GUIDE TO WORK FOR HIRE CONTRACTS

How to Understand and Improve Writers' Contracts for Documents Created as Works for Hire

October 2005 Edition

Principal author is Mike Bradley, who was helped by Cem Kaner, Alice Sunshine and Bruce Hartford. The text includes edits from reviewers Carol Busby, Suzanne Solomon, Bruce Hartford, Phil Mattera and Elana Sherman. Appendices were written by Suzanne Solomon, Alice Sunshine and Mike Bradley. The approach that the manual takes (samples of good and bad contract language with comments on each) is based on the union's guide to book contracts created by Phil Mattera and others.

Much of what's good in the document results especially from Cem Kaner's guidance.

National Writers Union-UAW 1981
113 University Place, 6th floor
New York NY 10003
212-254-0279
www.nwu.org

TABLE OF CONTENTS

Who Are We?

The BizTech Division of the National Writers Union represents writers who work mainly on a work-for-hire basis in business, technical, instructional, non-profit and government fields. They create such works as software documentation, corporate communications, marketing collateral, ad copy, textbooks, training programs, policies and procedures, grant requests, and research reports. They move freely from independent contracting to full-time employment to temping and back again. They sign work-for-hire contracts because royalties for their works would generally be impractical or negligible, and the contracts are commissioned rather than freelanced.

What Is Our Mission?

The mission of the BizTech Division is to improve biztech writers' livelihoods and connect them to the broader writing and labor communities. We seek fair and equitable writing contracts and healthy working environments in a full-employment economy. We seek independence from exploitative business relationships. We resist the effects of an unjust tax structure on our careers and communities. We stand with creative workers in all genres and nations to demand freedom of expression.

How Can You Join Us?

The division's national officers can be contacted through the union's Web site at **www.nwu.org**. Click the **Contact Info** link. You can also contact us by subscribing to our email list. It is presently on Yahoo. Go to **groups.yahoo.com/group/NWU-BizTech**.

The division sponsors biztech committees in the union's chapters around the country. Call your chapter and ask if there's a biztech committee. If there isn't, start one.

What's This Contract Guide About?

As a biztech writer, you negotiate your contracts one-on-one. You need to negotiate advantageous terms and avoid dangerous and inappropriate ones. This guide will help you do that. We also urge you to have your contracts reviewed by a union contract advisor. Ask for one at **advice@nwu.org**.

GUIDE TO WORK FOR HIRE CONTRACTS

1. *WHAT IS WORK FOR HIRE?*

This is a review of the most important clauses to look for in work for hire (WFH) contracts. It explains what the clauses mean, what's wrong with them, and how to improve them.

In a generic sense, "work for hire" means work that you are hired to do, as opposed to work that you do on your own. Sometimes it's explained as work that is done at another person's instigation or work that is not self-initiated. If you're hired as an employee, the work that you do for your employer is generic work for hire. In contrast, if you're a freelance journalist and you pitch a story to a magazine, the story is self-initiated so it's not work for hire.

In US copyright law, "work for hire" has a related but far more specific meaning. It is a means by which a client or publisher obtains the rights to your work—all the rights, now and forever. This approach can only be used with certain types of works and only by satisfying several key criteria. In all other cases, it is invalid.

A WFH contract, or, as the copyright law puts it, "work made for hire," may be used with nine kinds of works. Even with these works, strict conditions must be met for the contract to be valid. For example, the contract must be written, and it must be signed before the work begins; oral and retroactive WFH provisions are invalid. See "Rights to the Work," page 11 and Appendix B, page 33, for details.

In WFH a writer loses all rights immediately. Through a legal fiction, the client / publisher is regarded as the author. Being the author, the rights belong to the client from the get-go. As the writer writes each word, the rights to that word belong to the legal author, the client, not to her. This immediate loss of rights contrasts sharply with the practice in standard publishing contracts, where the rights belong to the writer until she explicitly transfers them.

Since the rights to a WFH creation belong to the client immediately, even if the writer isn't paid, it's vital to determine whether the contract is using the WFH designation legitimately. Nearly all technical writing and much business, education and Web content writing are legitimate subjects for WFH contracts. On the other hand, few book contracts are valid for WFH because books are not one of the WFH types.

After the legitimacy issue, the most telling difference in WFH is that the contract is typically a service contract in which the writer sells her labor at an hourly rate, rather than a sales contract in which she sells the product of her labor. In hourly contracts, the writer must be paid for every hour worked, provided she hasn't breached the contract. If the client balks, the writer can sue in relatively

inexpensive local courts. This makes handling disputes easier, because being sued is a heavy club to hold over a balking client's head.

The rest of the contract issues in WFH are fairly routine. The contracts are generally corporate contracts with elaborate non-disclosure and warranty / indemnification clauses. Such clauses are often found even in journalism contracts nowadays. Payment methods are different because the writer is generally paid for services, and contract law is often more pertinent than in book and journalism publishing, especially when settling disputes.

This guide focuses on two-party contracts involving only the writer and the client / publisher, rather than three-party contracts involving an intermediary, usually an agency that supplies the writer to the client. In the latter arrangement, the writer signs a contract with the agency but works for the client. Nearly all of the examples and recommendations in the guide envision two-party contracts but apply equally well in three-party situations. When three-party contracts are envisioned, the text says so.

All in all, a WFH contract is initially thorny, but it's no more daunting than the documents we create every day for a living. We need to do as we always do—understand the contract and negotiate the best terms possible. This guide and other services of the union (see Appendix E) can be counted on to help.

2. LANGUAGE YOU KNOW YOU WANT IN A CONTRACT

You know you want language about

- Scope of the project
- Payment (amount, basis and expenses)
- Billing cycle
- Project schedule

These are basic features of every writing contract, WFH or not. In this section, we'll discuss them from the point of view of a biztech writer.

Scope of the Project

> ***Acceptable Language.*** Write Right is an independent contractor and retains the right to hire assistants and perform work for other clients during the term of this agreement. Neither Client nor Write Right intends to establish an employer-employee relationship by this agreement, and both parties assert that Write Right is not an employee for state or federal tax purposes.

The scope, or extent, of the project is what you are paid to do. You should generally define the scope narrowly. A narrow scope protects you against project creep (ever-expanding responsibilities at never-expanding prices) by requiring your client to renegotiate the contract if the scope does indeed change. Renegotiating enables you to provide for any new conditions that have arisen.

> ***Acceptable Language.*** Either party may propose changes to the contract. All changes must be agreed to in writing.

You should provide a routine means for renegotiating the scope, as well as other aspects of the contract. This is usually in a separate clause entitled "Changes" or something similar.

> ***Language to Avoid.*** Write Right agrees to supply the writing services of Joe Writer to write manuals and other documents as assigned by WhizBang.

Another aspect of defining the scope narrowly is confining it to the current project. It may be tempting to have a contract that implies you'll be working in several projects, but unless those projects are defined narrowly, too, you could be inviting trouble. The phrase "and other documents as assigned by WhizBang" is

an example. It can be construed to mean that you are hired for an indefinite time with indefinite responsibilities, which is a characteristic of employees, not contractors.

Worse in this regard would be the phrase, "and perform other work as assigned by WhizBang." Employee tax agencies aggressively audit clients, looking for contractors whom it can reclassify as employees. Most of the consequences of a reclassification will fall on your client, but you will have to refile your income taxes, giving up your self-employment deductions and getting back your Social Security payments.

The phrase "supply the writing services of Joe Writer" is also unsatisfactory, but for a different reason. It implies a personal services agreement in which you personally are being hired rather than your business. This kind of agreement prevents you from hiring subcontractors to help you with the project, such as an indexer or graphic artist. While there are occasions when clients have good reason to want you alone to work on your part of the project, in the great majority of cases there is no reason at all for them to care or even know who does the work as long as it's done well.

Another aspect of scope is personnel. In some cases it may be important to specify your tasks in an addendum to the contract, or you may be able to work it into the project schedule. If you are one of several writers, you want to be clear on your role in the project and that of the other writers; you also want to know who your management contact is and who is managing other aspects of the project. This is especially important if you are working through a third party. If the client doesn't want to put this information in the contract, at least get it in a memo.

Payment Amount

Probably the best way to figure out how much you should be paid is to combine your actual needs with what the market will bear. The former is always harder to calculate than the latter because it gets personal. In tech writing workshops that Bruce Hartford and Andreas Ramos gave in the San Francisco Bay Area, Bruce said, "You're going to hear a voice inside you that says 'I'm not worth all that money.' Resist that voice!"

Use these three standards to determine how much you should be paid:

- Your actual needs. Sit down and calculate how much monthly income you need in order to meet your expenses, long-term savings and plans for growth. Then calculate the comparable hourly rate for a 35-hour week. That's your actual net need.

  Now add 25-40% to account for taxes, depending on your tax situation. That's your actual gross need. Charge this rate on your projects.
- Market level. Research the going rates in your genre. In the union, contact your local's committee or a union contract advisor (see Appendix E). Ask other writers, and check the classified ads of companies hiring in your genre.
- Commensurate with your experience and skills. You need to be frank about how marketable your experience and skills are, from the point of view of how clients see you and how you see yourself. You may discover

that you can adjust your rate up—experienced writers often get into a rut and don't realize that the market has left them behind. The collapse of the dot-com bubble drove down prices considerably, but they have begun recovering at this writing (fall of 2005), so it may be time to re-evaluate what you're charging.

If you're breaking into a new genre or learning a new technology, you may have to adjust your normal rate down a little, but to the right client your previous experience is still valuable, so don't be quick to reduce it by much. If you're changing careers from a non-writing, lower-paying field, forget everything you know about income in that other field. Set your rates according to your new career and respect your previous experience. Look for clients who need writers with exactly that experience and exchange it for a good rate of pay.

Basis of Payment

> ✍ ***Acceptable Language.*** Write Right shall be paid at the rate of $60 per hour.

Payment is generally hourly in WFH writing. Hourly payment is widely used and easily understood and implemented. It's also the least harmful to writers—if you work an hour, you get paid for an hour. Clients do nearly all the worrying in the hourly-payment situation because they have all the burden of controlling costs. In fact, in the experience of the union's grievance officers, the only significant problem that arises from hourly payment occurs when a client manager lets the costs escalate beyond budget. The manager may try to make the writer the scapegoat when the budget is finally brought under control. That would be the time for you to contact the Grievance & Contract Division (see Appendix E, page 53).

There are numerous alternatives to hourly payment. Most of them hold the promise of earning a profit,* but they involve considerable risk and most writers don't use them. If a client offers you a payment basis other than hourly, think long and hard before agreeing. Nearly all of the other schemes require you to state beforehand how long it will take to complete the project. In some industries, this amounts almost to suicide, especially since your schedule is subject to everyone else's ability to keep to their schedules.

* You earn profit by charging more for a project than it costs you to complete it. Your costs include your hourly rate, project expenses, and overhead, such as office maintenance. To help insure that you earn a profit, calculate all the costs, then pad the price by an estimated profit calculated as a percentage of those costs. The percentage should be large enough to make the risk of underbidding the contract worthwhile.

This table breaks down the advantages and disadvantages of non-hourly payment that the union's biztech writers have encountered.

Non-Hourly Payment		
Basis of Payment	***Pros***	***Cons***
Fixed Price: Deliverables ($1000 for outline, $5000 for first draft, etc.)	Client knows total cost beforehand and writer knows total income. Has potential for earning a profit.	Risky for writer because it states total cost up front. If project goes over budget, writer loses money unless she renegotiates the contract. Therefore, it's essential that the contract provide for renegotiating both deliverables and payment.
Fixed Price: Milestones (similar to deliverables, but can include reviews and other events that are not deliverables)	As for deliverables.	As for deliverables.
Fixed Price: Bid ($25,000)	As for deliverables and milestones. Not linking payment to deliverables and milestones may be an advantage for writer because it means fewer evaluations.	As for deliverables and milestones. Contract must provide a payment schedule, such as 25% at start, 50% on submission of manuscript, 25% on acceptance.
Percentage of total hours ($2000 per each 10% of total hours)	Client knows total cost of project beforehand and writer knows his total income and length of project.	As for deliverables, milestones and fixed price. Has further disadvantage that writer can't build in an additional amount for profit to compensate for the risk of accepting a fixed price.
By the hit (3¢ a hit)	For Web sites. Potential for significant earnings. This is more often offered as payment for placing ads on one's own Web site than as payment for creating sites for clients.	Not recommended as payment for writing except for experienced writers who can afford to take the risk of the site being a low-hit site. Contract must define means of counting hits and give writer the right to audit books at least annually.
Percent of advertising income (50% of advertiser payments)	As for by the hit.	As for by the hit.

Billing Cycle

> ***Acceptable Language.*** Write Right shall submit invoices bi-weekly, net 30. Interest on overdue payments is 1 percent a month.

The billing cycle is based on the payment basis. The usual cycle is bi-weekly or monthly. The turnaround time that you allow the client is usually the same as your billing cycle, so if you are submitting bi-weekly invoices, allow the client two weeks to pay them ("net 15 days"). However, clients often routinely pay invoices only at the end of the month and it's okay to accept that schedule.

Things to keep in mind:

- Negotiate the billing cycle separately from the payment cycle. For example, even if the client pays only once a month, it's usually better if you submit bi-weekly invoices so that your billing is up-to-date.
- Be extra good to the people who issue the checks. When you find out how to submit your invoices, get the name of the person in the Billing Dept. who handles them. Then put in some face time—introduce yourself to him and exchange phone numbers and email addresses. Find out how to contact him in case of problems and reassure him that you will always be willing to go the extra mile to solve problems that may hold up your checks.
- Call about late payments even before they're late, and issue follow-up invoices promptly. If tomorrow is the last day of the payment cycle and you haven't received your check, call your contact in Billing and ask if there's a problem. As soon as a check is two weeks past its due date, issue a duplicate invoice marked "Duplicate Invoice. 14 Days Late."

  Another consideration is the maximum you can sue for in your local Small Claims Court. It's pretty easy to win a non-payment claim, but if the local court limits your action to $1000, it's not wise to wait until you're owed $5000 before filing.
- Use Net 30. This is a commercial practice that allows you to charge interest on overdue bills. You need to put it on all your invoices. You can set any reasonable deadline and charge any reasonable interest, such as what credit cards charge.
- Contact your grievance officer sooner rather than later. Non-payment is the main reason that NWU members file grievances, but many writers wait longer than they need to before starting the ball rolling. Depending on what kind of story you're getting from your client manager and your contact in Billing, it might be wise to file a grievance after just a month's delay or it might be fine to wait two or even three months. Talking it over with your grievance officer is the best way to decide what to do.

> ***Language to Avoid.*** WhizBang will issue payment at the end of every month, provided the work submitted by Write Right is acceptable.

The problem with this language is that it provides no standards or remedies for what is acceptable. Clients have legitimate concerns about the quality of the work they pay for, but we have to be careful not to be victimized by overly-broad contract language.

If a client wants language about acceptability, insist on negotiating standards for it and insist on remedies. A typical standard is passing the client's reviews: once a draft satisfies the reviewers, it is acceptable. The usual remedy is that a reviewer who deems a draft unacceptable must provide reasonable guidance on why it is unacceptable and how it should be improved,.

The client may want to impose a time limit on remedying a draft. It's understandable that the client would be concerned, but setting a time limit in advance is generally impractical and unnecessary. It's impractical because there's

no way of telling what might be wrong with your draft; it's unnecessary because a schedule already exists—the project schedule.

> ***Language to Avoid.*** Contractor will submit invoices to Agency, which will forward them to Client. Agency will not pay Contractor until Client has paid Agency.

This is a conditional payment clause in which the writer agrees to be paid when the agency is paid. It's called a pay-when-paid clause. In a similar clause, called pay-if-paid, the writer agrees to be paid only if the agency is paid. Both clauses appear frequently in contracts from agencies, book packagers and other intermediaries.

Conditional payment clauses used to be wide open and widespread, but they are being beaten back, especially the pay-if-paid clauses. The Sixth District US Court of Appeals and the states of Illinois, North Carolina and Wisconsin have invalidated conditional payments; the New York and California Supreme Courts invalidated pay-if-paid. Most states that allow pay-when-paid limit the time that an agency can delay paying you to a reasonable period.

When you find a conditional payment clause in a contract, delay signing it until you find out what's legal in your state. Call your state labor department, state legislator, or do a search on the Web. Then tell the agency what you found. In all likelihood, agency management already knows whether the clause is valid in your state and will change the contract right away. They're only waiting to see if you're smart enough to ask.

Expenses

> ***Acceptable Language.*** Client shall pay non-routine expenses, provided Write Right obtains approval beforehand and submits receipts. Write Right will travel to other Client sites during the course of the project, for which Client will arrange travel and accommodations and prepay other expenses where possible.

It's typical for you to pay your own business expenses: your office equipment, computer and software, office supplies, and routine project-specific expenses.* However, it's legitimate to ask the client to pay project-specific expenses when they become significant—for instance, extensive use of delivery and photocopying services, or if a client requires you to obtain software for the project

* A key factor in protecting your tax status as an independent contractor (see "Relationship among the Parties," page 14) is that you stand to lose money when projects fail. In the past, you could satisfy this criterion by investing significantly in your business: buying your own computer, software and Internet account; setting up an office; using stationery and business cards; taking workshops; paying for routine copying and messenger services; and so on. However, tax agencies have begun to argue that this kind of investment is not good enough. They argue that only fixed-price contracts satisfy the risk criterion (see the table of fixed-price contracts on page 6). Given the likelihood that such contracts will be necessary in the future, and for other reasons, it is wise for writers to consider incorporating or establishing limited liability companies.

that you will not be able to use on other projects. Prior approval is customary. Try to specify the reimbursable expenses during the contract negotiations.

Non-routine expenses, such as travel outside the immediate area or entertainment of client customers, should be paid by the client. Where possible, as with airfare and hotel rooms, it's customary for the client to purchase them for you or at least pay you for them beforehand.

Project Schedule

> ***Acceptable Language.*** The reference manual schedule is attached to this contract as Addendum A. If changes in the overall project schedule or other factors cause the manual schedule to slip by three or more days, a new schedule must be negotiated and agreed to in writing.

The schedule is generally defined in an addendum or attachment to the contract. Go over it carefully to be sure that it is realistic. Project planning is notoriously unreliable in most of our industries. You need to protect yourself by not accepting impossible tasks.

The most common remedy for an unrealistic schedule is to pare down what you'll accomplish. If a client needs an environmental report in a month and you know it will take at least two months to complete, tell her so and suggest reducing the scope of the report or hiring a second writer.

Given all the problems with schedules, it's vital to provide for schedule changes. It's especially important if you can be hurt by them, as when you're being paid by the milestone. In the sample language above, the slippage that triggers renegotiation will depend on how tightly the project is scheduled. If you have only four milestones in a 6-month project, a 3-day slippage is inconsequential; you would use a week or more.

3. *LANGUAGE YOU MAY NOT KNOW YOU WANT*

You may not know it, but you want language about

- Rights to your work
- Relationship among the parties
- Access to the project
- Terminating the contract

These provisions can serve you and your client equally well.

Rights to the Work

> ✎ ***Acceptable Language.*** Whiz Bang and Write Right agree that the user manual that Write Right shall create shall be deemed a work made for hire, as provided in US copyright law.

In the 1976 revision of the copyright law, Congress granted a boon to publishers of large works that consist of numerous, individually-copyrightable works, such as textbooks, reference works and movies. It created a procedure by which publishers automatically acquire all rights to the individual works, saving them the inconvenience of negotiating with the creators every time they wanted to sell rights to the combined work. However, since the creators' loss of rights is such a severe consequence, Congress stipulated that all of the following conditions must apply:

- The work must be conceived and commissioned by the client, as opposed to the creator conceiving the work and selling it to the client, and it must be a specific work, not "all the manuals you write from now on." This makes it a work for hire in the general sense, that is, a work conceived by another party who hires a writer to create it.
- The work must be one of nine types (specified in "Work for Hire in US Copyright Law," page 33). If a client or publisher wants rights to any other kind of work, she must negotiate a contract that provides for the transfer of rights in the usual way.
- The contract must state that the work is a work made for hire (it must use the words "work for hire" or "work made for hire").
- The contract must be a written contract signed by both parties—an oral WFH contract is unenforceable.

When these conditions are satisfied, the Copyright Office allows your client to register as the author of your work. Since the client registers as the author, he has

all of an author's rights, including ownership of the copyright from the very beginning of creating the work. Each word as it is written belongs to the client as if he had written it himself. This word-by-word acquisition of rights is unique to WFH contracts. It does not apply to a standard transfer of rights, where the writer holds the rights until he transfers them.

> ***Acceptable Language.*** Should any works be deemed not work-made-for-hire, Write Right agrees to transfer all rights to such works to Whiz Bang at the conclusion of the project after all provisions of the contract have been satisfied.

In many contracts, the WFH statement is often combined with a transfer-of-rights statement that serves as a fallback in case the work isn't a valid WFH. It says that, if the work is not a valid work for hire, you agree to transfer all rights to the client in the normal way. This will take some explaining. In three parts.

Part one: no matter what the contract says, a work must be one of the nine types for the WFH provision to be valid. See "Work for Hire in US Copyright Law," page 33.

Part two: many clients and their legal staff don't understand WFH. All they seem to know is that it's a way for them to get the rights to a work. So they stick the language about WFH into their contracts, hoping it will work. And usually it does because writers don't know they can challenge it.

Part three: many clients and their legal staff don't write their own contracts. They buy boilerplate contracts at workshops, in-service trainings and Web sites. The boilerplates used to say only that the work is a WFH. Then some smart lawyer working for a boilerplate company, probably freelancing as a writer!, added the fallback provision. And now all the boilerplates have it.

Note that, in the sample language above, our fallback statement has the phrase, "after all provisions of the contract have been satisfied." This is an important addition for you to make. You will have to insert into the boilerplate yourself. It gives you leverage over a problem client should the fallback provision kick in. With this language, you can generally hold up the transfer of rights if the client fails to pay you or does something else untoward.*

> ***Language to Avoid.*** Writer agrees that all works of authorship that he or she has created for Company in the past shall be deemed works made for hire as provided in US copyright law.

* In California, writers should generally not use WFH contracts at all. Legislation passed in the early 1980s that was intended to help writers and other creative workers doing work for hire has had unexpected results. At first, the legislation simply confused the issue. Recently, it's turned into a career buster because the Employment Development Dept., which collects unemployment and other employer taxes, is using WFH as a reason to declare that a writer must be viewed as an employee of the client, not an independent contractor. It's too complicated to go into in this guide, but suffice it to say that writers in California should not use WFH contracts to give a client the rights to a document—they should use all rights contracts, instead: "Writer hereby agrees to grant to Client all rights to the Work when all terms of the contract are satisfied."

Occasionally, when a company first starts to use WFH contracts, it decides to make all of its previous contracts WFH, as well, in order to scoop up any rights it buy at the time. It sends its writers retroactive contracts with language like the above. Many newspapers began doing this in the mid-90s. However, courts have determined that WFH cannot be applied retroactively.*

Note that if you insert into a WFH document material that belongs to you, such as a sidebar or graphic, you will have to specify in your contract that you are using the material, that you own it, that it is not part of the work for hire, and that you are granting your client a non-exclusive license to use the material. Otherwise, it will become part of the WFH document and you will lose your rights to it.

Books as Works for Hire

Biztech writers are generally content to give up the rights to their works because there is no market for them other than the clients who commission them. However, work for hire contracts are commonly used in certain segments of the book industry, and their use is spreading into other genres, especially with the rise of book packagers. Authors of books should be skeptical of WFH contracts.

WFH contracts can be used legitimately for books that are one of the types enumerated in Appendix B, page 33. If you are offered a WFH contract for a book that is *not* one of those types, you should think very carefully about signing it. You have two basic options—sign the contract as is and honor its provisions, or negotiate a royalties contract that is comparable to the WFH contract. The union publishes an excellent guide to book contracts, as well as a separate guide to collaboration and ghostwriting contracts.

Here are some things to think about:

- The first option—signing the WFH contract—is often the practical choice.

  In the first place, the fee for a work for hire is often greater than you could earn with a typical royalties contract. In the second place, your publisher may not take kindly to an author who is challenging his ownership of the book, or he may not be able to service a royalties contract and therefore won't be able to offer you one even if he wants to.
- The second option requires educating the publisher and undertaking a new round of negotiations. It may be difficult but it could be worth the pain.

  A royalties contract is risky, even with a non-returnable advance, because royalties are based on sales, which are unpredictable. However, royalties contracts continue paying throughout your lifetime and 50 years after (assuming you kept the rights, as would be customary). If your book is likely to have a long shelf life, a royalties contract would probably be to your advantage.
- If WFH is used invalidly, the client does not become the legal author and the rights do not transfer unless there is a fallback all-rights clause. The

* Playboy Enters., Inc. v. Dumas, 53 F.2d 549 (2d Cir. 1995), cert. denied, 116 S. Ct. 567 (1996); Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992).

rights would belong to you. Theoretically, you would be able to ignore your WFH publisher and sell whatever you created to another publisher all over again. Of course, entering into a contract with the intention of subverting it is illegal and unethical.

Relationship among the Parties

> ***Acceptable Language.*** Write Right is an independent contractor and therefore retains the right to hire assistants and perform work for other clients during the term of this agreement. Write Right shall determine the manner and means of completing the project and shall not be subject to Client's supervision. Neither Client nor Write Right intends to establish an employer-employee relationship by this agreement, and both parties assert that Write Right is not an employee for state or federal tax purposes.

Tax agencies are the main audience for this part of the contract: the IRS, which collects income and Social Security (FICA) taxes, and the comparable agencies in your state that collect income and employee taxes (unemployment, disability, Workers' Comp). The main point of the language is to assure the tax agencies that you are not an employee of the client.

You and your client have the same interests on this issue, or, at least, you both want the same result, so it's usually easy to provide satisfactory language. If you have difficulty, it's probably because your client is ignorant of his responsibilities and is afraid to give you the independence that the tax laws require. As a result, you may have to educate him before you can negotiate acceptable language. Call a union contract advisor for help (see Appendix E).

Here are the minimum provisions that usually establish a client-contractor relationship, especially in the eyes of the IRS:

- You are at risk of losing money, if not on the specific project then in your business in general.
- You have multiple clients.
- You are not supervised the way employees are and you are not treated like an employee in other meaningful ways.

These criteria are not new, but they were not emphasized as they are now. In the past, more emphasis was placed on what you and your client agreed to. Now what matters is what really happens.

The sample language sometimes makes a client nervous about the level of your commitment to a project, so some writers are reluctant to use it. You should explain that the conditions outlined in the language are more for your client's protection than yours, since he will be subject to the unpaid employee taxes plus interest and penalties if you are found to be an employee. If all else fails, you should definitely avoid language that specifically denies you the conditions granted in the sample, because denying them usually establishes an employee relationship. Also avoid language that allows you or your client to terminate the contract at will (see "Terminating the Contract" on page 14), that requires you to report your time on the client's timesheets, work at the client's site on the same

schedule as employees, attend regular project meetings and other employee functions, or file regularly-scheduled reports such as weekly summaries.

Tax agencies are under enormous pressure to classify you as an employee because it is generally believed that employees pay more taxes. This is a mistaken belief when it is applied to freelance biztech writers,* but it is commonly held, nonetheless. Because of the pressure, the rules by which employee status is determined are constantly changing, and new reasons to classify you as an employee are being dreamed up even as you read this. Both the IRS and tax agencies in your state apply separate, ever-changing rules. For the latest info, you need to contact them or another reliable source.

Access to the Project

> ***Acceptable Language.*** Whiz Bang will provide timely access to the personnel, products and information needed by Write Right, especially as regards providing Write Right with updated samples of the product and informing Write Right of changes in the product.

This clause is generally easy to add to a contract. It alerts your client to his own responsibilities for your success. It also comes in handy if you find yourself on a project gone haywire, and you need to force the project manager to keep you in the loop.

Terminating the Contract

> ***Acceptable Language.*** This agreement terminates when all terms have been satisfied. Either party may terminate it without penalty for material breach or on 15 days' written notice.

The common notion is that contractors can be let go at any time for any reason, but that's not the case. Though most people don't realize it, contractors can only be let go according to the terms of their contracts.

The whole point of a contract is to bind both parties to an agreement. If you've bound yourself to write a research report, your client has bound himself to let you. If the client wants to terminate the project prematurely, she is still bound by its terms, which, in the sample above, would require him to give you 15 days' notice. You would have the option of working those 15 days or taking some combination of pay and early departure. Reasonable notice is two to four weeks, depending on the scope of the project.

Giving both parties the same rights to terminate may bear explanation. Your client wants to be able to terminate if she doesn't like your work or if the project's funding is cut. On your part, you want to be able to terminate if the need arises, say, if you get a better offer from another client. Yet you to want limit the client's

* The belief is based on the assumption that all contractors hide some of their income. Independent contractor biztech writers have little opportunity to hide income because they are paid by corporate accounting departments who report the payments on 1099 forms. They aren't paid in cash on the sidewalk outside the client's office building.

ability to terminate, because you're fond of paying your mortgage and grocery bills and don't want to be unemployed suddenly. Equal rights to termination is the effective and time-honored compromise.

You also want the right to cancel the contract if your client breaches the agreement, such as refuses to pay you. She wants the same option—she wants to be able to cancel it if you fail to meet your deadlines. As a result, many contracts qualify the right to terminate for breach with language like this: "In the event of material breach, the aggrieved party may terminate the agreement upon 30 days' notice unless the breach is cured within that time." This gives the parties a grace period of 30 days to fix whatever went wrong.

> ***Language to Avoid.*** Write Right may not leave the project before it is finished. If Write Right leaves in the last two weeks of the project, it must pay a penalty of $100 per day to offset the inconvenience to Client.

Don't agree to be a slave. Watch out for language that says you can't leave the project or you can't leave except for personal reasons or some such hooey, or language that makes you pay a penalty if you leave. Agencies have begun slipping this kind of provision into their contracts. Strike it out. Language of this sort is appropriate only when you are so unique and so valuable to the project that you are literally irreplaceable, say a David Kelly or Maya Angelou.

4. *Language You Ought to Know You Don't Want*

The clauses in this section often contain dangerous provisions that writers ignore, hoping they'll never be invoked:

- Warranty & indemnification
- Non-disclosure
- Non-compete

The ready availability of lawsuits in the US, compared to most other countries, is a double-edged sword. It's great when you need redress for your own injuries, but it's more than a little scary when you may have injured someone else. A central purpose of these clauses is to proportion responsibility for injuries between you and your client. Naturally, you want to limit your responsibility to only what is reasonable.

Negotiating changes in the clauses is sometimes difficult. The editor or manager with whom you're negotiating may have little idea of the clauses' meaning and may lack authority to change them. Many companies buy boilerplate contracts that they don't understand, so even the managers with authority to change them are reluctant to. Still, NWU writers and contract advisors have found that negotiating improvements is often possible, so we urge you to persevere. Some of these clauses put you at very serious risk.

And keep this in mind: your clients would never accept for their companies many of the clauses they try to foist on you. Not ever. Nor could they impose them on other businesses. Why should you accept them?

Warranty & Indemnification

Warranties and indemnifications go hand in hand. You can think of a warranty as a guarantee and an indemnification as the client's insurance in case your guarantee fails. For example, you warrant that you haven't plagiarized anyone in writing your document, and you indemnify your client against the costs of defending himself if he's sued for plagiarism.

Writers and managers alike are often uncomfortable with this part of a contract, so they negotiate by denial:

"Oh, don't worry about that. We never enforce it."

"So should I ignore it?"

"Sure. Pretend it's not there."

This approach is dangerous. If you sign a contract with inappropriate warranty and indemnification language, you may be liable for overwhelming expenses, possibly even the loss of your personal assets.

> ✍ ***Acceptable Language.*** Write Right hereby warrants that it will make reasonable efforts to insure that the documentation as delivered will not infringe or plagiarize another document. Write Right also hereby voluntarily releases, forever discharges, and agrees to hold harmless and indemnify, Client from liability, claims, demands, actions or rights of action, which are directly caused by Write Right's breach of this warranty and which Write Right could have taken reasonable action to avoid.

As a rule, you should only warrant that you will take reasonable measures to avoid problems. The standard of reasonableness is well-established in US law. It means that you only need to do what a reasonable person would expect you to do in the circumstances. It's reasonable to expect that you won't plagiarize the documentation of another program, so it's okay to warrant that. It's reasonable to warrant the manuscript that you deliver to the client because you wrote every word of it, but it's not reasonable to warrant the released document because you don't control what's finally released.

Likewise, you should only indemnify the client against injuries resulting from your own failures. If you have to compromise, this is the one thing you should not give up. Your indemnification should not cover the client's failures. Given the amount of control that a client has over a work for hire document—the client sets the parameters of the document, numerous reviewers approve every draft, corporate attorneys can or should review the document for liability problems, and the client controls the final edit and publication—, it's reasonable that he should bear principal responsibility for it. For this reason, you also want to avoid warranting actions for which you are only indirectly responsible.

If warranties and indemnifications show up in your contracts with any sort of regularity, you should consider buying insurance. However, note that being insured often makes you a target for lawsuits that would otherwise pass you by, since, through your insurance, you'll have enough money to make suing you worthwhile. Yes, it's a Catch 22.

> ✍ ***Acceptable Language.*** Write Right and Client agree to mutual waivers of incidental and consequential damages.

A common provision you should seek is a mutual waiver of incidental and consequential damages. If the client is sued by a customer and loses, the client may turn around and sue you in turn. With this waiver, he can only sue you for the actual damages that he suffered. He cannot sue you for incidental and consequential damages, such as the cost of lost business. It's customary and

acceptable to make the waiver mutual, meaning you can't sue the client for incidental and consequential damages, either.

> ***Acceptable Language.*** Write Rights' indemnification is limited to costs and damages in proportion to Write Right's responsibility as determined in a court of competent jurisdiction; total liability shall not exceed the total amount of Write Right's billings.

You also need language that makes your liability proportionate to your responsibility. Should you and the client lose a lawsuit in which you are codefendants, you should pay only the share of the costs and damages for which you are actually responsible. If only 10 percent of the problem is your fault, you should only pay 10 percent of the damages. You should also make every effort to limit your liability to your total billing on the project. Other acceptable conditions includes limiting the warranty to damages resulting from the writer's intentional acts and limiting the indemnification to the final disposition of costs and damages, rather than all the costs incurred throughout the proceedings.

> ***Acceptable Language.*** Write Right agrees to cooperate in actions arising from claims for which it has indemnified Client. In such claims, Write Right's cooperation is contingent on prompt written notice of claims and offers, and the right to approve or disapprove all settlements.

In lawsuits in which you're a codefendant, you want a veto over key decisions that affect you and you want to hear about key developments as quickly as possible, even if the client is providing the attorney and paying the up-front costs.

> ***Acceptable Language.*** In the event that a claim is unsuccessful, Write Right will incur no liability.

No loss, no liability. If you and the client defend yourselves successfully, you don't want to pay anyone anything. The loser will pay all major costs, and you don't want to pay the client's remaining costs.

> ***Language to Avoid.*** Write Right hereby warrants that the WhizMail documentation will not infringe or plagiarize any copyright, patent, trade mark, service mark or other intellectual property anywhere in the world. Write Right also hereby voluntarily releases, forever discharges, and agrees to hold harmless and indemnify, Client from any and all liability, claims, demands, actions or rights of action, which are related to, arise out of, or are in any way connected with, the WhizMail documentation.

Language such as this puts you at risk of having to pay at least half and maybe all the costs and damages in a lawsuit, which you probably just plain can't afford.

The language has these other problems, as well:

- It warrants all the documentation, instead of only the parts that Write Right created.

- The warranty includes all intellectual property created anywhere in the world, instead of only intellectual property that a writer in this genre would be expected to know. In the world of intellectual property, even accidental infringement is culpable and can subject you to penalties, so you don't want to guarantee that you won't accidentally infringe, say, the trademark of a company in Sweden.
- It indemnifies the client against legal actions arising for any reason whatsoever, instead of actions arising from the manuscript that Write Right delivered. Do not accept such sweeping language as "any and all" and "directly or indirectly." It allows a client to hold you responsible for everything but the next earthquake.

This indemnification agreement is also noteworthy because it is between an employee and her employer, a temp agency. In this kind of situation, the writer is assigned by the agency to work on projects for a client of the agency. It's not unusual for the writer to indemnify the client in such cases, but until recently, indemnifying the agency was unheard of. After all, the writer is an employee of the agency and her employer is ultimately responsible for her actions—an employee cannot sign away her lawful rights nor absolve an employer of its lawful responsibilities. Still, courts are upholding all sorts of heretofore-unsupported indemnification agreements, so this agreement may, in some cases, be valid. Which means the writer must whittle it down to acceptable levels or refuse to sign it altogether.

Non-Disclosure

> ***Acceptable Language.*** Write Right agrees to use Client's confidential information only for purposes of this project and not to disclose it for any other purpose for a period of two years, unless the information is made public. For purposes of this contract, confidential information is information which Client identifies as such, plus information whose disclosure would pose a reasonable risk to Client's business.

As with warranties and indemnifications, non-disclosure should be reasonable and limited in duration and content:

- In duration, the agreement should bind you only for that period of time during which disclosure could hurt the company. For products with a short life-cycle, that may be less than a year. For long-lived projects, it may be as much as five years, but certainly no more.
- In content, you can require the client to be proactive about identifying information that he considers confidential. For instance, he can add a "Confidential Information" label to every document; many clients already have a rubber stamp for this.

  It's common to pair the proactive requirement about confidential information with a general statement that introduces a standard of reasonableness—you will not disclose material that a reasonable person would consider confidential, such as the engineering drawings for a new product.

The agreement should not apply to information made public by someone else (whether legally or not). Thus, anything that's in the released documentation should not be protected, nor information released in interviews, press releases, tech support calls, FAQs, news stories, speeches, sales presentations, and so on. Nor anything that's leaked to the press by a disgruntled employee.

> ***Language to Avoid.*** Write Right will not discuss, disclose, or use in any way whatsoever except that permitted by Client, confidential information pertaining to the WhizMail project or any other project of Client or its divisions and subsidiaries, its customers or potential customers. For purposes of this contract, confidential information is any information, facts, skills or concepts that Write Right learns, develops or obtains in the course of the project. The terms of this contract are confidential; Write Right may not disclose them or the fact that the contract exists.

Corporate attorneys seem to go berserk when they draw up non-disclosure agreements. They try to close off all possible avenues by which information might leak out, even to the point of limiting your ability to do business in the very areas of expertise in which you excel. They also have a not-so-hidden agenda—they want to tie you to the company so that you cannot work for competitors.

Language like the above is showing up in contracts across the country. It binds the writer forever, long after the information is of any use to anyone. It requires the writer to protect trivial information about the client and information that is easily obtained elsewhere. It defines confidential information to include everything the writer learns, from truly confidential information, such as the inner workings of unique software code, to general skills, such as how to operate a new kind of computer, and common facts, such as the phone number of the reception desk. It even prohibits the writer from listing the contract on her resume or telling anyone how much she charged.

> ***Language to Avoid.*** As additional protection for Proprietary Information, Consultant agrees that during the period over which it is (or is supposed to be) providing Services for Company, and for one year thereafter, (1) Consultant will not encourage or solicit any employee or consultant of Company to leave Company for any reason, (2) Consultant will not engage in any activity that is in any way competitive with the business or demonstrably-anticipated business of Company, and (3) Consultant will not assist any other person or organization in competing or in preparing to compete with any business or demonstrably-anticipated business of Company.

This example is an outrageous non-compete clause (see next section) masquerading as a non-disclosure clause. The operative word for both non-disclosure and non-compete clauses is "non," so you can understand how companies' highly educated and overpaid legal counsels might sometimes get confused!

Non-Compete

When it comes to non-compete clauses, you can't rely on blanket recommendations because there wide differences in the validity and

enforceability of the clauses from state to state. In some states, an agreement not to write about a broad range of topics for anyone but your client would be judged unreasonable, while, in other states, the same agreement might be acceptable. In one industry, a 6-month non-compete period might be viewed as unreasonable, while in another it might be reasonable. Some courts have permitted non-compete restrictions on former employees even when a non-compete clause wasn't part of their employment contracts; other courts are moving in a more progressive direction. The New York State Supreme Court applied this stringent test to determine the validity of a non-compete agreement:

> A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.*

The same standard applies in New Hampshire, where the state Supreme Court struck down a 90-day non-compete period in a temp agency contract, saying the non-complete period wasn't necessary to protect the agency's interests.† California has decided that non-competes are illegal in all situations except to protect trade secrets (including customer lists) or where the owner, partner or top management of a company sells the company or leaves it for a competing firm.‡

When you find a non-compete clause in your contract, you have to research the laws in your state. You may have to be creative in your research: ask the state labor department; use a Web search engine to find legal cases; check the Web site of your state legislature or call your state legislator's office; ask the Writes Union or a local union for a referral to its labor lawyer; call the bar association for a consultation; go to a public or college business library; try a business association such as the Chamber of Commerce.

Regardless of local standards, you should generally seek to strike a non-compete clause altogether. It puts a severe crimp in your ability to earn a living, and you are already largely prevented from taking unfair advantage of your client by your non-disclosure agreement.

If you can't strike the clause, try to limit the damage by minimizing its duration and scope. The legitimate purpose of a noncompete agreement is to protect the parties from unfair competition, not to prohibit any and all competition. Fairness is the criterion for evaluating the agreement—the restrictions must be fair to you and your client, and they must not interfere with a public good. And, of course, you should be fairly compensated for any restriction that you accept.

> ✎ ***Acceptable Language.*** Write Right agrees that, for a period of two months following each posting on Client's Web site, it will not write on the same topic for the Web sites listed in Appendix B.

* BDO Sherman v Hirshberg, 690 N.Y.S.2d 854 (Ct.App. 1999).

† Gallagher, Callahan & Gartrell Employment Law Update, October 2000: http://www.gcglaw.com/resources/employment/october2000bia.html.

‡ "Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void": California Business and Professions Code §16600. See also, Morris v Harris (1954) 127 Cal.App.2d 476 and Diodes Inc. v Franzen (1968) Cal.App.2d 244.

This clause gives a Web site a two-month exclusive on the topics about which you write, but only for specific competing Web sites. You can write on those topics for other Web sites and other media. In agreeing to this, you would want to be sure that a two-month waiting period is necessary. For instance, if the Web site is a daily news site, even two weeks might be unreasonably long.

> ***Language to Avoid.*** For the term of two years after termination of this contract, Contractor will not directly or indirectly enter or engage in any branch of the technical writing business as principal, agent or employee, or in any other capacity, if doing so involves any customer of Big Deal Inc. with whom Contractor has at any time had any dealings on behalf of Big Deal Inc. under said contract.

Non-competes should not protect your client against normal competition. While it might be reasonable to prevent you, for a time, from writing for a competitor on the same kind of project that you wrote for the client, you should be free to write on competitors' other projects.

The kind of writing you do is important. If you're writing engineering documentation for a software application, a restriction that bars you from writing similar documentation for a direct competitor for six months might be reasonable, but if you're writing consumer-level Web site content, you should generally be able to write for competitors' Web sites simultaneously, since you are not likely to be writing mission-critical information.

Likewise, your client shouldn't be protected against your own competition. For example, if you write PR content, your client should not be protected from your soliciting the same companies that it solicits. You can find the prospects in phone books, industry directories and the Web, so a blanket proscription on soliciting them would be unfair. You are not the only writer soliciting those prospects, and you should not be limited in your ability to compete against those other writers.

If you must accept a restriction of this kind, seek one that specifically names the clients for whom you can't write, the kind of writing you can't solicit, and a timeline. This puts your client on the spot by having to specify which competition would be unfair, and it gives you plenty of opportunity to dicker.

The geographic scope of a non-compete restriction can be key, as well. If you're writing content for a consumer-level medical Web site, say, geographic scope is probably irrelevant and duration may be, as well, since you're not likely to be writing time-critical content. On the other hand, if you're interviewing local doctors for a Web site whose owner also sets up Web sites, it's reasonable to make you wait a time before contacting the doctors on your own about setting up Web sites for them.

Relative market power is another issue. If your client is an editorial services firm with 150 medium-sized accounts while you're a freelance editor, who's got the power? Those accounts are not going to jump ship and sign with you. At most, they may hire you to write an occasional article or study. A blanket proscription on your contacting the accounts is unnecessary because you are not in a position to raid them.

Many of the non-compete clauses that WFH writers see are in third-party contracts with temp agencies and the like. The clauses prevent you from working directly for the agencies' clients for some period of time.

> ***Acceptable Language.*** Write Right agrees that it will not negotiate an independent contract with Client for a period of six months following the beginning of the project without informing the Agency.

This agreement between a writer and an agency requires that, for six months, the writer not accept a position with the agency's client in secret. Instead, the writer has to let the agency know. Doing so enables the agency to negotiate with the writer and the client over its short-term loss of income.

Agency non-compete clauses keep you tied to the temp agency. You have fewer places to look for your next contract, and the agency is relieved of having to compete for you with meaningful inducements, such as higher pay. In many cases, the client has agreed to similar non-compete terms, which seems to draw the noose even tighter. However, be aware that negotiating to eliminate or reduce these restrictions is common; some states have even disallowed them altogether.

- Limit the time during which you're tied to the agency. Negotiate on when the clock starts ticking, as well as the duration. If you're tied to an agency for a year and you start a second project with them after only six months, the clock should continue ticking through the second contract, rather than start over.
- Limit the definition of the client for whom you cannot work. If you're writing a C++ training course for the operating system department of a large corporation, you should still be able to solicit the marketing department to write Web site content.
- Limit the prohibitions on your behavior. Suppose a contract requires that you inform the agency of any new work that you hear about in the client company and prohibits you from applying for the work yourself. You would want to negotiate for language that allows you to apply for the work as long as you notify the agency beforehand, giving them a fair chance to compete for it, as well.

> ***Language to Avoid.*** If Temporary Employee contracts with Client during the course of the project or for one year thereafter, Gimme Gimme Agency will receive a fee of $20,000. If Temporary Employee becomes a permanent employee in the same period, Agency will receive a fee of 20% of the annual salary. Temporary Employee is responsible for the fee if it is not paid by Client within 30 days of the commencement of employment.

If non-disclosure agreements can limit your ability to do business, non-compete agreements can turn you into an indentured servant. This sample takes an unconscionable fee if the writer contracts directly with the client, considering that the agency has been making money from the relationship all along. What's worse, it makes the writer responsible for paying the fee if the client delays.

Provisions such as these have only one aim. They enable an agency to hang onto its most important asset—you. Agencies have few selling points, since they all

provide basically the same service, often to the same customers. The one unique thing they have is you, and if you're any good, once they get you they're desperate to hang onto you.

You have more bargaining power than you think. Don't be shy about using it.

APPENDICES

APPENDIX A. MODEL CONTRACT LANGUAGE

Scope of the Project

✎ ***Acceptable Language.*** Write Right agrees to provide WhizBang Software, doing business at 123 High Tech Highway, Silicon Valley, California, with camera-ready copy for the hardcopy reference manual to WhizMail, a Windows 98 email program for desktop users. The reference manual will be delivered camera-ready in PDF format. Production will be coordinated with the remainder of the program's documentation, which will include a hardcopy user guide, online help, and job aids.

Either party may propose changes to the contract. All changes must be agreed to in writing.

✋ ***Language to Avoid.*** Write Right agrees to supply the writing services of Joe Writer to write manuals and other documents as assigned by WhizBang.

Basis of Payment

✎ ***Acceptable Language.*** Write Right shall be paid at the rate of $60 per hour.

Billing Cycle

✎ ***Acceptable Language.*** Write Right shall submit invoices bi-weekly, net 15 days. Interest on overdue payments is 1 percent a month.

✋ ***Language to Avoid.*** WhizBang will issue payment at the end of every month, provided the work submitted by Write Right is acceptable.

Contractor will submit invoices to Agency, which will forward them to Client. Agency will not pay Contractor until Client has paid Agency.

Expenses

✎ ***Acceptable Language.*** Client shall pay non-routine expenses, provided Write Right obtains approval beforehand and submits receipts. Write Right will travel to other Client sites during the course of the project, for which Client will arrange travel and accommodations and prepay other expenses where possible.

Project Schedule

✎ ***Acceptable Language.*** The reference manual schedule is attached to this contract as Addendum A. If changes in the overall project schedule or other factors cause the manual schedule to slip by three or more days, a new schedule must be negotiated and agreed to in writing.

Rights to the Work

✎ ***Acceptable Language.*** Whiz Bang and Write Right agree that all works of authorship that Write Right creates in the course of the project shall be deemed works made for hire, as provided in US copyright law. Should any such works be deemed not work-made-for-hire, Write Right agrees to transfer all rights to such works to Whiz Bang at the conclusion of the project after all provisions of the contract have been satisfied.

✋ ***Language to Avoid.*** Writer agrees that all works of authorship that he or she has created for Company in the past shall be deemed works made for hire, as provided in US copyright law.

Relationship among the Parties

✎ ***Acceptable Language.*** Write Right is an independent contractor and retains the right to hire assistants and perform work for other clients during the term of this agreement. Neither Client nor Write Right intends to establish an employer-employee relationship by this agreement, and both parties assert that Write Right is not an employee for state or federal tax purposes.

Access to the Project

✎ ***Acceptable Language.*** Whiz Bang will provide timely access to the personnel, products and information needed by Write Right, especially as regards providing Write Right with updated samples of the product and informing Write Right of changes in the product.

Terminating the Contract

✎ ***Acceptable Language.*** This agreement terminates when all terms have been satisfied. Either party may terminate it without penalty for material breach or on 15 days' written notice.

✋ ***Language to Avoid.*** Write Right may not leave the project before it is finished. If Write Right leaves in the last two weeks of the project, it must pay a penalty of $100 per day to offset the inconvenience to Client.

Warranty/Indemnification

✎ ***Acceptable Language.*** Write Right hereby warrants that it will make reasonable efforts to insure that the documentation as delivered will not infringe or plagiarize another document. Write Right also hereby voluntarily releases, forever discharges, and agrees to hold harmless and indemnify, Client from liability, claims, demands, actions or rights of action, which are directly caused by Write Right's breach of this warranty and which Write Right could have taken reasonable action to avoid.

Write Right and Client agree to mutual waivers of incidental and consequential damages.

Write Rights' indemnification is limited to costs and damages in proportion to Write Right's responsibility as determined in a court of competent jurisdiction; total liability shall not exceed the total amount of Write Right's billings.

Write Right agrees to cooperate in actions arising from claims for which it has indemnified Client. In such claims, Write Right's cooperation is contingent on prompt written notice of claims and offers, and the right to approve or disapprove all settlements.

In the event that a claim is unsuccessful, Write Right will incur no liability.

☟ ***Language to Avoid.*** Write Right hereby warrants that the WhizMail documentation will not infringe or plagiarize any copyright, patent, trade mark, service mark or other intellectual property anywhere in the world. Write Right also hereby voluntarily releases, forever discharges, and agrees to hold harmless and indemnify, Client from any and all liability, claims, demands, actions or rights of action, which are related to, arise out of, or are in any way connected with, the WhizMail documentation.

Janet Writer, a temporary employee of Gimme Gimme Agency, hereby voluntarily releases, forever discharges, and agrees to hold harmless and indemnify, Agency from any and all liability, claims, demands, actions or rights of action, which are related to, arise out of, or are in any way connected with, projects that Janet Writer undertakes as the agency's employee.

Non-Disclosure

✍ ***Acceptable Language.*** Write Right agrees to use Client's confidential information only for purposes of this project and not to disclose it for any other purpose for a period of two years, unless the information is made public by lawful means. For purposes of this contract, confidential information is information which Client identifies as such, plus information whose disclosure would pose a reasonable risk to Client's business.

☟ ***Language to Avoid.*** Write Right will not discuss, disclose, or use in any way whatsoever except that permitted by Client, confidential information pertaining to the WhizMail project or any other project of Client or its divisions and subsidiaries, its customers or potential customers. For purposes of this contract, confidential information is any information, facts, skills or concepts that Write Right learns, develops or obtains in the course of the project. The terms of this contract are confidential; Write Right may not disclose them or the fact that the contract exists.

As additional protection for Proprietary Information, Consultant agrees that during the period over which it is (or is supposed to be) providing Services for Company, and for one year thereafter, (1) Consultant will not encourage or solicit any employee or consultant of Company to leave Company for any reason, (2) Consultant will not engage in any activity that is in any way competitive with the business or demonstrably-anticipated business of Company, and (3) Consultant will not assist any other person or organization in competing or in preparing to compete with any business or demonstrably-anticipated business of Company.

Non-Compete

Acceptable Language. Write Right agrees that it will not negotiate an independent contract with Client for a period of six months following the beginning of the project without the consent of Agency.

Write Right agrees that it will not negotiate an independent contract with Client for a period of six months following the beginning of the project without informing the Agency.

Language to Avoid. For the term of two years after termination of this contract, Contractor will not directly or indirectly enter or engage in any branch of the technical writing business as principal, agent or employee, or in any other capacity, if doing so involves any customer of Big Deal Inc. with whom Contractor has at any time had any dealings on behalf of Big Deal Inc. under said contract.

If Temporary Employee contracts with Client during the course of the project or for one year thereafter, Gimme Gimme Agency will receive a fee of $20,000. If Temporary Employee becomes a permanent employee in the same period, Agency will receive a fee of 20% of the annual salary. Temporary Employee is responsible for the fee if it is not paid by Client within 30 days of the commencement of employment.

APPENDIX B. WORK FOR HIRE IN US COPYRIGHT LAW

For independent contractors and freelancers, nine kinds of works can be treated as work for hire, or, as it is called in copyright law, work made for hire. The rights to such works belong to the client from the start.

For no other kinds of works can copyright be conferred in this way. In all other works, the rights belong to the writer until she transfers them, and she can transfer one right at a time, keeping all others for herself.

Definition

From Section 101, Copyright Act of 1976 (USC 17 §101):

A work made for hire is

(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.

For the purpose of the foregoing sentence, “supplementary work” is 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, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

From Section 201, Copyright Act of 1976 (USC 17 §201):

(a) Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

What Are Collective Works and Compilations?

The law defines the terms "supplementary works" and "instructional text," but not "collective works" or "compilations." For these definitions, we have to turn to court decisions, of which there have been only a few.

Collective Works. A collective work is one in which a number of separate, independent, copyrightable works are assembled into a single, whole work. Examples include anthologies, newspapers, magazines, and collections of the writings of a single author. And probably a Web site.

Works that courts have decided are *not* collective works include

- Songs. The combined words and music of a song do not make it a collective work.
- A book published with illustrations and front matter. The illustrations and front matter do not make the book a collective work.
- Three one-act plays collected in a book. A small number of separate elements do not make the work a collective work (no, unfortunately, "small" was not defined).

Compilations. A compilation is the opposite of a collective work. It's a set of non-copyrightable facts, such as directories and indexes. The only parts of a compilation that can be copyrighted are the original parts, such as an introduction written by the compiler.

Books That Are Not Legitimate WFH Types

Books in a series, such as the "for Dummies" books, are often written as WFH, as are ghostwritten books, children's books and how-to books. Although these types may not have been tested in court, it's safe to say that they are *not* legitimate WFH types. The writers of these books don't know it, but they may own the rights to their books. Courts have determined that the authors of works created under invalid WFH contracts retain the rights to the works, provided the contracts don't have a fallback assigning the rights to the client.

*APPENDIX C. TIPS FOR A BETTER WORK FOR HIRE CONTRACT**

It's a Contract

A contract is an agreement between two or more parties (two people, two companies, a person and a company) regarding what each promises to do in return for what the other promises to do. To have such an agreement, there must be a shared understanding of the promises—what the law books call "a meeting of the minds."

You want to write on teaching old dogs new tricks for the Dog Fanciers Web site. You and the Web site owner talk things over and agree that you and she want to do business. That in itself is not a contract. Then she offers to pay you $1200 in exchange for your content on the Web site for one year; you accept and promise to deliver the content in monthly installments. You now have an oral contract.

Since people can remember oral contracts differently, they are harder to enforce than written contracts. For that reason, most states require written contracts in certain instances. For example, in most states any agreement involving a task that will take longer than a year to complete—writing a book, for instance—must be made in writing in order to be binding. In many states, written contracts are required if more than $5,000 is at stake. (Although if you didn't get it in writing and you are stiffed for more than $5,000, don't give up. You still have the right to fight for your money in court.)

There are many types of writing contracts, each specifying the working relationship between writer and client or publisher. In the biztech world, some contracts are negotiated directly with an client, either as a temporary employee, an independent contractor, or a vendor. Other contracts are indirect agreements that involve a temporary agency, a staffing firm, or a broker as a third-party intermediary between the writer and the ultimate client.

Rights and Work for Hire

In a standard magazine or book contract, a writer negotiates with a publisher over uses the publisher may make of the writer's work. The many different ways a work might be used are called rights. The writer owns, controls and licenses the rights to the publisher, and a publisher who uses the work in unlicensed ways may be committing copyright infringement.

Biztech writers typically have a different kind of agreement called a "work for hire" contract. When a writer works under a work for hire agreement, he or she gets paid a fee but has no ownership or control over the writing.

There are several provisos regarding work for hire. The two most important are

* These recommendations were collected and edited by Alice Sunshine.

- *Copyright law requires a written contract* that specifically states that the work is a "work for hire" or a "work made for hire." If that phrase is omitted in a written contract, the copyright to any work, regardless of the type, belongs to the writer.
- *Only certain types of writing by freelancers and independent contractors may be works for hire.* Examples include writing that contributes to a larger work, such as a computer manual or a section of a textbook. If the work is not one of the types specified in the Copyright Act (see page 33), it is not a work for hire, no matter what the written contract says.

Works created by full-time staff writers are also works for hire. In these cases, the employer owns and controls the copyright.

Contents of a Writing Contract

A contract should describe all the important aspects of the agreement, especially the rights and obligations of each party. Typical writing contracts include clauses that cover the following:

Who. Who are the participants in this contract?

What. What is being exchanged under this contract? What are the terms of the exchange?

When. Over what time period is the contract in effect? When is the work to be completed? When will the writer be paid?

Rights. Is it a work for hire contract? If not, what rights are being assigned?

Compensation. How much will the writer be paid? What expenses will be covered?

Termination. How can this contract be ended before the completion date?

Warranty & Indemnification. Will the client take responsibility for his or her part in the product in the event of a lawsuit?

Disputes. How will disputes among the parties to this contract be settled?

Many work for hire writing contracts also include clauses that cover these terms:

Mode of Employment. Is the writer a temp, a contractor, a vendor?

Supervision. To whom is the writer responsible? How closely will the writer be supervised?

Reporting. Will the writer submit time sheets? What reports must the writer make?

Non-Disclosure. What is the writer required to keep secret? For how long?

Non-Compete. Are there any limitations to the writer working for other companies? If so, do these limitations apply only to the period of the contract, or do they continue for a specified time after the contract ends?

Changes. What happens when either the writer or the client wants to change the work assignment?

Access. How much access will the writer have to company information and systems?

Portfolio. Will the writer be allowed to include his or her work in a portfolio?

Negotiating

In some cultures, it is considered rude or foolish not to bargain in the marketplace, but in the United States we are not used to bargaining. You are unlikely to get the manager of your local supermarket to come down on the price of frozen peas. But even in this culture, no self-respecting businessperson accepts the first bid offered.

Writers, like other people, often feel uncomfortable with negotiating. We may fear that if we ask for a higher fee or better terms, we will be passed up in favor of the next writer in line. As a negotiating posture, that kind of passivity is likely to get you a poor deal.

When You Have Your Greatest Negotiating Power. The moment when a publisher or client offers you a contract is the pinnacle of your power in the relationship. The employer is saying that he or she wants what you've got. This is your moment to say what you want in return.

Start with Your Own Contract. Ideally, you will open the discussion by presenting your own written contract spelling out your terms for the agreement. It is rare, though, for the writer to be the one who furnishes the contract. Usually, the employer's contract serves as the starting point.

Read the Entire Contract. Don't sign until you are clear on all aspects and are satisfied with the contract's terms. If you find parts of the contract that are unclear, wrong, or not in your interest, or if important issues are not covered, note them, and negotiate with the person with whom you are working. This is the time to contact an NWU contract advisor.

Negotiate Professionally. Negotiating does not have to be bellicose. A lot can be accomplished through a calm exchange of positions, wishes, and needs. The long-term goal of the negotiations is to create a productive working relationship that provides advantages for all involved.

There Are No Non-Negotiable Contracts. Sometimes an employer tells you a contract is non-negotiable. That is a bargaining stance. All contracts are negotiable to some degree. It is up to you to find the negotiable points and to exploit them to your advantage. When someone tells you a contract is non-negotiable, he or she is simply saying, "I don't want to change this contract."

If you can fulfill what the client needs, the "it's non-negotiable" stance is likely to weaken when you express your disagreement. It is not uncommon for employers, especially large ones, to have more than one "non-negotiable" contract. The first and worst is for the pushovers. A second is for the whiners. Another is the golden deal for writers who won't settle for less.

Know What You Want and Be Prepared. The real trick to negotiating is a carefully thought-out strategy. Consider what you want out of the deal. Then divide your wishes into categories based on desirability. For instance, you could look at the various provisions of a contract as:

- The things you absolutely cannot live with.
- The things you absolutely cannot live without.
- The things you would like, but can give up without much pain.
- The things you would give up only in exchange for something else.

Approach negotiations with a series of demands and fallback positions. The goal is to get as much of what you want as possible, but not to back the other party into a corner where their only out is to break off negotiations.

It is important to be realistic and prepared. On the one hand, do not make wild demands. On the other, don't give up easily what you really need to make the deal work for you. Be firm about the things you definitely want. By approaching negotiations in a professional, thoughtful way, you will make better deals.

Be Sure That Side Agreements Are Enforceable. Sometimes an editor is not willing to change the company's contract but will agree to changes or additional terms in a separate memo or an email. Such a side agreement, also called a side letter, can be a helpful tool to get what you need.

Take care to be sure the agreement is enforceable. Some contracts forbid side agreements with language such as, "This contract constitutes the full and complete understanding …" In that case a side agreement is not legally binding on the company.

Don't Commit Until You're Ready. Finally, be sure you are in the right state of mind when you negotiate. If someone takes you off guard by calling unexpectedly, say you are occupied and will call back in ten minutes. Use that time to breathe, look in the mirror, go over your negotiating points, and gush to your cat about how excited you are to get the offer. Then call back on time, feeling steady and prepared to talk.

Tips on Negotiating a Better Contract

- Remind yourself that all contracts are negotiable.
- Read the whole contract before you sign.
- Present your own contract first when possible.
- If you are an NWU member, have a union contract advisor review the contract with you (see Appendix E).
- Ask the client questions about sections of the contract that you don't understand. Ask for examples of how these sections will apply to you.
- Remember that your strongest negotiating moment is when someone admits to wanting you.
- Negotiate with your feet on the ground. Take a break and call back if necessary.
- Be knowledgeable but not obnoxious when you negotiate.
- Start a little high because it's easier to negotiate down than it is up.
- Stop talking after you say what you want. Let the other person respond.
- Be sure that a side agreement made with an editor is enforceable.

APPENDIX D. GLOSSARY OF CONTRACT TERMS

This glossary defines terms that you are likely to encounter in biztech writing contracts. For guides to other kinds of writing contracts, see the union's Web site (**www.nwu.org**).*

Note: In contracts, some of these provisions are presented with terms that are unfavorable to writers. The fact that we include them in the glossary does not mean that the union endorses their terms.

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 is not a panacea. It is cheaper than a lawsuit but definitely not cheap, the arbitrator's powers are unlimited and arbitrary, and you have extremely limited opportunities to appeal an unfavorable decision. Labor unions cannot arbitrate member grievances because they must advocate for their members.

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. In contrast, delegation is the transfer of obligations. The delegation of a duty to perform personal services, such as writing a manuscript, is often limited by contract.

* The glossary was written by Suzanne A. Solomon with contributions by (and thanks to) Mike Bradley, Alice Sunshine and Bruce Hartford. Additional edits by Mike Bradley. Sources for the glossary include the Copyright Act, 17 USC §101 et seq; Black's Law Dictionary (West, 6th ed.); Scott on Multimedia Law (Aspen Law & Business, 2d ed.); Nimmer on Copyright (Matthew Bender); Technical Writers Code of Professional Practice, Hardware & Software Industries (National Writers Union rev. 1997).

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, for example, failure to complete a work by the agreed-upon deadline. A material breach is one that can trigger a lawsuit under the contract even if the project has not been completed. [See *Damages/Remedies.*]

Best Effort. The standard of performance that requires a party to exert its maximum resources to fulfilling contractual obligations, even to the point of losing money. [See also *Good Faith, Reasonable.*]

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. It can be controlled by a clause in the contract, or, in its absence, by such factors as the parties' residence or where the contract was performed. In standard publishing contracts, California and New York are generally preferred for choice of law because they both have bodies of well-defined, acceptable laws relating to creators' and publishers' rights. There is no similar consensus regarding state laws for biztech and work for hire contracts. [See also *Venue.*]

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.

Compilation. A work that consists of numerous facts that in themselves are not copyrightable. Phone directories, book indexes,

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 contract in which a writer exchanges her labor in writing a software manual for money. [See *Legal Consideration, Meeting of Minds, Mutuality of Obligation, Offer and Acceptance.*]

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 and attorneys fees. Damages must have a realistic basis.

Actual Damages. Reward of the actual loss resulting from a breach of contract, such as payment of the unpaid invoices.

Incidental Damages. Damages that are a result of a breach of contract, such as expenses incurred in trying to collect the late invoices. 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.

Punitive Damages. Awarded in certain kinds of civil lawsuits, usually pursuant to statute, by multiplying the money award.

Statutory Damages. Damages awarded as a consequence of copyright infringement. The amounts are fixed by federal statute, thus the name "statutory." [See *Statutory Damages* in "Copyright Terms."]

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

Default. A failure to act as required by the contract. The default triggers the right to sue or excuses the other party's obligation to perform under the contract. For example, if the contract requires the client to provide a network logon, failing to provide it excuses the writer from performing the contract.

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 they are 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*.]

Good Faith. A standard of performance that relies on the defendant attesting that it has honestly tried. The least demanding of the standards. [See also *Best Effort, Reasonable.*]

Injunctive Relief. An award of non-monetary damages, such as requiring a writer to transfer copyright as provided by contract. Awarded in situations where monetary damages are not the appropriate remedy to compensate a loss. In order to get an injunction, the plaintiff must prove not only that he might win the lawsuit and that damage will be done in the meantime, but also that the damage cannot be made good with a money payment. The classic example is an injunction to stop a builder from tearing down an historic building; if it is torn down and the court decides later that it should not have been, it is too late to save the building. To protect the building, plaintiffs would seek an injunction to suspend the destruction until after the issue has been decided in court.

Because obtaining an injunction takes time and because there is no guarantee that it will be granted, parties often seek a contract clause that grants them the right to an obtain an injunction without having to justify it. The clause has become common in biztech writing contracts, although in 999 out of 1000 cases, there is little that a biztech writer could do that would warrant an injunction.

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 also *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. Non-parties to a contract who may acquire or exercise rights under the contract, such as a writer's estate or attorney.

Mediation. An alternative to lawsuits in which a neutral third party, the mediator, has no power to impose a binding decision on the parties to the dispute. Instead, the mediator facilitates the contending parties' reaching a mutually-acceptable resolution themselves. Labor unions cannot mediate member grievances because they must advocate for their members.

Meeting of Minds. The requirement that all parties to a contract have the same understanding of its substance and terms, such as the nature of the writing assignment and the stated compensation.

Mutuality of Obligation. The requirement that, for a contract to be valid, all parties must be bound to perform some obligation.

Offer and Acceptance. The essential elements without which no contract can be formed, i.e., a writer's offer to prepare the 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.

Oral Agreement. An agreement not written down. Oral agreements are as valid as written agreements except where they are specifically prohibited, as in transfer of copyright or when a contract requires that all changes be in writing. Oral agreements are very difficult to enforce, of course, even when both parties are well-intentioned.

Parties. Participants in a contract.

Reasonable. A common law standard for performance of contractual obligations. It is based upon what a hypothetical "reasonable person" would think or do, given the circumstances. It often appears in relation to a publisher's or other party's obligation to accept a completed manuscript or promote a book. Disputes over failure to exert reasonable effort are often resolved by testimony on common practices in the industry. [See also *Best Effort*.]

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 bilaterally. Can be exercised only 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 other clauses are still operative and must be complied with.

Side Agreement. Changes made to contract terms that are captured 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*.]

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 writing contracts.

Statute of Frauds. A common legal doctrine included in many states' laws requiring the contracts taking longer than one year to perform or involving more than $5,000 compensation must be written, not oral.

Term. A provision in a contract.

Time Is 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 geographic area where a case will be heard. In contract disputes, cases are often heard in one state but following the laws of another state. [See *Choice of Law/Governing Law Clause*.]

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

Warranty. Traditionally, in writing contracts warranties were 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. However, in recent years, warranties have been broadly expanded to include such guarantees as the information in a work is accurate and complete. Biztech writers are often presented with warranties that go far beyond what is reasonable or even legal, and which the writers' clients would not sign themselves. The terms of these warranties can be dangerous and should be negotiated to reasonable levels.

Copyright Terms

Assigning Copyright/Selling a Right. [See *License; Transferring Copyright*.]

Collaboration. [See *Joint Work*.]

Collective Work. Defined in § 101 of the Copyright Act as a work consisting of a number of separate contributions, some or all of which could each be copyrighted themselves, are assembled into a whole, such as a newspaper. The copyright to a collective work only covers the features of assemblage, such as the order of the articles, and the unique contributions of the collective work's producers, such as the page layout; it does not cover the separate copyrightable contributions. Contributions to a collective work, such as an article or photo, can be created as works for hire. [See *Work for Hire*.]

Compilation. A set of non-copyrightable facts, such as directories and almanacs. The only parts of a compilation that can be copyrighted are the original parts, such as an introduction written by the compiler and the page layout design. Compilations can be created as works for hire. [See *Fact; Copyright; Work for Hire*.]

Constitution. In US law, copyright is established by Article I, Section 8, of the Constitution, which gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." This language situates copyright and other protections in the context of advancing the sciences and arts, while in most of the rest of the world, as codified by the World Intellectual Property Organization (**www.wipo.int**), copyright and other protections are established to protect creators' rights to their works. Many intellectual property disputes in the US are based in the antagonism built into the US constitutional provision.

Copyright. The bundle of rights and privileges guaranteed to the legal author of a work or the holder of the copyright. Under the Copyright Act, 17 USC § 101 et seq., copyright belongs initially to the author and can only be transferred in a written agreement signed by both parties. 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. The bundle is infinitely expandable. That is, as a new use for a work is devised, the right to that use is automatically created and vested in all rightsholders.

Exclusive/Non-Exclusive. 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. The latter means that more than one licensee can use the work in the granted manner. Granting non-exclusive use generally limits further marketability of a work.

Fact. A non-original, non-creative piece of information, a real happening, something known to exist. Facts cannot be copyrighted. [See *Compilation; Copyright; Idea.*]

Fair Use. Permissible infringement of copyrighted material, such as for criticism, comment, parody, news reporting, research or teaching. Four broadly-defined factors are used in determining whether fair use has been made of copyrighted material, and the factors' application is never cut-and-dried. The factors are whether the use is for commercial or nonprofit purposes, the nature of the copyrighted work, the amount of the work used in relation to the whole work, and the effect of the use on the potential market for or value of the copyrighted work. This last factor is generally the most important, not whether the use is commercial or non-profit. Arbitrary standards, such as, "It's okay to quote up to 300 words," or, "It's okay to use a work if you attribute the author," are simply wrong. [See *Infringement.*]

First North American Serial Rights (FNASR). The right to be the first North American serial publication to print a work. This is the default sale for articles. It is the only unwritten transfer of copyright that courts have recognized; in that, they have relied on the section of the copyright law defining the copyright in a collective work. With the advent of online publication, especially on the Web, writers have asserted successfully that first-time online use is *not* included in FNASR. [See *Collective Work.*]

Ghostwriting. Creating a work that will have another person's byline. Many celebrity books are ghostwritten. The practice is sometimes modified by allowing

the ghostwriter a byline such as "As told to." Ghostwritten books are *not* a category of work that can be written as work for hire (except by employees). The union publishes a contract guide for ghostwritten works; see the union's Web site at **www.nwu.org**. [See *Work for Hire*.]

Idea. The concept of a work that the creator holds in mind. Ideas cannot be copyrighted. [See *Copyright; Fact*.]

Infringement. Unauthorized use of any of a rightsholder's rights to a work. Infringement is enforced by lawsuits in federal courts. In order to sue, the rightsholder must register the work with the Copyright Office. If the registration occurs before the infringement or within 90 days of its first publication, the rightsholder can win actual and statutory damages plus attorney fees and other legal costs; otherwise, the rightsholder can only win actual damages. [See *Damages* in "General Contract and Legal Terms."]

Instructional Text. A literary pictorial, or graphic work prepared for publication and for the purpose of systematic instructional. A type of work that can be created as a work made for hire. In this regard, how-to books are *not* instructional texts. [See *Work for Hire*.]

Intellectual Property. The tangible expression of a concept of the mind or the rights inhering in that expression. The term is of recent usage and is controversial. US copyright law gives the owner of intellectual property the exclusive right to publish or otherwise use the property. Other persons must negotiate with the creator for the right to use it.

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, interdependent parts of a single whole. To be a joint author, a writer must contribute an independently copyrightable portion of the work. Also termed "collaborative works." The union publishes a contract guide for collaborative works; see the union's Web site at **www.nwu.org**.

License. Authorization of use of rights to a work by an author or other copyright holder. Licenses can attach more conditions to the use of a right than transfers can. [See *Transferring Copyright*.]

Moral Rights. The right, originating in Europe, to maintain control over a 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 recognized in the United States only for visual arts.

Plagiarism. Appropriating the writing, language or other expression of another creator as one's own. If the material is still under copyright, plagiarism also constitutes infringement.

Registration. Depositing a copy of a work with the U.S. Copyright Office, along with a form identifying the author(s) and the nature of the work. Registration is not necessary for ownership of the rights to a work, but it is necessary for suing for infringement and claiming statutory damages.

Public Domain. The realm of works that are no longer protected by copyright. When a work enters the public domain, anyone can use it without risk of infringement. Works enter the public domain after the expiration of the copyright

term under law (usually the life of the author plus 50 years) or when they are deliberately placed there by their rightsholders.

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.*]

Right. The prerogative to use a work in one way. For every imaginable use, there is a right. All rights belong originally to the creator of the work; they can be transferred to other parties by written agreement signed by both parties. As new uses are discovered, the rights to those uses come into being automatically. The Internet is a prime example of new uses and new rights.

Secondary Rights. Rights to publish the work after its first publication. If marketed properly, secondary rights earn more than the first sale, even though, when they are in the same medium as the first sale, they are often paid at half the rate as the first sale. Secondary rights include second serial rights, second online rights, mass paperback rights, syndication and serialization rights, adaptation rights and translation rights.

Statutory Damages. Damages that the owner of an infringed right can claim if s/he has qualified for them. Statutory damages are often much larger than actual damages. The amount of the damages is set by the court within a range defined by federal statute. The main qualification for the damages is registering the work before it was infringed or within 90 days of its first publication. [See *Damages* in "General Contract and Legal Terms."]

Subsidiary Rights. [See *Secondary Rights.*]

Supplementary Work. A work prepared for publication as an adjunct to another work for the purpose of interdicting, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as user manuals, forewords, illustrations, maps, tables, bibliographies and indexes. Supplementary works can be created as works for hire. [See *Work for Hire.*]

Termination Rights Provision. The Copyright Act provides for the termination of a grant or transfer of rights 35 years after the transfer; it must be exercised by the author within five years after the end of the 35-year period. Termination rights are an important limitation on all-rights clauses because the right to terminate does not transfer with "all rights." There is no rights reversion for creators of works for hire because they are not the legal authors. [See *All Rights/Universal Rights; Work for Hire.*]

Transferring Copyright. Authorization by the rightsholder allowing another party to use the work. Can be narrowly or broadly constructed and exclusive or non-exclusive transfer. For example, a writer may transfer exclusive rights to publish her article to a certain Web site or the exclusive right to publish it for a limited time or the exclusive right to publish it but not to archive it, and so on. Non-exclusive transfers are generally disadvantageous to the writer because they limit additional marketing of the work. Note that, except for the FNASR default sale for articles, rights may not be assigned without a written document signed by both parties. [See *Exclusive/Non-Exclusive; First North American Serial Rights; License.*]

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) one of nine specific types of works specially ordered or commissioned in a written instrument, signed by all parties, in which the work in designated a work made for hire. The nine types are a contribution to a collective work, a contribution to a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. In a work for hire, the employer or commissioning party is considered the author of the work for purposes of the Copyright Act. Therefore, all rights belong to him, not to the actual creator. Work for hire is much abused in certain book genres and less so in journalism. [See *Collective Work; Compilation; Instructional Text; Supplementary Work.*]

BizTech Terms

1099. The federal tax form, identified by its number, on which earnings other than employee wages and salaries are reported. A 1099 form indicates that the contractor is not a regular employee and that no payroll taxes will be withheld. Though it is rare, an independent contractor is sometimes given a W2 form to fill out at the beginning of a contract instead of a 1099 form. You should not fill it out; insist on a 1099. [See *Employee; Independent Contractor; W2.*]

Agencies/Brokers/Job Shops/Labor Contractors. Companies whose business is recruiting and hiring temporary workers to work at client companies. The agency contracts with the client for whom the worker performs the service, and the worker is legally the employee or subcontractor of the agency instead of the client. The worker bills the agency, not the client, then the agency bills the client at a markup. Agencies are used by clients to increase and decrease staff quickly or to avoid paying the costs of full-time employees. In biztech, agencies dominate the market for independent contractor writers in most of the country, and they entered the offshoring industry immediately. In fact, some offshore companies operate their US offices as agencies. Agencies in biztech perform fewer services than literary agencies but have higher markups. [See *Independent Contractor; Temp; Third Party; Perma-temp; Markup.*]

Agent. A person or company who sells writer's literary works to publishers for a commission. Publishers pay the writer's royalties to the agent, who forwards the writer's share. Agents generally advise writers on the market for their works, provide high-level editorial guidance, and counsel them on career matters.

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 time-based standard of payment, usually hourly. [See *Deliverables; Fixed Bid; Milestones.*]

Broker. A term recently gone obsolete. It usually referred to a classier agency that employed writers exclusively as contractors. [See *Agent; Documentation House; Job Shop; Labor Contractor; Payroll Service; Perma-Temp; Temp; Third Party.]*

Conditional Payment. A practice regulated by law that, depending on the jurisdiction, allows a third party to pay a contractor when or if the client company pays the agency. A clause allowing the practice often appears in biztech contracts. It can be negotiated away after researching the local applicable laws. [See *Agency*.]

Confidentiality/Non-Disclosure Clause. A contract term that prohibits participants from disclosing information learned in the course of performing a contract, such as patents and trade secrets. Courts generally put severe limits on non-disclosure, favoring the right to "pursue happiness," instead, by earning a living or running a business. Biztech clients often take the opposite approach, imposing broad, long-running limits on disclosure. In the event of a dispute, the courts have the final say.

Corporation. A form of business enterprise that has much the same basic rights and obligations as an individual; in the US, termed "corporate personhood." Incorporation gives a self-employed worker certain tax advantages and other benefits if he works as an employee of the corporation, but it has cumbersome accounting requirement and incorporated writers usually hire an accountant. Third parties and large client companies will often insist that an independent contractor be incorporated or a limited liability company. Otherwise, they will insist that the contractor be an employee of an agency. [See *Agency; Limited Liability Company; Vendor*.]

Deliverables. A payment standard based on the writer's completing specific parts of the contracted product, such as payment of 30% of the writer's fee on delivery of the outline and sample pages of a manual. [See also *Milestones*.]

Documentation House. A company that undertakes complete beginning-to-end production of documentation, from project plan to text and graphics to camera-ready files to hardcopies and CDs. Documentation houses are contrasted with agencies that only place workers at client companies. [See *Agent; Broker; Job Shop; Labor Contractor; Payroll Service; Perma-Temp; Temp; Third Party.]*

Employee. A worker whose duties and performance are subject to the employer's supervision and control. Except for conditions imposed by law or collective bargaining, employees serve at the will of the employer and can be fired without cause. Biztech writers are sometimes employed as putative contractors when, in law, they should be classified as employees. Every tax agency that collects employee taxes has its own set of criteria for determining whether a worker is an employee or contractors. Being reclassified as an employee results in the writer having to refile income taxes for the period in question. [See *Work for Hire* in "Copyright Terms."]

Finder's Fee. A fee charged for finding something, for instance, the fee charged by an agency for finding employment for a writer. Agency fees vary widely but they are generally a percent of the writer's total billings, from 15-50%. [See *Agent; Agency; Payroll Service*.]

Fixed Bid/Fixed Price Contract. An offer to perform a contract for a set amount of money, agreed upon in advance.

Indemnification/Hold Harmless Clause. A clause providing that one party in the contract defend another party against a stated loss or liability, such as indemnification against copyright infringement. Usually concomitant with a

warranty guaranteeing a performance the failure of which will cause the loss or liability. In the contracts offered to biztech writers, indemnifications are often dangerously broad and must be reduced through negotiation. [See *Warranty*.]

Independent Contractor. A worker whose duties and performance are specified in the employment contract and who is not subject to supervision by the employing party. Among writers, the term usually describes writers working under work for hire contracts, as opposed to freelancers and authors. Independent contractors sell their time and are usually paid by the hour or by a fixed price; freelancers and authors sell the rights to their work and are usually paid by the word or in royalties. Contrary to popular belief, contractors cannot be let go at will; they can only be let go as provided for in the contract. [See *Work for Hire* in "Copyright Terms."]

Invoice. Billing statement. For contractors, an invoice should only state the project, the time period, the basis of the charge (such as the hours worked), and the charge. Additional information, such as a daily time record or a summary of work done, is evidence of W2 employment and should be avoided.

Job Shop. A less classy term for an agency; usually refers to agencies that employ workers solely as W2s who often perform the work in the job shop's own premises instead of in the client company's. [See *Agent; Broker; Documentation House; Labor Contractor; Payroll Service; Perma-Temp; Temp; Third Party*.]

Labor Contractor. A term for an agency that provides workers in the skilled and unskilled trades. [See *Agent; Broker; Documentation House; Job Shop; Payroll Service; Perma-Temp; Temp; Third Party*.]

Limited Liability Company (LLC). A form of business enterprise modeled on the German GmbH ("Gesellschaft mit beschränkter Haftung;" LLC is a broad translation of the term). An LLC allows for the flexibility of a sole proprietorship or partnership but with limited liability such as that granted to corporations. It has fewer legal requirements than a corporation and has tax advantages over a corporation. Third parties and large client companies will often insist that an independent contractor be incorporated or an LLC. Otherwise, they will insist that the contractor be an employee of an agency. [See *Agency; Corporation; Vendor*.]

Milestones. A payment standard based on a set of observable criteria. Milestones vary according to the project, but common milestones are completing drafts (first, second, final) and passing reviews.

Net Days. In a billing cycle, the maximum period of time after receiving an invoice in which the payee must render the full amount due. Late payments earn a penalty often computed at standard credit card rates. To be valid, the net days policy must be stipulated in the contract and displayed on every invoice. For example, a Net 30 statement might read, "Net 30. Late payments will be billed a penalty of 1% a month or fraction thereof." Often combined with a discount for early payment, such as "2%, 10. Net 30," meaning the payee gets a 2% discount for paying within 10 days of receiving the invoice.

Non-Compete/Non-Competition Clause/Exclusivity/Predatory Soliciting Clause. A contractual promise under which a worker agrees not to compete with an employer. Often applies only after the worker leaves the employment. When found in third-party contracts for biztech writers, the clause usually prohibits the

writer from becoming a direct employee of the client company during the employment and for a period of time afterwards and requires the writer to inform only the agency of any new openings in the client company. These clauses are enforceable only to the extent that they do not impose undue hardship on the worker, and courts vary widely in how they interpret the hardship.

Pay When Paid/Pay If Paid. See *Conditional Payment*.]

Payroll Service. A third party that serves as the employer-of-record handling billing and paychecks for temporary workers. The workers are recruited and sometimes managed by the client company but hired and paid by the payroll service. Recent court cases, such as Vizcaino v Microsoft, have found some operations of this kind to be illegal and have reclassified the workers as employees of the client companies. [See *Agent; Broker; Documentation House; Job Shop; Labor Contractor; Perma-Temp; Temp; Third Party*.]

Perma-Temp. A super-exploited long-term temporary worker. [See *Agency; Temp.*]

Portfolio Copies. Writers' copies of work produced. Used by the writer as work samples to show to prospects. Must be provided for in work for hire contracts; otherwise, showing the work might constitute infringement or breach of the confidentiality agreement.

Purchase Order. A document issued by a company or other 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. [See *Vendor.*]

Retainer. An additional payment to keep a writer available for a period of time, even if the work doesn't begin immediately or it is delayed in mid-project.

Reviewer. A person employed by the client to review a writer's work. For instance, for a software user manual, the reviewers would probably include software developers, QA, and project management. Reviews can be tied to the writer's payment schedule, and successful reviews can be used to refute a claim that the writer's work is unsatisfactory. [See *Deliverables; Milestones; Unsatisfactory Performance.*]

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

Subcontractor. I contractor performing a portion of the work that is contracted for in another agreement. A mark of an independent contractor is the right to subcontract, such as a writer subcontracting creation of charts and graphics. [See *Assignment of Rights/Delegation of Duties.*]

Temp. A temporary employee hired by an agency to perform work at a client company. Generally receives only those benefits mandated by law but may have the same working conditions and privileges, such as use of the company cafeteria, as a regular employee at the client company. [See *Agency; Perma-Temp.*]

Third Party. A party to an agreement whose role is secondary to the contracted performance. In biztech, the typical third party is an agency. [See *Agency; Conditional Payment; Perma-Temp; Temp.*]

Unsatisfactory Performance. A description of work that doesn't meet the client's needs for some reason and which is often used as a reason to terminate the contract. Vague accusations of "not good enough" are insufficient for a charge of breach of contract. Such accusations are often camouflage for a client wanting to get out of the contract for reasons having nothing to do with the writer; for example, in the experience of the union's grievance officers, charges of unsatisfactory performance have been used to cancel a contract without penalty when a company's financial situation forces a project to shut down. In this regard, note that in most states, a contractor must be paid for time worked, regardless of the client's dissatisfaction. Only a successful charge of breach of contract frees the client of the obligation to pay. [See *Conditional Payment; Breach of Contract*.]

Vendor. A provider of goods and services. In the business world, vendors often sell their goods or services through purchase orders instead of contracts. Among biztech writers, some clients demand that all independent contractors become certified as vendors to the company. Obtaining the certification usually may require being incorporated or a limited liability company. [See *Corporation; Purchase Order*.]

W2. The federal tax form, identified by its number, on which employee earnings and withholdings are reported. Though it is rare, an independent contractor is sometimes given a W2 form to fill out at the beginning of a contract instead of a 1099 form. You should not fill it out; insist on a 1099. [See *1099; Employee; Independent Contractor*.]

Warranty. A term guaranteeing specified performance by a party to a contract, such a warranty that a writer's work will be original. Usually combined with indemnifying the other party against damages caused by a failure to perform. In the contracts offered to biztech writers, the writer's warranty is often extremely broad and must be reduced by negotiation. [See *Indemnification*.]

Waiver of Benefits. A common term in agreements for independent contractors in which the contractor gives up, or waives, the right to employee status and benefits. [See *Employee*.]

APPENDIX E. HOW TO GET HELP FROM THE UNION

The BizTech Division sponsors projects throughout the union. Join the BizTech committee in your local to advance the union's goals and learn to make a better living in the process.

- The union's Web site (**www.nwu.org**) has numerous publications for BizTech writers. Click the **BizTech Writers** link for a list. You'll need the members' password to get some of them.
- Subscribe to the division's email list. It is presently on Yahoo. Go to **groups.yahoo.com/group/NWU-BizTech**.
- Contract advice is a free service of the union. An advisor will review your contract, explain it to you, and help you decide how to negotiate for improvements. Signing a contract without union advice is like buying a car from Slick Slim's Slightly Soiled Self-Propulsion Units and only kicking the tires.

  For an advisor in your genre, send email to **advice@nwu.org**.
- If you run into problems with your client after signing the contract, call on another free union service: your grievance officer. She will review your complaint and let you know your rights. If you've been wronged and the union can help, the grievance officer will guide you through some initial steps that often resolve the dispute. If the steps fail, the grievance office will take over the case and advocate for you with the client. Our grievance officers win an average of 80 percent of their cases.

  For a grievance officer, email **advice@nwu.org**.
- Get a copy of the *National Writers Union Freelance Writers Guide* from the union Web site or look for it in your local bookstore or library. There are several chapters for BizTech writers. Other genres are covered, as well.

INDEX

Note: Many of these terms and more are defined in the glossary, pages 39-51.

W


national
WRITERS
union