The Role of Investors in Marketing Literary Works

Copyright adheres to creative works when they are fixed in tangible mediums of expression for the first time. At the moment of fixation authors own and control their works in every respect, but this is likely to change as rights to works are offered to prospective investors. I am assuming here the author is interested in a return of his or her own investment of time and mental effort in creating the work. That is usually the case even if inarticulately expressed, but return of author's investment depends on others' investments, which involves a calculus that the investments are worth making.

The economic nexus when discussing creative works and their passage to market is unavoidable. Concern for return on investment operates at every level from creation to market, and at every level there are contractual relationships that establish precisely the amount each party is entitled to receive. For investors literary and derivative works are seen as commodities packaged and targeted for general or specific audiences. This is true however anathema this may be to cultural purists.

At the first level of investment when the potential is speculative the size of the pie is small; as potential is realized— measured by the unit sales of books, for example—the pie grows larger, and this controls the dollar value of every creative work intended for commercial gain. The risk calculated by the investor weighs heavily on the author whose own investment has already been made and may never be fully recouped.

Control of a Work Passes to Investors

The Copyright Act of 1976 grants a bundle (sometimes referred to as a "basket") of exclusive rights that are licensable and assignable to parties interested in exploiting the value of the work in different marketplaces. It is an undeniable fact that literary works if they are to succeed must "find audiences" willing to pay for them in any original or derivative forms the works may take. Ownership of copyright is not equivalent to controlling the life of the work. Control (even where the author continues to own his copyright) passes to investors. Of course, the Internet has made possible a means for authors to exploit their own literary works, and some have succeeded remarkably well on their investment, but those that have are in the minority.

More generally the material benefits of authorship are uncertain until a work is exploited by investors willing to risk cash and time investments without certainty of return. Loss of control is not without compensation although it is generally inadequate for the reasons already stated, namely that at the beginning a work's value is speculative, and because the pie is small investors have the better bargaining position, although this can change over time as authors become recognized as brands, at which point their bargaining positions become more equal.

Although there are always exceptions, authors without exploiters may never see a return on their investment; and even with investors there is never any guarantee of an audience in an author's lifetime. Congress was well aware of the unequal bargaining power of authors, which is why it wrote into the Copyright Act of 1976 a right to terminate licenses after a passage of years, which often comes too late for the author but benefits his estate. Justification for allowing an author to terminate a license (said Congress) lies in "safeguarding authors against unremunerative transfers

. . . because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's prior value until it has been exploited."

Granting Licenses and Selling Rights

It is possible that any given literary work will have several layers of licensees and sublicensees of rights and assignees of copyright operating in different, noncompetitive commercial markets. The economic expectancy of each is based on different contractual arrangements that are drafted to protect investors. For this reason these contracts must be carefully reviewed, negotiated where they can be and only signed with understanding of what the author gains and losses by the transaction.

In a typical threshold situation authors contract with publishers who in exchange for copying and distributing the work—the first two of an author's basket of exclusive copyright rights— demand exclusive rights to them for a period that can extend to the term of copyright, subject to reversion if the author has been astute enough to negotiate a proper clause or termination as of right under copyright law.

In this traditional scenario authors are compensated either by advances or royalties—or if both, royalties are always contingent on repayment of advances, which means selling enough units of the work to earn back advances. A publisher's recoupment of investment is not tied to repayment of advances but from the unequal distribution of proceeds. In addition to the exclusive license to publish and distribute publishers typically demand a list of sublicensing rights that publishers share with authors on a percentage basis, subject to negotiation.

Under the traditional scenario publication and distribution are at the publisher's expense, but there are other contractual arrangements with other kinds of publishers in which authors pay for a menu of services with contracts containing some unfortunate clauses. It is prudent to have counsel review these agreements so that at minimum the author knows what he or she is buying or giving up.

Derivative Rights

Of the several exclusive rights granted to authors the right to prepare noncompeting derivative works constitutes a significant asset separate from publishing and distribution rights that may already have been negotiated away. The Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, dramatization, fictionalization [or] motion picture version" of the original. The reuse of characters in subsequent works is also a significant asset that should be protected in any contract for derivative works. In publishing contracts authors typically retain their rights to motion picture and television productions of their works but in negotiating these rights investors generally demand assignments of copyrights, not simply terminable licenses. This introduces a different layer of concern for authors but also a greater likelihood of adequate compensation based on negotiated terms.

Typically, investors enter into option agreements to purchase authors' copyrights that provide for one or more extensions and ultimately exercisable on stipulated dates. Whether or not an option is actually exercised the author will be entitled to receive fees on extensions, and if exercised receive the full amount of the negotiated purchase price and if not free to offer the work again. Authors cannot shop their works around for the same rights during the option period. It is an exclusive agreement for the particular rights under contract.

Copyright assignment limited to particular works for limited purposes, then, passes control of the works to investors entirely, characters included unless there is provision for an author retaining rights to use them in future works. If there is no such provision the investor owns the characters to the exclusion of the author. Investors also separately own the derivative works they produce including all the benefits of copyright ownership in that work such as merchandising rights.

Conclusion

Authorship brings uncertain rewards. At least with publishers authors protect themselves to the extent they can by negotiating contractual terms that harm them the least while producing an acceptable income stream based on unit sales of their work. This is initially speculative and hence the size of the advance (if any), but if value is proved an author’s ability to improve his income rests of licensing or assigning rights to prepare derivative works.

The reality of authorship is that creation is a beginning and not an end. Authors must bring to the table a grown pie, ultimately shared (unequally most likely) with investors who offer just so much to have a piece, take it or leave it which the author generally takes because a piece is better than no piece.