Authors and Self-Publishing

With the rise of e-books and the popularity of self-publishing, there are now companies that offer self-publishing services such as editing, proofing, and design.If you're feeling like you want more information on the legal issues around this, this information sheet is for you.

Introduction

The Australia Society of Authors defines three types of publishers: commercial publishers, self-publishers and vanity publishers ((also called subsidy publishing, joint venture publishing, or partnership publishing).

Commercial book publishers (whether the international publishing companies or small independent publishers) provide the full range of publishing services: from editing, cover design, printing, distribution and marketing. While publishing companies may accept submission of works directly from an author, the usual route to a publishing deal is for a writer to submit the manuscript to a literary agent and if the agent decides to represent the writer, the agent will pitch the manuscript to the publishers they consider are the right publishers for the author's work.

Authors without access to a literary agent may take responsibility for publishing their own work. There are a variety of services that are available to assist authors to 'self-publish'. This information sheet seeks to provide information on self-publishing both e-books (also referred to as electronic publishing, e-publishing or digital publishing) and print editions (whether hardback or softback) and to describe the different self-publishing pathways that are open to an author – in particular some possible traps for the author engaged in self-publishing or considering using the services of a vanity publisher. In relation to publishing agreements:

- Authors can become members of the Australian Society of Authors and gain access to advice as to ASA minimum recommendations for publishing agreements; or
- Authors can become subscribers to the Arts Law Centre and use Arts Law's Document Review Service and receive legal advice on any publishing agreement.

What is self-publishing?

Self-publishing is where an author personally takes on not only the cost of publishing their book, but also responsibility for the book's design, production, marketing and distribution (i.e. the author and the publisher are one and the same). An author may for example commission an artist to design the book's cover and layout, contract a printer to print the book, even engage a public relations consultant – but at the end of the day all of these aspects of publication are controlled or arranged by the author. Many authors do not have the expertise to manage all the pre-publication steps, so self-publishing service providers can be contracted to meet the needs of authors who want to self-publish their works. There are many legitimate companies that provide self-publishing or publish-on-demand (POD) services.

An author could carry out all the pre-publication steps (including editing, proofing, layout and design) using digital pre-press technology or desktop publishing (DTP) software so that the work is ready for printing. The author would then contract with a printer for the book to be printed and bound. Such a form of self-publishing leaves the author in control of the publishing process and the copyright in the work. The printing contract would be a straight forward fee-for-services arrangement.

Digital printing technologies have resulted in companies providing POD services so that books are printed only when someone orders a copy. A POD service may suit an author engaged in self-publishing as the supply of books can be adjusted to meet the actual demand.

Vanity publishing/subsidy publishing/joint venture publishing/ partnership publishing

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There is a form of self-publishing that is sometimes called vanity publishing (also called subsidy publishing, joint venture publishing, or partnership publishing). In this arrangement, a publishing service charges writers a fee to publish their book. This means the publisher's business model derives income from the authors who pay to have their book published, as opposed to a traditional publisher who takes on all the financial risk of publishing an author's book (sometimes even paying the author an advance prior to publication or completion of the manuscript). The traditional publisher takes of the financial risk and seeks to recover its investment in the book through sales to readers.

Although many publishers that can charge authors a fee for self-publishing services are legitimate businesses, there are also unethical publishers in respect to which the NSW Department of Fair Trading has issued a warning that authors should make appropriate inquiries in order to understand what publishing and distribution services are provided and whether such services provide real value in return for the costs paid by the author. The NSW Writers Centre warns that often such "vanity publishers do not invest in any marketing or distribution, both of which are essential to successful publishing".

Issues with vanity publishing agreements

You should be clear about your expectations in relation to the services to be provided by the publisher. You should consider what distribution arrangements and marketing activities you expect the publisher to carry out. A publisher may limit publishing to supplying people who pre-pay for the publication; with online supply and promotion limited to the publisher's own website and no distribution into bookshops or other online services. This is essentially a POD arrangement as the publisher does not make a commitment to a minimum print run or commit to putting the book into bookshops and other book distribution channels.

Certain characteristics of unethical vanity publishers have been described by Fair Trading NSW. These include but are not limited to:

- Upfront payment expected from the author;
- Failure to commit to a minimum print run;
- Ambiguous statements as to the expected time for publishing or failing to publish when expected;
- Failure to commit to marketing the book and to put the book into bookshops or other book distribution channels; and
- High costs for the printing of the book, with limited potential for the author to recover the costs of printing from sales of the book.

These characteristics can often be identified in vanity publishing agreements. For that reason it is sensible to get legal advice before you agree to those contracts. Vanity publishers will often be focussed on the initial money received from you for their publishing services, but will fail to invest time or money into marketing or distribution of the book once publishing has been completed.

You should be wary of any publishing that is describing their publishing proposal as a 'limited time offer' or uses any other incentives to persuade you to sign a publishing contract without you have the receive advice on the publishing agreement or for you to have opportunity to investigate the suitability of the publisher for what you want to achieve with your book.

Getting trapped into a vanity publishing arrangement

The flaws in vanity publishing agreements have the consequence that may have limited remedies against the vanity publisher. Enforcing the agreement may require expensive legal action beyond the resources of the author.

Because of the uncertainty as to what distribution activities the publisher has the capacity to engage in, the financial value returned to the author may be significantly less than imagined. It may be that the author would get better value for money in using a printing company that can provide POD services, with the author taking responsibility for marketing and distribution

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activities.

It can also be difficult for the author to regain control over their work as it is common practice for a vanity publisher to own the book's International Standard Book Number (**ISBN)**, (see below for further information) as well as copyright in the layout of the book.

National Library of Australia deposit of books

Under section 201 of the *Copyright Act 1968* (Cth), it is mandatory for all publishers to deposit one copy of every work they publish in Australia to the National Library of Australia. This ensures that every book published in Australia can be identified and accessed by as many people as possible both now and in the future. Depositing of books is free and should be undertaken as soon as possible from time of publication. More information about legal deposit can be found at the National Library of Australia website, which also has information on the legal deposit requirements of each state and territory in Australia.

If a publication is available in both printed and electronic formats, the printed copy is subject to the NLA legal deposit requirements. If a publication is only available in electronic format, it is not covered by the NLA legal deposit requirements. The *Civil Law and Justice Legislation Amendment Bill 2014*, if enacted, will amend the Copyright Act to extend the legal deposit scheme to include work published in electronic formats.

An International Standard Book Number (ISBN) is not mandatory for published books; however it does enable libraries and bookshops to identify books, manage catalogues and databases, as well as make orders. ISBNs are managed by and purchased from Thorpe-Bowker Information Services.

As a self-publishing author, you may also seek to obtain a Cataloguing-In-Publishing (CiP) number, administered by the NLA. CiP databases are used by libraries in Australia and world-wide to catalogue upcoming publications. An ISBN is required to apply for a CiP. It is not a legal requirement like the legal deposit as stated above, however having a CiP will enable a book to be included on various databases from which libraries, booksellers and the public can select and order future publications. Applications for CiP are free, and can be completed via the CiP section of the National Library of Australia's website. Applications should be completed approximately one month before publication of the book.

Digital publishing: self-publishing e-books

In terms of ownership when self-publishing yourself, the author will generally own everything from the book's layout to the ISBN (although check the contract if paying a third party to self-publish for you). Therefore as a self-publisher, it is up to you to get your book out to the public and the opportunities to do so (particularly online) are many and varied. All self-publishers need a plan for addressing issues or risks that may arise. This plan should not only set out a marketing and distribution strategy but also address some legal and practical issues that all publishers, large and small, must meet or at least consider.

You should read the terms and conditions of the services provided by the online sellers and online digital publishers so that you understand whether the services provided by the online digital publishers is consistent with your marketing strategies.

In order for authors to self-publish e-books, the work must typically be converted into a publishing format that can be used with the e-book readers that are available to consumers. The industry standard e-book format is EPUB, while some publishing platforms, such an Amazon's Kindle and the Apple readers use their own formats.

There are two key types of online sellers:

- The publishing platforms that use a single retailer to customer channel, such as Amazon's Kindle technology and the Apple iBookstore, with software exclusive to Apple devices; and

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- multi-platform distribution services, which provide format conversion services in order to publish e-books across multiple e-book formats and e-book readers (e.g. Australian e-book Publisher, Bookbaby, Port Campbell Press, Smashwords & SPUNC).

The multiplatform online digital publishers provide a range of e-publishing services, such as format conversion / layout and design / retail direct to consumers / distribution through online sellers.

Online sellers, such as Amazon, may do direct deals with an e-book author, although not all online sellers will deal directly with self-publishers. It may therefore be necessary for a self-published author to deal with a multi-platform distribution service that has relationships with the online sellers.

What legal issues should be considered when looking to self-publish?

Copyright

Copyright issues may arise in relation to a self-published work and therefore authors hold the responsibility to consider and address any issues related to the originality of their work and when it is necessary to get permission to use the work of other authors or whether an exception to copyright may exist such as a use that is a 'fair dealing' when the work is used for purposes including criticism or review, parody or satire as well as reporting the news. An author should research and have a basic understanding of copyright law, in order to identify if any potential legal issues may arise in relation to the use of artwork, photographs and other copyright material.

Further information is available through information sheets published online by the Arts Law Centre and the Australian Copyright Council (ACC) that seek to outline the main issues associated with copyright:

- Arts Law Information Sheet: Copyright
- ACC Information Sheets (particularly *Permission: Do I Need It & Permission: How to Get It)*

The Australia Society of Authors publishes Rates of Pay guidelines which sets out the minimum rates recommended for permission to use material for republication.

Defamation

Defamation is a communication from one person to at least one other that lowers or harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence. The law of defamation aims to balance free speech with the right of an individual to enjoy a reputation free from an indefensible attack.

While the news media tends to be the main target for defamation actions, people have also sued over poems, novels, cartoons, paintings, photographs, artistic criticisms, songs and satire. The law of defamation is complex and often unpredictable. Defamation actions are very costly, difficult to defend and substantial monetary damages can be awarded. In some cases plaintiffs can obtain a court order called an 'injunction' preventing any further communication of the offending publication or material. When a claim is made that a publication is defamatory it may have the effect that online digital publishers and online sellers will withdraw the e-book from distribution. Even if no injunction has been issued, and the publisher may wish to limit their potential liability in the event the publication is determined to be defamatory.

Issues of defamation may arise in relation to a self-published work and therefore authors hold the responsibility to consider and address such issues. For more information see:

- Arts Law Information Sheet: Defamation Law

Contractual Agreements

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With regards to the production of the book, different legal issues may arise. Authors that self-publish may also seek assistance from third parties in order to complete other aspects of the work. These arrangements would usually require the author to enter into a legally binding contract, for example:

- an agreement commissioning an artist or photographer to create the book's cover art and/or illustrations;
- a design and commission agreement for an artist or designer to design the book's layout; or
- a production agreement with a printer to print and bind the book.

These contracts may vary depending on their purpose and the parties involved, but issues of copyright ownership and licensing, delivery dates and payment, should always be considered and addressed.

Further information is available through our information sheets, specifically relating to entering into a contract:

- Arts Law Information Sheet: Contracts: Getting it right
- Arts Law Information Sheet: A Glossary of Jargon

Further Information

You can find additional information about publishing and self-publishing on the websites of the following organisations:

The Australian Publishers Association information sheet on *Getting Published*

The Australia Society of Authors information sheets.

The Australian Society of Authors also published a model e-publishing agreement,

The Australian Writers' Marketplace website contains resources for writers including a listings directory of publishing services.

The Australian Literary Agents Association website provides a list of members and tips for submitting work to agents.

There are Writers Centres that provide resources to assist authors to get published and provide information on e-publishing:

- ACT Writers Centre
- NSW Writers' Centre
- Queensland Writers Centre
- NT Writers' Centre
- writingWA
- SA Writers Centre
- Tasmanian Writers' Centre
- Writers Victoria

Jane Friedman, *10 Questions to Ask Before Committing to Any E-Publishing Service*.

David Carnoy, *How to self-publish an ebook*.

David Carnoy, *Self-publishing a book: 25 things you need to know*.

Self publishing made easy, by Bowker.

Euan Mitchell, *Your book publishing options: how to make and market ebooks and print books* (Euan Mitchell publishing).

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- Authors can become subscribers to the Arts Law Centre and use Arts Law's Document Review Service and receive legal advice on any publishing agreement; or,
- Authors can become members of the Australian Society of Authors and gain access to advice as to ASA minimum recommendations for publishing agreements

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Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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