

Terms Commonly Found in BizTech Contracts

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General Contract and Legal Terms

Arbitration: A method of resolving contract disputes without filing a lawsuit. The participants in a contract agree to a dispute resolution process in which a neutral party, the arbitrator, hears the matter and issues a binding decision mandating the resolution of the conflict. Arbitration decisions may be appealed to the courts under very limited circumstances.

Assignment of Rights and Delegation of Duties Clause: Assignment is the transfer of rights under a contract, such as the right to be paid, to a third party. Delegation is the transfer of obligations under a contract to a third party. The delegation of a duty to perform personal services, such as writing a manuscript, is often limited by contract. Different from subcontracting because in delegation, the transferring party does not remain liable for performance on the contract. [*See Subcontractor.*]

Attachment: An addition or addendum to a contract, such as a payment schedule or job scope description. Attachments are often "incorporated by reference" in the main body of the contract, and therefore their terms are binding on all parties. If not, all parties should sign and date the attachment.

Attorney-in-Fact: Authorizing another in writing to act in his/her place to do some act, but not one requiring legal representation.

Attorneys Fees Clause: A provision in a contract allocating each party's obligation to pay legal bills in the event of legal action taken against each other or by a third party.

Breach of Contract: Failure to satisfactorily perform according to a contract term, i.e., to complete a work by the agreed upon deadline. A material breach is one that can trigger a lawsuit under the contract even if both parties have not completed their performance. [*See Damages/Remedies.*]

Cancellation/Termination Clause: A unilateral or mutual decision to not complete an exchange or perform an obligation under a contract. May trigger penalty provisions; often contains a notice requirement.

Choice of Law/ Governing Law Clause: Choice of law, or governing law, refers to which state's law will be applied in a lawsuit and can be controlled by a clause in the contract, or, in its absence, by factors such as the parties' residence or where the contract was performed.

Compensation: Value received in exchange for your time or your finished manuscript. This can be money, copies, insurance benefits, apples, puppies, global dominion or anything else upon which all participants in the contract agree.

Contract: A negotiated oral or written agreement setting forth the terms for an exchange of value between parties (which may be individuals or companies) and under which each party promises to perform an obligation. Certain terms, such as the obligations to be performed and the terms for setting price or compensation must be mutually understood, known in legal lingo as a "meeting of the minds," and promised to by the parties to form a legal contract. Example: A publishing contract in which a writer exchanges a manuscript for money. [*See Meeting of Minds.*]

Damages: The remedy for a breach of contract or other successful legal action. Damages are usually monetary compensation, such as the award of actual damages, interest on that amount, out of pocket expenses, recovery of court costs or attorneys fees.

Actual Damages: Reward of the actual loss resulting from a breach of contract, such as the disputed payments under the contract.

Incidental Damages: Damages that are a result of a breach of contract, such as expenses incurred by a return or recall of a defective or infringing software product. Beware of indemnification clauses making a writer liable for anything but actual damages attributable to the writer's breach.

Consequential Damages: Damages that are not a direct result of a breach of contract, but that the breaching party should reasonably expect to result from the breach under the circumstances. An example would be a lawsuit by a consumer of the *Viva Jalapeno!* cookbook for gastro-intestinal damage due to an error in the recipe calling for an excessive number of peppers.

Punitive Damages: Awarded in certain kinds of lawsuits, usually pursuant to statute, by doubling or tripling the money award.

Defamation: An intentionally made false communication, either spoken (slander) or published (libel) that injures another's reputation.

Default: A failure to act as required by the contract that triggers the right to sue or excuses the other party's obligation to perform under the contract, such as a writer's failure to deliver manuscript on time or a client's failure to pay.

Entire Agreement Clause: A provision in a contract stating that the entire agreement between the parties is contained in that document. Tends to invalidate oral agreements as well as undated side agreements or attachments unless specifically incorporated. Such a clause doesn't prevent the parties from making subsequent changes to a contract, but any changes should be in a writing dated and signed by all parties. *[See Attachment; Side Agreement.]*

Injunctive Relief: An award of non-monetary damages, such as requiring a writer to transfer copyright as provided by contract. Awarded in situations where money damages are not the appropriate remedy to compensate the loss.

Jurisdiction: The authority of a court to hear a particular case. Personal jurisdiction involves the court's power to exercise a judgment against a person and is usually based upon where the parties reside, or where the contract was performed. *[See Choice of Law/ Governing Law Clause.]*

Legal Consideration: The value to be exchanged for performance of a contract. A requirement for a binding contract.

Legal Representatives, Successors and Assigns: Nonparties to a contract who may acquire or exercise rights under the contract, such as a writer's estate or attorney.

Mediation: An informal alternative to arbitration in which the neutral third party, the mediator, has no power to impose a binding decision on the parties to the dispute.

Meeting of Minds: The requirement in contract law of mutual agreement as to substance and terms, such as the nature of the writing assignment and the stated compensation.

Mutuality of Obligation: The requirement for a valid contract that all parties are bound to perform some obligation under its terms.

Offer and Acceptance: The essential elements without which no contract can be formed, i.e. a writer's offer to prepare manuscript for a specified assignment and the client's acceptance by agreeing to pay a stated compensation for the manuscript. These elements are generally memorialized in a written contract, but when trying to enforce an oral contract, they must be proved.

Parties: Participants in a contract. Also, the festivities one plans with advance money once a plummy contract is negotiated with the help of your trusty BizTech Contract Guide.

Release: An agreement discharging a party from a contractual term or terms. Should be obtained in writing.

Rescission: Voluntary cancellation of a contract either unilaterally (by one party) or by both. Can only be exercised under certain circumstances.

Severability Clause: A clause in a contract providing that even if one clause is found to be illegal or invalid by a court, the others are still operative and must be complied with.

Specific Performance: The power of a court to require a party to perform a specific contractual obligation. Not applicable to personal services contracts, such as requiring a writer to complete a manuscript.

Standard of Reasonableness: A legal standard based upon what a hypothetical "reasonable person" would think or do in relation to a contractual obligation. Often appears in relation to a publisher's or other party's obligation to accept a completed manuscript or promote a book.

Statute of Frauds: A common legal doctrine included in many states' laws requiring a written document for contracts taking longer than one year to perform or involving more than \$5,000 compensation.

Term: A provision in a contract.

Time of the Essence Clause: A clause making timely performance as specified in the contract a material requirement, allowing for suit if not complied with.

Venue: The geographical region where a case will be heard.

Waiver: The act of not enforcing rights under contract, such as the right to be timely paid. Often seen in clauses providing that if a party waives performance of a particular obligation one time, it does not constitute a waiver of all performance under that clause.

Warranty: In writing contracts, a representation by a writer that the work product is original and does not infringe on another's copyright and that the writer is free to assign the rights covered by the contract. In recent contracts, warranty language has been expanded to include a promise that the information in a work is accurate and complete.

Copyright Terms

Collective Work: Defined in ' 101 of the Copyright Act as a work in which a number of contributions constituting separate and independent works in themselves are assembled into a collective whole, such as a newspaper.

Copyright: The bundle of rights and privileges guaranteed to the legal author of a work, or holder of the copyright, under the Copyright Act, 17 U.S.C. ' 101 et seq., which belong to the author or holder unless bargained, sold or given away. A transfer of copyright must be in writing. [*See Work for Hire.*] The bundle of rights includes the right to reproduce the work, the right to create derivative works such as a film adaptation, the right to distribute copies of the work and the right to perform or display the work publicly.

Copyright Infringement: Unauthorized use of any of the holder's exclusive rights.

Exclusive and Non-Exclusive Rights: The Copyright Act grants rights on an exclusive basis to the author or other holder, so that he or she has sole rights of use, but they can be transferred or licensed on an exclusive or non-exclusive basis.

Fair Use: Use of copyrighted material that is not considered infringement, such as for criticism, comment, parody, news reporting, research or teaching. Important factors in determining whether fair use was made of copyrighted material include whether the use is commercial or for nonprofit educational purposes, the nature of the copyrighted work, the amount of work used in relation to the whole and the effect of the use on the potential market for or value of the copyrighted work.

First North American Serial Rights/FNA Hard Copy Print Publication Rights: First time print rights.

Instructional Text: A literary pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Joint Work: Defined in § 101 of the Copyright Act as a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. To be a joint author, a writer must contribute an independently copyrightable portion of the work.

License: Authorization of use of rights to a work by an author or other copyright holder.

Moral Rights: The right, originating in Europe, to maintain control over work after it is sold to another, such as the right to claim authorship or prevent modification. Moral rights are separate from economic rights held by a copyright owner and are not recognized in the United States for writings, but are recognized for visual arts.

Plagiarism: Appropriating the writing, language or expression of ideas of another writer as one's own. If copyrighted material, will also constitute infringement.

Public Domain: When a work enters the public domain, anyone can use it without risk of infringement because it is no longer protected by copyright. This occurs after the expiration of the copyright term under law (usually the life of the author plus 50 years).

Rights Reversion: The return of copyright to an author after the termination of a specified grant of rights, according to the terms of the transfer, or under the Copyright Act. *[See Termination Rights Provision.]*

Subsidiary Rights: These include rights to reproduce the work after the initial publication, such as second serial rights, syndication rights, electronic rights (e-rights) in digital format such as online, database, CD ROM rights, and translation rights. It's increasingly common for the e-publication to be the first outlet for a published work.

Supplementary Work: A work prepared for publication as a secondary adjunct to a work by another author for the purpose of introduction, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes and indexes.

Termination Rights Provision: The Copyright Act provides for the termination of a grant or transfer of rights 35 years after the transfer that can be exercised by an author within five years after the running of the 35 year period. Termination rights are an important limitation on universal/all rights clauses because the right to terminate does not transfer with "all rights." This provision is not, however, applicable to work for hire contracts. *[See All Rights/Universal Rights; Work for Hire.]*

Transferring or Assigning Copyright: When an author or other holder of the copyright authorizes another to use a right or rights to a work. For example, a writer may sell the right to publish her article in an electronic outlet such as a website.

General Publishing Industry Terms

All Rights/Universal Rights Clause: A contract clause which transfers all rights in a work, including any present and any future rights held in all existing media and in any media which may be invented by future technological processes for an unlimited duration and unlimited territorial coverage, to a publisher or other party in one fell swoop and for a single fee. *[See Termination Rights.]*

Byline: Credit for authorship of work which can and should be provided for by contract.

Editorial Acceptance: The point in time at which a publisher or other consumer of writing agrees that the work satisfies the contracted for assignment even if some minor editorial work is still needed.

Kill Fee/ Rejection fee: Partial compensation given to a writer for work that the publisher does not use, or on an assignment that is terminated before completion.

Outlets: The place where the writer's product is published, such as a print outlet, or an electronic outlet, like a website.

Royalties: Payments based on a percentage of the number of copies sold or of publisher's receipts.

BizTech Industry Terms

1099: A federal tax form, identified by its number to describe the tax status of a independent contractor. The employer uses Form 1099 to report the contractor's income to the IRS. A 1099 indicates that the contractor is not a regular employee and that no payroll taxes were withheld from the income.

Agencies/Brokers: Temps are often employed by third party agencies, or brokers, who obtain contract work for the writer. The agency contracts with the client for whom the writer performs his/her services. The writer is a W2 or 1099 employee of the agency itself, and bills the agency directly. The agency profits from the writer's services by billing the client at a markup. *[See Independent Contractor; Temp, Perma-temp, Markup.]*

Agent: A third party who places a writer with a client for a percentage fee. Different from an agency or broker because the writer is employed by the client directly.

At Will Employment: The concept in employment law that says an employee serves "at the will" of the employer and can be terminated with or without cause. The concept has been modified by labor law and is not applicable to independent contractors who perform and are paid according to the terms of their contract.

Bill Rate: A basis of payment, usually hourly, but can be a fixed sum. *[See Fixed Bid.]*

Confidentiality/Non-Disclosure Clause: A contract term that requires participants not to disclose specified types of proprietary information, such as patents, trade secrets or copyrighted material, learned while performing a job. It should be limited to a defined duration, such as when the information is made public, or a one or two year period after employment or assignment. It should identify as specifically as possible the type of material to be kept confidential, and should limit in scope the nature of the material. For instance, the fact that the writer worked for a particular client should not have to be kept secret.

Deliverables: Pay structure similar to milestones, usually based on completion of some portion of the job. *[See Milestone.]*

Documentation House: A company with a staff of writers employed as W2 employees to perform writing assignments.

Employee: Whether or not you're classified as an employee can have consequences affecting payment of your state and federal income taxes; employment taxes such as Social Security (FICA), unemployment, disability and Workers Compensation; employee benefits such as health insurance, pension and profit sharing plans and legal protections against discrimination in the workplace, such as the Americans With Disabilities Act. Employee status can also affect whether or not you own the copyright to your work. *[See Work for Hire.]* The relevant factors in determining whether you're an employee or an independent contractor include the location of work (in-house or out), the duration of the work relationship, who supplies the work tools, who has discretion over when you work, who has discretion over hiring assistants or assigning additional projects, the method of payment, the provision of employee benefits and the tax treatment of the writer. *[See Independent Contractor.]*

Finder's Fee: An agent's (as opposed to agency) fee for finding employment or a contract for a writer. The fee is usually 10-15% of the total billed to the employer and is paid either by the employer or the writer. *[See Agent; Agency/Broker; Payroll Service Agency.]*

Fixed Bid/ Fixed Contract: An offer to complete a job for a set amount of money, agreed upon in advance.

Indemnification/Hold Harmless Clause: A term providing for the obligation by one party in a contract to defend another party against a stated loss or liability covered by the contract, such as copyright infringement or defamation.

Independent Contractor: A self-employed person who contracts with others to perform a service. Contractors are not "employees" under federal and state law and are not guaranteed the same benefits given to regular, or "W2" employees. [See *Employee; Employee Benefits; W2.*] Contractors may negotiate the pay rate and terms of each job they perform, and collect the tax benefits of being self-employed. They are responsible for filing their own quarterly tax returns (the client provides and files a Form 1099 with the taxing authority reflecting what income was paid to the IC), and paying income taxes, as well as obtaining health insurance, and setting up an individual retirement plan (IRA) and so on.

Invoice: Billing statement.

Mark up: The difference between what the agency or broker pays the writer and the amount the agency bills the client for the writer's work. Usually calculated as a certain percentage of the writer's billing rate or fee. The markup covers all of the agency's costs and profits.

Margin: The portion of the agency's markup that is left after the agency pays mandatory external expenses (if any) such as payroll taxes and discounts required by the client. An agency's margin covers the agency's internal expenses (staff, rent, insurance, etc.) plus profit.

Milestone: A point after a job is started and before it is completed at which an approval or re-evaluation is made by participants in a contract and to which partial compensation, based on a fixed bid sum, is often tied. The milestone may be based on the passage of some specified period of time, or on the completion of some percentage of the job.

Net Days: In a billing cycle, the maximum period of time after the writer submits the invoice in which the client or agency must pay the full amount due. For example, "Net 30" means the invoiced amount must be paid within 30 days of submission.

Non-Competition Clause/ Non-Compete/ Exclusivity/ Predatory Soliciting Clause: A contractual promise to the employing company under which a contractor, usually an ex-employee, agrees not compete with the original client by contracting with business competitors. Also found in third party contracts with agencies or brokers. These clauses are enforced, although courts will look unfavorably on a clause that imposes an undue hardship on the employee, such as a broad prohibition that forecloses an employee from working in his/her particular trade, or that has an unnecessarily broad geographic scope or time frame.

Payroll Service Agencies: Third parties used by employers as a screen to prevent a direct employment relationship with the writer. These agencies function similarly to brokers but do not place writers in jobs. [See *Temp; Perma-temp.*]

Perma-temp: A long term temporary employee, or agency worker, who looks, acts, eats and works like an employee but isn't legally considered an employee of the client for income and employment tax purposes. The status of perma-temps for employee benefits such as pension and profit sharing is in litigation. [See *Temp, Independent Contractor.*]

Portfolio Copies: Writers' copies of documents produced on a job to use for work samples.

Prompt Payment Discount: An incentive for early payment on a "Net Days" basis. For example, if company policy is to pay contractors on a "Net 90" basis, the company will pay within 30 days in return for a percentage discount, such as 2% of the total amount due. [See *Net Days.*]

Proprietary Rights: Patents, trade secrets, copyrights or other intellectual property that belongs to the writer, client, employer or other holder.

Purchase Order: A document issued by a company, or purchaser, ordering goods or services from another company, or vendor. A purchase order typically contains contract terms applying to the sale that the vendor is assumed to have agreed to if the vendor delivers the contracted for goods or services. Therefore, a purchase order should be reviewed as carefully as any contract.

Retainer: A down payment on signing a contract to keep the writer available if the job won't begin immediately because of delay or other scheduling issues.

Reviewer: A third person employed by a client, such as an expert, editor or manager, to review a writer's work. Reviews are often tied to the writer's payment schedule. *[See Milestones.]*

Scope of Employment: Activities done by an employee in the performance of job duties. *[See Work for Hire.]*

Side Agreement: Changes made to contract terms, or additional contract terms contained in a separate document from the contract. If you are using a side agreement, be careful that the primary contract language does not invalidate it with an "entire agreement" clause. Try to incorporate it by reference into the main document and make sure it's dated and signed by all parties. *[See Entire Agreement Clause; Attachment.]*

Subcontractor: Independent contractors may subcontract duties in the primary contract to another party. The subcontract is between the IC and the third party, and the IC remains obligated to the original contract party to perform the terms of the primary contract if the subcontractor does not perform. In that way, subcontracting differs from delegation. *[See Assignment of Rights/Delegation of Duties.]*

Temp: A temporary employee working for a limited period of time or on a defined project who generally does not receive traditional employee benefits.

Vendor: A self-employed person who often incorporates as a business to contract with clients to furnish writing services. Incorporation entitles the writer through her company to certain tax and other benefits. *[See Purchase Order.]*

W2: A tax form filed by employers in conjunction with payment of employment taxes.

Waiver of Benefits: A common term in work for hire contracts waiving or giving up the right to employee status and benefits. *[See Employee.]*

Work-for-Hire: ' 101 of the Copyright Act defines a work made for hire as (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. The employer or other person for whom the work is prepared is considered the author for purposes of the Copyright Act, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. *[See Supplementary Work; Instructional Text.]*

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