

Publication and Other Literary Contracts

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Gary enjoys working with creative people including entrepreneurs, small business owners, people who create new technology, and artists. His practice includes:

- Computer/Internet Law & Litigation
- Intellectual Property (copyright, trademark, trade secret & licensing)
- Art & Entertainment Law
- Corporate/Business Law
- Complex Business Litigation

Introduction: Your Legal Rights

You are reading this because you are a writer. That means that you have a special skill - the ability to express ideas in words in a way that other people cannot. Society wants to encourage the creation of good writing (even if the low pay most artists receive sometimes suggests that it doesn't). It is so important that this goal is written into the United States Constitution.¹ In the Constitution, society delegated this duty to Congress. Congress attempts to promote the arts by giving artists certain basic legal rights, primarily through copyright protection.

Authors contract with other parties, including agents and publishers, to publish and distribute their works. These contracts deal mainly with the transfer of specified portions of the copyright rights from the author to the publisher. In order to deal effectively with publishers and agents, it is important to understand something about contract law. The first section of this paper presents the basics of contract law.

The next three sections deal with specific types of contracts writers are likely to encounter. The second section discusses clauses that specifically apply to publication contracts. The third section deals with contracts with agents, while the fourth section deals with collaboration agreements.

Authors are frequently uncomfortable with negotiating for their legal rights. They see their role as creating the art. They usually want as many other people as possible to enjoy their creations. They are reluctant to demand substantial compensation for their work. And they are reluctant to fight to retain control over their works. But at the same time, many of these authors wish that they would be treated with the respect owing to a professional artist. To help you protect your rights, the fifth section of this paper discusses negotiation tactics and techniques.

Whatever else you agree to, do not negotiate away your future as an artist. This is so important that it has a section of its own, section six.

And finally, the seventh and last section of this paper suggests some places you can turn to for additional help and to learn more.

1. Contracts in General

a) Elements of a Contract

There is no magic language that makes a contract a contract. Any agreement between two parties where they each agree to do something may be a legally binding contract.

A contract is legally binding when two or more parties intend that their agreement be legally binding. If you agree to go to the movies Friday night with a friend, you have not formed a contract. Neither of you expects to end up in court if one of you cancels at the last minute. But if a writer and a publisher agree that the writer will write a magazine article and the publisher will buy it, they have formed a contract. If the writer goes off and spends six months or more writing that article, the writer can reasonably expect that the publisher will pay for the article when it is finished. The parties have formed an agreement that they expect the law to enforce.

¹ The United States Constitution, Article, 1, Section 8. Powers Granted to Congress ... Clause 8: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In order for a contract to be legally binding, it must be clear what the parties agreed to do. There cannot be an agreement unless certain basic elements of the contract are agreed upon. At a minimum, you must be in agreement on the following items in order to have an enforceable contract:

identity of the parties;

common objective (what you intend to accomplish);

"consideration" (what each side gives & what each side gets);

the time for performance (if not specified, often a 'reasonable' time period can be assumed)

acceptance of the contract by both sides

b) Oral Contracts

Most oral contracts are just as enforceable as written contracts.² But they often lead to disputes over what was agreed to. It is extremely unlikely that two friends will remember a conversation they had a few days before exactly the same way. It is highly improbable that two parties who no longer get along will remember a conversation that took place a year ago or more the exact same way. To avoid confusion, put all contracts and understandings in writing. You do not need to put all agreements into fancy, lengthy contracts drafted by attorneys. Often, a simple letter will do:

Dear Joe:

I really enjoyed our lunch conversation today. As I understand it, we have agreed that I will write a 5,000 word article on how to write a contract, and you will publish it in your magazine "Entertainment Law". You will pay me \$150 when I deliver the manuscript and \$150 when you publish the piece or six months after delivery of the manuscript, whichever is earlier. If this is not your understanding, please let me know right away; otherwise I will start on the piece next week. I'm looking forward to working with you.

Sincerely,

Gary K. Marshall

c) Know What You Are Signing

The courts treat written contracts seriously. You will be held to the wording of the fine print, whether you read and understand it or not. As one Washington court said:

Defendants admit they did not read the instrument when they signed it. If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture

² Some oral contracts are not enforceable under certain circumstances because they violate the Statute of Frauds, RCW 19.36. The main exception is contracts for the sale of real estate which must be in writing in order to be valid. Contracts that cannot be performed within one year should also be in writing, although they are usually enforceable even though they technically violate the statute of frauds.

does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.³

You should never sign a contract without reading and understanding it first. Realistically, most people will not read everything they are asked to sign. But you should.

To see what you are missing, you may want to try an experiment some time. For one week in your life, be very careful to read every piece of paper that you come in contact with that could be considered part of a contract. Read every sales slip, every receipt, and every piece of paper you are asked to sign. Read the back of tickets to shows and sporting events that you attend. Read the notices on the walls of parking lots, stores, repair shops, dry cleaning outlets, etc. You may discover that you have agreed to all sorts of things that you were not aware of.

2. Publication Contracts

a) What Are You Selling

The package of rights that copyright gives to an author are infinitely divisible. You do not have to transfer all of the copyright rights to the same person. For example, you could give the rights to the hardcover (or magazine) reproduction in the U.S. to one publisher and the rights to publish in the rest of the world to another publisher. All of the following could be sold separately as distinct rights: paperback - trade or mass market; movie or video; pre-publication serialization; post-publication serialization (reader's digest, comic book, ...); reprints in other books; translations; TV or radio readings/dramatizations; commercial/merchandise rights (t-shirts, posters, dolls); and foreign publication.

There is no limit to how many separate rights you can divide the copyright into. A publication contract is largely a description of how the pieces of the copyright will be divided up.

Know which of the divisible copyright rights you are giving to the publisher, and which rights you are keeping for yourself. Generally, you should give the publisher just as much as the publisher needs to publish your work. Only give the publisher rights that the publisher is in a position to use. It makes sense to grant a large multinational corporation the right to publish a book world-wide. But it may not make sense to grant world-wide publication rights to a small publishing house that specializes in marketing to high schools in the United States and has no foreign contacts.

The more rights you give up, the more you should be compensated. You will expect to get paid less if you are granting a publisher a one-time right to publish your work than if you are granting the publisher the right to publish the work forever.

These same rules apply to rights to other works based on your book (often referred to as subsidiary rights) such as book-club publications, syndications, serial rights, movies rights, etc. Publishers will usually try to obtain all of your subsidiary rights. And they will usually offer to pay lower royalties on subsidiary products than on the main product. Again, it may make sense to grant, say, movie rights, to a large New York publisher that has movie connections, but not to a small local publisher with no connections in the movie business.

³ *Peoples Nat'l Bank v. Ostrander*, 6 Wn.App. 28, 33 (1971), quoting from *Washington Central Imp. Co. v. Newlands*, 11 Wn. 212, 214 (1895).

Make sure the money you are being paid is proportionate to what you are giving up, and only give the publisher rights the publisher needs to exploit your work and is in a position to use.

In addition to asking for all of the pieces of your copyright rights, the publisher will often include a catch-all section where you transfer all of your copyright rights to the publisher. Never do this. Instead, grant the publisher a limited license to use your work. The key issue to keep in mind is to specify clearly exactly which property rights are being licensed or transferred to the publisher, and which rights are being retained by you.

b) Money & Royalties

There are many terms used in contracts related to money. Most of them are at least somewhat confusing; some are vague on purpose. Be sure that you understand the money terms in your contract.

Be clear as to how much is to be paid and by whom. What is the method of payment? How often do you get paid? What happens if you are not paid on time? Avoid vague terms like "profit", "net profit", and "gross profit", unless they are defined in the contract. They have no exact meaning. It is quite easy to define these terms to mean anything the parties want them to mean. If you are to be paid a percentage of profits, it is likely that "profits" will mean something very small indeed.

Generally, you will be paid a percentage of the revenue that the publisher receives from publishing your book. This is called a royalty. Royalty rates can vary considerably, depending on the negotiating power of the author. Most authors have limited negotiating power. Standard royalty rates are: hardcover 8-15% (10% typical); softcover 5-10% (7 1/2% typical); subsidiary rights - 50/50 split or better between the publisher and the author of moneys actually received by the publisher; discount copies - 8-15% of discount price.

Make sure that you know what the royalty is a percentage of. There are big differences between percentages of retail list price and percentages of net or wholesale price. The wholesale price is usually only 40% or so of the retail list price. So if the list price is \$10.00, the wholesale price is \$4.00. Ten percent of the list price is \$1.00 but ten percent of the wholesale price is only 40 cents.

It used to be fairly standard for royalties to be based on the retail list price. Many publishers, small publishers in particular, now base their royalties on wholesale prices. This results in 60% less royalties being paid to authors than before.

Many contracts call for the author to receive an advance on royalties. There is a big difference between an advance on royalties that is refundable and an advance that is non-refundable (sometimes referred to as a guarantee). A refundable advance may have to be repaid if the work doesn't sell or if the publisher decides not to publish your work. A non-refundable advance is the minimum royalty you will receive, even if the work doesn't generate any additional revenues. Most authors insist on their advances being non-refundable. Sometimes there is also an advance to cover expenses. Make sure that this advance is also non-refundable, so that you are reimbursed for your expenses even if the work is not published.

c) Things They Will Ask For

1) Duration

Usually, the publisher will ask for the right to publish the work for the entire time period that the work is protected by copyright law (ordinarily the life of the author plus 50 years). This is a reasonable request provided that there is also a termination clause (see the things you should ask for below). By the way, there is a provision in the copyright law that lets authors cancel contracts between the 35th and 40th years after the transfer of the copyright, regardless of what the contract says. If you think you want to do this, you should consult a copyright attorney.

2) Warranty

The publisher will ask you to warrant that your work is original and does not infringe on copyrights of others, that you own all rights in the work, and that the work will not violate any rights of privacy or defame anyone. The publisher will also request financial indemnification by the author in the event the publisher is sued.

This clause is standard and it is a reasonable request. But it should be limited to a warranty that "to the best of the author's knowledge", the work is original and does not violate anybody else's rights. You should be accountable for your own actions by being held personally liable if you knowingly infringe upon someone else's rights. But the publisher is in a better position to assume the risk of accidental infringement. The publisher usually publishes many works, and can spread out the cost of assuming this risk, while the author is involved in only a small number of works and is not in a good position to absorb this risk.

You should also limit your liability to situations where there is a judgment, by adding the language: "author only liable when there has been a judgment". Anyone can sue anyone else at any time, whether their claim has any merit or not. It is beyond your control to stop people from suing. You should only have to pay the publisher if you did something wrong for which a court has found you liable.

Try to state that the publisher (usually through its insurance carrier) will be responsible for defending all suits. Try to include a limit on your financial indemnification to a percentage of the amount paid to the author by the publisher (try for 50%, be happy with up to 200%). If you are getting paid \$500 for a piece, it is not reasonable for the publisher to expect you to be at risk for a million dollar judgment. But it is reasonable to expect to be at risk for a \$250 judgment.

3) Copyright in the Publisher's Name

The publisher may ask that the work will be copyright registered in the publisher's name. Never agree to this. It may cast doubt on your copyright protection. This was important to publishers when copyrights had to be renewed. Copyrights no longer have to be renewed, so publishers do not need to own the copyright, even though many of them do not know this yet. Make sure that the copyright is registered in the author's name.

4) Delivery of Manuscript

The publisher will ask that the author deliver the manuscript by a certain time, subject to approval by the publisher. This is a standard request. The publisher needs to know when the manuscript will be delivered so that the publisher can plan the publication schedule. But be sure

you can meet the deadline you are agreeing to. If the deadline is not realistic, it is better to negotiate a new deadline now than to be late.

If the contract says that the manuscript must be in a form satisfactory to the publisher, this can mean anything. Effectively the publisher is not agreeing to publish your work unless the publisher likes the finished manuscript. Instead of agreeing to this, try to get some objective language into this section, such as: "Author shall deliver a manuscript of the Work which, in style and content, is professionally competent and fit for publication."

5) Galley Proofs

Usually the author is to correct galley proofs by a certain time, and the author is to pay for the costs of extensive last-minute changes. Again this is a reasonable request, but make sure that the time deadlines are reasonable (often they are not) and that the publisher is agreeing to pay for corrections that result from the publisher's errors.

6) Non-Competition

The publisher will often include a clause prohibiting the author from publishing any works with a different publisher that might compete with the current work. This is an unfair request and should be deleted. The publisher already has some protection. Contract and copyright law prohibit you from writing the same work or a substantially similar work and publishing it somewhere else. But if you want to write a different book on the same subject, the publisher should have to compete with other publishers for the privilege of publishing your work. Remember that the publisher is not promising to refrain from publish any other works that compete with your work.

7) The Option Clause

The publisher will frequently ask for an option on the author's next work or all future works. Try to eliminate this clause altogether. Never give more than a "first option on next work at terms to be agreed upon within a stated time period, option to expire if no agreement in that time".

Keep in mind that many times artists are getting paid a value for their current work that is based on what their last work was worth. Most writers will not get paid a high price for their first book. If the first book sells well, they will receive a high price for their second book. If the second book does not sell well, the price they receive for their next book will be lower. And so on. If you commit yourself to a price for a future work now, you may be selling yourself short, especially if you have not had a big seller yet.

8) Deductions for Sums Owning Under Other Contracts

Some publishers will include a clause that allows the publisher to deduct sums that you may owe the publisher on other contracts from the fees the publisher owes you on the present contract. For example, if you received a refundable advance on another book that is not selling well, the publisher may not want to pay you royalties on a book that is selling well, until the publisher has recouped the amount of the refundable deposit on the book that is not selling well. You should not agree to this. Each publication contract represents a separate partnership between you and the publisher. The success of this partnership venture should not hinge on the success or failure of another partnership venture.

9) Electronic Rights

The Publisher will usually ask you to assign all electronic rights to the Publisher. These rights include the rights to reproduction of your work in electronic form in computer software programs, CD-ROM applications, and on-line database services. This is a very new area for writers and publishers alike. Many electronic applications will not be developed for several years or more into the future. Standard rates of compensation have not been established yet. Nonetheless, publishers often try to get these rights at the time the book contract is signed at no additional cost to them. You should resist this effort by reserving your electronic rights until a fair price can be established. Try to have a clause that says that you will transfer specific electronic rights to the publisher upon request on terms and conditions to be negotiated when the publisher is actually ready to produce an electronic product.

d) Things You Should Ask For

1) Reservation of Rights Clause

Do not give the publisher a blanket transfer of all copyright rights in your work, unless you really mean it. To make sure that you preserve all of your rights that you do not intend to transfer to the publisher, use a reservation of rights clause that says something like:

All other rights, including copyright rights, not herein specifically transferred from the Author to the Publisher are reserved exclusively to the Author.

2) No Unauthorized Changes

The contract should provide that there will be no unauthorized changes or omissions in the text or the title without the author's permission. This is a reasonable request. Your name is on the work as the author. It should be your words in the work. But many publishers will not agree to this.

If the publisher will not agree to this, you should at least get an agreement that there will be no substantive changes or changes in literary style without your permission. Publishers will frequently insist on retaining the right to conform your manuscript to the publisher's standard style of punctuation, usage, etc. and to a particular layout style. A compromise that might be acceptable to the publisher is to require the consent of the author for all changes, provided that the author's consent shall not be unreasonably withheld or delayed.

3) Termination Clause

Specify when the publisher will publish your work. The publishing rights should revert back to the author if not published after x time (usually one year after delivery of final manuscript). If the publisher publishes your work but later stops promoting it, you should be entitled to take the work to a different publisher. Specify that after publication, if the work is not available in published form for x time (typically five years, but preferably less), the rights in the work revert to the author.

4) Accounting

You should have a right to have your accountant audit the books of the publisher at least once a year (even though you may actually do an audit much less often if at all). You should normally

pay for the audit, unless you discover that the publisher was underpaying you, in which event the publisher should pay.

5) Attorneys Fees

Include a clause that in the event a dispute ends up in court, the losing party will pay the winning party's attorneys fees. This clause is helpful when one party has money and the other does not. Without this clause, the side that can afford to pay its attorneys usually wins, whether or not that part is in the right.

6) Free Copies

Ask for many free copies of the book or article and the right to buy as many additional copies as you want at the publisher's cost. Never underestimate your demand.

7) Damages and Risk of Loss

If your writing includes unique art work, such as rare and valuable original photographs, you should agree who is assuming the risk in case the work is damaged or destroyed. You should also specify that you have the first right of refusal to make any necessary repairs to the art work (if appropriate).

8) Credits

For most types of written works, the author's credits are fairly standard. But there are some cases, for example a ghost writing situation, where it is important to state how the writers will be listed in the credits related to the work and in certain notices and advertisements about the work. Often these clauses even talk about the size and type style of the credit.

9) Best Efforts

The publisher should be required to use its best efforts to promote the work. This is hard to enforce because different people will have different opinions on what constitutes best efforts to promote a work. But ask for it anyway - if the publisher won't agree to promote it's own product, you should get suspicious. For no good reason, other than tradition, publishers are very reluctant to put this in writing. Try to at least get your editor to write a side letter to you outlining the publisher's marketing plans for your work.

10) Marketing Input

It is reasonable to ask for control or input in marketing decisions over price, design, jacket copy, etc. Publishers should welcome your input. But publishers will rarely, if ever, grant this request.

3. Agents Contracts

Many authors use an agent to help them market their works. Other authors do not. If you agree to have an agent represent you, you should have a written agreement with your agent. Most of the terms of an agent agreement are fairly standard, so there is no need for a long contract. But there should be at least a one or two page letter dealing with the following issues.

a) Termination of the Agreement

Most agents contracts can be terminated at any time by either the agent or the author. To avoid misunderstandings, there should be a requirement that the termination be in writing.

b) Agent's Fees

It is standard practice that the agent will receive a percentage of any fees you receive on works that the agent helped you get published. The fee is almost always either 10% or 15%, and is usually not negotiable. The agent will charge one of those two percentages to all of the agent's clients.

It is also standard that the agent is entitled to his or her percentage even after the relationship has been terminated. Once an agent helps you get a publication, the agent is entitled to a percentage of fees you earn on that work during the entire term of the publication.

There is some variation on what works the agent is entitled to receive a percentage on. Clearly, the agent is entitled to receive a percentage of a work that the agent helped you get published. But what if the agent tried to get a book published but was no help at all. Say the agent shopped your book around all the major publishing houses in New York City and received nothing but rejections. Then you meet an editor at a cocktail party at a writer's conference in Seattle and convince the editor to publish your work. Generally, the agent will expect a percentage from any work the agent has tried to get published, regardless of whether the agent's efforts actually helped. But this is not always the case.

What about books that you publish on your own while you are represented by an agent? Generally, agents will only expect to receive a percentage on particular works that they have tried to get published for you. They will not expect a percentage of a book that they never worked on. But this is not always the case either. Some agents will expect a percentage of every work you get published while the agent is representing you. The agent may feel that the work the agent is doing promoting you and the works that the agent is trying to get published is of such general value to you that it will make it easier for you get other works published as well.

What happens if you terminate your agent, and then some time later you are able to get a work published that your agent had failed to get published for you? Your agent may try to claim he or she is still entitled to a percentage. The agent may have a legitimate claim. It is possible that the agent's earlier efforts actually helped you get the book published. But it is very difficult to determine in any particular case whether the agent really earned a fee. It is better to adopt some simple rule that it is easy to agree on. I recommend that you have a clause that says that the agent is entitled to a percentage if the agent tried to get the work published and you sign a publication contract within six months (or better yet - three months) of the termination of the agent relationship. There is a presumption in this clause that if you receive a publication contract within six months, the agent probably helped get the book published, and if the contract signing takes place more than six months after, then the agent did not help. This will not always be the case. But this clause is simple and easy to administer. Everyone will agree on when six months has passed, while the author and the agent may not agree on whether the agent contributed to getting the work published.

c) Expenses

Agents will often expect the author to reimburse them for certain expenses. Telephone calls, faxes, copies of manuscripts, postage, travel, and business lunches can add up to significant

amounts of money very quickly. Find out if your agent expects you to pay for these and other expenses. Put in writing what expenses you are responsible for. Generally, if the agent is receiving 15%, the agent should pay for most expenses, while agents who charge a 10% commission may expect you to pay for some expenses. Put some control on the expenses. For example, you may want to include a condition that the agent will not spend more than \$100 in any one calendar year for expenses you are responsible for without getting your permissions first in advance.

d) Attorneys Fees

And last, you should put an attorneys fees clause in every major contract you agree to.

4. Collaboration Agreements

If you write something jointly with one or more other people, you should have a collaboration agreement. There are two reasons for such an agreement. First, the agreement is a plan of action. Before undertaking any elaborate project, you should develop a plan of action. And nearly every collaboration becomes an elaborate project. Second, you should plan for the unexpected, such as the possibility that a collaborator will become unwilling or unable to complete the project.

a) The Plan of Action

1. Objective

The plan of action should state what the common objective is. Are you trying to write the greatest novel of the 20th century, no matter how long it takes, and how little it eventually sells. Or are you trying to write a cheap piece of trash that will make you a quick fortune. State the objective in writing and in some detail. Be sure that you are in agreement.

2. Division of Responsibilities

List the responsibilities of each of the collaborators. Be as specific as possible.

3. Copyright Ownership

Determine who will own the copyright in the finished work. If there is no written agreement on this point, the collaborators will jointly own the copyright in the entire work, regardless of which parts each contributed.

Generally the copyright owner has final say over artistic decisions such as editing and deciding who will publish the work, although this can be changed by specific clauses such as those suggested below.

It is possible to divide up the copyright ownership. For example each author could own the copyright in the parts they contributed, while one of the collaborators is designated as the copyright owner of the complete work, as a collection of individually copyrighted works.

4. Licensing of the Work

Determine who has the authority to license the work to others, and just as importantly, who does not have that authority.

5. Division of Proceeds

If you make money on the project, how much money does each collaborator get? Usually this is determined by percentages based on the value of each collaborators' contributions.

6. Credits

Specify how each collaborator is to be credited in the finished work.

7. Expenses

Specify whether collaborators can expect to be reimbursed for their individual expenses.

8. Completion Date

Specify when each task should be finished.

9. Artistic Control

Specify who has the authority to make changes in the final work, including making decisions about which material is to be included in the finished work, and which material is to be left out.

b) Planning for the Unexpected

1. Termination

Specify how a collaborator can quit the project. Usually you will want to specify that if someone quits, the remaining collaborators can continue on with the project. You may want to add detail concerning whether the remaining collaborators can use the material the person created before they quit, and conversely whether the collaborator who quit can use the material that has been generated so far.

2. Survivor's Rights

You should specify what happens if one of the collaborators dies. Generally it is best to let any money that would be owing the deceased to pass to his or her survivors. But artistic control of the project should remain with the surviving collaborators.

3. Option to Purchase

Absent an agreement to the contrary, each collaborator is free to sell their interest in the project. This interest may include artistic control over all or a portion of the project. You may want to include a contract provision that says that if one of the collaborators wants to sell their interest, they must first offer to sell it to the other collaborators.

4. Representations and Warranties

You may want to include a clause where each collaborator warrants and represents that his or her contribution is original.

5. Mediation and Arbitration

You may want to include a provision requiring mediation or arbitration of any disputes that may arise.

6. Attorneys Fees

Remember to put an attorneys fees clause in the contract, just in case.

5. Negotiation

a) Negotiation as a Fact of Life

Conflict is okay, it is a part of life. Do not be afraid of it. But not all negotiation has to be conflict oriented. Often it is geared towards finding a solution that benefits everyone.

A printed contract form can be formidable, but it is negotiable. It is only a first offer, usually a very biased first offer. Even a statement that "this contract is not negotiable" is in fact a first offer, even if a rather severe sounding first offer.

Be confident of your work. If you act like your art is worth something, others will think it is too. If you act like a professional, you will be treated like one.

People sometimes sell themselves short in a negotiation because they place too low a value on their art. Valuing art work is subjective, but try to place a realistic value on your art. One way to do this is to consider your second best alternative, i.e. if this publisher doesn't come through what is the next best alternative.

Recognize that everything is negotiable except perhaps life, death and taxes. You negotiate all the time. Which movie you and a friend will go see is a negotiation. So is haggling over price when buying a car or a stereo or millions of other things you do every day.

b) Negotiation is a Game of Skill

Whether you like it or not, negotiation is a game. There are certain basic skills to this game. They are not complicated to learn. You should be able to master the basic skills in one to two hours of study. But until you take the time to learn the basic skills, you will be at a serious disadvantage when "competing" (i.e. negotiating) against skilled negotiators. This skill consists of learning a number of techniques and tactics. You do not need to learn every technique and tactic. They are all closely related. Once you have learned a number of them, you will be able to deal effectively with any others that are tried on you during a negotiation.

c) Negotiation Techniques and Tactics

i) Before the Negotiation

Prepare Before the Negotiation - don't just think about it a little. Set aside some time. Write down your ideas, bring them with you to the negotiation to refer to (but don't show them to the other side.)

a) Define your objectives:

What do you need, what do you want?

Develop a bottom line. This is especially useful when there is more than one party on your side. But be flexible, be prepared to adapt as new information is learned during the negotiation.

What are your alternatives? (You can always just walk away, and go drive a cab or something. Know beforehand what you would do if you cannot come to agreement, so that you are not irrationally influenced by a failure to come to agreement.)

b) Develop a concession strategy. Which of your demands are you willing to give up, in what order?

What issues you concede and in what order can have a major effect on the negotiations. You may want to make some demands that you do not really care about in order to create issues you can concede on. Identify issues that are not important to you but are very important to the other side. These issues should be exchanged for something that is of high value to you. Develop a strategy to concede consistently small chunks from your position. Making large concessions indicates that there is a lot of excess fat in your demands. Making erratic jumps in the amount of your concessions can confuse the other side and lead to a deadlocked negotiation. During the negotiation, be aware of how much you have conceded and how much you have left to concede. Don't exhaust your reservoir of concessions too early.

c) What are the other side's objectives?

What do you know about the other side? You probably know more than you think.

What don't you know?

Can you find out more before the negotiation?

What do they need, want?

What is their bottom line?

What is their concession strategy?

What are their alternatives?

d) Define your areas of agreement and disagreement with the other side.

e) Assess your relative bargaining power. Your product is a unique work of art. You may have more alternatives than you realize. Don't just answer this one by yourself. You may be too biased because your ego is so wrapped up in your art. Ask other people in your field.

f) Use a friend to role-play the negotiation. Role play it at least twice, taking both sides, first your side, then the other side. Get some idea of what the other person will be thinking.

g) Consider having someone negotiate for you.

h) Try to identify the decision maker on the other side, negotiate directly with that person.

ii) During the Negotiation

The Stages of the Negotiation Process

<u>Stage One</u>	<u>Stage Two</u>	<u>Stage Three</u>
working relationship established	argumentation	crisis reached as deadlock occurs
initial negotiating positions adopted	search for alternative solutions	basic agreement reached
	compromise/ concession making	wrap-up

Recognize competitive versus cooperative styles of negotiation.

Competitive negotiations tend to occur when:

- There is only one thing to bargain for;
- The negotiation is a one time event;
- Power is a major factor.

Cooperative negotiations tend to occur when:

- There is a long-term relationship;
- There are multiple benefits and costs to be exchanged.

Hard: goal is victory maximize settlement distrusting unwilling to share info unfriendly, uncooperative unrealistic opening position extreme demands unyielding willing to stretch facts makes few concessions concessions are small makes up false issues	Soft: goal is agreement get fair settlement trusting willing to share info friendly, cooperative realistic opening position reasonable demands changes position easily honest makes concessions concessions are significant only asks for what is wanted
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When hard meets soft, hard usually wins.

Start with a large demand and be prepared to back off. Generally, higher demands bring higher settlements. If you initially ask for exactly what you want, you will usually end up with something less.

Look for win/win solutions - expanding the pie. When you can find mutual benefit, both sides gain.

Be an active listener.

Use information wisely. Don't give away too much information about your position. For example, don't tell the other side that they are your last hope on earth, even if it's true. On the

other hand, try to get as much information as you can about the other side's position. Your strategy will differ depending on whether the other side really wants you and only you, or is talking to lots of people. Remember that most information exchange happens before the formal negotiation. Whenever you deal with people, keep in mind that you may later be negotiating with them. Try to get information from them that may later be useful to you in a negotiation, while not telling them anything that they can use in a negotiation. In order to gather information for future negotiations you may want to join an Artist's Guild. Try to network with people in your field, this means to talk with other artists and publishers, editors, gallery owners or whatever. Ask questions. Learn how your industry works.

Notice both verbal and non-verbal communications.

Pay attention to physical arrangements. Consider the effect of negotiating on your territory versus the other side's territory versus neutral ground.

It is easier to negotiate on your home turf, and conversely, harder to negotiate on the other side's turf.

If you are sitting in a room, don't let them seat you facing the sun.

Negotiate over objective criteria; avoid subjective criteria.

If there is going to be a written agreement, offer to prepare the first draft. Control of the drafts means control of the negotiation process.

Acknowledge emotions, but do not overreact to them.

Recognize cultural and sexual stereotyping. Be ready to deal with it.

Recognize when the other side is using good guy/bad guy tactics (where one person acts unreasonable and the other person appears reasonable by comparison). Do not let it affect you.

If your objective is not achievable, consider making step by step agreements. (i.e. you want to get your book published, first get them to read it, then get them to publish an abbreviated version in a magazine, then ask for a full scale publication.)

If a negotiation gets stuck:

Take a break; or

Emphasize common goals, areas of agreement; or

Move to another (easier) issue; or

Try redefining the issue; or

Bring in an objective, disinterested third party to facilitate.

Be aware that some people lie. Draw a distinction between lies versus "puffing". There are little lies ("that's all I can afford to pay", when I can actually afford a little more). And there are big lies ("I have two other offers", well, not really).

iii) After the Negotiation is Over

Make sure you agree on what was agreed on.

If the negotiation was over something important, put the agreement in writing. Even if it doesn't seem important now, you may need it later. You don't always need a 30 page contract. Try

to at least have a short letter of general understanding. Often it is enough to write a confirming letter (It is my understanding from our negotiation that we agreed to . . .). You may want to write a confirming letter even for small things like when a deadline has been extended for a contest entry.

6. Save Your Future

Realistically, most people will give away a lot to get their work in print. Have faith in yourself, do not give away the future. Look for clauses in contracts that grant the publisher an unrestricted option on your future works. Avoid these at all costs. It may make sense to grant the publisher an option to match other offers on your future works, or to discuss in general terms working together in the future. But do not agree to sell your future works on the same terms and for the same price as your present work.

7. Learning More

At any given time there are many good books available on legal issues for writers. However, they tend to go out of print quickly. Over the years, I have found the following books useful. Some of them are out-of-print, but worth tracking down if you can find them.

a) Legal Rights Generally

Writer's Legal Guide: An Authors Guild Desk Reference, Tad Crawford Kay Murray, Allworth Press, 3rd edition, 2002.

The Law (in Plain English) for Writers, 2nd Edition, Leonard D. Duboff, John Wiley & Sons, 1992. (out of print)

Law and the Writer, Edited by Kirk Polking and Leonard S. Meranus, Third Edition, 1985, Writer's Digest Books, Cincinnati, Ohio. (out of print)

The Writer's Legal and Business Guide, Compiled and Edited by Norman Beil, Beverly Hills Bar Association Barristers Committee for the Arts, Arco Publishing, Inc., New York, 1984. (out of print)

b) Contracts

An excellent source for what a book contract should look like is "The Authors Guild Model Book Contract", available to members only from the Authors Guild, 31 E 28th St, 10th Floor, New York, N.Y. 10016-7923, (212) 563-5904, fax: (212) 564-5363, www.authorsguild.org, staff@authorsguild.org. Membership is on a sliding scale and is open to published authors only.

Another good source is the National Writers Union. They have two offices. National Office West, Oakland, CA, 510 839-0110, fax: 510 839-6097. And National Office East, New York, NY 10003, 212 254-0279, fax: 212 254-0673. They can also be reached on the Internet at nwu@nwu.org and <http://www.nwu.org/>.

c) Negotiation

Getting to Yes, Negotiating Agreement Without Giving In, 2nd Edition, by Roger Fisher and William Ury, Penguin USA (Paper), 1991.

This book is light reading. It is also short. But it does cover all of the basics of negotiation. As a result it is a good general introduction for everyone.

You Can Negotiate Anything, by Herb Cohen, Bantam Books, 1981.

This book is one long pep talk. If you have trouble asserting your rights, this book is for you.

d) Putting It All Together - Getting Published

How to Be Your Own Literary Agent, The Business of Getting Your Book Published, Richard Curtis, Houghton Mifflin Company, Boston, 1996.

Lit Biz 101: How to Get Happily, Successfully Published, Ray Mungo, Dell Publishing, New York, 1988. (out-of-print)

e) Finding a Lawyer

Many states have an organization of lawyers committed to helping artists. There are two active organizations in the Northwest:

Washington Lawyers for the Arts (WLA), Seattle, WA. (206) 328-7053, <http://www.thewla.org/>. This organization sponsors talks and offers publications (including this one) on legal topics of interest to artists.

Northwest Lawyers and Artists (Oregon Lawyers for the Arts), <http://www.budget.net/~nwla/index.html>. This organization sponsors talks on legal topics of interest to artists. Please call the Oregon Bar Association for lawyer referrals. Call the Northwest Lawyers & Artists to arrange for speakers only.

Most states and counties have bar associations which sponsor lawyer referral services. For example, in Washington, four county bar associations have lawyer referral services: King County (206) 623-2551; Lewis County (206) 748-9121; Pierce County (206) (206) 383-3432; and Spokane County (509) 456-6032. The Washington State Bar Association runs a lawyer referral service for people located outside of these four counties, (800) 552-0787. In Oregon, the State Bar Association has a special referral service for artists, (503) 620-0222.

1. Other Publications by this Author

The following publications are available for free download at the Law Offices of Gary Marshall website on the resources page at <http://www.marshallcomputer.com/resources.html>.

Publications for Entrepreneurs

[Top Ten Legal Mistakes Entrepreneurs Make \(and how to avoid them\)](#) (pdf file): Advice on how to avoid the most common legal mistakes that entrepreneurs make when starting and growing a business.

[Intellectual Property \(IP\) Licensing Agreements Top Ten](#) (pdf file): The ten most important factors you should keep in mind when drafting licensing agreements.

[Legal Issues for Online Sellers](#) (pdf file): An overview of the legal issues you need to be aware of as an online seller.

[Legal Issues for Online Publishers](#) (pdf file): An overview of the legal issues you need to be aware of as an online publisher.

Publications for Artists

[Copyright Basics](#) (pdf file): A brief overview of Copyright law - the basic form of legal protection for most artistic works, including maximizing protection for your works, copying someone's else's works, recent changes in copyright law and the impact of the Internet.

[Dangerous Talk: Speech and the Law](#) (pdf file): A basic overview of speech law, including the ongoing battle between the constitutional protections of First Amendment Free Speech and Freedom of the Press versus restrictions on criminal and obscene speech, personal liability for harmful effects of speech, defamation (libel and slander), and rights of privacy and publicity, and how this balance is changing in the post September 11th world.

[Publication and other Literary Contracts](#) (pdf file): An overview of publication contracts and agent agreements, including what to ask for and what to look out for. Also covers the basics of simple contracts you should be writing in the course of the ordinary day-to-day business of being a writer.

[Electronic Rights and the Writer](#) (pdf file): A guide to the ever changing world of electronic rights for writers. The Publishing Market is increasingly turning to electronic distribution on the Internet, computers, E-books, cell phones, iPads and other types of mobile electronic devices. In a way this is the new wild west for writers. Because it is a market that is expanding rapidly and changing all the time, the rules regarding electronic rights are also changing all the time.

Also check out Gary Marshall's Technology Law Blog at <http://marshall2law.com/>.

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