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## LEGAL ISSUES IN PUBLISHING

-On Overload-  
Please Fasten Your Seatbelts

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## DISCLAIMER!


- This may be boring
- You may not learn anything
- If you learn something, it'll probably be enough to make you dangerous
- This is **NOT** legal advice

  
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## ROAD MAP

- What's IP?
- Trademarks
- Copyrights
- Manuscripts
- Contracts
- Entities
- Q&A

  
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## Ideas and Concepts


- Are not protectable in and of themselves
- Legal protection extends to the **tangible expression** of ideas and concepts
- This tangible expression is known as intellectual property ("IP")

  
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## Definitions

- Intellectual Property is
  - The result of creative human endeavor
  - Protected by
    - Patents
    - Trademarks
    - Copyrights
    - Trade Secrets

  
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## Trademarks

- What?
  - **Trademark:** Indicator of source or origin of a good or service
  - Trademarks may consist of:


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## Words



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## Phrases



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## Designs



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## Combinations Thereof



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## Trademarks...

- Publishing Applications
  - Goods
  - Services
  - Titles
  - Characters
  - Book Covers

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## Trade Dress

- What?
  - **Trade Dress:** Total image and overall appearance of a good or service


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## Trademarks...

- **Exclusive right** to use mark with **particular** good or service within **territory**


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## Extent of Rights

- **Trademark:**
  - **Common Law Usage:** Demonstrated territory
  - **State Registration:** State border
  - **Federal Registration:** National border


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## Duration

- **Trademark**
  - **Common Law Usage:** As long as continuously used
  - **State Registration:** Usually 10 years (subject to renewal and continuous use)
  - **Federal Registration:** 10 years (subject to renewal and continuous use)


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## Public Domain...

- **When?**
  - **Trademark**
    - As long as continually used
  - **Trade Dress**
    - As long as continually used


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## Marking

- **Trademark**
  - **MARK®** (Federal Registration)
  - **MARK™** (State Registration and/or Common Law Usage)


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## Infringement

- **Test**
  - **Likelihood of confusion** among consumers as to source of a good or service
  - Determined by a variety of factors
    - None of which is dispositive
    - Such as...

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## Trademarks

- **Use of trademarks**
  - Body of text reference to actual good or service
  - Proper format
  - Attribution

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## Trademarks & Trade Dress...

- **Proper Format**
  - **Always** use as an **ADJECTIVE**
    - Trademark brand noun
    - *Big Chief*<sup>®</sup> brand writing tablet
  - **Not** as a **noun**
    - Please make a Xerox of this document.
  - **Not** as a **verb**
    - Let's go rollerblading in the park.

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## TRADEMARKS vs. TRADE NAMES

*From a Legal Perspective:*

*Trademark*  
≠  
*Trade Name*  
≠  
*Entity Name*

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## Entity Name

*Formal name* by which your *entity* (corporation, LLC, etc.) is registered with the state

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## Trade Name

Name, *other than entity name*, under which entity *does business*; whose purpose is to trace back to the *true entity* (also registered with state)

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## From a Marketing Perspective:

- **Not the Same**
  - The Procter & Gamble Company* dba *P&G* sells *Bounty*<sup>®</sup> brand paper towels


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## From a Marketing Perspective...

- Are the Same
  - IBM Corporation*  
dba *IBM*  
sells *IBM®* brand computers


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## Titles and Domain Names

- Protection
  - None in and of themselves
  - Unless used as a Trademark


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## Copyrights

- Definition
  - *Original works of authorship*  
fixed in any tangible medium of expression


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## Copyrights...

- Works?
  - *Literary* works 
  - *Musical* works  (including any accompanying words)
  - *Dramatic* works  (including any accompanying music)


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## Copyrights...

- Works?
  - *Pantomimes and Choreographic* works 


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## Copyrights...

- Works...
  - *Pictorial, Graphic*  and *Sculptural* works
  - *Motion Pictures*  and other *Audiovisual* works


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## Copyrights...

- **Works...**
  - **Sound Recordings**  
  - **Architectural Works**  


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## Copyrights

- **Exclusive Rights**
  - *Reproduce* the work
  - *Prepare* derivative works
  - *Distribute* copies
  - *Perform* publicly
  - *Display* publicly


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## Registration

- Rights accrue upon *creation*
- Registration
  - Proof of *ownership*
  - Public *record*
  - Required to bring *suit*
    - File within 3 months of *Publication*
    - Damages
    - Attorneys Fees


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## Marking

- **Copyright**
  - Visually Perceptible Copies
    - © 2010 Author Name
    - Copyright 2010 Author Name
    - Copr. 2010 Author Name
  - Sound Recordings
    - © 2010 Narrator Name


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## Extent of Rights

- **Copyright**
  - National border
  - International reciprocity


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## Duration

- **Copyright**
  - *Individual Work*: Life of author plus 70 years
  - *Joint Work*: Life of last-surviving author plus 70 years
  - *Anonymous Work, Pseudonymous Work, Work for Hire*: Earlier of
    - 95 years from publication
    - 120 years from creation


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## Expiration of Rights

- *Limited term monopoly* in exchange for promotion of the useful arts and sciences
- *Public Domain*
  - Available for all to use


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## Public Domain

- Available for all to use
- **Caveat:**  
Public Availability  $\neq$  Public Domain


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## Copyrights...

- Infringement
  - **Access** to original work and
  - **Substantial similarity** to original work


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## Copyrights...

- **Exceptions**
  - **Express permission**
  - **Fair use**
    - *Purpose and character of use*
    - *Nature of the copyrighted work*
    - *Amount and substantiality*
    - *Effect on the potential market*


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## Licensing

- Any of the Bundle of Rights
  - *Reproduction*
  - *Derivative works*
  - *Distribution*
  - *Perform publicly*
  - *Display publicly*


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## MANUSCRIPTS

- Defamation
- Right/Invasion of Privacy
  - *Publicity*
  - *Other*

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## Defamation




- **What?**
  - Explicit or implicit *injury to a person's reputation* caused by the publication of spoken or written words
- **In other words...**
  - Dishin' dirt about others



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## People...

- **NATURAL PERSONS**
  - Living
  - Dead
- **ARTIFICIAL PERSONS**
  - Entities
  - Characters

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## Defamation...

- **Who?**
  - *Living* natural person
  - *Existing* entity
- **What?**
  - *Libel* (written or Literal)
  - *Slander* (oral or Spoken)








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## Defamation...

- **Level of protection (ascending)**
  - Public official
  - Public figure
  - Private figure


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## Trade Libel

- **What?**
  - A *false statement that injures* the business reputation of a company or the sale of a company's products
  - Also known as **Product Disparagement**
  - Akin to Defamation

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## Right/Invasion of Privacy

- **What?**
  - The right to be *let alone*
- **Who?**
  - *Living natural* person



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## Right/Invasion of Privacy...

- **How?**
  - Public disclosure of *private facts*
  - *False light*
  - *Intrusion*
  - *Misappropriation of name or likeness*




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## Right of Publicity

- **What?**
  - Right to prohibit others from using your persona for commercial purposes
    - *Name*
    - *Likeness*
    - *Voice*
    - Any other *distinguishing characteristic*
- **Who?**
  - *Living natural* person
  - *Dead natural* person

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## Right of Publicity...

- **What is okay?**
  - *Reporting* 
  - *Scholarship* 
  - *Commentary* 

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## Commercial Misappropriation

- **What?**
  - Akin to the right of publicity
- **Who?**
  - *Existing entity*

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## Public Domain...

- **When?**
  - **Natural persons**
    - Death
      - Defamation
      - Right of Privacy
      - (*Right of Publicity*)
  - **Artificial persons**
    - Cease existence
    - Copyright expiration

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## OTHER ISSUES

- **NEGLIGENT PUBLICATION**
- **RIGHTS & PERMISSIONS**
- **SON OF SAM LAWS**
- **OBSCENITY**

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## Negligent Publication

- **What?**
  - Instruction, advice or other information that a reader uses to his or her **detriment**

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## Rights & Permissions

- **What?**
  - **Third party elements**
- **Examples?**
  - *Text*
  - *Photos*
  - *Illustrations*
  - *Maps*
  - *Lyrics*

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## Son of Sam Laws

- **What?**
  - Criminals cannot profit from their crimes



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## Obscenity

- **What?**
  - Matter that appeals to the *prurient interest*, depicts or describes in a *patently offensive way sexual conduct*, and *lacks serious* literary, artistic, political or scientific *value*

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## Obscenity...

- **In other words...**
  - "I shall not today attempt further to define the kinds of material but **I know it when I see it.**"
    - *Supreme Court Justice Potter Stewart*



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## Liability


- **Who?**
  - *Publisher*
  - *Author*
- **How?**
  - *Publication*
- **Protection**
  - *Insurance*
  - *Indemnification*

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## Manuscript Vetting

Checklist adapted from  
*Kirsch's Handbook of Publishing Law*  
Jonathan Kirsch



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## Manuscript Vetting...

1. Does the work contain any *material that was contributed* by someone other than the author?
2. Does the work contain potentially *damaging statements* about or depictions of a living individual or an existing company?

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## Manuscript Vetting...

3. Does the work contain potentially *embarrassing statements* about or depictions of a living individual?
4. Does the work make use of the *business name, trademark or trade dress* of an existing business?

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## Manuscript Vetting...

5. Does the work make use of the *name, image or likeness* of an individual, whether living or dead, for purposes of advertising, promotion, merchandising or implied endorsement?
6. Does the work offer *instruction or advice* that might affect the reader's mental, physical, legal or financial well-being?

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## Manuscript Vetting...

7. Is the work written by (or does it draw upon the experiences of) *a criminal*?
8. Does the work contain *explicit sexual content*?

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## CONTRACTS

- What?
  - *Grant of Rights* in property


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## Contracts...

- **Rights?**
  - *Own and use* for yourself
  - *Own* and *someone else uses*
    - *License*
  - *Sell* and *no* ownership or use
    - *Work for Hire*
    - *Commissioned Work*


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## Contracts...

- **What?**
  - *Licensing*
  - *Work for Hire*
  - *Commissioned Work*


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## Contracts...

- **How?**
  - *Contract before* you start the transaction
  - Seek professional *guidance*
  - *Provisions*
    - Who, what, when, where, why & how


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## Contracts...

- **Licensing?**
  - *Parties*
  - *Property Rights*
  - *Time*
  - *Territory*
  - *Transferability*
  - *Exclusivity*
  - *Quantity*
  - *Quality*
  - *Royalty*
  - *Remedies*
  - *Other*


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## Contracts...

- **Work for Hire?**
  - **What?**
    - Term defined by statute
  - **Who?**
    - Parties
    - Employer and Employee
      - Employment relationship
    - Commissioner and Commissionee
      - In *writing beforehand*


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## Contracts...

- **Works?**
  - *Contribution* to a Collective Work
  - Part of a *Motion Picture* or other *Audiovisual* Work
  - *Translation*
  - *Supplementary* Work
  - *Compilation*
  - *Instructional* Text
  - *Test*
  - *Answer* Material for a Test
  - *Atlas*

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## Contracts...

- **Commissioned Work?**
  - *May* or *may not* fit within definition
  - *May* or *may not* transfer ownership
    - Effective ownership transfer
      - **In writing**
      - Before work is done, preferably
  - *May* or *may not* waive visual art/moral rights

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## LEGAL ENTITIES

- **No liability protection for principals**
  - Sole Proprietorship
  - General Partnership
- **Liability protection for principals**
  - Limited Partnership(s)
  - Limited Liability Company
  - Corporation

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## Sole Proprietorship

### Advantages

- © Easy to organize
- © Less reporting
- © No double tax
- © Freedom of action

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## Sole Proprietorship

### Disadvantages

- © Unlimited liability
- © Fewer tax benefits
- © Termination on death of owner
- © Limited ability to raise capital

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## General Partnership

### Advantages


- © Few formalities
- © Combination of resources & talents
- © No double tax

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## General Partnership

### Disadvantages

- © Unlimited liability
- © Power of each partner
- © Dissolution upon death of a partner
- © Partnership profits taxed as income to partners
- © Managing relationships between partners

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## Limited Partnership

### Advantages

- ©General partners have additional capital
- ©Limited partners have limited liability
- ©Allocation of income and losses
- ©Avoids double tax
- ©Finite existence

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## Limited Partnership

### Disadvantages

- ©Limited partners have no control
- ©Initial organization cost
- ©Partnership profits taxed as income to partners
- ©Compliance with state and federal securities laws

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## Corporation (C corp)

### Advantages


- ©Limited liability of shareholders
- ©Perpetual existence
- ©Flexibility of financing through outside investors
- ©Transfer of ownership by sale/gift of stock
- ©Well-accepted form of doing business

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## Corporation (C corp)

### Disadvantages


- ©Initial organization cost
- ©Annual reporting requirement
- ©Double taxation

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## Corporation (S corp)

### Advantages

- ©Same as for C-Corporation
- ©Taxed at the individual shareholder level

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## Corporation (S corp)

### Disadvantages

- ©Except for the tax consequences, same as for C-Corporation
- ©With minor exceptions, only individuals can be shareholders
- ©Limited number of shareholders ( $\leq 100$ )
- ©Limited to one class of stock
- ©Must use calendar year

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## Limited Liability Company

### Advantages

- © Limited liability with or without limits on management participation
- © Flexible ownership and capital structure
- © No double tax
- © Allocation of tax benefits among members

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## Limited Liability Company


### Disadvantages

- © Initial organization cost
- © Transferability must be governed by buy/sell provisions

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## QUESTIONS



- **Answers**
  - The Answer to Life, the Universe and Everything is "42"
    - Douglas Adams, *Life, the Universe and Everything* (*Hitchhiker's Guide to the Galaxy* Trilogy)
  - "It Depends"
    - Universal legal answer