effort to roll back many of the protections that had been passed in the 1960s got underway, it became necessary to create some new groups that would exclusively defend freedom of speech.

The National Coalition Against Censorship and the Media Coalition were both founded in response to a Supreme Court decision in 1973 that we all feared would significantly undercut the protections that had just been established for sexual speech. They have operated through some heavy waters, and periods of intense pressure. Both groups were extremely active during the culture wars of the 1980s, and they have gone on to engage in a wide range of activities in defense of free speech in other areas.

One of the points that I would like to conclude with is that we, our organizations, are defenders of every-
body’s free speech. We are not partisan. We do not take sides. We don’t look at the content of speech. We think there’s enough work for us just to make sure that people have the right to say what they want and to give the American public the opportunity to make up their own minds about whether they want to endorse or oppose those ideas. So that is the history of free speech in 10 minutes.

RASEMBERGER: Thank you very much, Chris. I think it’s astounding to many of us that free speech as we know it is so recent, that it really just began after World War I in the U.S. The First Amendment, though, was enacted back in 1790, right after the Constitution was adopted. Can you explain, for the sake of historical interest, how people thought about the First Amendment prior to the 1920s and 1930s? Were there any legal challenges in defense of the First Amendment prior to the 1930s?

FINAN: I think it’s fair to say that nobody thought about the First Amendment very much. There was no litigation before the 20th century in support of First Amendment rights. Most people saw government suppression as being directed against radicals they didn’t agree with, and they didn’t see any inconsistency between the paper commitment of the Constitution and the government cracking down against hotheads, or people who threatened to corrupt the morals of the public.

RASEMBERGER: It’s fascinating. I want to ask you, since you are with the American Booksellers Association, if you could talk briefly about whether you see an increase in First Amendment pressures on bookstores today, or on publishers? And what those are if you do?

FINAN: I think it’s fair to say that there is an increase in censorship pressures in American society today. I think it comes from both the left and the right. On the left, there are people who are advocating for restrictions on speech that is hateful or directed against people in a discriminatory way. On the right, there’s a rejection of the mainstream media as fake. I think both of these are deeply troubling trends.

But as far as it affects publishing and booksellers, one of the things that we’re most concerned about is the fact that a number of books have been targeted for protests, causing publishers to withdraw them from sale. In the last 18 months, four books have been delayed, canceled or withdrawn as a result of protests: Birthday Cake for George Washington, which was a kid’s book about George Washington’s chef, who was a slave; a book called When We Was Fierce, another kid’s book; Bad Little Children’s Books, which was a satire for

adults, and then, of course, Dangerous, the Milo Yiannopoulos book that Simon & Schuster has canceled. We are disturbed by these attacks in part because we feel that whenever a book is withdrawn, it simply increases pressure on the next book that somebody finds offensive, and publishers are in business to make

Just a few years after the Founding Fathers adopted the First Amendment, the Federalists threw a bunch of Jeffersonian editors in jail for exercising the very freedom to criticize the government that was presumably protected by the First Amendment. So, right from the beginning there was uncertainty about how much free speech there was in this country

—Christopher Finan, author and former director of the American Booksellers for Free Expression. He is currently the executive director of the Coalition Against Censorship
money and they are subject to influence. They are influenced by protests. So we are concerned about that.

As far as censorship pressures on booksellers, I would say we’re not seeing direct pressure. But booksellers, like all other Americans, are concerned about what’s happening politically. The election was a shock to many in the country, booksellers included. They have been trying to figure out what their place is in this deeply polarized country, and they’ve come up with a number of different answers. Early on, many offered their stores as refuges for people who feared that their civil liberties would be under attack as a result of the change in the administration. There were stores that were focused on encouraging political participation, holding seminars on ways to influence public policy. There’s also a growing interest among some booksellers in promoting dialogue between the left and the right. So, we are definitely responding to the challenges that all Americans face, and we expect to continue to play our historic role as supporters of the marketplace of ideas.

**RASENBERGER:** Thank you, Chris. I think that describes the situation today very, very well, and it’s a good segue to our next panelist, Joan Bertin, from the National Coalition Against Censorship, who will talk about book censorship in schools, self-censorship by teachers, and the kinds of books that are challenged.

**JOAN BERTIN:** Thanks, Mary. There’s been a lot of attention to perceived assaults on First Amendment rights coming from the new Trump administration, but I’m going to talk about something that is very old-fashioned, which is book censorship in schools and libraries.

Censorship is a fact of life. It has probably been with us since the first storytellers told stories around a fire, and since the first artists drew pictures on the walls of caves. It has certainly been a fact of life ever since we have had the written word. It is part of the background noise of society, as people express differing views about things that are important in their lives. It is a predictable and constant feature of our work and the work of anybody who’s involved with either education or First Amendment activities. It is also notoriously hard to document, in part because an awful lot of it happens below the radar.

NCAC tracks book censorship incidents informally as they come to our attention, and the ALA makes an effort to track them more systematically, as much as possible, although one thing we know is that most efforts at tracking book censorship are notorious undercounts. One of the possible reasons for this is that a lot of these controversies are resolved behind the scenes. Another reason has to do with the fact that a lot of censorship happens preemptively, as a form of self-censorship.

In an effort to measure the pressures on public school teachers, with regard to the books they use in their classes, we teamed up with the National Council of Teachers of English, and did a survey of their members. We got responses from approximately 3,500 teachers. This was not a scientific survey, because we didn’t do a sample, and people were not required to fill out the responses. So it’s hard to say if this was representative of teachers more broadly. But of the people who did respond, 42 percent reported that they were aware of a challenge in their own schools in the last five years, and that’s a pretty significant number I think. And it corresponds with our experience, which is that book censorship challenges are quite common and widespread, even though most people don’t know about them.

When I tell people what I do for a living they always say to me, “Why are you talking about book censorship? We don’t have any book censorship in this country.” And I always say, “Yes, we do. Every day, some place in this country somebody is challenging or objecting to a book.” The reason people don’t know about it was hinted at in the survey responses, in that only a very small percentage of cases that involved challenges received any media attention or any attention from outside groups. Only 7 percent received media attention, and 9 percent received attention from an outside group. So, in point of fact, most people are not aware of a challenge in their own schools in the last five years.

NCAC tracks book censorship incidents informally as they come to our attention, and the ALA makes an effort to track them more systematically, as much as possible, although one thing we know is that most efforts at tracking book censorship are notorious undercounts. One of the possible reasons for this is that a lot of these controversies are resolved behind the scenes. Another reason has to do with the fact that a lot of censorship happens preemptively, as a form of self-censorship.

In an effort to measure the pressures on public school teachers, with regard to the books they use in their classes, we teamed up with the National Council of Teachers of English, and did a survey of their members. We got responses from approximately 3,500 teachers. This was not a scientific survey, because we didn’t do a sample, and people were not required to fill out the responses. So it’s hard to say if this was representative of teachers more broadly. But of the people who did respond, 42 percent reported that they were aware of a challenge in their own schools in the last five years, and that’s a pretty significant number I think. And it corresponds with our experience, which is that book censorship challenges are quite common and widespread, even though most people don’t know about them.

When I tell people what I do for a living they always say to me, “Why are you talking about book censorship? We don’t have any book censorship in this country.” And I always say, “Yes, we do. Every day, some place in this country somebody is challenging or objecting to a book.” The reason people don’t know about it was hinted at in the survey responses, in that only a very small percentage of cases that involved challenges received any media attention or any attention from outside groups. Only 7 percent received media attention, and 9 percent received attention from an outside group. So, in point of fact, most people are not aware of a challenge in their own schools in the last five years.

When I tell people what I do for a living they always say to me, “Why are you talking about book censorship? We don’t have any book censorship in this country.” And I always say, “Yes, we do. Every day, some place in this country somebody is challenging or objecting to a book.” The reason people don’t know about it was hinted at in the survey responses, in that only a very small percentage of cases that involved challenges received any media attention or any attention from outside groups. Only 7 percent received media attention, and 9 percent received attention from an outside group. So, in point of fact, most people are not aware of a challenge in their own schools in the last five years.

In terms of what happens with challenged books, our respondents reported that 45 percent of all challenges were resolved by offering an alternative assignment to the affected students. In some ways, maybe that’s the best result, because it probably only affects those students whose parents object, but this is an issue that would benefit from more information. If an alternative book was assigned for the entire class, that’s a bit more of a problem. If the teacher avoids the book in the future, to avoid possible challenges, that’s another problem.

More problematic is the fact that in some 20 to 25 percent of the cases, books were either restricted or removed from the classroom altogether. That means that the sensitivities, preferences, and the views of a few parents are restricting what is taught in schools, depriving other students of exposure to educationally valuable material.

Perhaps an even more troubling finding from this survey was the extent of self-censorship. Sixty-one percent of our respondents say they avoid, either frequently or regularly, books with sexual content. Another 55 percent avoid books that have profanity.
When I tell people what I do for a living they always say to me, “Why are you talking about book censorship? We don’t have any book censorship in this country.” And I always say, “Yes, we do. Every day, some place in this country somebody is challenging or objecting to a book.”

—Joan Bertin, Former executive director of the National Coalition Against Censorship (NCAC)
I will stop there and invite Mary to ask me some questions now or hold them until later.

RASENBERGER: I do have one follow up question. You and I have spoken about this before, censorship and self-censorship on college campuses, where there are often disputes about a sense of speech, and sensitivity triggers. Could you talk briefly about that?

BERTIN: Sure. There’s a lot of attention being paid right now to protests against Milo Yiannopoulos, Ann Coulter and Charles Murray, and I think it’s important to remember that 15 years ago, the same kinds of protests were being staged against Ward Churchill, Bill Ayers and Judith Butler. Now we seem to be in a moment where attacks are coming more from the left than from the right, but I think it would be incorrect to conclude that this is a one-sided phenomenon—it comes from both sides of the political divide and from places in between. We can see some of the same trends and tensions in the debate over “trigger warnings” on college campuses. (By trigger warnings, I’m referring to warnings that alert students in advance to specific material assigned in a course that might be upsetting or offensive.) Both of these situations reflect students’ heightened sensitivity to certain kinds of content, usually having to do with issues of race, ethnicity or gender.

To some extent, trigger warnings and objections to “controversial” speakers reflect a desire by students and faculty members to shield students from unpleasant ideas. But many academic groups, like the American Association of University Professors, have expressed serious reservations about the practice, while at the same time recognizing that teachers are always calibrating their approach to try to make the materials they use resonate. To convey the ideas they want to convey, in a manner that students can hear it best, and learn from it. Some instructors use a kind of a shock approach. Others do not. There’s room for experimentation in that, and different teachers can be successful using different methods.

The AAUP’s response, which I think is a wise one, has been to affirm the right of instructors to use techniques that they think best convey the material that they’re teaching, and at the same time, resist demands by administrators that they issue trigger warnings for certain kinds of materials. In doing that, the AAUP leaves it up to individual instructors, and that seems to me to be a smart resolution. Some teachers will use them. Some will not. In some cases, they’ll be effective. In other cases, they won’t. And then the whole question will evolve with a little more fact-based evidence about what works and what doesn’t work. The origin of the trigger warning issue has to do with an increasing awareness of sexual assault on campus and the fact that it was often not acknowledged on many campuses.

That said, it’s a good thing to recognize a problem that you’ve been sweeping under the rug. Now the question is, how do you recognize such a problem without undermining educational objectives, which may require students to confront unpleasant or upsetting attitudes or realities?

Does that sort of get to where you wanted to go, Mary?

RASENBERGER: Yes, that’s wonderful. Thank you, Joan. I think it’s really helpful to understand the issues on college campuses in that way. I want to move on now to David Horowitz. He’s the executive director of the Media Coalition, and he will talk about some of the issues that they’ve been working on recently. Dave, I’ll turn it over to you.

DAVID HOROWITZ: Thanks, Mary. Thanks for inviting me, and thanks to everyone attending. The Media Coalition does legal and legislative advocacy, which I guess is our fancy way of saying we do lobbying in the state and federal legislatures, as well as legal work, bringing challenges and writing friend of the court briefs in cases regarding laws that we believe violate the First Amendment. I’m going to talk a little bit about some of the issues we’re seeing right now and try to put them in context of a larger discussion.

Here are some examples of pressures on investigative journalism, in particular, citizen journalism, which is becoming increasingly common. The first, obviously, is government threats to prosecute publications of leaked materials. This is an old tradition. There’s been no abatement. A lot of it focuses on national security issues, but it is not limited to national security. The Obama administration was very aggressive in attempting to force reporters to reveal their sources of classified material and threatening them with prosecution. The Trump administration, based on everything they have said so far, is just as concerned about leaks, and has indicated interest in chasing down both the leakers and those who published the leaks. That is the way we think about prosecution of leaks most commonly, but it’s not limited in that respect.

Last year, we spent a lot of time fighting legislation in California that was intended to criminally punish anyone who published some undercover video tapes that were edited in such a way as to make abortion providers look bad by suggesting they were selling fetal tissue. In California, and many other states, you have to have the consent of each party to a private conversation to record them, otherwise it is illegal. This
legislation would have made it a crime to publish the recording even if the publisher was not connected to the illegal recording of the videos. That’s basically the same premise as punishing The New York Times for publishing the Pentagon Papers. Luckily, I can say that in the end we were able to get a bill that both sides could agree to and that didn’t impose any liability on publishers who did not participate in the actual illegal recording. But it’s an example of broader concerns with leaked materials and illegally obtained materials that are then published.

Another example along those lines is what we now call “ag-gag” laws, although they’re not limited to agricultural production anymore. They come in roughly three models. The first is that anybody who records cruelty to animals must immediately turn their recordings over to law enforcement, which may be sympathetic to the ag-producers, who are often large employers in town, and who may not be all that concerned with prosecuting cruelty to animals. The second version, which several states have passed, makes it a crime to obtain access to an agricultural or industrial business by lying on a job application in order to record activity, and then releasing those recordings. We often see these recordings documenting cruelty to animals, but you also see undercover journalism in old age homes and other places where there’s concern about the treatment of the patients or the clients. Versions of these laws have been passed in Wyoming, Utah and Idaho. All have been challenged, and all have been blocked so far. The Idaho law is now before the Ninth Circuit, and what happens in that case may dictate what happens in Wyoming and Utah. [After this panel, the Wyoming law was blocked by the Tenth Circuit Court of Appeals and the Utah law was struck down by the federal district court in Salt Lake City.]

The latest iteration of this attempt to stifle undercover investigative journalism are laws that allow the property owner to sue for civil damages if an undercover reporter or investigator obtains access to a property by not being forthright on their application for employment, and then publishes a recording that is harmful to the business. North Carolina has such a law, and Arkansas just passed a law that went even further by including a provision that would hold anyone who aided, encouraged, assisted or directed the person to make a recording, jointly liable. This means a business can sue a news publisher if they paid for the tape, or they said, “You get documentation of these violations of the law, we’ll publish it.” Under the Arkansas law, that act could amount to aiding the production of the tape that harmed the company and resulted in financial damage.

A third example along those lines is law enforce-
principle at this point. [The Third Circuit upheld the right to record the activity of law enforcement officers in public. The Second Circuit still has not ruled.]

The next area we see as a general conflict is one between privacy and speech, particularly now that more of people’s lives is being displayed online. Information doesn’t disappear with an old copy of a newspaper or when a book goes out of publication. There’s greater concern about how information affects people over the long term. Several examples that we’ve seen recently are essentially efforts to remove content, particularly from the Internet but also in published material, even when it’s truthful and accurate. In New York this year, legislation was introduced for “the right to be forgotten,” a concept imported from Europe, where they have many fewer protections for free speech and a much greater emphasis on protecting privacy. It would require that any inaccurate, irrelevant, inadequate or excessive content must be removed upon request. That is defined as content which, after a significant lapse in time from its original publication, is no longer material to current public debate or disclosure, especially when weighed against the financial, reputational or other harm that the information causes to the individual who would like it removed. That legislation didn’t go anywhere, but we don’t think it’s the last time that a state or the federal government might be interested in efforts to erase information generally.

A number of states have now considered laws that would require that arrest photos be removed from a website at the request of the person in the photo. Part of the problem is that there are businesses that essentially set up websites to publish mugshots and then charge people to have them removed; that’s the business model. We’ve been pretty effective in getting that legislation redirected to barring companies from charging to have the information removed, but mugshots themselves are often very important ways to convey stories, whether it’s Martin Luther King’s mugshot when he was arrested and subsequently wrote the Letter from Birmingham Jail, or Lee Harvey Oswald’s or O.J. Simpson’s mugshot.

Those are all efforts to have arrest information of various kinds removed from publication, but several states are considering laws to block publications of such information altogether. Both Texas and Illinois have considered bills to bar the publication of any picture of someone without their consent. Newsworthy or not newsworthy, it doesn’t matter. If you publish a picture of someone without their consent, it’s a criminal violation and they can request that it be removed. Montana considered a bill that would bar publication of an image of a fatal auto accident if the deceased person is identifiable and their next of kin has not yet been notified. It’s a reasonable interest in privacy certainly, but you can’t bar news publishers from publishing an image of an auto accident.

A lot of legislation is also being proposed that would bar publication of nude images of any kind, for any reason, at any time. They can be historical, educational, newsworthy, artistic. If you don’t have the explicit consent of the person depicted, you can’t publish the images. That means that publication of images from Abu Ghraib or Anthony Weiner’s cellphone, for example, would all be subject to criminal sanction.

Finally, there is the use of tort law to chill speech. The most obvious recent example was the lawsuit against Gawker by Hulk Hogan. Hogan’s lawyers used a particular tort, the publication of private facts, to get the case before a jury, because juries are known for being willing to punish news publishers. They don’t like them, and they like to impose damages on them. Unfortunately for Gawker, the owners couldn’t afford to continue to fight the lawsuit, even though they likely would have won in an appellate court.

Another example is the use of right of publicity. The right of publicity says that you can’t use my image in an advertisement for Coke or McDonald’s without my permission, but it is very common to see lawsuits being brought against speech that is not advertising. An example of this would be the soldier who sued Mark Boal, the author of the screenplay for The Hurt Locker and the article it was based on. He also sued Playboy, which published the original article, and the movie production company. The plaintiff ultimately lost but the case went on for several years, even though it was obvious that the article and the movie were not advertisements for anything. They were telling somebody’s story, and you don’t have to get somebody’s permission to tell their story, whether it’s flattering or unflattering.

My last example is libel, which has been in the news a lot, and the Trump administration keeps coming back to this point. A bill was introduced in Texas this year to make it easier to sue both publishers and authors for libel. This Texas legislation sought to make it a jury question rather than a question of law whether someone was a public figure or the case was a matter of public concern, which determines whether the higher burden of proof, the actual malice standard, applied. The bill is a threat because juries are much more inclined to punish authors, writers, journalists, news publishers and the rest of the media. That bill didn’t pass, but it was a blueprint for other states and potentially for the federal government to consider. Libel law has been established by the Supreme Court, and laws that violate those precedents will likely be struck down, but there are still legislators looking at ways, as they say, to open up the libel laws to allow plaintiffs to
put greater pressure on publishers, and in particular, to impose financial pressure on publishers by making them defend these lawsuits.

These are just some examples. I’m happy to talk about other legislation or any particulars about this legislation, if you’d like, but I’ll leave it there.

RASENBURGER: Okay, David, thank you very much. That was a lot of information, and I really appreciate you summarizing so much, so quickly. I have a couple of follow-up questions around the issues of defamation and right of publicity and how they can sometimes bump against free speech, and the types of cases that we’re seeing around those issues. It might be interesting for you to talk about either the Lohan case or the Tobinick case. The first issue is whether and how it’s important to limit the right of publicity claim, so that it doesn’t infringe on free speech, namely the free speech right to talk about individuals in an informational way as opposed to a commercial way. Then I want to ask another question about defamation, because we do have a president who has said that he would like to strengthen the libel laws.

HOROWITZ: Sure. The overview, particularly for the right of publicity, but also as an example in the Tobinick case, is that commercial speech gets much less protection under the First Amendment. It gets a different standard from what we call non-commercial speech. Commercial speech is limited to speech that is essentially an invitation to an economic transaction, as the lawyers say, which is essentially a fancy way of saying advertising. I can’t use Lindsay Lohan’s picture in an advertisement for a product. However, I can write a book about Lindsay Lohan, as a biography. I can use Lindsay Lohan as a character in historic fiction. I can make a movie about Lindsay Lohan, and it can be very unflattering, and it’s very much protected by the First Amendment.

So, the Take-Two case. … Take-Two is the maker of Grand Theft Auto. In the video game, there is a character that Lindsay Lohan feels is based on her. She accused Take-Two of using her image, her likeness and her personal characteristics. Even if the character is based on her, they’re allowed to do that, as long as it’s not in a commercial. They can’t make a video game that’s a commercial for a product other than the video game itself—for Coca-Cola, or McDonald’s or what have you. In that case, she has those rights. But there are a lot of attempts to try to shoehorn speech into what is considered commercial speech, and the Tobinick example is the same.

Dr. Edward Tobinick has a medical clinic in Florida. Some of the treatments he recommends for Alzheimer’s and other conditions are not generally accepted practices. Dr. Steven Novella is a professor at Yale, who has a blog, and he likes to write about medical procedures that he thinks are quack medicine. He did so about Dr. Tobinick’s treatments. Dr. Tobinick sued him, claiming that there was advertising on Dr. Novella’s website—you can buy T-shirts and such on Dr. Novella’s website—this converted the speech, the article and the blog post criticizing Dr. Tobinick from non-commercial speech into commercial speech. It was a fairly ludicrous argument, and the courts treated it as such, although it looks like Dr. Tobinick may seek review by the Supreme Court. [In early September, Dr. Tobinick filed a petition with the Supreme Court asking it to review the ruling by the Eleventh Circuit Court of Appeals. The petition is still pending.]

First Amendment protection for non-commercial speech is a very high barrier. Right of publicity and other torts like this and commercial speech are given much less protection. This is why you see these efforts by plaintiffs to shoehorn speech into the commercial speech area, to make it much easier for them to succeed. Those are a couple of examples that we’ve been involved with. I think both cases have probably

A bill was introduced in Texas this year to make it easier to sue both publishers and authors for libel. This Texas legislation sought to make it a jury question rather than a question of law whether someone was a public figure or the case was a matter of public concern, which determines whether the higher burden of proof, the actual malice standard, applied. The bill is a threat because juries are much more inclined to punish authors, writers, journalists, news publishers and the rest of the media. That bill didn’t pass, but it was a blueprint for other states and potentially for the federal government to consider.

David Horowitz
gone further than people thought they should have based on the merits, but that’s part of the problem. The distinction is an important one because most of what’s written, filmed, or produced is non-commercial speech, and therefore gets the highest protection under the First Amendment. And any chipping away at what we deem to be non-commercial speech is a significant threat.

RASENBERGER: Right. Thank you, David. That’s helpful. I do want to talk a little bit about how authors can protect themselves. A question that we get from many of our members when they’re writing about real people is, “Will I get sued writing about this?”

It’s helpful to understand the distinction between commercial and non-commercial speech, and that when you’re writing a book about somebody, that’s non-commercial. Right? Another concern that we’ve heard from some of our members is, “Well, first, Trump has said he wants to strengthen the libel laws to make it easier for plaintiffs. Is that a possibility?” Would that mean that there could be more meritless cases brought where plaintiffs bring lawsuits to scare the author or publisher, for instance by trying to shoehorn non-commercial speech into the commercial speech area or whatever just to get into court? Most authors cannot afford to defend those lawsuits, so they end up agreeing to not make the statements. Even if the publisher has agreed to cover the defense with insurance, generally speaking the author still has to pay the deductible. So, it can be very expensive to an author where the laws are not clear and harassment suits can be brought.

Before he became president, Trump himself bragged about bringing lawsuits against journalists and authors as a way of getting them to back down. I think he said once that he could crush a writer because he could afford to out-litigate them. Is this a real threat?

HOROWITZ: Yes, and he has done this. A New York Times reporter, Timothy O’Brien, wrote a book about Trump in 2005, in which he claimed that Trump was worth much, much less than he’d always claimed. He pegged Trump’s net worth at about $250 million, and Trump sued him. It was not dismissed in the district court, but it was ultimately dismissed after the appellate court reviewed the case. It was an effort to financially punish both the reporter and the publisher. The publisher did defend, and they did ultimately win. I think what happened to Gawker is not exactly defamation but an example of attempting to financially punish a publisher who wrote unflattering things. And in that case, it wasn’t even about the plaintiff but about somebody funding the plaintiff. It is an issue.

Maybe the best thing to do is to be an author in a state with a strong anti-SLAPP (Strategic Litigation Against Public Participation) law, which allows for the dismissal of the case at a very early stage and would minimize the financial cost. But it’s very difficult. It’s almost impossible to keep a plaintiff, particularly a deep-pocketed plaintiff, out of court. On the one hand, it’s a problem, and in anti-SLAPP lawsuits in some states, the prevailing party can obtain legal fees. So there’s a disincentive to those kinds of lawsuits. But not every state has an anti-slap law, and they’re a mixed bag. Some are much better than others.

There’s a lot of interest in a federal anti-SLAPP law that would be helpful in any federal court. As a lawyer, you know you can remove to federal court, assuming that you have constitutional interests or diversity of citizenship. But the bill keeps almost passing and then not quite passing. It’s a difficult issue because access to the courts is also a constitutional right, and you don’t want to deprive people of their right to the courts. It’s difficult to deny the right to access to courts, even to stop frivolous lawsuits.

RASENBERGER: Thanks for that. Do you see any potential for federal legislation on libel law, including anti-SLAPP law in this Congress? In other words, is there anything to President Trump’s statement that he’d like to strengthen the libel laws even though they are state laws?

HOROWITZ: I think it’s unlikely. I’m not sure there’s a great appetite among members of the House and Senate to get engaged in this kind of legislation. For the most part, libel laws are constitutionalized. So, you can’t pass a law that would change the actual malice standard to make it easier for plaintiffs to prevail. The Supreme Court has held that those are the rules, and you can’t just change that standard by legislative fiat.

Now I offer this caveat. It doesn’t mean that some legislatures, whether in the states or occasionally in Congress, don’t ignore what the Supreme Court has said and pass laws anyway. I don’t see anything in the federal legislature at this time. States are a very different story, and we see very odd things coming out of the states. The Texas legislature, for example, introduced a bill that would prevent any reporter who had given a campaign contribution in the previous five years, or worked for anybody who had, from benefitting from the Texas shield law that protects reporters from having to give up their sources. So we see all kinds of wild legislation in the states, and I wouldn’t rule it out there. But I don’t think there’s a great appetite for it in Congress.

The place that President Trump can exert greater influence is on his selection of judges, and in particular Supreme Court justices. Everything I’ve read about
Justice Gorsuch suggests that he is very strong on the First Amendment, and there’s no reason to think that he’s inclined to roll back what the Supreme Court has said about libel and the protections for speech in the context of libel law. But he’s also written very little on the subject, so we will see.

RASENBERGER: Thanks, David. We’ll move on now to some general questions for all three of you. I think it would be helpful if the three of you could talk about what you do on a day to day basis to address First Amendment concerns. How, in your daily work, do you go about bringing attention to issues? Exactly what is your work to ensure that the First Amendment remains protected and what are the challenges? I know that it’s a very open-ended question, but would one of you take a stab at it?

FINAN: Well, I go to Media Coalition meetings, and I read everything that Joan sends me. [Laughter] There is a handful of groups that focus mainly on free speech, and we all network through something called the Free Expression Network, sharing information that way. A lot of what we do is track the issues that our friends and allies are working on, so we know what’s going on. And when possible, we join in statements. Joan would probably want to say something about the fact that the NCAC often takes a leading role in drafting statements. We also did a statement on the Trump administration’s attack on mainstream media. That’s very important. The scope of the First Amendment now is so wide. There are so many parts of it that it’s a big part of our job to just keep track of that.

What I do at the Booksellers for Free Expression is a combination of advocacy and education on behalf of booksellers who are running into problems that are First Amendment related. Whether they’re being criticized by a customer for carrying a book or for not carrying a book. What’s the best way to respond to that? Author events by controversial people often become the focus of some intense protests. We help the booksellers walk through those problems and avoid the danger of canceling an event and creating a bad precedent.

—Chris Finan

I turned to Dave and to the Media Coalition to advise the bookseller about his constitutional rights, and they got involved and got the town to acknowledge the problem and to withdraw the violations.

The other big thing we work on a lot is the only national celebration of the freedom to read, and that’s Banned Books Week. It started in the early 1980s, and we have been working to bring it into the 21st century, working to build-up its impact through social media, and other initiatives. We think that’s very important. For many booksellers, it is their most popular promotion throughout the whole year. They get a tremendous response to the displays of books that people have no idea had ever been challenged. People walk in and see their favorite books from childhood and young adulthood in these displays, and it drives home to them the message that free speech continues to be a contentious issue in this country and needs people’s support. So that’s my day.

RASENBERGER: Thank you. I know this will date me in terms of my age, but I remember when I was in middle school or beginning high school and Are You There, God? It’s Me, Margaret, Judy Blume’s book, was first published. It was sort of a life changing book for my...
friends and me, and I later found out that that was one of the most commonly banned books, which I hadn’t realized at the time. As Joan mentioned earlier, there is so much book censorship that people just aren’t aware of. It’s a really interesting issue, how to create public awareness of banned books, and Banned Books Week is obviously a very good way to do that. It’s one of the things that your organizations do very well, to try to increase public awareness that there is still book censorship. Joan, can you tell us about some of the work that you do.

BERTIN: We work on a couple of different levels. As Chris indicated, we do work on the national policy level to articulate positions and organize different groups to join together to take a position, to make a statement or coordinate a campaign. Our own coalition has 55 national non-profit organizations, in addition to which we coordinate the Free Expression Network, which is a different group of free speech advocates. The National Coalition Against Censorship is composed of groups drawn from all sectors. There are religious groups, there are labor organizations, educational groups and so on. It’s not just civil libertarians. Whereas the Free Expression Network is a network of organizations that work specifically on one of many First Amendment issues.

But I also want to talk about a different aspect of our work, which is that we work with individual writers, teachers, students, parents, school administrators, you name it, around the country whenever there is a book censorship incident in a local community. We frequently get calls from authors who find out that their books have been challenged, and they ask for help. We then contact people in the school and try to assist in whatever way we can. In many of these cases, we will write a letter either to the principal, superintendent or the school board, depending on who’s involved, and try to help them understand their obligation under the First Amendment not to remove material just because somebody in their community doesn’t like it.

We have a very good track record in getting school boards to be more respectful of the fact that they serve a community with a wide diversity of views, even if some people are noisier than others and more insistent than others. As we often point out [to school officials], their chances of being successfully sued by a disgruntled parent who wants a book out of the school are slim to none, whereas their chances of being successfully sued if they take a book out that is educationally valuable, are much greater. The law has these principles embedded in it. People who work in school districts, from the teacher level up to the school board, don’t necessarily know what that law means or how to apply it, and we hope to be helpful to them in understanding what their legal obligations are.

I would say at least 50 percent of our work involves working in local communities around the country, and we work not just on book incidents but also art censorship incidents. Just this week there’s a new challenge to Rainbow Rowell’s book, *Eleanor & Park*, in Ohio, and a new challenge to *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie in Idaho. That’s the bread and butter kind of thing that we deal with.

RASENBERGER: Thank you, Joan. David, did you want to add anything? You did talk a bit about the types of litigations that you get involved in.

HOROWITZ: Just briefly, I would say that, on the legislative side, we monitor all 50 states and Congress. If we see legislation that’s a problem, we work with our members who may have people in the state or in state capitols, as well as other members who may have grassroots support, whether it’s booksellers or librarians, to try to stop the legislation.

We inform legislators that the bill is unconstitutional for whatever reasons, and we do everything we can to build a coalition to oppose it. In the event that the legislation passes, that’s when then we would
consider a challenge. Over the 40 or so years that the Media Coalition has been around, we’ve done at least 35 to 40 challenges, where we’ve gone into court and sued because the law violates the First Amendment, and—not to pat ourselves on the back—with a very strong record of success.

In fact, we’re just winding up a litigation in Louisiana, where they passed a law that said any website that has any sexual material that’s inappropriate for minors has to age-verify everybody who comes to the website, which typically drives away many people who come to that kind of content, who don’t want to give up their name and age to verify that that’s what they’re looking at. We sued and won in the district court, and the state of Louisiana decided not to continue the lawsuit. In that case, we worked together with our members, who were willing to be plaintiffs in the lawsuit. We bring the challenge. We would also look at writing a friend of the court brief for important cases we didn’t initiate but that we think could have a significant impact on the media players that are represented within Media Coalition, including authors, booksellers, book publishers, and librarians.

But most of my day is staying up to date on what’s going on in the various states, drafting letters and memos on the legal issues and then working with our lawyers, depending on where we are in litigation, having discussions about cases we might bring and where we are in cases that we’re currently involved with.

RASEMBERGER: Great, thank you. We have a question from a participant, which I think you would be the best person to answer, David. The question is about portraying a real person. Is there a difference between literature or portraying the person on stage or in film? In other words, does the medium matter?

HOROWITZ: In theory, it does not matter. However, there’s a lot of litigation around video games, and some courts have treated the issue differently for that medium. Video games are deemed to be fully First Amendment protected, no different than a book, a movie, a magazine, or any other kind of content. Yet, we’ve seen a handful of decisions recently in right of publicity cases, where the video game was treated differently, and the plaintiffs, typically athletes in sports games, were able to prevail where they would not have if the use had been made in the context of a movie or a book, because the court found reason to exempt video games or treat video games differently.

The implication for all media is that we then see court cases that open the door for litigation, whether it’s against video games or otherwise, and also with legislation to enact the right of publicity. It’s an issue both for the video game industry and video game creators, but it also has the potential to impact all the other parts of the media. Again, particularly when legislation is being written, there typically are big fights over which media is explicitly exempted from the right within the legislation. So that’s a long way of saying the medium shouldn’t matter, yet at times it does.

RASEMBERGER: But in terms of books versus film, what I’m hearing you say is that there really isn’t a difference. Like a nonfiction book compared to a documentary, or a made for TV fictionalized version of someone’s life or something like that.

HOROWITZ: I’ll tell you the biggest difference. Movies often make a lot more money, so they’re much more inviting targets to sue. Legally no, they’re not treated differently, but when the movie makes $200 million—in Hollywood accounting, that probably means they took a loss—but when you see in the newspaper, “Oh, it made $200 million and I’m a character. I’m gonna sue.” I guess what we should hope for is that books start making $200 million per year, and then we’ll see how it goes.

RASEMBERGER: Hear, hear! Exactly. We have only two minutes left, and there is one topic we haven’t gotten to, which I want to mention because we are hearing more and more about it. We are considering holding a panel on the topic. This is a relatively new phenomenon, or at least we’re hearing about it recently, where author manuscripts are being sent out to “sensitivity readers.” This particularly pertains to young adult books where there are issues of gender, race or sexuality. Outside readers are hired by a publisher to comment on the book, and we’ve heard from some authors that this feels like a form of censorship to them. With just a minute left, if any of you want to jump in and say anything about that, please do so. Otherwise, I’ll just tell the audience, stay tuned.

BERTIN: I would say that there’s a serious possibility that sensitivity readers could be used to avoid publishing controversial content. It’s not entirely impossible that they could be used to improve a text. It’s a very complicated issue, and I’m delighted to hear that you’re going to hold a panel on it, because it badly needs to be explored. I think that publishers have been under attack recently, and they might perceive this as a way to avoid future attacks. I just hope it won’t be at the cost of trying to avoid controversial topics.

RASEMBERGER: Thank you, Joan. It is a complicated topic. I want to thank Chris, Joan and David very much for your participation today. We really appreciate it. And, to everyone in the audience, we appreciate your participating today as well. ♦
contract for literary translation, which the Guild plans to roll out early in 2018, as part of its commitment to incorporate translators’ concerns into its ongoing Fair Contract Initiative.

The survey confirmed some long-held assumptions, while shedding light on new issues.

- Contradicting the belief that royalties for translators are a rarity, nearly half of the respondents reported always or usually negotiating royalties in their contracts. Similarly, over half reported receiving royalty payments, and over half of those whose contracts did not stipulate royalties said it was because the publisher refused.
- Two-thirds of translators reported always or usually retaining copyright to their work; over half of those who did not retain copyright said it was because the publisher refused to grant it.
- Half of the respondents who translate prose (where pay, as a rule, is significantly higher than it is for poetry) reported receiving 13 cents per word or more—slightly higher than the rate the Society of Authors states that UK publishers are prepared to pay. On the other hand, a disturbing number of respondents reported working for subpar rates of 7 cents per word or less.
- On the whole, the survey showed that income for literary translators has not changed significantly over the past five years. Although 39 percent reported spending more than half of their time on translation and translation-related activities, just 17 percent reported earning more than half of their income from that work.

“It’s so wonderful to have this detailed information about translation contracts and earnings finally available,” said Susan Bernofsky, director of the Literary Translation program at Columbia and a past chair of the PEN America Translation Committee. “I hope translators across the country will take advantage of the Authors Guild’s contract-vetting service, and also that more publishers will step up as champions of translator-friendly contracts. I’m grateful to the team at the Authors Guild for this significant contribution to translator advocacy.”

About the Survey

The survey was distributed online in April 2017, to members (approximately 1,200) of the Authors Guild, the American Literary Translators Association, the PEN America Translation Committee, and the American Translators Association’s Literary Division, and was also publicized on social media. The survey was open to all translators, but focused on those who work in the U.S. and/or work predominantly with U.S.-based publishers.

The survey’s main findings, with commentary and advocacy recommendations, can be seen at: www.authorsguild.org/wp-content/uploads/2017/12/2017-Authors-Guild-Survey-of-Literary-Translators-Working-Conditions.pdf

The Payout Is in Sight: 2000 Freelance Class Action Suit Nears a Conclusion—Again

It has been a long road, but we can report some progress toward the payout in the freelance class-action suit that the Authors Guild initiated in 2000. Many of you are claimants in that case, which was filed against electronic databases and two major newspapers and magazines (In re Literary Works in Electronic Databases Copyright Litigation). The case was brought because thousands of freelance writers had agreed to one-time usage of their works, which were then later used in electronic databases without their authorization and without them receiving additional compensation.

After 14 years of litigation—from the trial court to the Court of Appeals (twice), and to the U.S. Supreme Court—in June 2014, the Southern District Court of New York gave its approval to a (revised) settlement. The payout was set at $18 million. Initially, the lawyers for the class estimated that writers with valid claims would receive payment as early as the third quarter of 2015, but they didn’t know exactly how long the claims-administration process would take. As those of you waiting know, more than three years later, class members still haven’t been paid.

Unfortunately, publishers filed 41,000 specific objections (an unexpected and extremely large number) and after those were settled, some authors filed objections to proposed payouts, causing the long delay. Each of those objections had to be resolved through a pain-taking process of investigation and negotiation. (The plaintiffs’ lawyers did ask that the undisputed claims be paid without delay, but defendants and publishers...
wouldn’t agree to that.) Almost all of the objections have been resolved at this time and we are hopeful that the payout will occur in the coming month or two.

As the settlement process finally nears an end, we want to bring you up to date on where matters stand as of this date and offer the best information we can on what has happened, and what remains to be done before the money is paid out.

Case History

This litigation began after a federal appeals court ruled that the electronic rights in an author’s freelance works belong to the author, not to the print publication in which the article first appeared. Appeals of this decision led to a landmark Supreme Court decision, *New York Times v. Tasini* (2001), which held that several online databases and print publishers had infringed the rights of six freelance authors by reproducing the authors’ works electronically without first securing their permission.

This was a crucial moment for preserving the rights of working writers in the transition to an increasingly online publishing economy. The Authors Guild filed a companion suit in 2000, along with the American Society of Journalists and Authors, the National Writers Union, and 21 freelance writers, and that suit was combined with the *Tasini* case after the Supreme Court decision. The consolidated case then went back to the lower court for a decision on the remaining legal issues and amount of damages.

The defendants in the Authors Guild case are database owners such as LexisNexis, and publishers that included The New York Times, Dow Jones, Time Inc., and The San Diego Union-Tribune. We spent several years negotiating a settlement, which was approved in 2005. But legal challenges kept it bogged down in the courts.

When Will I be Paid?

With more than 3,000 authors and about 600,000 articles at stake, this was an enormous lawsuit. The many disputes over individual articles took the lawyers and the claims administrator by surprise. (In most cases, authors don’t even know if their claims have been disputed.) But the plaintiffs’ counsel now report that all the objections have been resolved, including two arbitrations which were held in mid-November. Now that the claims administrator has issued its Final Report, the timetable should be as follows:

- The claims administrator, Garden City Group, will issue its Final Report (which is expected to take place almost immediately after the arbitrations have ended).
- The publishers will have until February 18, 2018 to deposit the money they owe into an escrow account.
- The escrow agent then will have 28 days to report on which defendants have or have not made their payments.
- The Defense Group as a whole will then have 10 days to make good on any missing payments.

If this timetable holds (and we see no reason it shouldn’t), the claimant writers should receive their checks in April 2018. More information from the class counsel can be found on the settlement website, www.copyrightclassaction.com.

We are going to track this closely and will keep you up to date.

If you need to provide the claims administrator with your updated contact information, you can do so at: cert.gardencitygroup.com/ed2/fs/home.

How Much Will I Receive?

Because of the technicalities of copyright law, the amounts depend on whether each work was formally registered with the US Copyright office, and if so, when. (It’s not typical for freelance magazine and newspaper writers to do that, but it provides the strongest protection against infringement.) The plaintiffs’ works were divided into three classes: A (registered promptly), B (registered later), and C (not registered).

The exact amounts received will also vary depending on the original fee paid for the article, the year it was published, whether the writers registered the copyright, and whether they agree to future use of the article in the databases. According to lawyers working on behalf of the class, a small number of writers will receive settlement payments of more than $100,000; a larger number will receive five-figure payments, and many writers will receive four-figure checks.

Please note that only those class members who submitted timely, valid claims under the Initial Settlement Agreement are eligible to receive payments under the Revised Settlement Agreement. The claims deadline for that original settlement was September 30, 2005.

Details on categories of compensation and timing payouts can be found at www.authorsguild.org/industry-advocacy/18-million-freelance-settlement-update/
BOOKS BY MEMBERS


Rachel Caine: Ash and Quill; Cathleen Calbert: The Afflicted Girls; Stephanie Calmenson (and Anton Gionata Ferrari, Illus.): No Honking Allowed!; Eric Carle (Ed.): What’s Your Favorite Color?; Michael Carlebach: Some of Us; Betsy Carter: We Were Strangers Once; Michelle A. Carter: From Under the Russian Snow; Selene Castovilla (and John O’Brien, Illus.): Revolutionary Rogues: John André and Benedict Arnold; Diane Chamberlain: The Stolen Marriage; Christina Charles: The Secrets Between Her Thighs; Jerome Charyn: Winter Warning; Ron Chernow: Grant; Stephen D. Chicoine: Captain Mallon: Doughboy Hero; Andrew Clements: The Losers Club; Michael Connelly: The Late Show; Bruce Coville (and Paul Kidby, Illus.): Trolled; Judy Cox (and Nina Cuneo, Illus.): Sheep Won’t Sleep: Counting by 2s, 5s, and 10s; Doreen Cronin: Cyclone;


Jennifer Egan: Manhattan Beach; Dave Eggers (and Shawn Harris, Illus.): Her Right Foot; Diane Elliott: Blood Fiction; Susan Middleton Elya (and Juana Martinez-Neal, Illus.): La Princesa and the Pea; Karen English: It All Comes Down to This; Hallie Ephron: You’ll Never Know, Dear; Helen Epstein: Another Fine Mess: America, Uganda, and the War on Terror;


The National Book Awards were presented at a black-tie gala held at Cipriani Wall Street on November 15 in New York. Jesmyn Ward won the Fiction prize for Sing, Unburied, Sing, her third novel and her second National Book Award win in six years. (Salvage the Bones won the prize in 2011.) Frances FitzGerald’s The Evangelicals: The Struggle to Shape America was a finalist in the Nonfiction category. Jennifer Egan’s Manhattan Beach and Carol Zoref’s Barren Island were longlisted for Fiction. Annie Proulx was awarded the National Book Foundation’s 2017 Medal for Distinguished Contribution to American Letters. The award, “recognizing individuals who have made an exceptional impact on this country’s literary heritage,” was presented at this event.

The shortlists for the Carnegie Medal for Excellence were announced on October 26. Jennifer Egan’s Manhattan Beach and Jesmyn Ward’s Sing, Unburied, Sing were shortlisted in the category of Fiction. Sherman Alexie’s You Don’t Have to Say You Love Me: A
Memoir was shortlisted in the category of Nonfiction. On the Carnegie longlists, announced in September, were Louise Erdrich’s Future Home of the Living God and Paul La Farge’s The Night Ocean were longlisted in the category of Fiction. Ron Chernow’s Grant and William Taubman’s Gorbachev: His Life and Times were longlisted in the category of Nonfiction. The winners will be announced at the American Library Association (ALA) Midwinter Meeting in Denver on February 11.

Kirkus Reviews announced the finalists for the 2017 Kirkus Prize on September 19. Jesmyn Ward’s Sing, Unburied, Sing was a finalist in the category of Fiction. Karen English’s It All Comes Down to This was a finalist in the category of Young Readers’ Literature. Lorri Horn’s Dewey Fairchild, Parent Problem Solver was also longlisted in the Young Readers’ Literature category.

Grant announced its third Best of Young American Novelists list. Lauren Groff and Garth Risk Hallberg were among those recognized.

Bethany Ball’s What to Do About the Solomons was shortlisted for the Center for Fiction’s 2017 First Novel Prize. Marcie R. Rendon’s Murder on the Red River was longlisted.

Peggy Adler received the Albert Nelson Marquis Lifetime Achievement Award in recognition of her outstanding contributions to the literary profession.

Anne Applebaum’s Red Famine: Stalin’s War on Ukraine was longlisted for the Baillie Gifford Prize, given for nonfiction.

Ronald Argo’s Baby Love won the 2016 Library Journal Indies Ebook Award in the Mystery category.

Tucker Axum III won the second annual James Patterson Co-Author Competition.

Seeds of Freedom: The Peaceful Integration of Huntsville, Alabama by Hester Bass was the 2016 Elementary Honor Book for the Carter G. Woodson Award, given by the National Council for the Social Studies.

Patricia Bell-Scott’s The Firebrand and the First Lady: Portrait of a Friendship: Pauli Murray, Eleanor Roosevelt, and the Struggle for Social Justice won the Lillian Smith Book Award. Established in 1966 by the Southern Regional Council, this award honors those authors who, through their writing, carry on Smith’s civil rights legacy. Ms. Bell-Scott’s book was also nominated for the Hurston Wright Legacy Award in the category of Nonfiction. Excerpts from the book were adapted for the May 12, 2017, première of “Silent Voices,” a musical performance by the Brooklyn Youth Chorus.

Alexander Chee has been named this year’s Paul Engle Prize recipient. The award recognizes “an individual who . . . represents a pioneering spirit in the world of literature through writing, editing, publishing, or teaching, and whose active participation in the larger issues of the day has contributed to the betterment of the world through the literary arts.” The award will be presented during a special ceremony as part of the Iowa City Book Festival on October 12.

Martha Cooley’s “Mercedes Benz,” originally published in A Public Space, was among the O. Henry Prize Stories winners for 2017.


Edwidge Danticat won the 2018 Neustadt International Prize for Literature. The award “recognizes outstanding literary merit in literature worldwide.”

Ellen Datlow won the Hugo Award for Best Editor, Short Form.

Susan Faludi’s In the Darkroom was longlisted for the Brooklyn Public Library Literary Prize in the category of Fiction.

Thomas Fox won Dan’s Papers 2017 Literary Prize for Nonfiction for his short story “The East End Rocks.”

Ruth Franklin’s Shirley Jackson: A Rather Haunted Life won the Biographers International Organization’s Plutarch Award for best biography.

D. L. Gardner’s novel Cassandra’s Castle received a Book Excellence Award in the category of Young Adult Fiction.

Susan J. Gordon’s Because of Eva: A Jewish Genealogical Journey received the 2017 Award for Best Memoir from the American Society of Journalists & Authors at a reception in New York City on May 5, 2017.

Philip Gourevitch was awarded the Whiting Creative Nonfiction Grant. The $40,000 award is for works-in-progress and “intended to support multiyear book projects requiring large amounts of deep and focused research, thinking, and writing.”

Cathryn Hankla’s Great Bear: Poems was a finalist for the Library of Virginia Award in Poetry.

Anne Hosansky’s “Fanny Brawne Afterward” won First Place in the NY Poetry Forum Contest and was an Honorable Mention in the Mid-Island YJCC Poetry Contest in Nassau County, NY.

Dorothea Jensen’s A Buss from Lafayette was a Purple Dragonfly Book Awards First Place Winner in the Historical Fiction category, a Literary Classics Book Awards Gold Medalist in the Middle School/Historical Fiction category, an eLit Awards Bronze Medalist in
the Juvenile/Young Adult category, a recipient of the Children’s Literary Classics “Seal of Approval,” and a Booklife Prize in Fiction Quarter Finalist in the Middle Grade category.

Suzanne Kamata’s The Mermaids of Lake Michigan was awarded a Silver IPPY Award for Best Great Lakes Fiction.

Jon LaPoma’s Understanding the Alacran won the silver medal in the 2017 Florida Authors and Publishers Association President’s Awards in the Contemporary/Literary category.

Marc Liebman’s novel Forgotten was a finalist for the Next Generation Indie Book Awards in the category of Historical Fiction and the Book Excellence Awards in the category of Fiction.

Weam Namou’s The Great American Family: A Story of Political Disenchantment won a 2017 Eric Hoffer Book Award in the Self-Published category.

Idra Novey won the Sami Rohr Prize for Jewish Literature for her novel, Ways to Disappear.

Roberta Parry’s Killing Time won second place for Adult Fiction in the New Mexico Press Women’s 2017 Communications Contest.


Annie Proulx’s Barkskins was shortlisted for the 2017 Dayton Literary Peace Prize.

Patricia Skalka’s Death in Cold Water won the 2016 Edna Ferber Fiction Book Award from the Council for Wisconsin Writers. The award was presented in Milwaukee, WI, on May 13.

George Saunders’ Lincoln in the Bardo won the 2017 Man Booker Prize.

Grace Talusan’s memoir The Body Papers won the 2017 Restless Books Prize for New Immigrant Writing for Nonfiction.

Christine Topjian’s Jesus Loves You won the Christian Small Publishers Book Award of the Year in the category of Gift Book. The awards honor books produced by small publishers each year for outstanding contributions to Christian life.

Jesmyn Ward is a 2017 MacArthur Fellowship recipient. The fellowship includes a $625,000, no-strings-attached award for extraordinarily talented and creative individuals to “pursue their own creative, intellectual, and professional inclinations.”

Jane Weitzman was named the board president of the Jewish Book Council.

Julie Weston’s Basque Moon won the WILLA Literary Award in the Historical Fiction category.

Darryl Wimberley’s A Sleeping Wound won a Goethe Award in the Women’s Historic Fiction category.

Ben H. Winters’s Underground Airlines was a finalist for the 2017 Chautauqua Prize.

Romy Wyllie’s Loving Andrew: A Fifty-Two-Year Story of Down Syndrome won the 2017 John E Weaver Excellent Reads Award in the Parenting category.

---

**IN MEMORIAM**

Michael H. Agar, 72, died on May 20, in Santa Fe, NM. A linguistic anthropologist with multiple interests, he was the author of Ripping and Running, The Professional Strange and The Naked Emperor on Drugs.

Brian Aldiss, 92, died August 19 at his home in Oxford, England. The author of more than 80 works of science fiction, his best-known works include Non-Stop, Hothouse, Greybeard and the Helliconia trilogy.

John Ashbery, 91, died on September 3 at his home in Hudson, NY. In 1976, he became the only writer to win the Pulitzer Prize, the National Book Award and the National Book Critics Circle Award in the same year for his poetry collection Self-Portrait in a Convex Mirror. He also received the National Humanities Medal in 2012.

Michael Bond, 91, died June 27 at his home in London. He was the creator of the popular children’s book character Paddington Bear. He wrote more than 20 books about the traveling bear, of which 35 million copies have been sold worldwide, in a multitude of languages.

J. P. Donleavy, 91, died September 11 in Mullingar, County Westmeath, Ireland. An American expatriate who lived most of his life in Ireland, he was best known for his novel The Ginger Man.
Jean Fritz, 101, died May 14 at her home in Sleepy Hollow, NY. She was an award-winning author of over 45 books of history for children, including *Bunny Hopwell’s First Spring*, *George Washington’s Mother* and *Homesick*, which won the National Book Award.

A. R. Gurney, 86, died June 13 at his home in Manhattan, NY. A successful Broadway playwright who explored the customs and failings of the upper classes, he was also the author of several novels, which punctuated his long career in the theater.

Beatrice Trim Hunter, 98, died May 17 in Hillsborough, NH. The author of 38 books, she was best known for *The Natural Foods Cookbook*, first published in 1961.

Denis Johnson, 67, died May 24 in Gualala, CA. The award-winning author was best known for his short-story collection *Jesus’ Son* and his novel *Tree of Smoke*, which won the National Book Award in 2007.

Spencer Johnson, 78, died July 3 in San Diego, CA. He was the author of the best-selling books *Who Moved My Cheese?* and *The One Minute Manager*.

Lee Maynard, 80, died June 16 at a hospital in Albuquerque, NM. He was the author of the Crum trilogy, based on his West Virginia hometown.

Kate Millett, 82, died September 6 in Paris, France. She was a feminist and human rights activist, best known for her first work, *Sexual Politics*, published in 1970.

Robert Pirsig, 88, died April 24 at his home in South Berwick, ME. He was the author of the best-selling 1974 classic *Zen and the Art of Motorcycle Maintenance*.

Lillian Ross, 99, died September 20, in Manhattan, NY. She wrote in short and long form for *The New Yorker* from 1945 to 2012. A superb observer, she kept the focus on her subjects and herself in the background. “The act of a pro is to make it look easy,” she wrote in *Reporting Back: Notes on Journalism*. “If you’re good at it, you leave no fingerprints.”

Kenneth Silverman, 81, died July 7 in Manhattan, NY. He was the Pulitzer Prize–winning author of the biography *The Life and Times of Cotton Mather*.

Judith Stein, 77, died May 8 in Manhattan, NY. A historian and professor at City College, she was the author of *The World of Marcus Garvey: Race and Class in Modern Society*, *Running Steel*, *Running America* and *Pivotal Decade*. [commas to semis, with Running Steel, RA as one entry?]

James Stevenson, 87, died February 17 at home in Cos Cob, CT. A prolific artist and author, he produced close to 2,000 cartoons and a considerable number of articles for *The New Yorker*, while writing or illustrating more than 100 children’s books.

Susan Vreeland, 71, died August 23 in San Diego, CA. Best known as the author of *Girl in Hyacinth Blue*, she also published several *New York Times* best-selling books. Her work has been translated into 26 languages and adapted for films.
An Author’s Guide to Agency Agreements

Agreements between authors and agents can be tricky things. Sometimes there’s a written contract setting out the terms of the relationship, sometimes there isn’t. And even when there is a contract, the language it uses can seem alien to non-lawyers. But, since this is one of the most crucial professional relationships in an author’s life, it’s vital that you understand it clearly. To help you navigate the mysteries of the agency agreement, we’ve compiled a guide of key points for you to keep in mind.

I. Literary Agent Representation—the Relationship

Before addressing the major issues to be considered in an author-agent contract, let’s explore what authors need to know about the relationship between author and agent.

The Agent Owes a “Fiduciary Duty” to the Author

A literary agent or agency has a “fiduciary” relationship with its author clients; this means that you are placing a greater level of trust in your agent than you do in other commercial dealings, such as your relationship with your publisher.

Agency Agreement vs. Agency Clause—Pros and Cons

A number of literary agencies do not provide their clients with written agency agreements, but instead rely solely upon the agency clauses that will be inserted into the publishing and motion picture agreements. It’s best, though, to have a written agency agreement in place to prevent any misunderstandings as to the terms of the arrangement, and to define the terms in the event of termination.

Recommendations

If the agency does not provide the author with a written agency agreement, it is best to ask for one to make sure all terms are understood and agreed upon. If the agency does not provide a contract and insists on relying on an agency clause, then before retaining the agency the author should ask to review and approve the clause used by that agency in the contracts it negotiates. It is best to do this by e-mail so that you have a written record and to acknowledge that you agree to the terms, so that there is a legally binding agreement.

The Agency Clause

An agency clause (such as is often added to publishing and other licensing agreements) may also set out the terms of the relationship between the author and the agent. Such clauses usually:

1. Provide that all sums payable to the author shall be paid to and in the name of the agency.
2. Stipulate the percentage commission that the agency is entitled to deduct from amounts payable to the author (these are generally standard and non-negotiable—see below); and
3. Provide that the agency is entitled to act on the author’s behalf in all matters arising out of the publishing or other applicable agreement.

Many agency clauses (and agreements) state that there is “an agency coupled with an interest”. This phrase should be deleted, since if the agency relationship is truly an “agency coupled with an interest”, the relationship would then be irrevocable. In fact, almost every agency clause is revocable by the author, and courts and legal commentators agree that merely inserting language in an agency agreement or clause stating that it is “an agency coupled with an interest” doesn’t create an unbreakable relationship unless the agent actually has an interest in the author’s work apart from the mere right to receive commissions.
RECOMMENDATIONS
Authors should carefully review the agency clause, as well as any agent representation agreements, to confirm that the scope of the agency clause or agreement does not exceed the rights the author intends to grant to the agent. If an agency clause is to be used instead of a representation agreement, the author should (i) review a sample clause provided by the agency and get a representation in writing (e-mail is fine) that the sample provided is the one that will be used in future agreements, and (ii) confirm agreement to the agency clause in writing (again, e-mail works) to create a binding agreement.

Beware of Reading Fees
The Association of Authors’ Representatives (the leading trade association for literary agents), includes in its Canon of Ethics a prohibition against members charging fees to potential or existing clients to read and evaluate their writings. If an agent charges “reading fees,” the author should seriously consider finding an agent who does not, since such fees are not customarily charged by leading literary agents.

II. Agency Agreements—Principal Provisions
Now that you have, we hope, a clearer understanding of how the agency relationship works, let’s move on to the contracts themselves. Here are some major points to consider when you’re asked to sign an agreement with a literary agent or agency:

What Works Are Covered
An agent may wish to represent only a client’s new work, all of the client’s work, or just every work the client writes during a stated period of time. (To be clear, the agent’s rights to represent the work are usually granted in perpetuity, or until the relationship is terminated under the terms of the contract or by the mutual agreement of the agent and the author.)

RECOMMENDATIONS
The agreement usually covers only one work (except where multi-book deals are involved) and that work should be defined as specifically as possible—at least by its subject matter and, if possible, by its tentative title.

Rights Granted During the Term of the Agreement
An agency agreement gives an agent the right to sell the work to a publisher for a specific number of months, or even years. Normally, the agent is appointed the author’s exclusive worldwide agent to sell, license or otherwise negotiate the transfer of rights in the work covered by the agreement, for the term set out in the agreement; this means that the agent alone is entitled to act on the author’s behalf in negotiating the exploitation of the work(s) covered by the agreement. The agent should also have the right to appoint sub-agents to handle the transfer rights that the primary agent may not be equipped to handle—such as outside the U.S. and Canada or in foreign languages, as well as other non-publishing rights, such as motion picture, television and theatrical rights.

RECOMMENDATIONS

1. Termination: As a general matter, an author should have the right to terminate the agency agreement if the agent doesn’t make a book publishing deal within the agreed upon number of months. Even if the agent agrees to such a right to terminate, however, the agency is normally entitled to receive commissions on deals the agency procured prior to the author’s termination of the relationship. Therefore, the agent should still be entitled to receive commissions if, within 90 days (or sometimes up to 180 days) after termination, the author enters into a publishing agreement with a house with which the agency negotiated the basic terms of a deal prior to termination.

Some agencies will insist that they are entitled to receive commissions if they submitted the author’s work to the ultimate publisher, even if they did not negotiate the basic terms of the publishing agreement. The author should resist agreeing to compensate the agency in these circumstances. Remember, if another agent is subsequently retained and actually negotiates the deal, that agency is usually entitled to receive its own commissions.

If an agent charges “reading fees,” the author should seriously consider finding an agent who does not, since such fees are not customarily charged by leading literary agents.
A fair compromise where the original agent submitted the work is to give that agent an additional period (of up to six months from the date of termination) in which to substantially negotiate a deal for that manuscript. As an alternative, the agency agreement should give the author the right to demand a list of places where the agency has submitted the author’s manuscript; if an agency insists on receiving commissions in perpetuity from deals that were negotiated but not concluded during the agency term, then the author should at least receive a list of those publishers to whom the agency submitted the work.

2. The scope of representation stated above (including the right to appoint sub-agents to transfer rights outside the U.S. and Canada in the English language, in foreign languages and other non-publishing rights such as motion picture, television and theatrical rights) is usually acceptable in the industry, except in the rare occasion where the author has a pre-existing relationship with a motion picture agent.

3. The agreement should require that the agency keep the author regularly advised as to all negotiations on the author’s behalf.

4. The agency should be expressly prohibited from signing any deal, memo, publishing agreement or subsidiary rights agreement on the author’s behalf. The client author is the only party who should sign such agreements granting rights to the author’s work. When an agent signs a deal on behalf of the author, misunderstandings can occur and rights can be granted without the author’s knowledge or approval. It is a recipe for the agency relationship to go sour.

Agent Commissions

The following rates are considered to be standard in the industry:

1. Commissions on domestic book publishing and performance rights (motion picture, television and live stage rights) agreements are generally 15 percent of the gross amounts payable to the author.

2. Commissions on foreign rights agreements are generally 20 percent of the gross amounts payable to the author on foreign rights deals (although some agents charge a higher commission on sales in certain foreign countries where the amounts received are generally very small for the efforts involved). These commissions are generally standard and non-negotiable, although it is best to seek to ensure that the 20 percent royalty rate (as opposed to 15 percent) only applies on foreign sales if a sub-agent is used.

Payments to The Author by The Agent

Most agency agreements provide that all advances and royalties payable to the author under any publishing or other agreement for exploitation of rights in the author’s applicable work will be paid to and in the name of the agency, which will deduct its commissions (and any expenses covered elsewhere in the agency agreement) and then remit the balance to the author.

RECOMMENDATIONS

1. The agency should be required to remit monies due to the author within ten days (or within a mutually agreed upon fixed period of time) after receipt by the agent.

2. The agency should be required to hold all monies received on behalf of the author in the agency’s client trust account rather than in the agency’s general account. (This is the practice of most reputable agents in any event.)

3. If the agreement (or agency clause) provides that the agency’s commissions are payable “as an agency coupled with an interest,” this phrase should be deleted (for the reasons set forth above).

4. The agency should provide the author with copies of all fully executed license agreements and royalty statements it receives for the work.

5. The agency should agree to give the author a semi-annual or annual accounting of monies it received on the author’s behalf.

6. The agreement should expressly provide that if the author terminates the agency agreement after the agency has made a sale, then the agency will sign an amendment to any [publishing or other] agreement [in which its agency clause was inserted] with respect to the work which would provide that:

   a. The agency is no longer authorized to act as the author’s agent with respect to the work covered by the applicable agreement (i.e., the agency will not negotiate any future amendments or new agreements regarding the work); and
b. The agency’s share of commissions will be paid directly to the agency by the publisher and the balance shall be paid directly to the author or the author’s designee.

7. The agency should not be entitled to receive commissions on sales of rights in the work made after termination of the agency agreement by the author—unless the agency has been responsible for procuring such sale or such sale had been substantially negotiated by the agency prior to termination of the agency agreement.

Expenses
The agency may be expressly entitled to deduct from money owed to the author expenses such as those for postage, messengers, bank charges, photocopying a manuscript and sending copies of a manuscript to foreign publishers and/or sub-agents.

RECOMMENDATIONS
The author should be entitled to approve each expenditure in excess of $75.00 (or another mutually agreed upon amount) before it is deducted; or alternatively, the parties should establish a firm cap total of expenses after which additional expenses must be individually approved.

Warranties, Representations and Indemnities
Occasionally, agency agreements contain warranties, representations and indemnities from the author to the agency similar to those found in publishing agreements.

RECOMMENDATIONS
The author should seek to delete these provisions from the agreement. Although the author will have to assume such obligations in any book publishing agreement to protect the publisher against claims or lawsuits regarding the contents of the author’s literary work, the author’s agent is not exposed to such risks and therefore does not need such protections.

Assignability
The agreement may provide that it is assignable by the agency.

RECOMMENDATIONS
Because an agency agreement is a fiduciary one, the agreement should prohibit assignment by the agency of the agency agreement to another agency. However, there is usually no reason to object to the agency’s ability to assign its right to receive commissions.

Claiming Your Royalties

Continued from page 13

to result in large findings of unpaid royalties, but may be sought for strategic or other business reasons, auditors may choose to work on an hourly rate or a fixed fee. An auditor’s pre-audit discussions with an author and a basic review of royalty statements and publishing agreements are usually free of charge.

Authors may be hesitant to assert their audit rights for fear of upsetting their relationship with their publisher—but remember, your publishing agreement is the codification of a business relationship, not a friendship. Publishers are regularly faced with audit requests as part of the normal course of business, and authors are legally entitled to a review of the records that support their royalty payments. Authors should not fear retaliation, only inadequate information. Authors can be sure of the accuracy of their payments only after they ask the questions they have the legal right to ask, and receive accurate information.

Ms. Saitz leads the royalty compliance practice at Ankura Consulting Group. She can be reached at juli.saitz@ankuraconsulting.com.
Literature and Migration, 2.0

In our article on immigrant authors in the last issue of the Bulletin (Summer 2017), we invited readers to submit names of favorite writers we may have overlooked. Our first response came from member Manu Herbstein of Accra, Ghana, who sent us a remarkable list of authors, which we reprint here with thanks.

Mr. Herbstein, a Guild member who was born in South Africa, is the author of Ama: A Story of the Atlantic Slave Trade, which won the Commonwealth Writers Prize for Best First Book in 2002.

Any future contributions to this and the original list will be posted on the Guild’s website (authorsguild.org).

DENNIS BRUTUS
Sirens, Knuckles, and Boots; Letters to Martha and Other Poems from a South African Prison. Born November 28, 1924, Salisbury, Southern Rhodesia (now Zimbabwe); died Cape Town, South Africa, December 26, 2009. Brutus spent time as a political prisoner on Robben Island. He was granted political refugee status in the United States in 1983 and taught at the University of Denver, in Colorado (where he earned his PhD in 1968), and University of Pennsylvania from 1966 to 1977. He wrote two autobiographies, many essays and short stories, two verse plays, and a number of poems.

ES’KIA MPHALELE
Man Must Live, Down Second Avenue, The African Image. Born December 17, 1919, Marabastad Township, Pretoria, South Africa; died October 27, 2008, South Africa. Mphahlele taught at the University of Denver, in Colorado (where he earned his PhD in 1968), and University of Pennsylvania from 1966 to 177. He wrote two autobiographies, many essays and short stories, two verse plays, and a number of poems. He was awarded a White House Fellowship in 1996 under then-president Bill Clinton.

SANTHA RAMA RAU
A Passage to India (novel), Home to India (stage adaptation). Born January 24, 1923, Madras, India; died April 21, 2009, Amenia, NY. The first Indian student to attend Wellesley College, Rau graduated with honors in 1944. She was primarily a travel writer—a chronicler of journeys in Asia, Africa, and the former Soviet Union.

NGŪGI WA THIONG’O

MAZISI KUNENE
Emperor Shaka the Great, Anthem of the Decades. Born May 12, 1930, Durban, South Africa. A poet and scholar of the Zulu nation, Kunene was active in the anti-apartheid movement while in extended exile. A professor of African literature for close to twenty years at the University of California, Los Angeles, he was also South Africa’s first poet laureate. He returned to South Africa in 1992 and died in his home town, Durban, on August 11, 2006.

BENJAMIN KWAKYE

MARK MATHABANE
Kaftir Boy, Miriam’s Song. Born October 18, 1960, Alexandra, Gauteng, South Africa. Mathabane moved to the United States in the late 1970s, sponsored by tennis star Stan Smith. He was awarded a White House Fellowship in 1996 under then-president Bill Clinton.

STAY CURRENT ON GUILD NEWS!

Don’t miss industry news, updates on our advocacy efforts and valuable resources for your writing business.

• Follow us on Twitter: twitter.com/authorsguild
• Like us on Facebook: facebook.com/authorsguild
• Subscribe to our e-mail newsletter: eepurl.com/blUBZD

To ensure that your Authors Guild e-mail messages always make it to your inbox, add news@authorsguild.org and staff@authorsguild.org to your e-mail address book. If you are a Gmail user, simply move one of our e-mails from your promotions tab to your primary tab.
Legal Watch
Continued from page 28

Lessons for Home
While the court’s decision in Access Copyright was ultimately a victory for the rights of the Canadian writer, the facts show that the university-created educational fair dealing guidelines raised levels of poverty for thousands of Canadian writers, killed off the school division of educational publishing for the largest university press in the world, and led to the loss of employment for many in the publishing field.

What should be unsettling to American authors is that the same pattern can—and is—occurring here. Pearson is currently reviewing the viability of its U.S. course work business, and it would be foolish to think other major publishers are not doing the same.

As mentioned earlier, U.S. fair use doctrine is looser than Canada’s, which prescribes specific categories for what does and does not constitute fair dealing. U.S. fair use law merely sets out general principles of fair use, providing an open-ended list of examples. This means the U.S. is even more vulnerable than Canada when it comes to potential abuse of a fair use/fair dealing system.

The plight of the Canadian publishing industry and its writers is a powerful incentive for reviewing the way we conduct our own copyright law. It’s up to us, the citizens, to call out universities and other organizations that take advantage of what were meant to be exceptions to copyright law, not the norm.

—James M. LoPiano
Legal Intern
Membership Application

Mr./Ms. __________________________________________ Pseudonym(s) _____________________________________

Address __________________________________________ City ____________________ State _______ Zip ____________

Phone ( ) __________________ Fax ( ) ____________________ E-mail ___________________________________

Agent name __________________________ Agency ______________________ Agent phone ( ) _______________

How did you become interested in joining the Guild? (check one)
 Invitation
 Writing journal _____________________
 Referred by _________________________________________
 Other _______________________________________________

What is your primary reason for joining?
 Support and advocacy efforts
 Legal services
 Health insurance
 Site-builder and other Web services
 Other ___________________________________________________________________

Qualifying writers include book authors and freelance journalists. Book authors published by an established American publisher and self-published writers who earned at least $5,000 in writing income as a book author or freelance writer in the 18 months prior to applying for membership are eligible. Writers earning at least $500 in writing income in the 18 months prior to applying for membership may qualify for acceptance as Associate members of the Authors Guild. Freelance journalists must have published three works, fiction or nonfiction, in a periodical of general circulation within the last 18 months.

Book(s)  
Title  
Publisher  
Year  
Field/Genre
__________________________________________  
__________________________________________

Freelance articles  
Title  
Publisher  
Mo./Year  Subject
__________________________________________  
__________________________________________

__________________________________________  
__________________________________________

__________________________________________  
__________________________________________

Please enclose a check for your first year’s dues in the amount of $125 payable to “The Authors Guild” or charge your Visa or MasterCard. Account No. _______________ Expiration Date _____/_____ Amount: $125

Mail to:  
The Authors Guild  
31 East 32nd Street, 7th Fl.  
New York, NY 10016