

WORDS FOR HIRE

BY WILLIAM C. DIETZ

ESTATE PLANNING

“Dying is a part of living and none of us is going to get out of here alive.”
– Evel Knievel

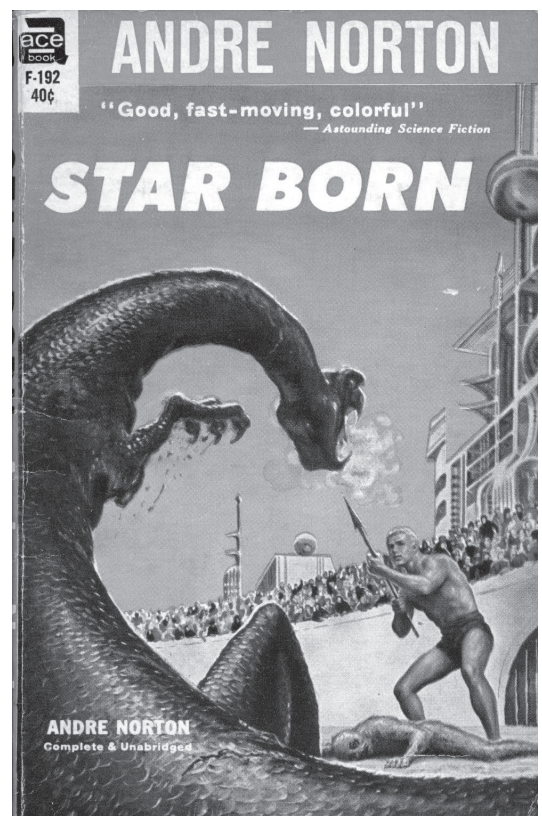
Mr. Knievel had a way with words as well as motorcycles. And he was correct. Every single one of us is going to the great bookstore in the sky. Or to the vast digital library in the sky. Not a pleasant thought perhaps, but something we need to accept. And it would be a good idea to accept that fact sooner rather than later because you may get hit by the proverbial truck. Failing to plan for your literary estate could leave the people you love with some difficult problems.

How difficult? Andre Norton's estate is an excellent example of what can go wrong.

Sue Stewart was Norton's friend, assistant, and confidant. Here's what she had to tell me.

What was your relationship with Andre Norton?

SS: I was a close friend and her personal assistant. She often referred to me as “the daughter she never had.” In our household, Andre was “Meemaw”... which is southern slang for grandmother.



What sort of legal provisions had Andre Norton made where her estate was concerned?

SS: Four co-authors received rights to some of the books that they co-wrote. Dr. Victor Horadam received all her writing awards. According to Andre's diary, he was supposed to have overseen an exhibit of those awards at a university. Mr. Horadam received royalties to Andre's unpublished works. Me and my husband received the bulk of her entire estate.

What sort of legal problems arose after her death?

SS: Dr. Horadam filed a lawsuit against me and Andre's estate in August 2005, claiming he was supposed to get all of Andre's literary estate. The trial was held in October 2006. I believe Horadam prevailed based on the judge's personal opinion, rather than applying the law. I appealed the case to the Appellate Court and prevailed. After the Appellate Court rendered its decision, Horadam applied for permission to file his appeal with the Tennessee Supreme Court. They turned him down. During the course of the litigation, me and my husband had to file Chapter 7 bankruptcy. Horadam took advantage of our situation and caused us more trouble by contacting our bankruptcy trustee, attempting to obtain Andre's literary estate by a "court-house steps" sale. Fortunately, he did not prevail there either!

From start to finish, I had faith in God and never lost sight of my faith. From start to finish, Mr. Kidwell only brought forth the facts/truths about the case. I had a strong confidence in my God and I had strong confidence in Mr. Kidwell, who was able to overcome the almost impossible.

I can't think of a better introduction to Sue's attorney Mr. Dicken Kidwell. Mr. Kidwell holds a B.S. in Journalism and a Law Degree from the University of Ten-

nessee, was a pilot in the United States Air Force, served as a Special Agent for the F.B.I., belongs to a number of legal associations, and continues to practice law in Murfreesboro, TN.

Had you ever read any of Norton's books before your work on her estate?

DK: No, I had not. I've never been a science fiction or fantasy reader. I really like nonfiction, history and biographies mostly.

How did you get involved in the Norton case?

DK: Sue Stewart contacted me.

What had occurred by the time you got involved?

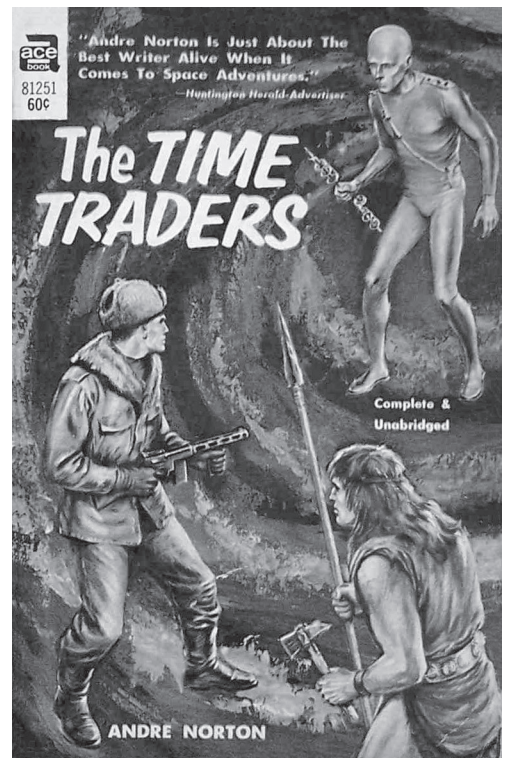
DK: The original start of this was the filing of a declaratory judgment action concerning the will of André Norton. I told Sue Stewart I would represent her and filed what we call an answer to the complaint for declaratory judgment. Eventually we came to the trial. We lost the trial here in Rutherford County.

From there the matter went to appellate court. The trial judge looked at the will, and said in effect that "I'm satisfied that the will is clear. We don't need any testimony to clear up what the will really says."

We took exception to that. And we are allowed in this state to give an offer of proof in case he was wrong. And I had, I don't know how many people, come in to testify that Andre Norton wanted Sue Stewart to be the main beneficiary of her will. The witnesses that I called were Norton's caregivers, real estate people who sold her house, and literary acquaintances.

Ultimately, it was a very intellectual decision by the appellate court.

We maintained that words like "copyright" and "posthumous" have



different meanings in the publishing world. In the context of the publishing industry posthumous publication does not refer to republishing a previously published book—it means publishing something that has never been published before. Therefore, only a new, never-before-published book would be a posthumous work. And the first judge didn't understand that.

The whole effort lasted three or four years, and the other side tried to appeal to the Supreme Court of Tennessee. Their application to appeal was denied.

Based on your experiences, what can SFWA members do to avoid the sort of problems you encountered?

DK: Any will or gift should be carefully written, and terms like royalties and copyrights should be defined. If I run into something and I say, "hey what does that mean," that's when you need to clarify it. If you are leaving everything to one person, that's pretty clear. But if you're splitting things among numerous people, you should be very careful.

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Sue Stewart has some additional advice to offer.

SS: When authors want to draft a will for their estate plan, they need at least to seek the advice of two lawyers. One needs to specialize in wills/estate planning. The other needs to be specialized in intellectual property law. Both of these attorneys should work together to prepare a very well organized plan for their client. Unfortunately, Andre retained a lawyer who knew nothing about intellectual property law. This is what caused legal problems with her estate. If an author currently has a copyright lawyer for their representation, it doesn't mean that he can automatically draft a well organized and efficient estate plan. Common sense tells you that you don't use an attorney for doing legal work that he has no experience in.

Contact your State Bar Association or go to the website and read up on the listed attorneys. Some Bar Associations will give you a list of good firms that practice the particular laws that you need. Make sure you get the right one to handle something as important as you last wishes. If you don't, you create a possibility of a loved one losing the gift that you intended them to have. It could end up going to someone who wrongly gains from your mistake.

I'm sorry to say that though largely settled, Sue Stewart's legal problems continue. Dr. Victor Horadam and his attorney claim to have rights to so-called derivatives, meaning T-shirts, movies, and other items.

*So what should one do? I turned to entertainment attorney **Caitlin Bellum** for more advice. Caitlin is an attorney at **Hendricks & Lewis PLLC**. A law firm that focuses on art & entertainment, intellectual property, media and technology: hllaw.com.*

What are the pros and cons of: (1) leaving different types of rights to different people, (2) leaving the rights for specific works to different people, and (3) the complexities involved in leaving all rights to a group of people. (Three children for example.)

CB: An IP (intellectual property) owner can bequeath one right or all rights in a particular work to either one beneficiary or multiple beneficiaries. One thing the IP owner should consider before he or she decides who to bequeath the rights to, is whether the beneficiary or beneficiaries will benefit from these rights. For example, if an author owns a website that sells his books and bequeaths his rights to that website to his agent... in hopes that the agent will maintain the website, but the author's spouse receives the proceeds from the sale of the books, then the agent has no real benefit in maintaining the website.

Additionally, even though the IP owner may bequeath certain rights to a beneficiary, that beneficiary can choose *not* to accept the bequeath. Or the beneficiary may not be able to accept the bequeath due to incapacitation or death. Therefore, the IP owner should always provide replacements.

Leaving all rights to a group of people (co-owners): As co-owners, these beneficiaries all own equal, undivided interests in the copyright. One should be aware that any joint owner of a copyright can grant non-exclusive rights in it (e.g., a license to reproduce the copyrighted work) without the other joint owners' consent. Although the grantor must pay them their shares of the revenue earned. As a result, this could dilute the economic value of the copyright and could also lead to the copyright owner's beneficiaries competing with each other to market the copyright.

The goal of the estate plan should be to centralize control of the copyright and to facilitate management of the bundle of rights included in the copyright. There are a number of options the IP owner can choose from to reach that goal. These are including, but not limited to: appointing a Literary Executor (see description below); using a revocable trust or testamentary trust; transferring the IP to a business created by the IP owner during life; or gifting the IP including the copyright or trademark in the IP.

What sort of copyright/trademark related issues should a writer consider while planning the estate?

CB: When developing an estate plan, it is important to address intellectual property assets differently from other types of property, such as real estate, stocks, or bonds. Some basic points to consider when an estate plan includes intellectual property assets are:

Identify all of the Intellectual Property in the estate.

Identify all of the IP, whether formally registered or not, that is currently owned by the author and what rights he or she has assigned or licensed to third parties. (See the note at the end of this interview for more on this subject.)

Take steps to register the IP. If the IP is not already formally protected, steps should be taken to register the IP with the appropriate government office. While registration is not necessarily required for all types of IP, it offers important advantages.

Assign a value to IP. The value of IP is important because it is part of one's total estate and is subject to

estate taxes. Valuations and appraisals may need to be done more than once depending on the popularity or future use of the work.

There are a number of methods for valuing and appraising individual works and collections of works. The valuation methods are generally based on the market value or the income value. There are appraisers and valuation consultants who are qualified to assess these values. A number of factors influence the value of a piece of work, and valuation professionals will look at market conditions, licensing agreements, publishing agreements, royalty rates, and popularity of the IP.

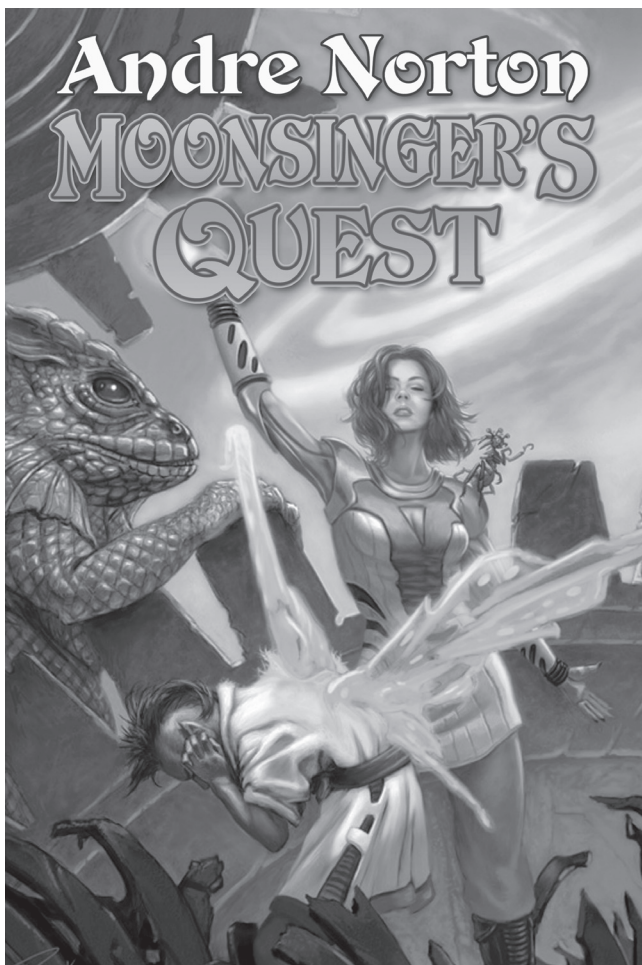
Depending on the owner's estate planning goals, it may be necessary to evaluate the market value of the IP separate from potential income to be generated from such IP. Some authors may elect to have one beneficiary own the rights to a piece of work, but another beneficiary to receive royalty proceeds and income.

Consider whether restrictions or limitations should be placed on the rights. Estate plans can be very specific as to what IP rights may be transferred upon death. The IP owner has the ability to place certain restrictions and limitations on the transfer of IP, and the IP owner can transfer one or all of the rights associated with a particular piece of IP to a particular beneficiary in the manner that he or she prefers. For example, an

IP owner may elect a beneficiary to be responsible for decisions regarding the publication of a copyrighted work, and such decisions may include the right to distribute that copyrighted work. The remaining rights associated with the copyright can be transferred to a second beneficiary.

Name a "Literary Executor." A Literary Executor, as opposed to a General Executor, is the person selected for the limited purpose of managing IP owner's literary property when he or she passes on. The Literary Executor, who acts on behalf of the beneficiaries under the IP owner's will, is responsible for entering into contracts with publishers, collecting royalties, and maintaining copyrights.

The IP owner must keep in mind that being a Literary Executor can be a lot of work, so he or she wants to choose someone who would be up to the challenge. By taking the time to select a Literary Executor, the IP owner lessens the likelihood of intra-family disputes. Such squabbles could result in family members refusing to negotiate for the further exploitation of the IP owner's works. Ideally, the Literary Executor should be someone who understands how the entertainment industry operates and should also be someone comfortable with negotiating contracts, or savvy enough to hire an attorney or literary agent to help exploit the IP owner's works. It is important that the will describes the scope of the Literary Executor's duties. Like with anything else in a will, the IP owner can impose limitations, qualifications, or conditions on the Literary Executor.



What if an author's heirs don't like the author's agent and want to make a change?

CB: First, you must ask whether the author's agent continues to be the agent after the author's death. This should be laid out in the agent-author agreement. If the contract does not include language regarding the relationship after the author dies or if no contract exists, then look to state specific agency law.

What if an author's agent goes out of business after the author dies?

CB: Again, if the contract does not specify, then state specific agency law applies.

What if an author's agent has inserted language into contracts giving him or her the "irrevocable right to represent the author in perpetuity?"

CB: That language means that the agent has the right to negotiate all rights under the contract, including subsidiary rights, forever and will act as the author's agent forever. This takes control away from the author's heirs or beneficiaries who own the rights in the works at issue. It could create major problems, especially if the heirs or beneficiaries are not happy with the agent's services. Also, because an agent typically collects and

Self-published or not, an author wants to specify who he or she is bequeathing the proceeds from the sale of books (or any works) to.

receives all sums of money payable to the author, an author's heirs or beneficiaries will not have direct control of all monies related to the particular works involved. This can be prevented by modifying the author-agency agreement during the author's life so that rights granted to the agent are revocable. The agreement should also include termination language to give the author and the author's heirs or beneficiaries a way to get out of the agreement.

What issues might arise as a result if the author has co-authored or ghost written books? And how can such problems be prevented?

CB: When two or more co-writers collaborate on a copyrighted work, all co-writers own equal, undivided interests in the copyright to the work unless they contract to alter those interests. A copyright could also be jointly owned if a writer has transferred part of his or her ownership interest to another party. With any jointly owned copyright, there is no right of survivorship. This means that when one co-owner dies, the deceased's share of the copyright does not pass to the other co-owners. Instead, the deceased co-owner's share passes to his or her beneficiaries under the Copyright Act, the deceased co-owner's will, or the applicable state law of intestacy, depending on the circumstances. One should be aware that any joint owner of a copyright can grant non-exclusive rights in it (e.g., a license to reproduce the copyrighted work) without the other joint owner's consent. However, the grantor must pay their share of the revenue earned.

Ghost written book: A ghost writer generally does not get any credit unless the person who hires the ghost writer wants to give credit. The person who hires the ghost writer typically owns all the rights to the ghostwritten book, including the copyright, and the ghostwriter usually does not participate in any royalties or other income derived therefrom.

What sort of brand maintenance/business issues may arise? Examples: Who is going to pay to maintain the deceased author's domain name? Who is going to respond to the dead author's e-mails? Who is going to update the dead author's website? And keep it current?

CB: We call this "trying to control from the grave." An author can certainly bequeath certain rights to a beneficiary, like rights to the dead author's website, and request that the beneficiary update and maintain the website, but the beneficiary is not required under the law to do so. In fact, the beneficiary can do whatever he or she wants with the website (e.g. sell it, turn it into a porn site, etc.).

As discussed above, one thing the IP owner should consider before he or she decides who to bequeath the rights to is whether the beneficiary or beneficiaries will benefit from these rights. For example, if the author's spouse receives the proceeds from the online sale of the books, then the agent has no real benefit in updating and maintaining the website. If the beneficiary benefits from the bequeath, then he or she will have more incentive to carry on the dead author's wishes.

What about the possibility of a movie, TV, or game deal after an author's death? Who would get the rights? Who will negotiate with the buyer? Could the dead author's agent have the right to do so? What can authors do to provide for such a situation?

CB: Again, the author can bequeath these rights to anyone. The agent, beneficiary, or Literary Executor can be responsible for negotiations. It is whatever the author wants. Remember, an author can put whatever he or she wants in a will.

What about cash flow from self-published books on Amazon & B & N? Should that sort of thing be mentioned in the dead author's will?

CB: Self-published or not, an author wants to specify who he or she is bequeathing the proceeds from the sale of books (or any works) to.

What if an author licensed her/his IP by entering into a joint authorship agreement with an independent contractor—and that contractor dies mid-agreement?

CB: If you licensed your IP to someone, that person would not become a joint author. Rather, they would be a licensee and have no rights other than what is spelled out in the license agreement. If the licensee dies mid-license, then the license would typically terminate.

However, if you collaborate with an independent contractor and decide that both you and the independent contractor are now co-owners of the copyright in the book, then you can insert language into the agreement regarding what happens if that co-owner dies mid-agreement.

For example: If [independent contractor] should die, become incapacitated, or for any other reason reasonably beyond his or her control be unable to complete his or her responsibilities with respect to the Work prior to the completion of the Work, then [independent contractor] hereby sells, grants, conveys, assigns, and sets over unto [you] and its successors and assigns, on an exclusive basis, all of [independent contractor's] right, title, and interest in and to the Work including but



not limited to the [copies, artwork, page layouts, and designs] prepared for [you], and all of the assets, properties, contracts, rights and obligations.

As stated above, if the co-owner dies after the agreement, then his or her copyright interest passes to the beneficiaries, unless contracted otherwise.

One thing that needs to be mentioned is that the Copyright Act provides for “recapture” of a copyright, also called “termination rights.” There are two clauses in the Copyright Act that address termination rights. One applies only to pre-1978 works, and another applies to post-1978 copyrights. Both clauses provide that the copyright claimant (the author) retains control over a transferred copyright through the power to terminate the transfer at a future date. Thus, an author, or if deceased, his or her surviving heirs, have a non-assignable, non-waivable right to terminate most transfers and licenses granted by the author at a defined point in the future. If the author has no heirs, this right passes to his or her executor, administrator, personal representative, or trustee.

CB: Finally, it’s very important that the author/artist organizes everything regarding his or her estate (this includes IP, property, retirement plan, etc.). I’ve seen cases where a father died and his children had no idea where his retirement fund was located, what he was getting from social security, etc. The children had to go on a hunt to find these things, which added more stress to the situation. The same would apply to all IP. Get those registrations printed and put them in a binder so they are easy to find. Make a list of all of your novels, unpublished works, etc. Spell out exactly what you want done with your work. For example, if you never want a piece of work published, then make sure you spell that out so your intentions are known.

It must be noted that this is by no means a complete legal summarization of IP and estate planning. We highly recommend authors seek an estate planning lawyer, tax lawyer, IP lawyer, and accountant.

If they haven’t already done so, I would urge all SFWA members to start working on their literary estate *now*. It may be something of a chore, but it will constitute a gift to your heirs, and help them through a difficult time.

I would like to thank **Sue Stewart**, **Dicken Kidwell**, and **Caitlin Bellum** for taking time out of their busy schedules to be interviewed. If you would like to provide feedback regarding my column, or make suggestions regarding future columns, please send them to: bill@williamcdietz.com.

Disclosure: William C. Dietz is one of Caitlin Bellum’s clients.

