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THE AUTHORS GUILD BULLETIN

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COVID-19 RESOURCES FOR AUTHORS

All our lives have been upended in unprecedented ways, but the Guild remains here for you and is working harder than ever to support those of you who have been impacted by COVID-19.

Our website offers comprehensive details about government economic relief, needs-based funding, and our various programs and initiatives in response to the virus. We will continue to issue regular updates.

authorsguild.org/covid-19-resources-for-authors
TRIBUNE MEDIA OFFERING EMPLOYEE BUYOUTS

In November 2019, the hedge fund Alden Global Capital purchased a 32 percent stake in the Tribune Publishing newspaper chain. Two months later, Tribune announced a buyout program for employees who had been with the company for at least eight years. CEO Tim Knight e-mailed employees explaining that the program would help Tribune “avoid turning to company-wide reductions of the workforce as a last resort.” (Knight himself was replaced in early February by Terry Jimenez, who had previously served as chief financial officer.)

In reporting the story—which affected its own employees—the Chicago Tribune described Alden as “a secretive New York hedge fund with a reputation for dramatic cost-cutting across its growing media empire.” Alden owns roughly 200 publications, managed under the aegis of MediaNews Group. Its newspapers have seen significant layoffs, including at the Denver Post and San Jose’s Mercury News.

Two Alden representatives have joined the board of directors of Tribune Publishing. Alden has agreed not to increase its stake until June 30, suggesting it might do so after that date. At the end of 2019, Tribune Publishing had about 4,100 full-time employees spread among nine publications: the Tribune, New York Daily News, Baltimore Sun, South Florida Sun-Sentinel, Hartford Courant, Virginian-Pilot, Orlando Sentinel, Daily Press in Virginia, and Pennsylvania’s Morning Call.

Tribune Publishing previously offered employee buyouts in 2018, not long after a first round of layoffs, and Chicago Tribune workers formed a union, the Chicago Tribune Guild. It has posted an open letter to the board of directors, warning of Alden’s record and urging the company to increase staffing, to consider other civic-minded and/or local buyers, to cooperate with the union and to refocus on journalism and sustainability over profits.

BIG BROTHER IS BUSY COLLECTING

The Guardian reports that Amazon is collecting extensive data from Kindle users: not just the books you’ve read, but the dates and times you’ve read, what you’ve highlighted and the color of the highlighter. It knows every word you’ve looked up in the Kindle dictionary and if you’ve copied text and pasted it into another app.

Guardian writer Kari Paul learned this when she requested her personal information from Amazon under the California Consumer Privacy Act. The information arrived in a large spreadsheet.

“I now know that on 15 February 2019 starting at 4.37 pm, I read The Deeper the Water the Uglier the Fish—a dark novel by Katya Apekina—for 20 minutes and 30 seconds. On 5 January 2019 starting at 6.27 pm, I read the apocalypse-thriller Severance by Ling Ma for 31 minutes and 40 seconds. Starting at 2.12 pm on 3 November 2018, I read mermaid romance tale The Pisces by Melissa Broder for 20 minutes and 24 seconds.”

An Amazon spokeswoman told Paul that the data is used “to provide customers with products and services, pay content providers and improve the reading and shopping experience.” Paul points out that it’s reasonable to assume the data is being used any number of additional—and profitable—ways. Ancillary information can be inferred from the books we read and the sections we highlight and return to later for inspiration or information: age, health, consumption preferences, profession, hobbies, political preferences, even what we eat.

Some consumers might shrug and move on, or be pleased to contribute to the data, if it might serve them in the future. But Amazon is a special case for those in the publishing industry. The company is not only a major bookseller but a publisher and e-reader provider. Its operational decisions direct how the majority of readers find, purchase and consume books. As Paul points out: “The company is now responsible for the sale of some 50 percent of physical books for major publishers and 80 percent of e-books.” Even those who buy from independent bookstores might find themselves in the Amazon data web if they post their reading lists on Goodreads, which is owned by Amazon.

Paul closes with a warning from Evan Greer of Fight for the Future, a privacy advocacy group: “Never underestimate the power, or willing-ness, of tech companies to do almost anything to make a little extra money—including shifting the entire
way we make music or read and
write books. They are perfectly will-
ing for art to be collateral damage
in their pursuit of profit.”

**TRUMP TAKING AIM AT ACADEMIC PUBLISHING?**

Several outlets are reporting that the administration of President Donald J. Trump is considering an executive order that would require government-sponsored academic research to be published for free and without paywalls. The European Union has a similar policy, set to provide open access to all research funded by European agencies starting in 2021.

Almost 130 groups signed a letter of opposition, arguing that such a policy would “jeopardize the intellectual property of American organizations engaged in the creation of high-quality peer-reviewed journals and research articles and would potentially delay the publication of new research results.”

The letter argues that the move would inappropriately regulate the marketplace and have a negative impact on both for-profit and nonprofit companies. More importantly, the letter maintains, it isn’t necessary; federally funded research already must be available to the public within a year of publication. Reducing that window will dramatically lessen interest from publishers and could even lead to the closing down of some scientific organizations, thus affecting the U.S.’s role as a world leader in science and technology research.

Signers of the letter included medical and scientific research societies, publishers such as Macmillan and Wiley, and even the U.S. Chamber of Commerce. Also expressing concern is Senator Thom Tillis (R-NC), chair of the Senate Subcommittee on Intellectual Property. He has written to President Trump and Commerce Secretary Wilbur Ross asking for a briefing on the rumored policy and offering input.

Maria Pallante, president and CEO of the Association of American Publishers, has been vocal, telling Publishing Perspectives: “If the proposed policy goes into effect, not only would it wipe out a significant sector of our economy, it would also cost the federal government billions of dollars, undermine our nation’s scientific research and innovation, and significantly weaken America’s trade position. Nationalizing this essential function—that our private, non-profit scientific societies, and commercial publishers do exceedingly well—is a costly, ill-advised path.”

**ARE E-BOOK SUBSCRIPTION SERVICES THE FUTURE?**

Forbes contributor Bill Rosenblatt has a prediction for readers and publishers: “By the end of the 2020s, we’ll see subscription e-books become as ubiquitous as Spotify and Netflix.” The only reason they haven’t succeeded already, he argues, is lack of support from publishers, which have chosen not to license sizeable book catalogs to Scribd and Amazon’s subscription services.

Rosenblatt argues that e-book subscription audiences are not yet large enough to convince publishers that the risk of opening up to that market is worthwhile. This will change, he believes: “To get publishers interested, a large tech or retail player with global reach—as large as Amazon—has to appear with a solution that’s ready to go.”

If such a company can provide an audience of hundreds of millions to the Big Five publishers, they might all take the plunge. Rosenblatt seems confident this will happen in the coming decade.

Rosenblatt frames his prediction mainly as a recommendation for the publishing industry. Unfortunately, he does not address authors’ incomes or the question of whether writers will be helped or hurt if readers shift from purchasing and borrowing e-books to accessing them on a cheaper subscription basis. He gives only a passing mention to the fact that a subscription-like service already exists, for free, in the form of public libraries. “Relatively few people know about them,” he writes. We beg to differ.

**OVERDRIVE SOLD TO AMERICAN INVESTMENT FIRM**

OverDrive, the world’s largest digital content lending platform, serving more than 43,000 libraries in 76 countries, including public, corporate and school libraries, and the hugely popular e-book app Libby, will have a new owner in 2020.

The Japanese commerce giant Rakuten, OverDrive’s parent company since 2015, is selling OverDrive to KKR, an American investment firm.

OverDrive’s current CEO Steve Potash, who founded the company in 1986 and sold it to Rakuten five years ago, will reportedly remain in his position. American Libraries magazine speculates that KKR views OverDrive as a solid investment and will aim to increase its value in the coming five to seven years. Publishers Weekly reports that the sale was aided by Richard Sarnoff, a former president of Bertelsmann Digital Media Investments who has worked at KKR since 2011. Sarnoff also oversaw KKR’s 2018 purchase of RBmedia, a major audiobook publisher and distributor.
I’d first like to express my heartfelt wish that you and your loved ones are safe and healthy. The Authors Guild staff are successfully working from home, and we continue to remain intensely focused on helping authors through this crisis.

When the pandemic first emerged, we engaged in discussions with publishers, bookstores, authors, and others. Our goals were to: first, define the problems authors faced in this unprecedented crisis; and second, develop and implement specific plans to address these issues. Our goal is to help all authors (not just our members), especially the most vulnerable.

We’ve also been working with states and the federal government to understand exactly what programs are available to help authors facing financial hardship, and to make absolutely sure authors and freelance writers are not left out of the relief effort.

To that end, we’ve created an Authors Guild COVID-19 Resources page with comprehensive information on the resources available to you. Here you can learn about the programs the Guild has launched and how they can help you.

I wanted to tell you about just one of the things the Guild has done for authors. This is a big one. When the CARES Act Pandemic Unemployment Assistance legislation was put through Congress, we noted that it did not appear to cover freelance writers, authors, and other freelance creators who work from home or in the field. And this was borne out when we heard that some freelancers were being denied and told they didn’t qualify. This outrageous oversight—when everyone else was getting support—spurred the Guild to action, and we reached out to other creator organizations (photographers, musicians, composers, graphic designers, songwriters, etc.) to join us. Our executive director, Mary Rasenberger, a copyright law expert who has experience writing legislation, immediately jumped into action and drafted an amendment to the CARES Act PUA clarifying that freelancers of all kinds would be eligible for help. Seventeen other groups agreed to sign on. Our lobbyist in Washington, Marla Grossman, reached out to members of the House and Senate asking for support for our amendment or to obtain a clarification from the Secretary of Labor. Simultaneously, 34 Senators signed on to a letter requesting the same guidance from the Secretary of Labor. The Guild is now working with the Senators and leadership in the House to finalize the exact language of guidelines that would make it clear that authors and writers who have lost work due to the COVID-19 crisis are eligible for PUA insurance. This all happened in a matter of days.

I’m telling you this story because this is why I love the Authors Guild. It is an organization that fights for writers like no other. It is effective. It takes action and it gets things done. The Guild was the only writers’ organization down in D.C. monitoring legislation and making sure authors and freelance writers were not left out. I am so proud and thankful we have an executive director who has the credibility, knowledge, and legal background to actually write federal legislation, and that we have a lobbyist like Marla who can skillfully guide it through Congress.

While the struggle is by no means over, and we face myriad challenges on every front, the Authors Guild has been at the forefront not just with Congress, but also with effective programs, advocacy, webinars, education, and financial support for authors. And this has happened even as some of our own staff have fallen ill to coronavirus (all, thankfully, are recovering.)

We are doing a great deal more than this. We’ve launched a #SupportAuthors social media campaign to support spring books, and we’re hosting a series of COVID-19 webinars on a whole range of issues, from how to get CARES Act and other government relief to marketing books online, holding online book tours, and organizing speaking events through Zoom. We’re fighting for authors who have not been paid money owed to them or whose contracts have been otherwise violated or suspended. And we’ve exposed Internet Archive and its despicable use of the pandemic as a cover to massively violate authors’ copyrights for its so-called “National Emergency
During the last decade, technology has grown at breakneck speed, making tech companies some of the wealthiest and most powerful enterprises in the U.S. At the start of the decade, Amazon had 30,000 employees and a market value of $80 billion. Today, the company is worth an estimated $1 trillion and has a 750,000 person workforce. Uber, then a fledgling start-up, had launched in beta and hired its first employee. Facebook had 700 million users, one third of the 2.5 billion people who actively use the platform today. In just ten years, technology has completely transformed our lives, reshaped our routines, habits, and our political process. Authors have been on the front lines of this change from the beginning, contesting questions of privacy, freedom of speech, and copyright. It has not been an easy fight; as discussed in our recent white paper, “The Profession of the Author in the 21st Century,” technological factors like the growth of digital readers and the monopoly power of tech companies such as Facebook, Google and Amazon, which first devalue the price of content before capturing its market and suppressing competition, have substantially contributed to the decline of author incomes in the past ten years.

As we round out the first decade of the millennium, it is important for us to not only take stock of how technology has changed authorship but how it is poised to change it in the coming years. One of the biggest changes on the horizon is the growth in artificial intelligence technologies. A Brookings Institution report last year estimated that AI technologies will wipe out 25 percent of jobs in the United States, with workers in transportation, administration, and customer service facing the greatest risk. Jobs involving repetitive tasks may be the first on the line, but every occupation—including writing—will have to contend with intelligent machines that can perform tasks that until now were the exclusive domain of humans.

The technology underlying AI tools capable of creative work is already in use—for example, auto-complete in email composers and grammar checks—and more sophisticated tools capable of writing prose, composing music, and painting are not far off. Today, many AI technologies can pass the Turing test, which measures the functional equivalence between artificial and human intelligence. In 2016, a Japanese AI-authored novella beat out human-authored submissions in the first round of a literary prize competition. The same year, Microsoft unveiled “The Next Rembrandt”—an AI-generated painting in the style of the Dutch master. John Seabrook reported in a recent New Yorker piece that the nonprofit AI developer,
OpenAI, has created an AI writer called GPT-2, which it has withheld from the public because the program is “too good at writing.”

AI technologies rely on ingesting data and learning from patterns. Programmers “feed” this data to the AI system and, to varying degrees of supervision, guide execution. For example, if the AI is given a task to write a short story, the programmers will feed it a set of short stories. The AI will identify patterns and similarities within the content and build a model from which to assemble an entirely new output. This raises two obvious questions: where is the input data coming from and have those creators given permission for their works to be used to train AI?

Tech companies have spent most of the past decade amassing data through various means and channels. Some data, like pictures that are used to train AI to recognize human faces, is submitted voluntarily when users upload content online. Other data, like books, come from digital copies made without permission of their rights-holders. If this sounds familiar, it is because the use harkens to the Google Books case. Although Google publicly claimed that the copies were being made in order to preserve and expand access to books, the company’s ultimate purpose was to use the massive trove of books it had digitized to build AI systems, devices, and products capable of understanding natural language. Using copyrighted works without permission to train AI to create new works—books, music, visual art, etc.—just adds insult to injury. So far, we haven’t seen too many AI-authored creative works actually competing in the market for human works, but unless we preemptively create robust rules around such uses, content channels will no doubt be flooded with AI-generated works that are intended to replace human-authored works, such as book summaries and how-to books which follow certain conventions that can be emulated.

In January, the Authors Guild submitted comments to the United States Patent and Trademark Office in which we argued for the creation of a collective licensing regime to regulate mass ingestion of copyrighted works for machine learning purposes, especially when the AI is used to create new works. At the same time, we argued for stricter liability for third-party beneficiaries of copyright infringement. Under current case law, liability for copyright infringement requires “volition,” which is difficult to prove when the infringement is done through the use of automated technologies. Unless rules are changed, AI developers, users, and the companies that own and profit from AI technologies will not be held liable for infringement incidental to the use of AI. I raised these and other issues related to use of AI at the Copyright Office symposium “Copyright in The Age of Artificial Intelligence,” which took place in February, and in my input on the American Bar Association Intellectual Property Section’s comments to the World Intellectual Property Organization.

Copyright law and publishing are undergoing profound changes, forcing institutions that oversee copyright policy to adopt new regulations and methods to continue administration of the IP sector. The Guild has had an opportunity to participate in the drafting of a bill sponsored by Senator Thom Tillis that would give the U.S. Copyright Office much-needed independence from the Library of Congress, allowing it to modernize operations and implement new registration processes to protect a wider range of content. We are also hoping that by the time you read this bulletin, Senator Ron Wyden will have lifted his hold on the CASE Act. You may recall that this important bill passed the House of Representatives in October with a resounding vote. Yet, despite it having major support in the Senate, Senator Wyden has blocked it from the floor.

The future we have long imagined—of self-driving cars and intelligent assistants—is finally here. It is up to us to make sure that that technology is used for improving lives instead of depriving hardworking authors of their livelihoods.

—Mary Rasenberger
Executive Director
You’re writing a memoir about your life with your ex-husband, Jeff, whom you left ten years ago after discovering that for most of your marriage, he had been having sex with women he had been meeting online. He is now married to someone else and living hundreds of miles away. Your book describes in detail events and conversations that took place when you first began to suspect what Jeff was up to, when he realized he had been caught, when he pretended to change and to try to revive your marriage, and when you realized that he was still “dating” online.

In the book, you’ve disguised Jeff by changing his name, his physical appearance and his profession, among other things. (See “Writers, Take Warning: Things Every Writer Should Know Before Signing a Book Contract,” Authors Guild Bulletin, Summer 2016.) Between those changes, the passage of time, and the fact that he lives in a different city, Jeff almost certainly will not be identifiable to anyone who doesn’t know that he was once married to you. But since you’re writing under your own name, anyone who knew Jeff before or while you were married to him will recognize him. You’re worried that if the book is published, Jeff might threaten to sue you for invasion of privacy.¹

You don’t want to publish under a pseudonym. Getting Jeff to sign a release is not a viable option. The whole point of the book is to write about how your experiences with Jeff affected your personal development and your ability to trust people, so you can’t just omit the more titillating incidents. If you publish the book and Jeff does sue, is the court likely to find in Jeff’s favor?

In this particular hypothetical, the answer is probably not. Generally speaking, the courts will reject claims for invasion of privacy in favor of a First Amendment right to disclose even highly embarrassing private facts if those disclosures are

¹ For purposes of this article, which concerns invasion of privacy claims, we will assume that Jeff is not also going to sue you for libel, but it is not uncommon for both claims to be asserted.
related to issues of “legitimate public interest.” 2 Court discussions of this issue come up in a wide range of cases, but there are three court opinions that specifically concern autobiographical disclosures, and two of them involve autobiographies. 3 Although each judicial decision is based on the specific facts of the case it addresses, and although none of these decisions is recent, these three opinions provide some useful general guidance when it comes to memoirs and autobiographical disclosures.

The earliest case, *Campbell v. Seabury* (5th Cir. 1989), involved *Brother to a Dragonfly*, the autobiography of religious and civil rights leader Will D. Campbell. One of the book’s main themes was the affection between the author and his older brother, Joseph, who played a big part in the author’s religious development and his participation in civil rights activities. Joseph’s wife sued the author and the publisher for “tortiously invad[ing] her privacy by including in the autobiography private facts relating to her homelife and marriage with the author’s brother, Joseph Campbell.” The district court granted summary judgment for the defendants. (Summary judgment is a decision on the merits without a trial.) On appeal, the Fifth Circuit Court of Appeals affirmed the decision.

The plaintiff did not claim that the statements made about her were false, nor did she argue that the book as a whole was not a matter of legitimate public interest. Rather, as the opinion states, “she argue[d] that no logical nexus exist[ed] between the matters of legitimate public interest and her homelife and marriage to Joseph Campbell to justify the inclusion of the challenged material in ‘Brother to a Dragonfly.’” The court disagreed: “An account of the author’s close association with his older brother certainly is appropriate in the autobiography. Likewise, accounts of his brother’s marriage as they impacted on [sic] the author have the requisite logical nexus to fall within the ambit of constitutional protection.”

In the other autobiography case, *Bonome v. Kaysen* (Mass. Super. Ct. 2004), the plaintiff, Joseph Bonome, was the former boyfriend of Susanna Kaysen, the author of *Girl, Interrupted*. Kaysen met Bonome when they were both married to other people. According to Bonome, Kaysen pressured him to leave his wife, which he did. They then moved in together and remained a couple for a few years. Sometime after the couple split up, Kaysen published *The Camera My Mother Gave Me*, a memoir about the effects of a painful vaginal condition that she developed about six months into their relationship. As the court put it, the book “chronicle[d] the effects of Kaysen’s seemingly undiagnosable vaginal pain in a series of ruminations about the condition’s effects on many aspects of her life, including her overall physical and emotional state, friendships, and her relationship with her boyfriend. It detail[ed] her intense pain and discomfort and her many fruitless attempts to obtain an accurate medical diagnosis and effective treatment.” It also described Bonome’s lack of sympathy for her condition, including his making many nasty comments and trying to force her to have sex despite the pain she was experiencing. Kaysen did not mention Bonome by name, and in fact, she disguised facts about his life, but anyone who knew that he had been her boyfriend during this time was able to recognize him in the book.

In rejecting Bonome’s invasion of privacy claim, the Massachusetts state trial court noted that the intimate scenes depicted in the book related to both the impact of Kaysen’s chronic pain on her relationship with Bonome and “the issue of when undesired physical intimacy crosses the line into nonconsensual sexual relations in the context of her condition,” both of which the court characterized as matters of legitimate public concern. The court further stated, “Where one’s own personal story involves issues of legitimate public concern, it is often difficult, if not impossible, to separate one’s intimate and personal experiences from the people with whom those experiences are shared. Thus, it

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2 Invasion of privacy is a matter of state law, so different states, and different courts within different states, define the tort differently.

3 These cases come from three completely different judicial authorities, two state courts and one federal appellate court. A decision by one state court has absolutely no legal authority over decisions by courts of other states, a decision by a federal court in one circuit has no inherent authority over courts in other circuits, and a decision by the lowest court in a state is not binding on any other courts even in that state.
is within the context of Bonome and Kaysen’s lives being inextricably bound together by their intimate relationship that the disclosures in this case must be viewed. Because the First Amendment protects Kaysen’s ability to contribute her own personal experiences to the public discourse on important and legitimate issues of public concern, disclosing Bonome’s involvement in those experiences is a necessary incident thereto.”

The third decision, Anonsen v. Donahue (Texas Ct. App. 2003), was an appellate court finding in an invasion of privacy suit brought by relatives of Miriam (Mickey) Booher, who appeared as a guest on The Phil Donahue Show in a segment about pregnancies that result from incest or rape. On the show, according to the court opinion, Booher disclosed that her husband had raped her daughter from a previous marriage, Nancy Anonsen, when the girl was 11 years old; “that Booher had never reported the rape to authorities; that she had remained married to her husband for some 16 to 17 years after the incident; and that her 16-year-old adopted son, who had been raised as her daughter’s adopted half-brother, was actually her daughter’s biological child.”

Neither Booher nor Donahue disclosed the names of her husband, daughter, or grandson on the air, but because Booher used her own full name, it was clear to anyone who knew the family whom she was talking about. Booher’s husband and daughter sued for invasion of privacy in their own right and as guardians of the son/grandson. The trial court granted summary judgment in favor of the defendants, which meant, as was noted earlier, that the plaintiff lost without there having been a trial, and the plaintiff appealed, asking the appellate court to order a trial.

The appellate court concluded that Booher’s speech was constitutionally protected, first, because “the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding and healing of those victims, are matters of legitimate public concern,” and second, because “Booher, like her daughter and grandson, is herself one of the victims of the family tragedy of incest. Her reactions to that tragedy, the impact on her life of her daughter’s rape, the birth of the child of that rape, whom she adopted and raised as her own, and her eventual discovery of the truth about her husband—all comprise her story as well as that of the other family members. Therefore, we are unable to agree with appellants’ contention that a jury should be allowed to determine whether Booher’s voluntary, undisguised appearance on the Donahue show was [legally actionable].”

In each of these cases, the court held that the person trying to tell his or her life story was entitled to do so even though it included embarrassing disclosures about other people, both because the overall theme or context of the disclosures was a matter of legitimate public interest, and because the parts of the defendant’s story that were being challenged related to that matter of legitimate public interest. In the Bonome case, the court also emphasized that “Kaysen was not a disinterested third party telling Bonome’s personal story in order to develop the themes in her book. Rather, she is telling her own personal story—which inextricably involves Bonome in an intimate way.” Along the same lines, the Anonsen court concluded “that to allow a cause of action [i.e., a lawsuit] based upon Booher’s truthful and undisguised account of her own and her family’s experience is inconsistent with the first amendment.”

In our hypothetical, you are writing about your own husband’s infidelity and its impact on your long-standing marriage and you as a person. It seems reasonable to conclude that a court would find that topic to be a matter of public interest. If the intimate scenes and conversations that you describe are clearly related to that theme, then it also seems likely that a court would hold that there is enough of a “nexus” between the disclosures and those matters to reject Jeff’s claim for invasion of privacy.

Nevertheless, even if you are sure that your story involves a matter of legitimate public interest and that the things you are saying directly relate to it, you still have to be careful.

First, in each of these cases, the person about whom private facts were disclosed had an ongoing,
guy named Brian, with whom you had a very brief affair while Jeff was out committing adultery. Even if you could argue that the affair with Brian was the result of Jeff’s conduct, it would be a lot harder to convince a court that the disclosure of intimate facts about Brian is related to the overall public-interest topic of infidelity and its effect on the other spouse.

Second, even if you are reasonably sure that your book does not invade Jeff’s privacy, that conclusion is not a “get-out-of-jail-free” card. If Jeff is vindictive or believes he is being hurt by the publication of the book, he will sue if he has the money to do so. If that happens, it could be years and hundreds of thousands of dollars before a court holds, if it does, that you are not liable for invasion of privacy. All that time, you will be paying legal fees, and, depending on the indemnity provisions of your publishing contract, your publisher may be withholding royalties to pay their own legal fees. These potential costs may not be so bad if you have the money, if you are covered by your publisher’s media perils insurance (or if you are self-publishing and have your own media perils insurance), or if you received an enormous advance that you think will exceed the costs. But whatever your financial circumstances may be, you should think very hard about whether the satisfaction of finally writing about what happened to you — and maybe helping someone else avoid the same fate — outweighs the risk of having to defend a lawsuit. The last thing you need is to have the terrible events you describe once again take over your life.

Jessica R. Friedman has practiced literary property, copyright and trademark law in New York City since 1989. She has been named as a Super Lawyer® for the New York Metro Region for the last five years. More information about her practice is available at literarypropertylaw.com. © 2020 Jessica R. Friedman
WHY HAVE YOUR MANUSCRIPT “VETTED”?

Minimize the odds of being sued

By Carolyn Schurr Levin

Many people have already read your manuscript—friends, family members, coworkers, your writing community, your author support group, your editor, your copy editor, your literary agent, the guy who sits near you at Starbucks, your neighborhood dog walker, and quite possibly others. Why, then, should you have it read by an attorney as well? Quite simply because the benefits of having your book vetted by an attorney who is well versed in prepublication review cannot be emphasized enough. Although no lawyer in our litigious world can guarantee that you will not be sued, a legal review can assess your risks and minimize the likelihood that any potential lawsuit will be successful. There is no way to overstate how important that is.

A legal review can also be used as evidence that you were not negligent in the event that a claim is made against the book at some point. It can also help you secure media insurance, if you are interested in purchasing it. A media liability insurance policy can protect against claims, such as libel, copyright infringement and invasion of privacy.

But before you incur the expense of a legal review, you probably want to know what a vetting lawyer does during the prepublication review process.

A vetting lawyer looks for potential plaintiffs (both individuals and companies, named and unnamed) and content that could prove problematic. Such reviews include analysis of a host of potential legal issues, including libel, invasion of privacy, copyright and trademark infringement, sourcing and interviews, and other issues depending on the content and nature of the work.

What a Vetting Lawyer Does

A vetting lawyer considers how you would defend against any potentially troublesome content in the event that one or more of these hypothetical plaintiffs decide to file a claim.

A vetting lawyer assesses how you might lessen the risk of a claim or lawsuit.
A vetting lawyer reviews not only your manuscript but also supplemental materials, including photographs and illustrations, the foreword, cover copy, disclaimers, bibliography, footnotes and end-notes, press releases, promotional materials, and possibly other elements.

What a Vetting Lawyer Doesn’t Do

A vetting lawyer does not censor content. His or her job is to assist you in publishing your work, not to prevent you from publishing.

A vetting lawyer does not copyedit. That job is for the copy editors.

A vetting lawyer does not fact-check. That job is for the fact-checkers.

So, now that you know what a vetting lawyer does, here’s a final note: Merely consulting with an attorney is not enough. You should carefully evaluate the attorney’s suggestions and incorporate them into your manuscript. At its best, a legal prepublication review provides you with a new way to think about your content, allowing you to clarify, substantiate, modify, and strengthen it.

It is preventative medicine that, without doubt, is worth the cost, and not just so you can sleep well at night.

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A VETTING LAWYER DOES NOT CENSOR CONTENT. HIS OR HER JOB IS TO ASSIST YOU IN PUBLISHING YOUR WORK, NOT TO PREVENT YOU FROM PUBLISHING.

A VETTING LAWYER DOES NOT COPYEDIT. THAT JOB IS FOR THE COPY EDITORS.

A VETTING LAWYER DOES NOT FACT-CHECK. THAT JOB IS FOR THE FACT-CHECKERS.

* www.authorsguild.org/member-services/media-liability-insurance/
Knowledge Is Not Free

By Scott Turow

On November 12, 2019, former Guild president Scott Turow delivered the Christopher A. Meyer Memorial Lecture at the Copyright Society at George Washington University. We reprint it here with his permission and our thanks. It has been edited for length and clarity.
More than 30 years ago, right after I left the federal prosecutor’s office in Chicago to go into private practice, I was asked by the head of the litigation department at my firm to help out on a trademark case. The general counsel for the client was not the kind of person who wanted to hear that our client was in a hopeless position, probably because the client’s peril came as the result of the GC’s earlier advice. The GC ordered his outside litigation team to do something, do anything, and so we filed a trademark case, making a claim that at least passed the red-face test and bought us time in the underlying dispute. Our complaint was promptly dismissed in the district court and we appealed. Because I was the former deputy chief of the appellate section in the U.S. Attorney’s Office and had appeared in the United States Court of Appeals in Chicago many times, I was dispatched to do the oral argument. I was very well prepared, in the sense that I had read every case cited by both sides and a lot of background material on the statute we’d sued under, but even before I got to the podium, the presiding judge on the three-jurist panel had a question for me. This judge was a former law professor, like many federal appellate judges, and it was sometimes said behind the judge’s back that he regarded the fundamental issue in every case as the same, namely, Am I the smartest person in the room? (Generally speaking, by the way, he was.)

I had appeared often before this judge over my eight years as an assistant U.S. attorney, and I think I had done well enough in discussing the intricacies of federal criminal law, but now, literally before I had finished saying, “May it please the court,” the judge asked me, with a malicious smile, to assess my client’s position on this trademark issue in light of Judge Learned Hand’s 1930 opinion in the copyright case of Nichols v. Universal Pictures. I hasten to add that that decision had not been cited by us or our opponents in the district court or at any point in front of the court of appeals. As I stared word-struck at the judge, I realized that the question from the bench could have been put more plainly: What in the living hell are you doing here?

All of you might be forgiven for thinking the same thing. To state the obvious, I am not an intellectual property lawyer. Since I have the opportunity to talk to an audience well versed in copyright, I may detour this evening to a couple of technical points, but my views are stated not as a legal expert but as an author and an author’s advocate. In the latter role, I have always been deeply mindful of how many enormously talented authors I have known who have not had the same blind luck as I in becoming a best-selling author. My goal in advocating for authors always has been to protect not the people at the top of the literary food chain but everybody else, so that writing as a livelihood continues to be a viable option for those daring enough to pursue it.

To that point, I need to tell another story. For more than a decade, I was privileged to be sent overseas regularly as part of the U.S. State Department’s Speaker Program. Why me? Under administrations of both political parties it was the policy of the United States to promote the rule of law, and there seemed to be a judgment that a novelist who wrote about the law, whose books had been filmed now and then, might make the point about the value of the place of law in a democratic society in a livelier way than might an arid discussion by, say, a law professor.

I loved going. In 2012, my wife, Adriane, and I were dispatched to Russia. I spoke at universities, visited bookstores—which in Russia are open 24 hours a day—and because I was then president of the U.S. Authors Guild, I was invited to meet with the leadership of Russian PEN, the international authors rights organization. This proved to be a Dickensian moment. We walked up five floors of dark stairs that squeaked and shuddered and seemed on the brink of collapse; the heat in the building was only enough to keep the pipes from freezing. Incandescent light was sparing. In a bare room with peeling paint, we met with several writers huddled in their overcoats. This was the moment for me to get the answer to a question that had preoccupied me: Why was it that I was visiting the nation of Chekhov, Turgenev, Dostoyevsky, Tolstoy, Bulgakov, Solzhenitsyn, a nation with one of the longest and most noble literary heritages on
I BELIEVE THE PREMISE OF THE COPYRIGHT CLAUSE IS THAT A DIVERSE LITERARY CULTURE—AND AUTHORS AS AN INDEPENDENT CLASS WHOSE AUTONOMY CAN’T BE THREATENED SO LONG AS THEY HAVE AN APPRECIATIVE AUDIENCE WILLING TO PAY FOR THEIR WORKS—is essential to the cultivation of ideas and thus to our democracy.

Today, copyright and the protection it is meant to provide authors is under broad threat. Authors’ incomes here and throughout the Western world are in decline, leaving aside the fortunate few who can call themselves “best-selling writers.” Those authors who are scuffling for a living are making even less these days than they did a decade ago, as a recent survey by the Authors Guild established. The same is true in Canada and in the U.K.

There are many reasons for that. Book industry revenues have declined in the internet era. As a result, publishers simply pay authors less. The standard royalty on e-books, for instance, in terms of the share of proceeds it represents, is about half the royalty for physical books—25 percent of net vs. 50 percent for physical books.

But the depreciation of the value of authors’ copyrights is another problem, and that erosion in value has occurred across a number of fronts. The digital age has set off a food fight in which authors now face off against traditional allies like libraries and even other authors.

Some of the most vociferous opponents of copyright, for instance, are other writers. The so-called Copyleft, which sails under slogans like “Knowledge Wants to be Free,” is to a great degree peopled by academics. They find copyright an impediment to their research, since they can’t quote extensively from other works or otherwise parrot their ideas without the original

Author's permission. In preparing for tonight’s remarks, I stumbled across a site called Academia.StackExchange.com that contains the following advice: “You are unlikely to get in trouble by having illegally copied content on your hard drive... Yes, it is illegal to download (‘make copies’) of material that is protected by copyright. However, all that is illegal is not criminal.” As an aside, as someone who has practiced criminal law for 40 years, you should know that advice is idiotic and wrong.

The rhetoric of the Copyleft makes me crazy. First of all, knowledge is never free. It is the product of years of labor in writing and research. Nobody in this society works for free, nor should authors alone be expected to, particularly since we are one of the few professions Congress is empowered to protect in the Constitution.

Despite the fact that Copyleft academics like to style themselves as high-minded advocates for the free flow of information, they are, in truth, intensely self-interested. Academics do not support themselves in most cases by exploiting their copyrights, which unfortunately, in today’s world, often have little value. Their livelihoods come generally through university positions, in which the more they publish, the better their chances for promotion. Since copyright inhibits willy-nilly publication, it’s contrary to their economic advancement. It’s paychecks, not principles, that account for the Copyleft’s antagonism to copyright.

But no matter how aggravated I get by the Copyleft, I also know the sad truth is that authors individually, or even as a group, are no longer powerful enough in this society to pose an existential threat to one another. Instead, in a capitalist society like ours, Mr. Putin’s role in suppressing copyright is played by capitalists, and especially by internet behemoths like Google and Amazon.

When the Constitution was written, there was the author on one hand and on the other, the publisher, who essentially controlled the printing press. Today the intellectual property of massive corporations—whether we are talking about Google’s algorithm or the hugely impressive software that fuels Amazon’s platform—stands between authors and their audience, and the
corporate owners of that IP are determined to
drain maximum value from what they have, even
when that comes at the expense of authors.

I have spent so many years complaining about
Amazon and their repeated efforts to enhance
their profits at the cost of authors that I suspect
that if you Google “Scott Turow comments on
Amazon,” smoke will probably come out of your
computer. Most of my beefs with Amazon are not
copyright issues per se, so I won’t sidetrack myself
tonight. The latest fracas, however, is. It turns out
that many counterfeit books are being sold on
their site. Scanning technology has made it easy
for pirates to produce copies of physical books,
and Amazon’s penchant for welcoming third-
party sellers has given the counterfeiters haven
there. Frankly, I believe Amazon when they say
they’d rather not sell counterfeits, or at least that
they’d rather not be known for selling counterfeits.
But a New York Times report last summer made
them far more motivated to do so. The problem is
that Amazon makes at least as much on the sale of
counterfeits as it does selling genuine books, and
probably more, since the resellers can offer them
lower wholesale prices for the books than the real
publishers do. In fact, as New York Times reporter
David Streitfeld reported, some publishers have
found their only defense is to pay Amazon so that
their legitimate site outranks the counterfeiters
when people search for a title.

Ironically, the piracy and counterfeiting of
physical books lags behind what has long gone on
in the world of digital books, where offshore sites
offer pirated e-books for free or nearly free. The
role of search engines is critical here. A search on
Safari and Google that clearly seeks illegal mate-
rial like, “Where can I download pirated e-books?”
brings up articles with links to 20 pirate sites and,
of course, paid ads for those sites. In my days as a
prosecutor, I knew that if a fellow stood on a street
corner and answered the question, “Where can
I get heroin?” and then received money from the
drug den down the street every time he directed
someone there, the guy on the corner would soon
be in prison for aiding and abetting the distribu-
tion of a controlled substance. But the safe harbor

provision of the Digital Millennium Copyright
Act (DMCA) inoculates the search engine compa-
nies from the basic moral responsibility that our
laws have always imposed on other citizens to not
assist in the commission of crimes. Self-published
e-book authors on Amazon’s Kindle Direct site
often find their sites hacked, with readers direct-
ed to counterfeit or pirated editions. Again, the
DMCA limits Amazon’s incentives to police what’s
going on.

The role of the law in depreciating the value
of copyright is especially vexing to me, because
it seems to collide with the overall constitutional
policy, which I see as favoring authors. And in this
regard, my complaints go beyond the DMCA to the
ever-expanding doctrine of fair use.

To amplify my lament, I want to give special
attention to the decision made a few years ago by
the United States Court of Appeals for the Second
Circuit in our lawsuit, Authors Guild v. Google
Books. At the risk of sounding like a sore loser, I
want to point out that the decision has had exact-
ly the kind of destructive consequences that the
Guild and other authors’ advocates predicted.

As a reminder, in 2004, Google made arrange-
ments with seven major university libraries to
digitize approximately 20 million volumes select-
ed by the libraries and to convert those scans into
machine-readable text. Approximately seven mil-
lion of those books were in copyright, not yet in
the public domain. Google then proposed to cre-
ate something called the Google Books Project,
which allowed a user to feed a search term into
Google Books, receive results that listed the books
in which the terms appeared, and see “snippets”
of these books —“snippets” being short quota-
tions from these books, whether from copyrighted
works or not. The Authors Guild, originally joined
by the American Association of Publishers, sued.
We reached a settlement with Google that would
have paid authors and publishers for the use of
their works and made all 20 million books acces-
sible in every public library in the United States,
but the Justice Department Anti-Trust Division
intervened to object (don’t even ask!), and the set-
tlement was soon scuttled by the district court.
Ultimately, after another intervening appeal and instructions from the court of appeals, the district court deemed the Google Books Project a “fair use.” “Fair use” is a statutory exception to copyright that allows one to make limited use of copyrighted material without the owner’s permission. The classic example of fair use is the quotation of passages from a book in the course of a review.

I think that the Google Books decision expanded fair use far beyond what Congress ever intended, and I expect that, sooner or later Congress or the Supreme Court will say so. To explain why, I need to get a little lawyerly and technical.

My dear friend Paul Aiken, one of the finest IP lawyers I ever met, was executive director of the Authors Guild when the Google Books dispute arose. We lost Paul far too soon to ALS several years ago. To Paul, our lawsuit against Google and our mirror-image suit against the consortium of libraries that provided the books for copying, a collective called the HathiTrust, were slam dunks. That was because Section 108 of the Copyright Act is sometimes referred to by librarians as giving them “superpowers.” It presumes, on its face, that duplication of copyrighted works is an infringement, and then gives librarians the right to make a limited number of copies in specified circumstances for purposes of preservation or research. That was Paul’s aha!—if the libraries couldn’t make these copies themselves, they couldn’t hand the books to Google to do it. Although I had some doubts at the time, as I’ve thought this through for years, I now see that Paul was completely right.

The problem we faced is that amid many qualifications, 108 says that nothing in the section “in any way affects the right of fair use.” But as Paul argued, that fair use had to be compatible with 108. It couldn’t authorize exactly the copying that 108 prohibited; otherwise the exception would swallow the rule and violate the familiar canon of statutory construction that says a law may not be read so as to render any part of that law a nullity. And the number one limitation in 108 on library copying is that the copy must be “made without any purpose of direct or indirect commercial advantage.” That is closely akin to the first factor for fair use analysis, set forth in the fair use section of the copyright act, Section 107, which first lists consideration of whether the “use is of a commercial nature or is for nonprofit educational purposes.”

Clearly, Google spent hundreds of millions of dollars to digitize 20 million books, and they didn’t do that out of the goodness of their hearts. This copying project had immense value to Google. The billions of words, the billions of sentences, when absorbed by Google’s algorithm, made it far more sophisticated in its ability to recognize the nuances of written language. That is a process we all engage in throughout our lifetimes by reading the books someone has paid for, us or a library or the people we borrow the book from. Besides that commercial use, the Google Books Project also drove users to its site, where like all Google users, they were subjected to the barrage of advertising that keeps the site flourishing.

Google Books was a high-stakes piece of litigation for Google. As a former senior person at Google once said to me, “Google is a business built on other people’s content.” Think what a minefield it would be for Google to have to determine whether every search result contains copyrighted material. That probably explains why they settled first.

Yet the Second Circuit decided that by enabling word-searching of millions of books, Google had made a “transformative use” of the volumes. A “transformative use” is a use of copyrighted material that has nothing to do with its original purpose. “Transformative use” was a doctrine first employed by the U.S. Supreme Court in deciding that 2 Live Crew didn’t violate the copyright to Roy Orbison’s song, “Oh, Pretty Woman,” with a rap version intended to parody the original. Parody is a transformative use because Orbison didn’t write the song with any intention of making fun of himself. Beyond that, parody is an important form of commentary, and it would probably affront the First Amendment if copyright could be used to stifle critical discussion.

I find the Second Circuit’s characterization of word-searching and snippet display to be a transformative use a reasonable conclusion, although not entirely beyond debate. Most of the works...
107, lists four factors to be considered. The Google Books opinion treats transformativeness as the trump card.

The opinion states without benefit of citation that “the ultimate primary intended beneficiary of [copyright] is the public,” more so than authors. I don’t see that. The copyright clause says that the public benefit—progress in the useful arts—is accomplished by securing to authors the exclusive right to their works. As I read it, what’s good for authors in the short run will be good for the society in the long run. But because of the court’s emphasis on the benefits of this transformative use, it did not matter that Google was making a variety of commercial uses of the material they copied, including securing eyeballs and clicks through the Google Books Project. During the course of the litigation, Google stopped displaying ads on the Google Books pages, but the court never required them to adhere to that practice, and guess what? When you put in “Google Books” as a search term today, the first result is an ad for Google’s very own Google Play site.

Similarly, because of the benefits of snippet display and word-searching, the court gave short shrift to the third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” True, Google customers were only going to see an itty-bitty, tiny, little piece of the book. But even if we’re talking only about snippet display and not the huge advantage of educating the algorithm, over the course of thousands of searches, Google was using the whole book, every word of it, and they were using it to make money.

As I said at the start, I am not a copyright expert, so it’s easy to say I’ve got all of this wrong, and I might. But what time has shown is that the Google Books decision opened the floodgates in just the way that the Authors Guild and many other authors’ advocates feared.

The last of the factors under 107 is “the effect of the copying upon the potential market or value of the copyrighted work.” The court concluded that snippets could not serve as substitutes for the underlying work. But that, of course, is not what

Google scanned were nonfiction, and most good nonfiction books come with an index, meaning you could word-search key phrases in the individual volumes. Google Books allows a traditional use—looking in a book’s index—to be conducted far more quickly by making the viewing of millions of indices instantaneous. That’s very convenient. But I’m not sure that convenience alone is what the Supreme Court meant by a transformative use. Is it really transformative to take a mass of copyrighted material and simply make it computer accessible? But what I take greater issue with is that the Google Books court took transformativeness to be the dominant concern in a fair use analysis (a position, incidentally, that the judge who wrote the opinion had taken earlier in a law review article, a fact that I also find problematic). The section of the Copyright Act that allows for fair use, Section
Furthermore, the scandalous activities of outfits like Open Library put more pressure on legitimate libraries, which feel they need to have matching access to works. “Users,” otherwise known as voters, are the coin of the realm for libraries in the parched region of public funding. If public libraries want to survive they need to please their patrons. And beyond that, of course, librarians believe it is their mission to spread knowledge at little or no cost.

Thus Google Books, by turns, has exacerbated the tensions between authors and librarians. One of the saddest aspects of the digital free-for-all is that it introduced fierce divisions between authors and publishers on one side and libraries on the other. I do not know an author who did not come to the statute says. Section 107 requires the court to consider “the effect of the copying,” which means: “What was the consequence of allowing Google to make these copies in the first place?”

As anybody who has ever used a photocopy machine in a library knows after seeing the printed notices often displayed there, making a photocopy of an in-copyright book is presumptively illegal. The Google Books court found nothing wrong with Google making these copies in the first place and holding on to them. Thus, Google Books has been widely read to mean that there is no copyright infringement in making a digital copy of copyrighted work so long as your subsequent use of that digital copy is fair. By ripping the fair use analysis away from the restrictions on copying that animated Section 108, the librarians’ “superpowers” section, the court turned every person with a physical book and a scanner into a would-be fair user—with gruesome consequences for authors and their copyrights.

An outfit called the Open Library has been asking subscribers to send it copies of books they have purchased. Open Library then makes a digital scan of that book. Nothing wrong with that, supposedly. After all, Google Books says so. Then, like a real library, Open Library makes the digital copy available for “borrowing,” allowing the copy to be downloaded to any kind of digital reading device. Never mind that real libraries have purchased the e-books they make available to their users and, accordingly, have secured the explicit permission of publishers and authors to allow users to download them temporarily. I’m sure Open Library would argue, “The person who gave us the book for scanning owned it legitimately too.” In other words, under the coverage of Google Books, the Open Library proposes to entirely disembowel the market for e-books. Furthermore, the Internet Archive, the parent organization of Open Library, is now making full-text scans of in-copyright books available through Wikipedia via links to Wikipedia’s citations of the book. Sweet reason has no hope of stopping them. Information wants to be free. The reward for eight years of litigation against Google appears to be more litigation. Pro bono volunteers are welcome.

**ALTHOUGH PEOPLE ALWAYS FLINCH WHEN I SAY THIS, LIBRARIES ARE COMMUNIST ENTERPRISES. IF EVERY CITY MAINTAINED A MUNICIPAL MOTOR POOL WHERE YOU COULD BORROW A CAR FOR A COUPLE OF WEEKS FOR FREE, YOU COULD IMAGINE WHAT THE AUTO MANUFACTURERS WOULD HAVE TO SAY ABOUT THAT. BUT A DIFFERENT LEGAL FRAMEWORK SURROUNDS INTELLIGENT PROPERTY, AS OPPOSED TO PHYSICAL PROPERTY.**

Furthermore, the scandalous activities of outfits like Open Library put more pressure on legitimate libraries, which feel they need to have matching access to works. “Users,” otherwise known as voters, are the coin of the realm for libraries in the parched region of public funding. If public libraries want to survive they need to please their patrons. And beyond that, of course, librarians believe it is their mission to spread knowledge at little or no cost.

Thus Google Books, by turns, has exacerbated the tensions between authors and librarians. One of the saddest aspects of the digital free-for-all is that it introduced fierce divisions between authors and publishers on one side and libraries on the other. I do not know an author who did not come
of age in a library, and nonfiction authors depend heavily on libraries to do their research. We love libraries, but the remote lending of e-books is putting great strain on the relationship.

Although people always flinch when I say this, libraries are communist enterprises. If every city maintained a municipal motor pool where you could borrow a car for a couple of weeks for free, you could imagine what the auto manufacturers would have to say about that. But a different legal framework surrounds intellectual property, as opposed to physical property. American authors have accepted the free use of their work in libraries as a good thing for everyone, including them. (Throughout Western Europe, authors receive a tiny payment, sometimes called an author’s pence, every time a book is borrowed. I’d love to see a similar system here, especially if it were capped at a relatively low level, so that all the money didn’t flow to best-selling authors, who don’t need the boost.)

But remote e-book lending is a problem. The old model involved certain barriers to use. You had to get to the library by bus or car, park, find the book on the shelf, stand in line to check it out, read it in a prescribed period of time and pay the fine if you didn’t bring it back. Now library patrons can sit at home, examine a library’s holdings of e-books, and borrow an e-book without ever leaving their chairs. If they are registered patrons of a given system, they can be in Zanzibar when they borrow the book.

It should not come as much of a surprise that publishers have recently concluded that this free armchair access to new e-books is cutting into e-book sales, which, as I think of it, means depreciating the value of a copyright. Recently, John Sargent, the thoughtful and courageous longtime head of the Macmillan publishing group, announced that Macmillan was changing its terms for e-book sales to libraries. It was dropping the price and making the first e-book the library purchases available for perpetual borrowing, instead of for a limited number of times, as had been the practice. But there was a catch. No e-books would be sold to libraries until eight weeks following publication, which is the usual life cycle of demand these days. If the library’s patrons are desperate to read the book, then they’ll have to buy it. John’s decision has been met with outrage by the American Library Association. And logic tells me that if John’s decision holds, there are bound to be “Knowledge Wants to Be Free” librarians quietly directing their patrons to the pirate sites where the e-book can be downloaded for free. That in turn might spark lawsuits, even prosecutions.

I go to these lengths to make one simple point: the claim that authors are playing a losing hand is not histrionic. We need more help from Congress—and a more sympathetic understanding in the courts.

I have a daughter who is, Lord save her, an author, and she has just turned in the manuscript of her second book to her publishers. She writes about food and makes part of her living as a consultant to the food industry, which is what she expected. When she was in grad school, doing her MFA in creative writing, I made her the gift of a membership in the Authors Guild. She read our various laments for a while and then told me there was no point in getting upset. “Dad, no one my age thinks they can make a living as a writer,” she said. True, probably, but I don’t think the framers would be happy to hear that.
WHY WE WRITE
WHAT WE WRITE

The lure of jumping genres

By Barbara DeMarco-Barrett

Lately I’ve been thinking about genres and how we writers land in our chosen genres. This all began when, quite recently, I began to examine my attraction to dark fiction, namely noir. I’d just wrapped up editing and writing a story for Palm Springs Noir, an anthology of 14 short stories for Akashic Books to be published in late 2020 or early 2021. Something was going on with me and noir and my fascination with the dark and seamy side of life. I’m not a gloomy person. I have a sense of humor. I laugh at the slightest opportunity. But I like suspense and realism, and when I write short stories, noir is where I tend to go. But why?

My family has been involved in nefarious, and also criminal, acts. My father became a bigamist when he married my mother, and when I was little, my Sicilian dad was rumored to be a honcho in the Western Pennsylvania Jewish Mafia. My half brother, a Chevy car dealer on Long Island, was chased out by the mob, so he resettled his lot in the upscale city of Naugatuck, Connecticut. A relative and a good friend were big-time drug dealers. Another relative was jailed for stabbing his wife—in self-defense, the story goes: she was beating up on him. Then, in high school, as my parents’ marriage was going down the drain, I had a meth-head boyfriend who began spending more time in jail than at home. Need I go on?

Maybe all this is why the dark side of life attracts me—and writing noir and literary suspense helps me work out whatever it is I need to be working out. Yet, there are writers of dark fiction who’ve had perfectly happy childhoods, brought up by perfectly happy parents.

Mystery novelist Patty Smiley, whose latest book is The Second Goodbye, the third novel in the LAPD Pacific Homicide series, says she had a great upbringing. Although, she says, “There was a great-great-grandfather who was traveling in winter by troika to a neighboring village to get supplies when he was murdered by horse thieves.” When she was a kid, a national kidnapping story got her going, and she planned to be a spy when she grew up. She memorized poetry to keep herself entertained, just
I laugh at the slightest opportunity. But I like suspense and realism, and when I write short stories, noir is where I tend to go. But why?

in case she was captured. In grad school, she discovered Sue Grafton’s *G Is for Gumshoe*, and the urge to write mysteries took root.

Crime novelist T. Jefferson Parker grew up in sunny, conservative Orange County, California, where he surfed, played in Little League, and prowled the orange groves in search of snakes and lizards. “The more-than-occasional darkness in my books doesn’t derive from the world I grew up in,” he says. “Sometimes you see what you want to see. Our imaginations draw from mysterious wells and lead us in unpredictable directions.” In college, he wrote an unpublished literary novel, but put it aside and jumped to suspense fiction when editor Morgan Entrekin, then at Delacorte, encouraged him to go commercial. Parker’s reading of Chandler, Hammett, and MacDonald made the mystery genre a natural choice. His first novel, *Laguna Heat*, “did extremely well,” he says. “So, the genre kind of picked me.”

The form also picked Ivy Pochoda, who started out in literary fiction with no intention of ever switching genres. “Once my [second] novel, *Visitation Street*, was deemed to be a mystery,” she says, “I realized I enjoyed writing in the genre, if not following all of its rules and conventions. It’s liberating not to have to play by the rules of straight literary fiction. Overall, mystery and crime writers are a little more forgiving about playing with the conventions of their genre, whereas the gatekeepers to the pure literary world are quick to judge.”

Novelist, memoirist, and Edgar Award–winning short-story writer Susan Straight cut her teeth on the spy thrillers she found on her parents’ bookshelves. Her first short story, written in a city college summer school class when she was 16, opened on an idyllic setting—until a dead body appears near a waterfall. “The professor had me come to his office to ask if I needed to talk,” she says. “Now that I’ve written in every genre, I see how much landscape, death, and violence have intertwined in all of them. My chapters in *Between Heaven and Here* are all about the death of a woman whose body is left in a shopping cart—something my brother-in-law saw in our old neighborhood—but the narrators all miss and love the woman’s beauty and presence. In my new memoir, *In the Country of Women*, as I wrote the stories of six generations of women ancestors as they migrated to California from the South, I was stunned to find that bullets were a unifying talisman. Either guns had been pointed at them, or they had witnessed violence; one woman shot an attacker, killing him. In that way, noir has shaded so much of my work, in all three genres.”

Many writers migrate from genre to genre. I’ve written and published articles, essays, poetry, and short stories and am working on a novel that would fall more into the literary suspense category than anything else. Fifteen years ago, I published a book on writing, *Pen on Fire*, that became a Los Angeles Times bestseller. It was inspired by a student who kiddingly asked me to move in with her because then she would be sure to write all the time. I told her I would write a book for her instead, which is how *Pen on Fire* was born. When I was obsessed with knitting, I wrote an essay about it for an anthology (*Knitting Through It*). But I mostly write fiction, often inspired by real-life events, and now and then it turns dark. I follow my interests rather than the market.

You Can Too, says she’s surprised more writers don’t migrate. She cites Virginia Woolf and Joan Didion as two “women of letters” who excelled at both. “After I wrote my first novel,” says Karbo, “I really couldn’t imagine churning out one novel after the next. And I’ve always been drawn to nonfiction—biographies, essays, and memoirs. Most of the time when I get a hankering to write a novel, it’s because I’m drawn to embodying a character, something that doesn’t work in nonfiction. I feel absolutely no fidelity to either genre and go where my interests take me. Possibly this is why I haven’t had a more successful career, but really, if the writing doesn’t possess you, why do it?”

Carolyn Niethammer has written the award-winning novel The Piano Player, three books on edible wild plants, a cookbook, a nonfiction book on Native American women, two biographies, and a travel book; this fall her book on the culinary history of Tucson will be released. “It has been a wonderful, fascinating life,” she says. “But as I look at the careers of other more financially successful authors, I see that I did myself no favors by jumping around. The most successful writers stick with one genre and develop a readership. I am known for my food-related books—a few people have come up and told me they have everything I’ve written in that line—but I remain a small fish in a small pond of Southwestern-based literature.”

You can be a bestselling author for decades and still feel you would have done better if you had stuck with a single genre. Tess Gerritsen has jumped genres, publishing 28 novels—romance, medical thrillers, crime novels, science fiction, historicals—despite being advised not to. On the one hand, she thinks maybe she should have listened, yet says that “if I hadn’t gambled and written my first police procedural, The Surgeon the TV show Rizzoli & Isles would not have been born.” She agrees there are advantages to sticking to your brand, but when you get bored or feel stalled, it’s time to change. “That’s when jumping genres can salvage a career or keep you feeling excited about writing. Yes, it may be wise from a career perspective to repeatedly deliver what your readers expect, but you start to feel like a trained monkey. What do you do with the thrilling new concept that’s out of your genre? What if you uncover a historical fact that begs to be turned into a novel? Sometimes you just have to write that story, even if you know it might hurt your sales record. Even if everyone advises you against it.”

Kathleen Vyn says she’s always jumped genres. She’s published children’s books, worked as a freelance journalist, published books on ecology, and writes short stories. “As a journalist,” she says, “I wrote about every subject matter including engineering. I enjoy learning about different subjects and writing about them. That’s the fun of being a writer. You’re never bored.”

Jeri Westerson, author of The Crispin Guest Novels Series, moved from historicals and medieval mysteries to paranormal and Victorian/steampunk because of her fascination with magicians of that time period. “I must write what speaks to me,” she says. “No passion, no output. I hope to come up with something my agent can sell, but I can’t always afford the wait.” As she waits, she self-publishes and she’s okay with that. “It’s about...
keeping my name out there, in front of bookstores and librarians. Libraries will buy the books—I do well in libraries—even if bookstores won’t necessarily stock them. It doesn’t make as much as the traditionally published stuff, but it’s something to promote that’s new. There’s nothing sadder to me than authors who are still selling the same old books from years ago because they have nothing new published.”

Dennis Palumbo’s work as a therapist and his fascination with the human condition and “how a person’s emotional/psychological issues contribute to his/her behavior” motivated him to write his Daniel Rinaldi mystery novels. He believes everyone has “operatic passions,” but most of us don’t act on these passions. “It’s only in crime fiction that readers—and writers—get to vicariously express or experience people acting on these impulses,” he says. “As a therapist, as well as a writer, this more explicit narrative is thrilling to explore.” His novel series “illuminates what really goes through a psychologist’s mind while working with patients, and in a broader context, addresses the current state of the mental health profession.”

In her twenties, Marcia Biederman had a real-life detective experience, something having to do with illegal arms sales to South Africa by a manager at the firearms company she worked for as a temp. She did some sleuthing, wrote articles for newspapers, and based her first mystery novel on the experience. She later moved from mystery novels to biography because, she says, “Instead of creating a detective protagonist, I wanted to be the detective. As I got older, I wanted to write about real-life women who’d left a mark on their era—for better or worse—and I wanted to piece together the missing information about these women’s lives. I can’t tell you how excited I am to put the puzzles together. First, I turned real life into fiction, and now I’m turning facts into narrative nonfiction.”

That old saw, “When life gives you lemons, make lemonade,” worked for Christina Adams. In grad school, she focused on fiction, but when her baby son was diagnosed with autism, her focus took a turn. Her first book, the memoir A Real Boy: A True Story of Autism, Early Intervention, and Recovery, was published in May 2005 and was followed last year by Camel Crazy: A Quest for Miracles in the Mysterious World of Camels, a memoir of her investigation into the effectiveness of camel milk as a treatment for autism. “I get to use my literary writing skills, which is important to me,” she says, “and blend personal narrative with science and cultural reporting. So, it’s the best of all possible nonfiction worlds for me.”

Sometimes jumping genres gives us a way to exercise and expand our writing chops, which we can then bring back to the genre we started out with.

Erica Bauermeister started out in her early thirties writing memoir, but publishers kept telling her she needed to be more personal. She switched to fiction and was commended for how personal her writing was. “Now, after four novels,” she says, “I have a memoir, House Lessons: Renovating a Life, coming out this spring, so I suppose fiction taught me how to be truthful.” Writing fictional characters taught her to dive deep into motivation and backstory. This felt liberating and gave her insights into herself that she didn’t expect. “Here’s what I think the difference was,” she says. “When I was young and writing memoir, I was in control. I was using my experience to craft a message, a way I wanted to be seen. When I wrote fiction, I couldn’t be in control. I had to go where the characters led me, or they shut up and the story shut down. I had to learn to trust, to be vulnerable, and listen. I could control the beauty of the words, but I couldn’t control the story itself.” So, when she circled back to the memoir form, she had “twenty years of perspective . . . and four novels’ worth of practice with the craft of writing. And I knew that a good book follows its story, wherever that leads.”

Barbara DeMarco-Barrett is a writer in Southern California. She is the host of Writers on Writing on KUCI-FM and teaches at Gotham Writer’s Workshop. Her work appears in USA Noir: Best of the Akashic Noir Series and her book, Pen on Fire: A Busy Woman’s Guide to Igniting the Writer Within is in its 11th printing.
The law of unintended consequences is stirring up trouble in California, where an earnest effort by the legislature to protect Uber and Lyft drivers and other “gig workers” from exploitation has threatened the livelihood of freelance writers, editors, and photographers.

The law is still widely known as AB5 (that is, Assembly Bill 5), even though it was passed by both houses of the California legislature, signed by the governor, and codified as California Labor Code Section 2750.3 in September 2019. To summarize what is a long, complex, and highly nuanced statute, the new law establishes that service providers are presumed to be employees unless the hiring party can prove otherwise. Some professional services are exempt if the freelancer meets certain criteria, as described below. The exemption covers freelance writers and editors who limit their annual submissions to any single publisher to 35.

The burden of proving that a service provider is a bona fide independent contractor is so daunting that some national print and digital publications have stopped using California-based freelancers rather than take the risk that they will be forced to bear the burdens of an employer, including the payment of minimum wage and overtime compensation, family and sick leave, payroll taxes, and premiums for workers’ compensation, unemployment, and disability insurance.

What I am calling burdens, of course, may well be seen as benefits by the service providers themselves. Indeed, AB5 is regarded as a progressive measure by the legislators who sponsored it, the labor unions that lobbied for it and the governor who signed it into law. Authors and journalists, however, are more likely to regard the new law as a threat to their livelihoods.

Who Must Comply?

Strictly speaking, the law of California applies only in the state of California, but the new provisions of the California Labor Code are a source of concern for publishers across the country. Indeed, while a
boycott of California-based freelancers may be an overreaction, the risk of falling afoul of California law remains.

The new law applies directly to publishers headquartered in California or those whose headquarters are out of state but who maintain a business presence in California. The California law also applies to out-of-state publishers that use the services of freelancers living or working in California. The California law does not apply to out-of-state publishers that use freelancers in their own states or in states other than California.

Of course, a publisher operating in any given state must comply with the laws and regulations of that state. Massachusetts, for example, is also highly protective of employment status, and some of the issues discussed here may arise in the future in other states too.

**What Changed in California Law?**

A policy that favors employment status under various California rules and regulations is nothing new. The law has long provided that employment is a rebuttable presumption when it comes to hiring and that a hiring party that wants to treat a worker as an independent contractor bears the burden of proof in overcoming the presumption. But the preference for employment is much more muscular now because of two major changes in the law.

First, the California Supreme Court ruled unanimously in the 2018 case of *Dynamex Operations West v. Superior Court* that all workers are presumed to be employees rather than independent contractors unless the hiring party is able to satisfy a strict three-part test known as the “ABC test.”

A. The worker is free from the control and direction of the hiring party in connection with the performance of the work, both under the contract for the performance of the work and in fact.

B. The worker performs work that is outside the usual course of the hiring party’s business.

C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

The next change came in September 2019, when the California legislature enacted AB5. The bill was promptly signed into law and went into effect on January 1 as newly enacted Section 2750.3 of the California Labor Code. Thanks to several last minute amendments to AB5, the statute goes beyond the *Dynamex* case and now includes several additional provisions that were meant to address the needs of the news media (though the journalists themselves disagree, and the changes only burden the publishing industry, as we shall see).

**The Impact on Authors**

Although Section 2750.3 has not yet been fully implemented or litigated, a strong legal argument can be made that it does not apply to the conventional dealings between authors and publishers in the book trade.

Publishers do not customarily engage the services of authors who create a book. Rather, publishers acquire intellectual property rights in works of authorship that are created by the authors. If and when the argument is tested in court and upheld, then the conventional author-publisher contract may fall entirely outside the scope of labor law in California, including the newly enacted section of the California Labor Code.

The argument is strongest when a work of authorship is actually in existence, even if only in the form of a book proposal and a few sample chapters. However, if no intellectual property exists when the publishing agreement is signed and the contract uses terms like “services” to describe the author’s work, the contract might start to look more like a contract for the provision of services and run afoul of the California law. For example, if the contract provides that the publisher is acquiring the “results and proceeds of the services rendered by the Author,” which is advantageous language when the publisher seeks to acquire as
many rights as possible, the contract is more plausibly characterized as a contract for services.

The argument that books fall outside the scope of labor law is weaker when it comes to other content providers whose work consists of editing, proofreading, typography, house or catalog copy, or press releases. The work of a copy editor or a proofreader, for example, is best characterized as a service. The copywriter who produces flap copy, catalog copy, and press releases is producing works of authorship, but it is harder to argue that the core relationship with the publisher is the acquisition of intellectual property rights rather than the provision of services. The argument is also weakened by the fact that publishers rarely employ authors but commonly employ editors and copywriters—a factor that favors employment status under Section 2750.3.

Finally, the new statute raises the risks of any publisher that seeks to acquire a work of authorship as “commissioned work” or “work made for hire.” Existing sections in California law, California Labor Code Section 3352.5(c) and California Unemployment Insurance Code Sections 686 and 621(d), have long stated that an individual who provides a work of authorship on a work-for-hire basis is deemed to be an employee of the acquiring party. Until now, these two sections have been ignored by employers and by the courts. When combined with Section 2750.3 of the California Labor Code, however, these existing statutes represent a sharply elevated risk for a publisher that seeks to acquire a writer’s work on a work-for-hire basis.

A Dubious Safe Harbor for Freelance Writers and Editors

As a general rule, Section 2750.3 of the California Labor Code adopts the ABC test, but exceptions are carved out for various specific businesses and professions that fail to satisfy all three of the requirements under the ABC test. One of the exceptions applies to freelance writers and editors (and also to photographers and newspaper cartoonists) who work under contract with the hiring party. For these individuals, a different, multilayered, and more complete test is applied to determine if a publisher can treat its freelance writers and editors as independent contractors rather than employees.

The exception applies to freelance writers and editors under contract “who do not provide content submissions to the putative employer more than 35 times per year.” A “submission” is defined as “one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is provided for in a contract that defines the scope of the work; (III) is accepted by the publication or company and published or posted for sale.” The problematic word in the clause is “journalist,” which raises the question of whether the exception applies at all to freelance writers and editors who work in the book publishing industry.

The same exception applies to still photographers and photojournalists who do not license content to the putative employer more than 35 times per year, and to graphic designers, grant

PUBLISHERS ACQUIRE INTELLECTUAL PROPERTY RIGHTS IN WORKS OF AUTHORSHIP THAT ARE CREATED BY THE AUTHORS. IF AND WHEN THE ARGUMENT IS TESTED IN COURT AND UPHELD, THEN THE CONVENTIONAL AUTHOR-PUBLISHER CONTRACT MAY FALL ENTIRELY OUTSIDE THE SCOPE OF LABOR LAW IN CALIFORNIA.
writers, fine artists, and marketing professionals whose work is “original and creative in character.”

But the exception applies only if freelance writers, editors, or other specified professionals meet six additional conditions listed in the statute, including maintenance of a business location, issuance of a business license, the ability to set or negotiate their own rates, the ability to set their own hours, the availability to perform the same type of work for other customers, and the ability to exercise discretion and independent judgment in the performance of services.

Once it has been determined that a freelancer does not satisfy the ABC test but falls into one of the exceptions in the new law, yet another and longer test is applied to determine whether the freelancer is an employee or an independent contractor. The applicable test is the one that was established in the 1989 California Supreme Court case *S. G. Borello & Sons Inc. v. Department of Industrial Relations*. Unlike the simple ABC test, the *Borello* test consists of 11 different factors, including “whether the person performing services is engaged in an occupation or business distinct from that of the principal” and “whether or not the parties believe they are creating an employer-employee relationship.”

Most strikingly, the carve-out for freelancers does not help journalists who contribute more than 35 items per year. A weekly columnist or blogger, for example, falls outside the scope of the exception and is more likely to be deemed an employee of the publisher. That’s why Vox Media terminated the contracts of hundreds of freelance contributors in California. And that’s why the American Society of Journalists and Authors and the National Press Photographers Association challenged the constitutionality of the law under the First Amendment in a lawsuit filed on their behalf by the Pacific Legal Foundation, a libertarian public interest law firm.

**Practical Steps**

If an author or journalist wants to forego the benefits of steady employment in order to secure work from publishers, then a business relationship can be structured—and a contract can be written—that may enable both parties to navigate around the new law. Of course, it is not enough to write and sign a self-serving contract. The author or journalist and the publisher must actually comply with the requirements of the new law.

For example, as noted above, the book contract between an author and a publisher should avoid any reference to services or to work made for hire, and the contract should be based on the acquisition of rights, preferably to an existing work of authorship, even if it is only a proposal at the time the contract is signed. Most proposals, after all, include one or more sample chapters, which amount to an existing work of authorship. Moreover, compensation in book contracts traditionally consists of advances and royalties on books sold rather than payment to the author for writing the book. (The Authors Guild is seeking an opinion from the California Department of Labor that the new law does not apply to authors and publishers who enter into typical trade book contracts.)

As another example, the contract between a journalist and a publisher should be based on the six conditions listed in the carve-out for freelance writers and editors above, and freelance journalists should operate their businesses in compliance with these conditions.

Some of us expect that the courts will fine-tune the new California law in the future, but we still fear that damage will be done to authors and journalists in the meantime.

**Important Notice:** This article is an overview of recent developments in California law and does not constitute legal advice. Some elements of the law discussed here may change. Readers must consult an attorney with appropriate experience and expertise to determine if and how the current laws may affect their legal rights and legal risks.

Jonathan Kirsch is a Los Angeles-based author, book reviewer, and attorney specializing in copyright, trademark, privacy, and publishing law.
LEGAL WATCH

* ORACLE AMERICA INC. V. GOOGLE LLC

A significant copyright case is scheduled to be argued before the U.S. Supreme Court on March 24, 2020. In this case, the Supreme Court may reach a decision that will impact how fair use is interpreted by courts in the future.

The case arises from the fact that Google used the Java Application Programming Interface (API) without permission in order to develop its own Android mobile platform. Google argued that its use was a “fair use” under the copyright law. Oracle sued for copyright infringement, and in Oracle America Inc. v. Google LLC, the U.S. Court of Appeals for the Federal Circuit found that Google’s use “was not fair as a matter of law.” Google subsequently appealed the case to the U.S. Supreme Court.

While, on its face, the Google case applies to computer software, this is the first time the Supreme Court will be addressing fair use in approximately 25 years. In that time, courts have increasingly interpreted fair use in a rather expansive fashion, tending to rely on whether they deem the use to be “transformative”—and transformative can be in the eye of the judicial beholder. That is why the Authors Guild has joined a group of other author organizations to submit an amicus curiae (“friend of the court”) brief to the Supreme Court to assist the court in conducting its fair-use analysis in a way that recognizes the impact this doctrine has had on authors.

* CHRONICLE BOOKS ET AL. V. AUDIBLE

In July 2019, Audible announced its new “Captions” feature, which was intended to display text synced with audio narration—without the permission of the author or publisher of the book in question. This feature was to have launched in September 2019, but the announcement was met not only with the expected uproar from the publishing industry but also with a lawsuit.

In August 2019, the American Association of Publishers (AAP), through seven of its members, brought a copyright infringement suit against Audible in the Southern District of New York, demanding both damages for the infringement and that the court enjoin (i.e., prevent) Audible from launching Captions. The Authors Guild, to-

LEGAL SERVICES SCORECARD
From July 31 through December 31, 2019, the Authors Guild Legal Services Department handled 624 legal inquiries. Included were:

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<th>Book contract reviews</th>
<th>Agency contract reviews</th>
<th>Reversion of rights inquiries</th>
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Audible effectively undoes all of this important work with its Captions feature. Authors thus face a significant threat in the loss of control of their work and harm to the value of their work."

The case was settled by the parties and dismissed by the court on January 14, 2020. On February 5, AAP’s attorneys submitted to the court a proposed order that would permanently bar Audible from displaying without consent written text derived from the audiobook versions of the plaintiff publishers’ works.

The directive was passed by the EU Parliament in March 2019, giving the member states two years in which to enact the directive within their own laws. In what may seem an ironic twist—especially since its representatives were supporters of the Copyright Directive—the U.K. has announced that since it is no longer a member of the EU, it does not intend to implement the directive. This decision leaves U.K. copyright holders (like many people and industries in the U.K.) in limbo with respect to the EU. It remains to be seen if the U.K. will decide to pass its own version of the elements contained in the directive, or whether it will head in a different direction entirely with regard to copyright.

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<th>Inquiries on copyright law, including infringement, registration, duration, and fair use</th>
<th>Inquiries regarding securing permissions and privacy releases</th>
<th>First Amendment queries</th>
<th>Other inquiries, including electronic rights, literary estates, contract disputes, contract questions, periodical and multimedia contracts, movie and television options, internet piracy, liability insurance, finding an agent, and attorney referrals</th>
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I. LOBBYING ACTIVITIES

* CASE ACT FOR A SMALL CLAIMS COPYRIGHT COURT

We continue to actively lobby for the Copyright Alternative in Small-Claims Enforcement (CASE) Act, and our efforts—working both with elected officials and at a grassroots level—have borne fruit. Currently, authors and other creators have no practical way to enforce their rights, even in cases of clear infringement, because bringing a litigation in federal court is so expensive, averaging more than $250,000 even for a simple infringement case. The bill enables copyright owners to expensively bring a claim for infringement for damages of up to $15,000 per work infringed (or $30,000 total)—without having to hire a lawyer or travel to the nearest federal court. This tribunal will be helpful with respect to the infringement of both articles and books, including internet e-book piracy cases, where damages from lost sales are within or reasonably close to the $15,000 or $30,000 limits. Most authors don’t even think about bringing such lawsuits now.

The bill passed the House in October 2019 with resounding bipartisan support (410–6); however, it is currently stalled in the Senate due to a hold placed by Senator Ron Wyden (D-OR). We, along with other copyright organizations, are continuing to lobby Senator Wyden to lift his hold and let the matter proceed to a floor vote. Senator Wyden’s objections are based on the misconception that the bill would allow copyright trolling; we and our allies have addressed these objections without success and are now organizing Senator Wyden’s constituents to impress on him the importance of this bill to artists in his district and beyond.

* DMCA SAFE HARBORS (SECTION 512)

We expect 2020 to be an important year for changes to regulations governing the use of copyrighted material online. The rampant spread of internet piracy has made it clear that the safe harbors created by Section 512 of the 1998 Digital Millennium Copyright Act—which protects internet platforms from liability for copyright infringement by their users—are not working as intended.

Section 512 puts the burden on rightsholders to find and report infringement. What’s more, the “notice and takedown process” requires rightsholders to specifically identify infringing URLs in their notices, while internet platforms are obligated only to remove those particular URLs. This creates a fruitless whack-a-mole situation with rightsholders sending hundreds of DMCA notices, only to see their content appear under a new URL.

After almost five years of hearings, roundtables, and public comments (in all of which the Guild has taken part), the U.S. Copyright Office is expected to issue the results of its 512 Study this spring. Meanwhile, Senator Thom Tillis (R-NC), chair of the Intellectual Property Subcommittee on the Senate Judiciary Committee, has tentatively scheduled hearings throughout the coming year with the goal of creating a draft DMCA reform bill and proposing other solutions to make the DMCA more effective. The Authors Guild and sister creator groups will be involved in ensuring that the interests of authors and creators are acknowledged in these discussions.

We expect that the result of the report and the Senate hearings will yield robust proposals for targeting piracy and protecting copyright online.

* ANTI-TRUST EXEMPTION FOR AUTHORS

Getting an antitrust exemption for authors is one of our top advocacy priorities in 2020. Currently, antitrust laws prohibit authors from engaging in collective bargaining. An exemption will allow authors and other creators to collectively negotiate payment and other contract terms. We believe that collective bargaining rights will be a great boost to the writing community and alleviate its income decline. We have drafted a bill tentatively titled “Freelance Author and Artist Freedom Act,” which would exempt writers, photographers, and artists from antitrust laws, and we will be working with legislative staffers to find a sponsor. Given the political climate, however, we don’t expect to introduce the bill during the 2020 legislative year.
**WORKER CLASSIFICATION AND FREELANCE WRITING**

Following the enactment of California's AB5 law (discussed in detail on p. 27), freelance writers in California have reported losing their publishing clients, who fear the writers will be deemed employees under the new law. Although freelance writers fall within the exemption, a lack of education and an arbitrary limit of 35 submissions per year has caused confusion and harm to California-based writers. We are working with other groups representing freelance writers and creators to change the submission limit to qualify for the professional services exemption and also to clarify that book authors are not covered by the law. As other states—including New York and New Jersey—consider enacting similar worker-classification laws, we are pushing for clear and simple exemptions for freelance writers.

**COPYRIGHT OFFICE MODERNIZATION**

We have been working closely with Senator Thom Tillis’s (R-NC) office on a draft bill to ensure that the Copyright Office has the resources and authority to upgrade its registration and recording systems, thereby simplifying both. The bill will also ensure the independence from the Library of Congress that the Copyright Office needs to address crucial policy issues. A modern twenty-first-century Copyright Office is critical to meeting the needs of today’s creative economy.

**FREE SPEECH/FREEDOM OF THE PRESS**

**COLLABORATIVE FREE SPEECH EFFORTS**

We continue to work with a range of organizations to push back on censorship wherever we see it. We have signed on to four statements or letters organized by the National Coalition Against Censorship, including one on the banning of books in schools and libraries, and a recent statement by the American Association of University Professors criticizing President Trump’s pledge to deny federal research funds to colleges and universities that do not “support free speech”—as the government may interpret it.

As in past years, we are supporting Banned Books Week. We announce all of our various anti-censorship efforts and post them on our website.

We also signed on to an amicus brief with Media Coalition in *Prison Legal News v. Jones*, a case in which the Florida prison system banned *Prison Legal News*, in violation of the newsletter’s First Amendment right to free speech and a free press.

**LITIGATION**

**AMICUS BRIEFS**

The Authors Guild signed on to two amicus briefs this past year, *PEN America Center v. Trump* and *Chronicle Books et al. v. Audible*; we plan on signing on to a third in *Oracle America Inc. v. Google LLC*, which will go before the U.S. Supreme Court in the 2020–21 session.

In *PEN America Center v. Trump*, the issue relevant to us is PEN America’s ability to bring a First Amendment lawsuit on behalf of its membership—what is commonly referred to “organizational standing.” This issue is of great relevance to the Guild’s ability to bring lawsuits on behalf of its membership.

In *Chronicle Books et al. v. Audible*, Audible’s projected “Captions” feature was to display text on the user’s device (phone, tablet, etc.) synced with audiobook narration, without the permission of the author or publisher. This case was settled by the parties and dismissed by the court on January 14, 2020. (See p. 32.)

In *Oracle America Inc. v. Google LLC*, the fair use doctrine will go before the U.S. Supreme Court for the first time since 1994, when the court decided *Campbell v. Acuff-Rose*. Fair use is an important limitation on the exclusive rights of authors and creators, but over the last 25 years its scope has been greatly expanded in lower courts. The Authors Guild’s amicus brief will urge the court to emphasize the importance of the fourth fair use factor—“the potential effect on the market for copyrighted works”—in guiding the lower court’s fair use analyses. This factor, which prevents usurpation of licensing markets for the copyrighted work by an infringing work, has been undermined by lower-court decisions in the Ninth and Second Circuits. A clear rule from the Supreme Court on fair use could have dramatic consequences for mass-digitization of books and electronic licensing.

The Authors Guild, the Romance Writers of America and the Science Fiction and Fantasy Writers of America assisted in the defense of Tom Tessier, a writer facing a trademark infringement claim from author Michael-Scott Earle for using the word “tamer” in the title of his books. While single book titles cannot be claimed, copyrighted or trademarked, series titles can be trademarked. However, just like the word “cocky,” which was the subject of a similar trademark lawsuit last
the feasibility of bringing strategic lawsuits against notorious bad actors. Because the owners and operators of the vast majority of pirate sites reside outside of the United States in countries where enforcing U.S. court judgments are extremely difficult, the primary goal of our lawsuits will be to raise awareness of the need to push for broader systemic changes that will compel U.S.-based intermediaries, like Google and multiple hosting providers, to remove pirate sites from their platforms.

V. OTHER COPYRIGHT-RELATED INITIATIVES

* COPYRIGHT AND ARTIFICIAL INTELLIGENCE

In January, we submitted comments to the Copyright Office in response to the rise of artificial intelligence. This is an evolving question with serious consequences for authors and books, and we will be working on it throughout the year.

* ESCALATING PIRACY REPORTS TO PLATFORMS

Last year, we helped authors take down roughly a dozen groups on Facebook that allowed their members to post and download pirated PDF and EPUB files of books. Some of these groups were hosting copies of thousands of pirated books that could be downloaded directly from Facebook’s platform. Facebook’s takedown process is designed primarily for complaints against individual posts, and it removes those in response to a complaint from a rightsholder, but it fails to target repeat infringers or close down the rogue groups despite having been notified of their illegal practices.

LinkedIn’s SlideShare platform, which allows users to upload slide decks, has become a hotbed for pirated links. Dozens of Guild members have complained about links for pirated copies of their books being available on this platform. Many are “phishing links,” that is, links that promote free books for a malicious purpose, such as information-farming or spreading viruses, but there are also numerous cases of full-length books being made available as free downloads. In a few instances, as many as 70 separate accounts are advertising the links. Members told us that they had been sending takedown notices to LinkedIn without getting a timely response. To address the situation, we held a conference call with LinkedIn’s copyright enforcement team, following which our members started reporting an accelerated response to their takedown complaints. In our exchanges with LinkedIn, we have emphasized the futility of the takedown process and suggested technical measures that would prevent the uploading of pirate or phishing links to their platform. We have scheduled follow-ups with the team and will continue to monitor the situation.

Another internet platform that pirates are using to sell e-books is eBay. Despite the fact that eBay’s terms prohibit users from listing intangible items, countless seller accounts are advertising 99-cent pirated PDFs and EPUBs of books. Once a purchase is made, the accounts e-mail the purchaser a copy of the pirated book. We have reached out to eBay’s legal team and will continue to press them on cleaning up their platform.

In cooperation with authors and publishers, we are looking into the feasibility of bringing strategic lawsuits against notorious bad actors. Because the owners and operators of the vast majority of pirate sites reside outside of the United States in countries where enforcing U.S. court judgments are extremely difficult, the primary goal of our lawsuits will be to raise awareness of the need to push for broader systemic changes that will compel U.S.-based intermediaries, like Google and multiple hosting providers, to remove pirate sites from their platforms.
**MEMBER NEWS**

* BOOKS BY MEMBERS


for and Profited from America’s Revolution; James Shapiro: Shakespeare in a Divided America: What His Plays Tell Us About Our Past and Future; Samuel Shem: Man’s 4th Best Hospital; Charlotte Watson Sherman: Brown Sugar Babe; Lauren Shovan (and Saadia Faruqi): A Place at the Table; David Shulkin: It Shouldn’t Be This Hard to Serve Your Country; Judy Sierra (and Marc Brown, Illus.); Everyone Counts; Fanchon Jean Silberstein: Art inSight: Understanding Art and Why It Matters; Daniel Silva: The New Girl; Coco Simon (and Joanie Stone, Illus.); Hole in the Middle; Marilyn Singer (and Ryan McAmis, Illus.); Who Named Their Pony Macaroni?; Poems About White House Pets; Paul Singh: The Seduction of Religion: An Illuminating and Provocative Guide to the Religions of the World (2nd Edition); Karin Slaughter: The Last Widow; Paul Smith (and Sam Usher, Illus.); The Adventures of Moose & Mr. Brown; Traci Sorell: At the Mountain’s Base; Traci Sorell (and Charlene Willing McManis); Indian No More; Teresa Sorkin: The Woman in the Park; David Sosnowski: Buzz Kill; RuthSpiro (and Irene Chan, Illus.); Baby Loves Scientists: You Can Be Anything!; Wesley Stace (and Mark Morris); Out Loud: A Memo; Michael Stanley: Facets of Death; Hannah Stark (and Bob Kolar, Illus.); Trucker and Train; Brian Starr: Our Lady of the Lake; The Priest, The Knight, and Zeus; Mark Stein: The Presidential Fringe: Questing and Jesting for the Oval Office; Sydney Ladensohn Stern: The Brothers Mankiewicz: Hope, Heartbreak, and Hollywood Classics; Amy Stewart: Kopp Sisters on the March; Katherine Stewart: The Power Worshippers: Inside the Dangerous Rise of Religious Nationalism; Whitney Stewart: Mindfulness and Meditation: Handling Life with a Calm and Focused Mind; R. L. Stine (and Nichole Matthews, Illus., and Kelly Matthews, Illus.); The Scare School; Christine Sloan Stoddard: Desert Fox by the Sea; Lauren Stover (and Paul Himmelein and IZAK, Illus.); Bohemian Manifesto: A Field Guide to Living on the Edge; Whitney Stuart (and Rocio Alejandro, Illus.); Tummy Ride: Calming Breaths for Little Ones; Sarah Sullivan (and Madeline Valentine, Illus.); A Day for Skating; A. P. Sylvia: Vampires of Lore: Traits and Modern Misconceptions; Thomas Tacker: Rethinking Consumer Protection: Escaping Death by Regulation; Amy Rebecca Tan: Summer at Meadow Wood; Aerle Taree: PoeTaree: The Jurisprudence of Life; Sergio Troncoso: A Peculiar Kind of Immigrant’s Son; Monique Truong: The Sweetest Fruits; Danielle Trussoni: The Ancestor; Lily Tuck: Heathcliff Redux: And Other Stories; Lara Tupper: Off Island; Anne Tyler: Redhead by the Side of the Road; Myron Uihleg (and Carolyn Arcabascio, Illus.): The Bar Mitzvah Boys; Deborah Underwood (and T. L. McBeth, Illus.): Ducks; Deborah Underwood (and Irene Chan, Illus.); Finding Kindness; Deborah Underwood (and Cindy Derby, Illus.); Outside In; Deborah Underwood (and Meg Hunt, Illus.); Reading Beauty; Lisa Unger: The Stranger Inside; Rachel Vail: Bad Best Friend; Karla Valenti (and Annalisa Beghelli, Illus.); Marie Curie and the Power of Persistence; Nicole Valentine: A Time Traveler’s Theory of Relativity; Patrice Vecchione: Ink Knows No Borders: Poems of the Immigrant and Refugee Experience; My Shouting, Shattered, Whispering Voice: A Guide to Writing Poetry and Speaking Your Truth; Richard Vetere: The White Envelope; Zaglada; Carl Vigeland: A Symphony for Shelby; Steven Vogel: Betrayal in Berlin: The True Story of the Cold War’s Most Audacious Espionage Operation; Ginger Wadsworth (and Craig Orback, Illus.); Born to Draw Comics: The Story of Charles Schulz and the Creation of “Peanuts”; Kate Walbert: She Was Like That: New and Selected Stories; Amy Waldman: A Door in the Earth; Ayelet Waldman (Ed.) (and Michael Chabon, Ed.): Fight of the Century: Writers Reflect on 100 Years of Landmark ACLU Cases; Betty Webb: The Panda of Death; William Wells: The Now-And-Then Detective; Andrew Welsh-Huggins (Ed.): Columbus Noir; Abigail Hing Wen: Loveboar, Taipei; Tracey West (and Matt Loveridge, Illus.); Griffith’s Guide for Dragon Masters: A Dragon Masters (Special Edition); Alice Wexler and Vida Sabbagh: Bridging Communities Through Socially Engaged Art; Dianne White (and Felicita Sala, Illus.); Green on Green; Susan Wiggs: The Oysterville Sewing Circle; Preslaysa Williams: Healing Hannah’s Heart; Alan A. Winter (and Herbert J. Stern); Wolf; Jonah Winter (and Nancy Carpenter, Illus.); Mother Jones and Her Army of Mill Children; Jonath Winter (and Jeanette Winter, Illus.); Oil; Jonah Winter (and Bryan Collier, Illus.); Thurgood; Barry Wittenstein (and Jerry Pinkney, Illus.); A Place to Land: Martin Luther King Jr. and the Speech That Inspired a Nation; Stuart Woods: Contraband; Stealth; Treason; Robin Yardi: Owl’s Outstanding Donuts; Victoria Zackheim (Ed.): Private Investigations: Mystery Writers on the Secrets, Riddles, and Wonders in Their Lives; James Zirin: Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits.

MEMBERS MAKE NEWS

The 2020 Carnegie Medal longlists were announced on October 1, 2019. Alice Hoffman’s The World That We Knew, Siri Hustvedt’s Memories of the Future, and Cathleen Schine’s The Grammarians were longlisted in the Fiction category. Carolyn Forché’s What You Have Heard Is True: A Memoir of Witness
in New York City.

Carolyn forché were presented on November 20

Memorial Award.

nominated for the Sue Grafton

r. rendon, and

Marcie

Satapur Moonstone,

Gigi Pandian

s Biographical.

sujata Massey

and the Censors

was nominated

Hitchcock

' s

the category of Best Fact Crime.

Stolen Identity

was nominated in

of Betrayal, Family Secrets, and

People Know About Us: A Mystery

The Less

' s

Axton Betz-hamilton

egory of Best Paperback Original.

Winter

susan Alice Bickford

Dread of

' s

were announced on January 22.

Biographical.

s

were longlisted in the Nonfiction

Making of an American Imagination

Dr. Seuss: Theodor Geisel and the

Becoming

and

Past and Earth's Perilous Future

Jon Gertner

' s,

Janis: Her Life and Music

' s

Warren

and Resistance,

holly George-

Chasms of Water, Stone, and Light

Genealogical Resource.

Connecticut Society of Genealogists

America: Clinton

of Criticism. The winners will be an-

was a finalist in the category

Peggy Adler's Images of

was selected as one of the 2019

Southwest Books of the Year by

Kelly Bennett’s picture-book

manuscript “Crosstown Bop” was a

finalist for the IDEO Children's Book

Challenge.

Edward Borowsky’s The Great

Mongolian Bowling League of the

United States of America won the

2019 International Book Award in

the Fiction: Novella category.

Linda Eve Diamond’s poem

“Lost Gloves” was awarded a

Grand Prize in Artists Embassy

International's Dancing Poetry

Contest. The poem will be choreo-

graphed as a dance and performed

by Natica and Richard Angilly's

Poetic Dance Theater Company at

the annual Dancing Poetry Festival

in San Francisco, California. In ad-

dition, her poem “Notes” was selected

as a First Prize award winner and

will also be read at the festival.

Thomas L. Dynneson

received the 2020 Albert Nelson Marquis

Lifetime Achievement Award.

Mary Mackey’s The Jaguars

That Prowl Our Dreams: New and

Selected Poems 1974–2018 won the

2019 Eric Hoffer Small Press Award.

Leonard S. Marcus

won the 2019 Chen Bochui Foundation

International Children's Literature

Award for “special contributions to

the development of Chinese chil-

dren's literature.” He is the first

American to receive this honor.

Laura Pedersen’s Life in

New York: How I Learned to Love

Squeegee Men, Token Suckers,

Trash Twisters, and Subway Sharks

won the Seven Sisters Book Award

for Best Nonfiction.

Louis Picone

received the Ella Dickey Award at the Missouri

Cherry Blossom Festival. The award

is given to authors who have con-

tributed to the preservation of

history.

Margaret Porter’s Beautiful

Invention: A Novel of Hedy Lamarr

received the 2019 New Hampshire

Literary Award for Outstanding

Work of Fiction.

Regina Porter’s The Travelers

was named a finalist for the PEN/

Hemingway Award for Debut Novel.

Albert Russo’s Call Me

Chameleon was named a Book

Excellence Award finalist.

Mo H. Saidi

received the

Voices de la Luna’s Voices of Texas

Award, presented at a gala on

October 6, 2019, in San Antonio.

E. M. Schorb

was the winner of the eighth annual Beverly Hills Book

Award for R & R: A Sex Comedy, in

the category of Humor.

Rachel Louise Snyder’s No

Visible Bruises: What We Don't

Know About Domestic Violence Can

Kill Us was named a finalist for the

2019 Kirkus Reviews Prize in the

category of Nonfiction.

Matthew Tekulsky’s novel

Bernie and the Hermit was a final-

ist in the 2019 William Faulkner-

William Wisdom Creative Writing

Competition in the Novel category.

Douglas Wells’s The Mourning

Islands was named a finalist for the

2019 International Book Awards in

the Fiction: Mystery/Suspense cat-

egory. It was also the winner of the

New York City Big Books Award in

the category of Mystery and the

Florida Authors and Publishers

Association’s President’s Book

Award Gold medal in the category of

Adult Fiction–Mystery.

Jane Breskin Zalben’s A Moon

for Moe and Mo won the 2019

Sydney Taylor Award’s Silver medal.

* IN MEMORIAM

Al Alvarez, 90, died on September

23 in London, U.K. The writer, critic,

and poetry editor was best known

for 1971’s The Savage God, a semi-

nual study on literary suicide.

M. C. Beaton, 83, died on

December 30 after a brief battle

with illness. The Scottish author,

born Marion Chesney, wrote the

best-selling Agatha Raisin series,

among other well-known crime

novels.

Carol Brightman, 80, died

November 11 in Damariscotta,
Maine. She was a biographer and nonfiction author who wrote definitive books on the novelist and critic Mary McCarthy and the rock band the Grateful Dead.

Andrew Clements, 70, died November 28 in West Baldwin, Maine. The children’s author was best known for his middle-grade novel Frindle, the bestseller in his 80-plus book catalog.

Stephen Dixon, 83, died November 6 at a hospice in Towson, Maryland. He published 18 novels and nearly 600 stories to great critical acclaim, winning several O. Henry Awards, Pushcart Prizes, a Guggenheim Fellowship, and two National Endowment of the Arts grants.

Ernest Gaines, 86, died November 5 in his hometown of Oscar, Louisiana. He was an acclaimed novelist best known for 1971’s The Autobiography of Miss Jane Pittman and 1993’s A Lesson Before Dying, which was awarded the MacArthur Foundation’s “genius grant.” He had been an Authors Guild member since 1968.

Mordicai Gerstein, 83, died September 24 in Westhampton, Massachusetts. He wrote and illustrated more than 40 children's books, his most famous being The Man Who Walked Between the Towers, which won the Caldecott Medal in 2003.

Paul Inggrassia, 69, died September 16 in Naples, Florida, after a battle with pancreatic cancer. A longtime Wall Street Journal reporter on the auto industry, he won the Pulitzer Prize in 1993 for his reporting on turmoil at General Motors.

Judith Krantz, 91, died June 22 in Bel Air, California. She wrote a series of New York Times–bestselling novels, beginning in the late 1970s with Scruples. Her debut work was adapted as a miniseries, as were six subsequent novels.

Johanna Lindsey, 67, died October 27 in Nashua, New Hampshire. A best-selling historical romance novelist whose books sold over 60 million copies, she was known among her fans for titles such as Beautiful Tempest and Captive of My Desires.

Dennis Schmitz, 82, died September 12 in Sacramento, California. He was Sacramento’s first poet laureate and helped produce The Sacramento Anthology: One Hundred Poems.

Anne Rivers Siddons, 83, died September 11 in Charleston, South Carolina. She was best known as an author of novels featuring strong, Southern women, like the best-selling Peachtree Road and Heartbreak Hotel. She also served on the Authors Guild Foundation Board until her death.

Elizabeth Wurtzel, 52, died January 7 in New York City. She was best known for her 1994 memoir Prozac Nation, which helped ignite the late twentieth-century boom in confessional memoirs. Later work included Bitch: In Praise of Difficult Women and Creatocracy: How the Constitution Invented Hollywood.

DECEASED MEMBERS

Betsy Aswad
Alex Ayres
Deirdre Bair
Jonathan Baumbach
Eli P. Bernzweig
Patricia Bosworth
Mary Higgins Clark
Clive Cluster
Craig Comstock
Edith Kunhardt Davis
Rita Emmett
Richard P. Frisbie
Ernest J. Gaines
Albert Gillotti
Rosemary Ellen Guiley
A. E. Hotchner
Ward S. Just
Barbara Kafka
Nancy Kalish
Elaine Kendall
Nathan Kravetz
James C. Lehrer
Ronald Ley
James D. Livingston
Robert K. Massie
Donald McCaig
Dinah L. Moché
Jill Elizabeth Morgenthaler
Stew Mosberg
Gina Ogden
Harold Prince
Michael J. Ritt
Richard Rosenthal
Anne Rivers Siddons
Alvin Silverstein
Karen Cecil Smith
Jim Stinson
Ann G. Thomas
Eleanor Lea Wait
Elizabeth Wurtzel
Samuel H. Young
Over the last few months, the Authors Guild and the world of publishing have lost a number of significant contributors to the literary canon and protectors of authors’ rights. Here are tributes to a few who made a big difference.

Mary Higgins Clark, 1927–2020

The Authors Guild mourns the passing of Mary Higgins Clark, a celebrated best-selling novelist and member of the Guild since 1976. Clark, who was known as the Queen of Suspense, served on the Authors Guild Council for 20 years. She received the Authors Guild Foundation award for Distinguished Services to the Literary Community in 2018. She passed away on January 31, 2020, at the age of 92.

Ms. Higgins Clark’s 56 titles sold more than 100 million copies in the United States alone. In her memoir, *Kitchen Privileges*, she described her youthful self as “aching, yearning, burning” to write. She sold her first story at the age of 29—after receiving 40 rejections—and her first novel, *Where Are the Children?*, at 47. As she told Marilyn Stasio in a 1997 *New York Times* interview, she wanted to create stories that would make a reader say: “This could be me. That could be my daughter. This could happen to us.” In 1988, the *Times* reported that Higgins Clark had broken a record by entering into what was believed to be “the first eight-figure agreement involving a single author,” with a multibook contract that guaranteed her at least $10.1 million.

Ms. Higgins Clark coauthored five suspense novels with her daughter Carol Higgins Clark, and the Under Suspicion series with Authors Guild Foundation Board member Alafair Burke. Two of her novels were made into feature films, and many of her other works were made into television films. Her last novel, *Kiss the Girls and Make Them Cry*, © Beowulf Sheehan
A. E. Hotchner, 1917–2020

The Authors Guild mourns the loss of A. E. Hotchner, who passed away on February 15, 2020, at the age of 102. He joined the Authors Guild in 1950 and was for many years an active member of the Authors Guild Foundation. It is difficult to summarize Mr. Hotchner’s contributions to American arts and letters, and even more difficult to estimate his loss to our community.

Mr. Hotchner was born in 1917, in St. Louis, Missouri. He received his undergraduate and law degrees from Washington University in St. Louis, and practiced law briefly before joining the U.S. Air Force during World War II. After the war, he settled in New York City, where he took an editorial position at Cosmopolitan, leading to his long-time friendship with Ernest Hemingway, whom Mr. Hotchner memorialized in his 1966 biography of the author, Papa Hemingway.

In a career that spanned more than 70 years, Mr. Hotchner authored 20 books in multiple genres: novels, memoirs, biographies, and profiles of celebrities whose ambit Mr. Hotchner occupied and whose friendships he celebrated. His 1972 memoir of growing up in St. Louis during the Great Depression, King of the Hill, was adapted into a film by Steven Soderbergh in 1993. A creative polymath, Mr. Hotchner also wrote for theater and television. In 1982, together with his friend and neighbor Paul Newman, Mr. Hotchner cofounded Newman’s Own, a food brand with the mission of funding charitable and educational programs. Over the years, Newman’s Own has donated over $550 million in profits to the arts and social causes, including the Authors Guild.

Mr. Hotchner was a literary citizen par excellence, whose contributions on and off the page cannot be replaced.

Jim Lehrer, 1934–2020

Jim Lehrer, the cofounder with Robert MacNeil of the first iteration of PBS NewsHour in 1975, and for 36 years its solo anchor, died at home January 23, 2020, at the age of 85.
Mr. Lehrer was a rare public figure: modest, measured, arguably the calmest and most trusted American anchorman since the Walter Cronkite and Huntley and Brinkley era, and surely the merriest. He was also a dedicated writer. He published his first novel in 1966 and went on to publish another 19, as well as four plays, two screenplays, and three memoirs. He was a member of the Authors Guild from 1966 until his death.

His credentials as a son of the American heartland were well earned and impeccable: He was born in Wichita, Kansas, in the middle of the Depression; his mother taught school; his father drove buses. He came of age in Texas, getting his first taste of the news business as sports editor for his high school paper. He earned a bachelor’s degree at the Missouri School of Journalism, spent three years in the Marines, and covered the assassination of President Kennedy while a reporter for the *Dallas Times Herald*, weaving many of those experiences into his stories.

It may come as no surprise to Eudora Welty fans that Mr. Lehrer was a devoted admirer and a personal friend, and her influence shows in the ease with which he captured small-town everyday life in book after book.

**Robert K. Massie, 1929–2019**

The Authors Guild mourns the passing of Robert K. Massie, a Pulitzer Prize–winning biographer and World War I historian, who served as president of the Authors Guild from 1987 to 1991. The work ethic that fueled his prodigious literary output made him an exceptional leader during a transformative time for the Guild and its members. Mr. Massie died December 2, 2019, at the age of 90.

“When Bob Massie assumed the presidency of the Guild, he did so at a time when it was under great stress,” said Sidney Offit, former president of the Authors Guild Foundation. “He felt an urgency to give back to the community of writers. He knew it would be a strenuous activity, and to someone as focused as he was, that it would divert him from his work. But he conducted the Guild with dignity and wisdom.”

As president, Mr. Massie often set aside his own writing to devote his time to advocacy efforts. “We’re a meat-and-potatoes organization, not a wine-and-cheese organization,” he said, and he fought hard to correct flaws in the Tax Reform Act of 1986 that negatively affected authors. Massie marched on Washington with a team that included Tom Clancy, David McCullough, David Halberstam and Barbara Tuchman to successfully pass legislation that, among other changes,

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I met Jim Lehrer decades ago at an author’s event. I was an enormous admirer of him as a broadcaster, and I was amazed that he seemed pleased to meet me. I went on to read several of his mysteries, where the humor, in particular, stands out in my memory. But I was especially impressed by him as a person—genial, humble, incredibly down to earth and a tremendous supporter of other writers. It’s a huge loss.

—Scott Turow

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allowed authors to capitalize book advances over several years.

A graduate of Yale and a Rhodes scholar, Mr. Massie turned to biography following a career in journalism. In 1967, he won fame and praise for his first book, Nicholas and Alexandra, a vividly detailed account of the Romanovs. He became an Authors Guild member that same year. Peter the Great: His Life and World would win the 1981 Pulitzer Prize for Biography, and Catherine the Great (2011) would close his career.

We extend our sincerest condolences to his family and loved ones. We will always remember Bob for his tenacity and warmth.

Alice Mayhew, 1932–2020

Alice Mayhew, a revered and singularly hands-on editor for almost half a century, died February 4th at her Manhattan apartment. She was 87.

Ms. Mayhew, who was known for her deep engagement with her authors, and a talent for turning books in search of a through line into best-sellers, joined Simon & Schuster in 1971. One of her early bestsellers was Our Bodies, Our Selves in 1973. The following year, she speed-coached two young journalists to the finish line with one of the most significant works of the decade, the Pulitzer Prize-winning All the President’s Men.

Alice, as everyone called her, could be intimidating, but more often than not she was right—bailing writers out of deep waters, helping them redirect their “arcs,” seeing them through to the end, and trimming all the way. The list of writers whose major works she edited and coached to completion is distinctive and wide-ranging: a long list of journalists turned authors—among them onetime Authors Guild president J. Anthony Lukas (Common Ground), Diane McWhorter (Carry Me Home), and Walter Isaacson (Steve Jobs and Leonardo da Vinci), political figures—John Dean, Jimmy Carter, Ruth Bader Ginsburg—and now and then an occasional title on the lighter side.

As reported in the New York Times and elsewhere, when Simon & Schuster celebrated its 90th anniversary in 2014, staff members voted for their 90 favorite S&S titles over the company’s history, 29 had been edited by Mayhew.

Sonny Mehta, 1942–2019

Sonny Mehta, whose 32-year career at Alfred A. Knopf transformed the renowned publishing house, died December 30, 2019.

Mr. Mehta, the son of an Indian diplomat and a literary citizen of the world, was named Knopf’s editor-in-chief in 1988, the third since its founding in 1915, and was appointed chairman of Knopf Doubleday Publishing in 2009.

He published the work of nine Nobel laureates and dozens of Pulitzer Prize and National Book Award winners, and he introduced American readers to a broad and varied cast of foreign authors, reflecting both his passion to discover the next great book and his worldly upbringing.

Guild member Gay Feldman, a longtime friend of Mr. Mehta, invited us to quote from a tribute she wrote for The Bookseller a few days after his death:

“Reading was his great kick: Sonny was probably the most passionate, international, and informed reader I’ve ever known. . . . There was something of the essentially solitary nature of the reader always about him; yet when he took an interest in an author, he brought to it the proselytizing energy and fierce intensity of the most loyal fan.”

That was his gift from the start. “There’s a blockbuster side to Knopf,” he told New York Times reporter Roger Cohen in a 1990 piece titled “New Publishing Star, Sonny Mehta, Talks Profits as Well as Art.”

“It’s P. D. James or John le Carré or our best-selling books. We try to sell our writers as aggressively as those houses regarded as commercial, with a capital C.” AG
Like many authors, I have set up a “Google Alert” so that any time my name newly appears on the web, I get an email with a link to it. Every day, multiple alerts arrive, directing me to websites that have just uploaded illegal copies of my books.

If you’ve ever come home to find your house robbed, you know the feeling I had when I first saw my entire life’s work, stolen and displayed on a piracy site.

The internet has become a candy store for the stealing of creative work, and it is devastating the careers and incomes of authors and virtually everyone whose work touches the creative arts. In the past ten years, according to an Authors Guild survey, full-time authors have experienced a 42 percent decline in median income, partly due to rampant piracy and copyright infringement. Photographers, musicians, songwriters, artists, poets, graphic designers, filmmakers, small businesses, and cultural organizations like symphonies and theaters all suffer as well.

Ultimately, everyone who values and finds meaning in the arts loses out, as our nation’s creative tapestry frays and more and more young artists find they cannot make a viable living from their work.

Congress knows about the problem and is actually working to solve it—including by moving forward a new bill called the CASE Act that would give writers and artists vital new tools to enforce their rights and stop piracy of their work.

Right now, bringing a copyright infringement lawsuit in federal court costs a minimum of $300,000, putting it out of reach of most artists and small businesses. The CASE Act would establish a far simpler, more affordable copyright “small claims” tribunal, creating a streamlined process for creators to take action against people who have stolen their work without having to hire a lawyer or travel to often distant federal court.

A three-judge panel of experts would hear these cases. Litigants could testify on video, and the burdensome “discovery” process (where the parties exchange documents and information) would
be narrowly focused on the core dispute—keeping costs even lower. The tribunal would be entirely voluntary; those charged with copyright infringement would always have the right to opt-out and take their chances in Federal court.

The CASE Act has strong support from both Republicans and Democrats. It recently passed the House by an overwhelming 410–6 vote and has been unanimously voted out of the Senate Judiciary Committee. Organizations across the political spectrum support it, from the Authors Guild, of which I am president, to the U.S. Chamber of Commerce, the AFL-CIO, the American Bar Association, the Songwriters Guild of America, the Association of American Publishers, the Screen Actors Guild, and scores more.

So why isn’t the CASE Act the law? Because companies like Google and its fellow travelers, like the Re:Create coalition and the Electronic Frontier Foundation, are trying to kill this legislation with false and alarmist arguments, claiming, for example, that someone who re-tweets a meme might have to pay $15,000. The histrionics deliberately ignore a key safeguard in the bill: An expert tribunal is tasked with reviewing these cases and quickly weeding out frivolous claims, protecting both internet users and creators. Resources are focused on genuine, harmful commercial piracy that is bleeding small and independent artists dry.

Google doesn’t care about memes, of course. It cares about the monetized flow of information, data, and advertising it has created. That business model allows it to earn just as much scraping data and selling ads alongside pirated books, music, photos, and films as it does from licensed works. This “profiting from piracy” business model diverts huge income streams from struggling, small-time creators to Google. The only thing standing in the way of this transfer of revenue is copyright, and we need the CASE Act to make copyright more effective.

This time, Google and its friends seem to have overstepped. They have isolated themselves as Democrats and Republicans come together behind the CASE Act to protect the intellectual property rights of millions of American creators and small businesses.

I urge the Senate to look past Google’s fear-mongering and vote to enact the CASE Act.

Douglas Preston is the author of *The Lost City of the Monkey God*, of which stolen copies can be found all across the internet. *This article first appeared in The Hartford Courant on November 10, 2019, and is reprinted here with the permission of the author, who owns the copyright.*
Tell Internet Archive to Remove Your Books from the So-Called National Emergency Library

Our statement against Internet Archive’s “National Emergency Library” received overwhelming support. The Guild has advised members of Congress, sent a letter to Internet Archive, alerted the press, and is conducting a takedown campaign.

Many of you asked what you can do. You can start by sending the owners of Internet Archive a strong, collective message that displaying and distributing full-text copies of copyrighted books to the entire world without authorization is not OK. It is a flagrant violation of copyright law. It is piracy, pure and simple. There are already plenty of legitimate places for students and others to read e-books for free—namely through their local and school libraries. And most bookstores are still open for business online.

Click here for instructions for sending Internet Archive a cease and desist letter as well as a template letter.

* OVERHEARD

I purpose, for the succor of solace of ladies in love (unto others the needle and the spindle and the reel suffice) to recount a hundred stories or parables or histories or whatever you like to style them, in ten days’ time related by an honourable company of seven ladies and three young men made in the days of the deadly pestilence. . . .

—Giovanni Boccaccio, The Decameron, 1353
Did You Know the Authors Guild will review your contracts and more?

Our legal experts will assist you with:

- Contractual Negotiating Points
- Contract Disputes
- Reversion of Rights
- Defamation and Privacy Rights
- Copyright Questions
- Nonpayment of Royalties
- Copyright Infringement
- Publishing Contract Reviews

Contact us at staff@authorsguild.org to learn more.