The NWU Literary Agent Agreement

(Confidential: For NWU members only)

Understanding the Author-Agent Relationship

A Guide to the NWU Preferred Literary Agent Agreement

Introduction

This guide is an educational tool for authors who are considering entering into a relationship with a literary agent, or who need help in understanding an existing author- agent agreement. It should be read in conjunction with the National Writers Union Preferred Literary Agent Agreement and used to evaluate or improve any agent agreement you may be asked to sign. Both documents are available to National Writers Union (NWU) members.

Deciding to retain an agent is a major decision in any author\'s career. An agent will agree to represent your work because she believes she can sell it to a publisher or publishers. The agent is your representative, whom you hire to market your work, to negotiate your publishing contracts, and to oversee your royalty accounts. In exchange for an agent\'s representation, an author agrees to pay the agent a commission; a commission is a percentage of all income earned from those rights that the agent is able to license. Every author\'s work includes a bundle of individual rights that may be exploited: e.g., hardcover print rights; paperback print rights; electronic database rights; interactive software rights; foreign translation rights; television adaptation rights; audio cassette rights, and so forth. In addition, as new forms of media are created, new rights (e.g., CD-ROM rights) emerge and become valuable. Collectively, these individual rights form the copyright to one\'s work.

While not all of an author\'s rights may be instantly marketable, they do exist and an author will own each one unless, and until, he signs it away. Moreover, each of an author\'s rights is severable from his other rights and may be licensed or transferred independently. For instance, when licensing your print publication rights, you do not necessarily transfer your television adaptation rights or your electronic database rights. This principle is known as the "Doctrine of Divisibility" and is a cornerstone of U.S. copyright law.

Because rights may be licensed independently, you are not required to grant an agent authority over your entire copyright bundle. Rather, you may choose to retain different types of agents to represent your different types of rights. This is an important consideration, as an agent who is an expert on screenplay rights may not be qualified to negotiate a stage adaptation of your work.

For many authors, an agent agreement is the first agreement they will ever face in their literary endeavors. And, while there are clear advantages to having competent, well- connected representation, it is critical to remember that the agent works for the author and not the reverse. One of the basic tenets of the National Writers Union is that authors must educate themselves at every level of their career and must actively participate in the decisions that affect their lives: education is empowerment.

As a matter of law, an author-agent relationship is a fiduciary relationship that assumes financial accountability and professional business conduct on the part of both parties. Sometimes, however, an author is more inclined to perceive his agent as a friend, a person to whom he can blindly defer all business activity. In fact, mutual respect, confidence, and trust should be at the foundation of your affiliation. But it is also important to recognize the tenuous reality of an agent\'s livelihood. She must represent the interests of many clients, some of whom may be competing with each other, and at the same time must preserve her financial relationships with publishers. You should be aware that it is ultimately your responsibility to keep your work a priority in your agent\'s mind; it is thus very important to work with your agent as she

makes deals that will affect your career (and your pocketbook), rather than to passively accept her directions or neglect. Your active participation should begin with review of your agent\'s own agreement.

There was a time when agents operated on a handshake and an oral agreement. Though the practice is not as common today, many established agents continue to use oral contracts to the great satisfaction of both parties. There are strong benefits to an oral agreement, provided the author and agent each have a clear understanding of its parameters. The author-agent relationship has become increasingly complex in recent years. International conglomeration in the media industry means there are fewer and fewer houses to which to sell works, and rapidly emerging technologies make the disposition of rights a challenging undertaking. As a result, many agents have found it necessary to clarify agreements in writing. There is nothing inherently wrong with a written agreement, provided it is fair to both agent and author. Too often, however, the written agreements supplied by agents serve to advance only the interests of the agent.

The NWU guide and agreement will help you to navigate the difficult issues you may face when negotiating with an agent. The documents were developed by experienced staff members, legal interns in the Union\'s Research and Advocacy Program*, and seasoned members who make up the NWU\'s contract and grievance divisions. The documents will help you understand where, and why, your interests may depart from those of your agent, and will educate you about general contract principles, fair business practices, and relevant industry standards. It is the NWU\'s hope that our documents will provide you with the basic knowledge and facility to suggest agreeable terms. If, in the course of your negotiations, you decide to diverge from our preferred language, it is important that you keep in mind one very important rule of contract interpretation: A contract must be read in its entirety and, thus, must be consistent in its parts. Make sure that any changes you make do not conflict with other terms you have retained. Conflicting terms create ambiguity. Ambiguity defeats the contract\'s inherent purpose.

Finally, as you progress in your career, remember that, as a member of the National Writers Union, you are never alone. To learn more about the author-agent relationship, or other issues that affect your professional life, contact your local NWU office for the dates of workshops on book and journalism contracts, copyright, electronic publishing, and other topics. If you have questions about a specific contract, or need assistance with a dispute, please do not hesitate to call. A complete list of resources is available from the NWU\'s national office.

Understanding the NWU\'s Literary Agent Contract

Name and Description

By specifying the name and description of the work that the agent is to represent, you limit the scope of your agreement and diminish the possibility of latent ambiguities. Read in combination with paragraph 1, this section ensures that your agreement will apply only to those works for which you have retained the agent; you would not be required to give this particular agent any later works you may produce, or any works for which you already have an established market; e.g., an established journalist may want to retain an agent to represent his book, but will not want his frequent magazine articles or speaking engagements to be subject to an unnecessary commission. Certainly, there are cases where an author will seek to have an agent market all of his writing, particularly where the agent has a broad array of experience or where the author has a narrow writing focus. But a broad agency agreement belies the fact that agents are not always experienced in all genres and that author-agent relationships sometimes go astray; a limited agreement makes it much easier for the author to move on. Should the agent- author relationship thrive, however, the agreement may be easily extended by attaching a written addendum signed by both parties. (See "Additional Works," Section 1.)

Section 1. Scope

Exclusivity

There is a distinction between engaging someone as your exclusive agent and granting a person the exclusive right to represent your work. The former construction, as set forth in the NWU Preferred Literary Agent Agreement, means that as long as the contract remains in effect, you agree not to engage another agent to market the particular works and rights for which you are engaging this agent.

Conversely, the NWU does not recommend a clause that grants the agent the exclusive right to represent your work, because it precludes you from representing yourself. For example, there may be circumstances where you are able to facilitate an agreement for a foreign license on your own. Granting the agent an exclusive right to sell would prohibit you from negotiating for yourself, and would entitle the agent to a commission that she did nothing to earn.

Granting an agent exclusive representation would also preclude you from hiring an attorney, or from consulting with outside parties where such options may be more appropriate. For example, while the agent may be best equipped to negotiate a hardcover print contract, you may find it less expensive and more helpful to have your lawyer negotiate the deal, or to have the NWU review your contract and give you advice on how to negotiate yourself. (See "Option Clauses."

Rights

Unless you write as an employee, or under another form of work-for-hire agreement, you will own the entire copyright to any work that you create from the moment that your work is expressed in a fixed medium, e.g., on paper, on the screen, on a cassette. (See "Work- For-Hire.") Each right within your copyright is severable from the others, and thus can be disposed of individually. Whether your agent will dispose of all of these rights or only some of them will depend upon many factors: the nature of the work, the extent of the markets, the agent\'s contacts, your own clout as a writer, and whether you have established representation in other markets. An author who has a long history as a screenwriter, or a stage writer, for instance, may choose to carve those rights away from the literary agent\'s domain. The Union suggests that you discuss with the agent her knowledge of particular rights, your previous relationships with agents or lawyers from specialized fields or your ability to represent yourself in those fields, her plans for proceeding with your work, and her track record in relevant markets. A good agent will work with you to discuss these issues and to come to a fair agreement.

Rights that derive from the original sale are known in the industry as "subsidiary rights" (subrights). When determining what rights an agent will represent, authors should keep in mind that certain rights are commonly controlled by print publishers, and an agent will need the necessary discretion to offer these rights for sale. Rights frequently licensed to publishers by agents, on behalf of authors, include: hardcover publication, softcover publication, reprint, bookclub, audio cassette (books on tape), simple compilation and abridgement, second serialization (abridged articles appearing after hardcover publication), syndication, and nondramatic electronic rights. Regarding rights licensed to the publisher, your agent will take a commission on any royalties you may earn after the publisher has taken its cut. For example, your agent may agree to give the publisher control of book club rights for an author-publisher split of fifty percent (50%) each. If the publisher succeed s in selling book club rights, your agent will likely take fifteen percent (15%) of your fifty percent (50%) before passing those royalties onto you. Additionally, if subsidiary rights are granted to the publisher, income from those rights may be applied against your advance (unless otherwise specified in the book contract). It is conceivable, for instance, that you could have a successful sales record overseas, but never see income from those sales if your advance has not been earned back.

If an agent retains control of rights and licenses them directly to a third party, your share will be larger because the publisher will not receive a cut. For example, if an agent directly sells foreign translation rights to a German publisher, you will receive the income from that license, minus the agent\'s commission, probably twenty percent (20%), and the publisher will receive nothing. More importantly, perhaps, when an agent controls subrights, the author will receive income from such sales regardless of whether the advance has earned out. That is not always the case when a publisher controls subrights.

Duration

The NWU strongly suggests that your agent agreement remain in effect only until you or your agent decide to terminate it. This principle, known as "termination-at-will," is the most expedient and flexible method of ending a contract. Oral agency agreements are usually "terminable-at-will." A contract that is terminable-at-will may last as long as the agent is alive, or for as little as a few months. Duration provisions always, repeat always, must be read in conjunction with termination provisions. (See "Termination."

Some agents will resist an agreement that is "terminable-at- will." They may argue that selling a manuscript can take months or even years and that they cannot confidently invest resources in marketing your work if you can arbitrarily terminate at any time. It is not in an author\'s best interests to terminate an agreement without valid reasons, however, and few authors will terminate in bad faith. Conversely, a poor agent relationship can virtually suffocate an author\'s career. It is the NWU\'s position, therefore, that termination must remain within the control of the author.

If an agent insists on a minimum commitment, we recommend that you should not agree to more than one year\'s time. It is important to balance the agent\'s desire for your continued commitment with your own right to end an arrangement you find is not serving your interests. One year should be more than enough time for each of you to evaluate the relationship.

Additional Works

In the happy event that you and your agent want to expand the scope and duration of your agreement, the NWU recommends attaching a written list of the additional works and/or rights that will be represented to your current agreement. This addendum should be signed and dated by each of you, and should stipulate whether there will be any other changes to the terms of your original agreement. (See "Modifications.") For example, unless you modify the duration of your agreement, the new works and rights would be represented by your agent indefinitely, until you or your agent terminate the relationship.

Section 2. Authority

While your agent must have relatively broad authority to negotiate on your behalf, this section assures that you maintain the final say in approving or rejecting any contract. The clause reinforces the premise that you play an active role in your own business affairs and that you and your agent function as a team when making final decisions. After all, it is your work and your career that are at stake.

As a practical matter, however, you should be aware that many agents negotiate umbrella boilerplate contracts with publishing houses and, in their negotiations for particular authors, may have limited latitude to discuss certain terms. For instance, Agency X may have negotiated a strong "manuscript acceptance" clause with Publisher A, but may have the standard acceptance clause with Publisher B. As the author, however, you should always request that the agent pursue changes that are important to you.

Some agents will request authority from you to enter into contracts for small dollar amounts, or to dispose of specific narrow rights without prior approval. These clauses are constructed for convenience, so that the agent need not track you down for every minor question. Whether you give an agent such discretion is largely a matter of personal preference. If you do feel comfortable with relinquishing final approval to some degree, make sure the clause is narrowly drawn to reflect specific rights (e.g., nonexclusive licenses authorizing brief quotations) and is limited to a small amount of money such as licenses for less than two hundred dollars.

Section 3. Compensation

Commission

Most agents today charge a 15% commission for licensing domestic publication rights and a 20% commission for

licensing foreign rights; some agents still charge a 10% commission.

The extra commission for foreign rights is justified by the extra cost involved in effecting international transactions and in engaging foreign sub-agents to place works in foreign markets. It is important to clarify financial subtleties in your agent agreement. First, the primary agent should be responsible for paying the foreign sub-agent. If this is not set forth, you could potentially find yourself owing two full commissions to two different agents. Secondly, since some foreign countries impose taxes and duties on the sale of publication rights, you may want to specify that the agent\'s commission is to be based on your compensation after such taxes. Discuss this latter point with your agent to determine her practice and its pros and cons.

Royalties

Because the agent is your designated representative, most publishing contracts stipulate that the agent will collect all compensation owed to the author by the publisher(s), including advances, royalties, and license fees. This arrangement creates a fiduciary duty on the part of the agent to distribute that money to you. It also becomes part of the agent\'s fiduciary responsibility to make sure the publisher is making accurate and timely payments of all money owed to you. A frequent exception is made in the case of termination of an agency relationship. In such a circumstance, arrangements can be made for the publisher to make separate payments to the agent and to the author respectively. (See "Separate Checks.")

Accounts

Many agents do not, in fact, keep independent bank accounts for each author they represent. The reason for having separate accounts is largely precautionary. If the agent were to go bankrupt, any funds reserved in an author\'s account would in theory be preserved. As long as your agent keeps honest and accurate books, however, and you reserve the right to examine them (see "Audits" below), insisting on separate accounts may not be necessary. Most agents, at the very least, will maintain a vendors\' account (business) and an authors\' account (for all clients).

Payments

Ten (10) business days allow enough time for the agent to complete all appropriate accounting, to make sure checks clear, and to remit your share of the money she has received. Many agents operate on this time schedule. Reciprocally, you should promptly remit to the agent her share of any money you owe as a result of payments made directly to you. Note that where foreign rights are sold and checks must clear foreign banks, this time period may be extended, but authors should request that the agents mail foreign payments within one day after they clear. Any deciphering of statements or separation of monies can be accomplished, ideally, during the time it takes for the check to clear.

An agent, as a fiduciary, has an obligation to provide reasonable access to records, statements, receipts, and transactions that relate to you. Each agent may have a different procedure for doing this. For example, one agent may make it a practice to provide copies of all canceled checks; another may provide copies of monthly bank statements. The Union recommends that you require the agent to send periodic royalty statements, even if no money is owed you, because this enables you to keep accurate and current records and provides you with the only reasonable way to ask informed questions. Regardless of the agent\'s system of accounting, always expressly reserve the right to audit her books. While state law protects your right to audit a fiduciary, it is far easier to accomplish if articulated in writing in the contract. Agents, as a matter of integrity, should agree to pay the costs of your inspection if a sufficient discrepancy is uncovered; in fact, many agents do.

Section 4. Employees

This is a very standard clause that speaks for itself. There is no reason an agent should be prohibited from hiring whoever will best assist her in the fulfillment of her job, whether secretaries, bookkeepers, or assistants. However, an author should

not charged for those services, which are essentially operational expenses, and you should be fully apprised if you request general information about people who are working on your account.

Section 5. Termination

Grace Period

For some authors, the termination of their agent relationship can be as painful as a divorce, particularly where the author feels the agent has abused the author\'s trust in some way. If you are able to negotiate an agreement that is terminable-at-will, termination can be relatively clean, though perhaps not painless. (See "Duration," Section 1.) All termination letters should be sent by certified mail, "return receipt requested," so as to secure the specific date on which notice was received.

As a matter of fairness, it is the Union\'s position that authors who are terminating "at-will" should give agents a period of thirty (30) days from receipt of notice to conclude any outstanding negotiations. This allows the agent time to secure a commission on agreements that may be near the final stages, but at the same time emphasizes the finality of the termination. An agent may not institute any new proceedings during this period and should not receive a commission on deals still pending after the thirty day period. This both protects an author from paying double commissions later and reinforces the principle that an agent receives a commission only for work actually completed. In some situations, when an agent has performed an exceptional amount of work in anticipation of a license, or when a pending deal is rather complex, it may be appropriate for an author to extend the grace period or to grant the agent narrow authority to continue representing that particular negotiation process until it is completed. With respect to film projects, for example, a grace period of up to 75 days may be appropriate.

Limitations

If your agent\'s agreement binds you to a minimum time commitment, it is likely that you will have to wait for expiration of that period before going to a new agent. (Hopefully that period will not be more than one year.) (See "Duration," Section 1.) If your agreement covers only one work, you may at least be free to market a new work through someone else. Sometimes agreements that bind the author for one or more years also demand authority over all of an author\'s works. An author in these situations should always ask the agent to release him from the agreement early. If the agent is as unhappy as the author, she may very well agree.

Misrepresentation

Unless your contract stipulates otherwise, a terminated agent may not continue to represent you, even on continuing licenses she may have originally negotiated. Her authority ends with termination of the relationship; any attempt to continue as your spokesperson would amount to misrepresentation. An author should be careful not to confuse this limitation with the agent\'s continuing right to collect a commission.

Commissions

After you terminate your relationship, the agent is entitled to receive commissions on any contracts she negotiated and completed prior to the termination. These commissions will be calculated based on the terms of the publishing contracts that the agent actually negotiated. The agent will continue to receive commissions for as long as those particular agreements remain in effect. Sometimes, an agent will allow the author to "buy her out" with one flat payment, but this is rare and an author should understand that the agent has a legal right to collect compensation that is the fruit of her work. Unless you otherwise agree, however, the agent should not receive a commission from any agreements concluded with a publisher(s) following her period of employment.

Separate Checks Option Clauses

If you do break with your agent, the Union recommends that you direct the publisher to cut individual checks and send your payment and your agent\'s commission to each of you separately. This prevents you from having to deal with the agent on a continuing basis, which is especially important if you and the agent are on poor speaking terms.

To effectuate separate checks, you should write to the publisher, explain that the agent no longer represents you, and instruct the publisher not to send any further payments to the agent. This is sometimes more difficult than it sounds, since publishing agreements usually bind publishers to send payments to the care of the agent. However, publishers will usually agree to separate checks after receiving verification that the relationship has ended, e.g., a copy of the letter, a phone call from the agent. A publisher would be on weak ground if it attempted to refuse such a request, particularly if the agent had been terminated for a breach of fiduciary trust. If there is a dispute over the terms of your termination, however, the publisher will usually hold all royalties in escrow until the matter is settled.

Section 6. Choice of Law

New York and California have the most sophisticated bodies of law concerning agency agreement interpretation. Unlike choice of venue, application of law need not be based on the address of either the agent or the author. You need only specify that a particular state\'s laws will control the agreement. However, if preferable, a more general clause may be substituted. For example, "This agreement shall be construed and interpreted pursuant to applicable law." Under this wording, were a dispute to arise, a court would determine the applicable law.

Section 7. Assignability

An agency agreement is ultimately a contract for "personal services," or for the personal talents of an individual. Obviously, some agents are better than others, and you do not want your agent to assign her obligations to another agent without your express, prior approval. This applies to agents within the same agency, as well as to small agents who are not incorporated. Similarly, if an agent dies while your work is still generating income, you do not want her successor in interest to be able to represent you. If you die, you want your heir to have a choice as to whether to continue the agent\'s authority. In order to continue representing a work or license, therefore, the agent would need to secure a new agreement with the author\'s heir. It is, however, a well-established principle of law that when an author dies, the agent\'s authority to represent his works is terminated.

Be aware that agents who may be affiliated with a particular agency often leave for other agencies or to open their own agencies. Unless your agreement with that agency contains a "travel clause," it would be necessary for you to terminate the old contract and begin a new one in order to maintain the personal representation. Likewise, you may wish to stay with an agency in spite of the fact that your particular agent has left. If so, it is important to terminate the old agreement and sign a new one assuring that your former agent\'s replacement fits your criteria and will be acting in your best interests. The worst thing that could happen would be for no one to be in charge of your representation.

Section 8. Modifications

This is an important provision known as a "merger clause." Standard in written agreements of any kind, it limits the scope of the agreement to that which is in writing and provides that any change in the agreement also must be in writing in order to be valid. It prevents complications by disallowing parties from arguing that they later changed the provisions of a written agreement via a telephone call or other oral conversation.

Section 9. Arbitration

Arbitration is an alternative to litigation, should you find yourself in an irreconcilable dispute with your agent. The advantage of arbitrating rather than litigating a dispute is that matters get resolved more quickly and at less cost. (See the National Writers Union Guide to Book Contracts for a more complete discussion of arbitration clauses.)

There are several reputable arbitration associations in this country. One of the more well-known groups is the American Arbitration Association (AAA). However, the Union does not necessarily favor the AAA over others, as the choice of arbitrator may vary depending on your location. Also, be aware that arbitration cannot guarantee a favorable result any more than litigation, and you should thoroughly think through both options before making a decision. An arbitrator is not bound by traditional rules of evidence or by precedent. Rather, he has general latitude to rule in a manner he deems fair to the circumstances. The arbitrator could decide that the relationship shall continue longer than you originally agreed or that you must accept a contract that the agent has negotiated. In an attempt to be fair to both parties, an arbitrator may decide largely to terminate the relationship, but to allow the agent to continue to represent particular licenses. Ultimately, however, arbitration will be less costly and more expedient than litigation. And while an arbitration clause may not appear initially in an agent\'s agreement, it should not be a very controversial clause to discuss. Unlike publishers, most agents cannot afford litigation any more than you can and, therefore, should be open to including an arbitration clause at your suggestion.

Miscellaneous

Third-Party Beneficiary

Language that names the agent as a third-party beneficiary is not necessary, but is acceptable. It means that an agent is entitled to benefit financially (e.g., by commission) from a contract between you and the publisher.

Agency Clause

Most book publishing contracts will include an agency clause which stipulates that your agent is the agent of record for your work and is the party to whom royalty and license fees should be sent. The clause governs only the rights that fall within the publishing contract. Rights which the agent reserves for you, and is responsible for exploiting herself, are not within the domain of the publishing contract. For example, an issue regarding the sale of foreign rights would not be subject to the agency clause within the publishing contract if you had not granted those rights to the publisher. Rather, those rights fall within the domain of the agent\'s authority and are subject only to the terms of your agent-author agreement. Thus the agency clause cannot be used to interpret or expand the scope of your agent\'s authority with respect to rights outside the publisher\'s control. Be wary of agents who attempt to tell you differently.

Competing Works

Many agent contracts will have a clause that permits an agent to represent authors of competing works. Unless you have outstanding clout, it will be virtually impossible to change this stipulation. Agents often have a particular specialty and may represent other authors who deal with similar subject matters and genres. Therefore, it may be to your benefit to inquire whether the agent is trying to sell a work similar to yours or to try to ascertain the agent\'s priorities.

Potential Problem Clauses

There are some clauses that the NWU does not recommend in its Preferred Literary Agent Agreement because they are both unnecessary and unfair in their application to authors. We recognize, however, that these provisions may appear in the agreements supplied by agents and that some agents may unconditionally refuse to accept any changes to their agreement. Whether you are comfortable working with such an agent is a personal decision. Either way, you will be better equipped to negotiate if you fully understand the implications of the provisions.

Warranties

A narrow warranty clause will request your express assurances that you have full authority to enter into the agent agreement. It is unnecessary. If you do not have the right to enter into an agreement (because you have another exclusive agent, for instance) you will be liable for any damage to the agent irrespective of whether it is stated in the contract.

A broader warranty clause will state not only that you have the right to enter into the agreement, but also that you have not violated another author\'s copyright or exceeded the boundaries of libel or privacy laws. This is also an unnecessary warranty and is more dangerous to accept. An agent, unlike a publisher, is not a rights holder and will not be deemed responsible for such acts if you and your publisher are ever sued. (See NWU Guide to Book Contracts.) Understandably, an agent may fear that a plaintiff interested in casting a wide net will sue her as a matter of course. Even if an agent is sued initially, however, she will be dropped quickly as a case against an agent is almost always legally unsustainable. Nevertheless, if you decide to make the above warranties to your agent, you must understand that if you are sued, you will be liable for breach of the agent contract in addition to being responsible for defending the claims against you. If your agent insists on a warranty, the following clause should suffice:

"AUTHOR warrants that he has the right to enter into this agreement, and that there does not now exist, and AUTHOR will not hereafter make, any commitment with respect to the rights covered by this agreement for as long as this agreement shall remain in effect."

Indemnification

Sometimes, however, an agent\'s agreement will combine a warranty clause with an indemnification clause. Again, this is not necessary for the agent to represent you. "Indemnification" means that you will assume the agent\'s liabilities. There are few circumstances in which indemnification would be justified, as actions against agents are rarely sustainable. An agent will be deemed liable only for her own acts and, in fact, a broad liability clause could allow her to avoid liability for acts that were her fault. If your agent insists on an indemnification clause, make sure it is very narrowly drawn:

"AUTHOR agrees to hold agent harmless from any action, claim, proceeding, or liability that may arise," is unacceptable unless accompanied by the phrase "as a result of a breach of AUTHOR\'s warranty, as finally sustained by a court of law."

Reimbursements

Some agents require that authors reimburse them for "ordinary business expenses" such as the cost of duplicating manuscripts, long distance telephone, express mail, etc. Many agents will absorb operating expenses as part of their general business costs and will charge only the commission in exchange for services. If your agent insists on reimbursement for ordinary business expenses, you should narrow the instances as much as possible (e.g., photocopying of manuscript only), and you should make sure the agent provides an itemized invoice. Do not agree that the agent may simply deduct such expenses at will. In addition, you should insist on a realistic ceiling on expenses; e.g., "Agent may not exceed $150 in photocopying expenses per year without author\'s prior written consent." Any "extraordinary expenses," such as attorney consultation, must require your prior written consent.

Reading Fees

Some agents charge reading fees for reading the manuscripts of authors who are not yet their clients. The National Writers Union steadfastly opposes this practice, as do many agents. Some agents charge modest fees for the simple task of reading an author\'s manuscript and deciding to represent you. It is up to you to decide whether this is advantageous to your career. But, recognize that some persons who purport to be "agents" demand large fees (often several thousand dollars) to "edit" and/or "critique" your manuscript. Many of these "agents" are not really in the business of selling books to publishers; they simply make money from inexperienced authors.

It is true that there are fewer and fewer editors who are able to spend their editorial time developing new talent. As a result, there are some authors who can benefit from expert attention offered elsewhere. But few agents are also editors, and you should tread very carefully if you receive an offer from a "book doctor." If you do decide to pay a reading fee, make sure that you are getting substantial value for the agent\'s service rather than just paying a fee to have your work categorically rejected. It is important that you verify that the agent will provide an in-depth, written critique of the work as well as an evaluation of its marketability. It is just as important to research the agent\'s qualifications to do so.

Be extremely wary of an agreement that gives the agent automatic authority to represent options, or "next works," that you may produce for a publisher. First, the NWU prefers that agent agreements be work-specific. Second, there are few legitimate reasons for an option clause to appear in a publishing contract, and it should be one of the first clauses that an agent negotiates out of the contract. (See NWU Guide to Book Contracts.) Any agent should be seriously questioned if she 1) does not negotiate an option clause out of the publishing agreement and 2) by her own agreement, requests an automatic commission from you in the event that option is exercised by the publisher. Such a commission would be binding regardless of whether you have a new agent at the time of the new work and regardless of whether the agent actually negotiates the new deal. It places you in jeopardy of either paying two agents or being stuck in an unworkable agency relationship. It also raises conflict-of- interest issues for that agent. Thus an agent\'s authority over a next work should be clearly identified in the original contract or a written addendum.

Agency Coupled with an Interest

This language is conspicuously absent from our agency clause, and for good reason. Such language implies that the agent is entitled to actual property rights in your work when, in fact, an agent enjoys a financial interest. Only an agent who is also a coauthor would be entitled to property rights in your work, and in such a case her rights would be secured not through an agency agreement but through a collaboration agreement and/or copyright law.

Work-For-Hire

Sometimes an agent will offer a "work-for-hire" agreement. Work-for-hire is a special category of the U.S. Copyright Act and, in essence, means that an author does not own the copyright to his own creation. Rather, copyright vests with the employer or, in limited circumstances, with the commissioning party. A work-for-hire agreement is valid only if it is in writing and if it fits the uses enumerated in Section 101 of the Copyright Act; e.g., work created as an employee, work translated, etc.

Furthermore, beware of an agent who simultaneously asks you to assign your copyright and claims she is offering a work-for-hire agreement. Assignment of copyright is not necessary with a valid work-for-hire agreement, as the copyright vests automatically with the other party. Also, an agent may try to accomplish an assignment of copyight under the guise of a "collaborative" agreement; e.g., an agent claims to be collaborator and therefore is entitled to all or a portion of your copyright. Work-for-hire and all-rights agreements should be signals to the author that an "agent" may not be an agent at all, but a packager.

Finally, beware of agents who try to reduce the role of a writer in a collabration agreement to that of work-for-hire while enhancing the role of the "contract expert" (usually the first author). Whenever an agent represents both parties to a collaboration there is a potential for conflict of interest. In light of the fact that copyright law protects the expression of an idea, as opposed to the idea itself, it is unacceptable that the writer be asked to waive rights for the benefit of the agent\'s "big-name" client.

Packagers

It is impossible in this short space to explain fully the proper and improper roles of packagers or "book producers" in the publishing industry. A packager is someone who contracts with a publisher to facilitate the production of a work that is too expensive, too insignificant, or too specialized for the publisher to oversee. For instance, packagers will often produce large, expensive, color- intensive or photo-intensive coffee table books. Be aware that not all packagers conduct legitimate

businesses, however. Some packagers operate simultaneously as agents and, of these, some prey on the inexperience of new authors. Question any agreement where an agent requests you to assign your copyright to her. An agent who controls the copyright of several authors, or artists, may well be able to contract with a publisher, but the publisher will have no obligation to anyone but the agent. Although you are the author, you are reduced to having only a third-party financial interest in your own work. You become completely dependent on the agent for payment, and such payment, if it comes at all, will be a much smaller portion (usually 50% of agent\'s income) than you otherwise would enjoy. Most importantly, by giving up your copyright, you forfeit all future benefits of the work.

As with some work-for-hire agreements, authors will sometimes agree to unfavorable packaging arrangements simply to earn some extra money. If you are in this situation, it is critical that you understand the potential implications stated above. You should never give a packager your favorite work, or a work you think has great potential. Because the very quality of the work is at risk, some authors even opt for a pseudonym when writing for packagers.

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