

Exclusive Gallery and Publishing Agreements: US Precedent and Commentary

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The following hypothetical Exclusive Gallery and Publishing Agreement was drafted especially for this article, to present an interesting array of problematic issues. As explained in the commentary accompanying major provisions of the agreement, from the artist's perspective many of the terms are unusual, onerous and overreaching. From the gallery's perspective the agreement contemplates substantial, guaranteed payments continuing over a long period of time. In return, the gallery demands prolific output, sweeping rights and the artist's total exclusivity and dedication. In actual practice, the use of such a one-sided agreement is not encouraged or endorsed by the author.

The text of the hypothetical Exclusive Gallery and Publishing Agreement, with commentary, follows. The commentary is set in a different typeface.

THIS AGREEMENT

IS MADE THIS _____ DAY OF _____, 199____
BETWEEN _____ (HEREINAFTER REFERRED TO AS 'GALLERY')
AND _____ (HEREINAFTER REFERRED TO AS 'ARTIST').

1. Term

The initial term of this Agreement shall be for two (2) years, (the 'Initial Term') with three (3) consecutive one (1) year options. The Initial Term shall commence on the date of execution hereof. The Agreement is automatically renewed for each option year unless Gallery notifies Artist in writing of Gallery's desire to terminate the Agreement. Gallery's notice shall be given to Artist prior to the expiration of the end of the second year of the Initial Term, or prior to the expiration of each option year.

From the gallery's perspective, it is desirable to have a unilateral option to extend the term of the agreement for as long as possible, having the choice of dropping the artist after the initial term if his or her work is not selling well, or keeping the artist tied to the agreement if the gallery is profiting in the relationship. From the artist's perspective, it is preferable for any option to extend the term of the agreement to be mutual, requiring the consent of both parties. Ideally for the artist, the agreement should be terminable for any reason on 30-days written

notice to the gallery. At a minimum, the artist should have an express right to terminate the agreement if the gallery fails to pay the artist on time, or breaches the agreement (see paragraph 14 below), or if the artist's income from the gallery's activities does not meet a specified minimum.

2. Exclusivity

Artist hereby designates and appoints Gallery as Artist's exclusive dealer, throughout the universe during the term of this Agreement, and any extensions thereof, to offer for sale and authorize others to offer for sale all of Artist's two or three dimensional works, (including, without limitation, original paintings, watercolors, drawings, sculptures, posters, lithographs, etchings, serigraphs, photographic works, as well as all works in analog, digital or electronic media including video, CD-ROM, CD-Interactive, or any other medium now known or hereafter devised, heretofore created or hereafter created by Artist during the term hereof and any extensions thereof, including commissioned works created during the term hereof.

The gallery's intention here is to acquire total exclusive control over the sale of artist's original works during the term in any medium whatsoever, including resale of pre-existing works and commissioned works. From the artist's perspective, it is often desirable to exclude certain works, such as commissioned works, pre-existing works, studio sales and sales to the artist's pre-existing house accounts, from the scope of the gallery's exclusive rights, or to exclude media in which the artist has not previously worked, or where the artist has ongoing channels of commercial distribution.

2.1 During the term of this Agreement, Artist hereby appoints Gallery as the exclusive publisher of Artist's work throughout the universe to produce, sell and otherwise market fine art limited editions, poster editions, sculpture editions, and other forms of Artist's work as Gallery may decide to publish in its sole discretion.

2.2 During the term of this Agreement, Artist agrees not to perform any services as an Artist for compensation other than pursuant to this Agreement, nor to enter into any agreements with others for the use of Artist's name, likeness, signature, or other identification for the reproduction, marketing, sale, or other disposition of artwork, without the written consent of Gallery.

In addition to having the exclusive rights to control the sale of the artist's work, the gallery will also serve as the artist's exclusive publisher of fine print multiples as well

as poster editions. From the artist's perspective, it is unfair to grant exclusive publishing rights to the gallery without a firm commitment from the gallery to publish a guaranteed minimum of editions. (See paragraph 3.7 below.) The artist should also exclude from this limitation any pre-existing licences to use the artist's name, any licences granted to charitable institutions, or other exceptions requested by the artist.

3. Gallery's Duties

Gallery shall pay Artist fifty percent (50%) of the retail or wholesale selling price of all original paintings, whether watercolor, oil, acrylic, or otherwise, and drawings, except as otherwise agreed to herein. The fifty percent (50%) profit split shall be applied toward all paintings and drawings after twenty-four (24) original paintings no smaller than 36 × 48-inches are selected by Gallery and purchased by Gallery for the sum of _____ dollars (\$_____) each, totaling a guaranteed draw of _____ dollars (\$_____) per month. (See paragraph 5 below). Gallery has the option to select any twenty-four (24) original paintings no smaller than 36 × 48-inches out of a guaranteed minimum of fifty (50) originals to be delivered to Gallery during each twelve (12) month period of the Agreement including option years. Oil paintings, watercolors or drawings or other original non-sculptural works sold other than the twenty-four (24) paintings selected by Gallery each year of the Agreement shall be sold by Gallery, and the net selling price shall be split fifty percent (50%) to Gallery and fifty percent (50%) to Artist.

This is the real heart of this 'output' contract. The gallery receives the right to choose 24 large original paintings out of a minimum of 50 that must be created by the artist during each year of the agreement. The gallery owns these paintings outright and may sell or dispose of them without sharing any of the profits with the artist. In return, the artist is paid a guaranteed draw each month. On sales of the remaining 26 paintings, after the gallery has deducted its framing charges and promotion and advertising fees (see paragraphs 3.1, 3.2 below), the artist and gallery split proceeds 50/50. From the artist's perspective, 50 large paintings per year is an overwhelming burden that few artists could satisfy, regardless of how much money they are paid, especially in light of the additional work required of the artist in connection with published works described below. A more reasonable annual output would be 20 to 30 paintings. Also, the promise of a 50/50 split is deceptive; after deducting the gallery's additional charges, the artist's real share is considerably less than 40%.

3.1. Gallery shall frame all original artwork at Gallery's own expense and Gallery shall be entitled to deduct two times the actual cost of framing before calculating Artist's share of the net selling price.

From the artist's perspective, two times the framing costs is excessive. From the gallery's perspective, doubling framing costs is a good way to recoup expenses involved in arranging for framing. Framing style and costs should be mutually agreed on prior to framing.

3.2. Gallery shall be entitled to deduct a ten percent (10%) promotion and advertising fee from the net selling price of any paintings sold by Gallery before calculating Artist's share of the net selling price.

From the gallery's perspective, an additional 10% deduction helps defray the gallery's overheads. From the artist's perspective, this additional 10% deduction is unfair 'double dipping', giving the gallery an extra 10% for expenses that should be part of the gallery's normal overheads. If there is an agreement to deduct 10%, the artist should be given an annual statement about where the money was spent; and add a contract provision ensuring that any money deducted is actually spent directly on the artist's behalf.

3.3. All funds received that are due to Artist will be held in trust by the Gallery for the benefit of Artist and remitted to Artist every ninety (90) days together with a full accounting.

The gallery agrees to hold proceeds from sales of the artist's work in trust for the artist and to account for and pay the artist's share every 90 days, or quarterly, rather than twice a year. The creation of an express trust helps guarantee the artist's receipt of his or her money, even if the gallery goes bankrupt. Trust funds are usually exempt from claims of the gallery's creditors, and federal bankruptcy judges accord greater respect to express trusts, than to state law created trusts for consigned artwork, such as contained in the civil laws of many states.

3.4. Unless otherwise agreed to herein, Gallery shall adequately insure all original artwork created by Artist and delivered to Gallery at all times once received by Gallery. Gallery shall pay for all transportation charges relating to the delivery and/or shipping of original artwork of Artist unless otherwise agreed to between Artist and Gallery.

The gallery agrees to insure all work at its own expense and pay for all shipping costs. These important cost factors are often overlooked in gallery agreements. The gallery should assume the risk of damage, loss or destruction of any work.

3.5. Gallery shall receive fifty percent (50%) of the selling price of any commissioned or portrait artwork and Artist shall receive fifty percent (50%) of the selling price of commissioned artwork, less the specific deductions for promotion and framing set forth above.

From the gallery's perspective, receiving over 60% of fees paid for commissioned works is a tidy windfall. From the artist's perspective, the gallery's deducting two times framing charges (regardless of whether or not the work is actually framed) and an additional 10% is unfair and excessive.

3.6. Gallery shall use its best efforts to market, promote, advertise and sell Artist's artwork created during the Initial Term and option terms of this Agreement, as well as any works previously created by Artist. All marketing and promotional expenses relating to Artist, including exhibitions, gallery shows, art fairs and expos, will be paid by Gallery unless otherwise provided in this Agreement. All marketing and promotion decisions in relation to Artist shall be at the sole discretion of Gallery. Gallery agrees to mount no less than one 'solo' show for Artist at Gallery's _____ location during each year of the Agreement.

From the gallery's perspective, this provision prevents the artist from demanding extravagant promotion, advertising or numerous exhibitions. From the artist's perspective, the gallery should be committed to definite promotional activities (especially if the gallery is

receiving a 10% surcharge for promotion and advertising), such as display advertisements in national art magazines, displays at national and international art fairs and expos, at least one solo exhibition at a desirable location during each six- or twelve-month period, ongoing display of the artist's work at the gallery, and creation of one or more full colour brochures featuring the artist's work during each year.

3.7. Gallery shall publish at least _____ serigraphic editions during the first year of this Agreement, and at least _____ serigraphic editions during the second year of this Agreement. Gallery shall publish a minimum of _____ serigraphic editions during the third, fourth and fifth years of the Agreement. Gallery may publish as many serigraphic or other editions as it so elects, as long as it satisfies the minimum requirements of this paragraph. The selection of the images for said serigraphic editions shall be at Gallery's sole discretion after consultation with Artist, and said selections shall be taken from original artwork created by Artist during the term of this Agreement or may be selected from artwork created by Artist prior to the execution of this Agreement.

3.8. The edition size (*tirage*) of the serigraphic editions to be published by Gallery shall consist of _____ pieces, broken down as follows:

3.8.1. _____ prints arabic numbered _____ - _____ inclusive, which shall be the property of Gallery, subject to the payment provisions set forth in paragraph 4.1 below;

3.8.2. _____ prints arabic numbered _____ - _____ with Remarque, said prints being the property of Gallery subject to the payments to Artist set forth below. Remarques shall be pencil drawings created by Artist on each of the above _____ serigraphs;

3.8.3. _____ Artist's Proofs Prints arabic numbered AP _____ - _____ inclusive, said Prints being the property of Artist and being delivered to Artist upon Artist's completed signing of each edition; further, Artist agrees that Artist shall not sell or offer to sell any such Artist's Proofs directly or indirectly to anyone for a period of thirty-six (36) months after delivery of said Artist's Proofs to Artist; provided, however, Artist may sell Artist's Proofs to Gallery at an agreed upon price, and Artist may give gifts of Artist's Proofs without restriction;

3.8.4. _____ Publisher's copies arabic numbered PC _____ - _____ inclusive, said copies being the property of Gallery;

3.8.5. _____ Printer's Proofs, arabic numbered pp. _____ - _____ inclusive, that shall be the property of the Printer;

3.8.6. _____ Washes that are unnumbered and that are painted over entirely on finished or unfinished prints from each edition, in acrylic or oil, that are than mounted on board and sold as Washes. Each Wash shall be signed and dated by Artist. Each Wash shall be of slightly different colors, and are the sole property of Gallery;

3.8.7. _____ Prints roman numbered _____ - _____ inclusive, printed on black paper and signed and numbered on the image with a paint brush;

3.8.8. Total *Tirage*: _____; Pieces on white paper: _____; Deluxe Remarques: _____; Artist's Proofs: _____; Publisher's copies: _____; Printer's Proofs: _____; Pieces printed on black paper: _____; Washes not numbered: _____; Total edition size: _____ pieces, signed and numbered, plus ten (10) Washes.

3.9. It is understood and agreed between the parties that there may be up to ten (10) dedicated Proofs in each above-stated edition, but only if requested by Gallery. These pieces are not for sale and can be used only for promotional purposes. All other pieces in the *tirage* of an edition may be sold by the party having ownership, subject to the provisions of this paragraph.

The gallery agrees to publish a minimum number of serigraphic editions each year, including prints, proofs, Remarques and washes as well as prints on coloured paper. From the gallery's perspective, having a huge inventory of a variety of types of prints and proofs ranging from deluxe editions at the high end to poster prints at the low end, permits the gallery to offer the artist's work at a wide range of prices. Having differently numbered editions in roman or arabic numerals for example, and several types of proofs can enhance collectors' perceptions of scarcity, justifying higher sales prices. Such practices can also be used to deceive collectors. Ethical publishers and artists will usually not authorise releasing a total number of proofs exceeding 10% of an edition. From the artist's perspective, creating washes and remarques, supervising quality printing and signing of what can easily amount to 500 prints in an edition, is vastly time-consuming, intensive hard work. Although the artist receives a certain number of artist's proofs as part of the bargain (sometimes called 'H/C' proofs, from the French 'hors commerce'), to avoid the artist competing with the gallery for sales, it is typical for the gallery to demand an 18- to 36-month holdback period dating from the gallery's first release of the work, during which the artist may not sell such proofs.

It should also be noted that under the terms of this agreement, the artist receives no additional compensation for any of the original works created as remarques or washes and the majority of the artist's compensation is not paid until after all pieces have been completed and signed (see paragraph 4.2 below). In some agreements the artist receives the first ten numbered prints of each edition, and the right to contract with a different publisher as to images not selected by the gallery for fine print editions within one year. The artist should also have the right to supervise the printing process and reject any prints that are defective or inferior in colour, register, or any other respect, in the artist's sole discretion.

4. Artist's Compensation

Subject to compliance by the Artist with the terms and conditions of this Agreement, Gallery shall pay Artist the sum of _____ dollars (\$_____) per month on the first day of each month for the first two (2) years of this Agreement. In option years three (3) and four (4) Gallery shall pay Artist the sum of _____ dollars (\$_____) per month on the first day of each month, and in option year five (5) Gallery shall pay Artist _____ dollars (\$_____) per month on the first day of each month. All said monthly payments by Gallery to Artist pursuant to this paragraph 4 correspond to the delivery by Artist to

Gallery of two (2) original large paintings of the minimum of four (4) paintings to be delivered each month pursuant to paragraph 5 at prices paid to Artist of _____ dollars (\$_____) per painting for the first two (2) years of the Agreement, _____ dollars (\$_____) per painting for the first two (2) option years of the Agreement (years three (3) and four (4) of the Agreement), and _____ dollars (\$_____) per painting for the last option year (year five (5)) of the Agreement. As more fully described in paragraphs 4.3 and 4.5 below, it is Gallery's responsibility to pay Artist for twenty-four (24), of at least fifty (50) paintings delivered to Gallery in this method of monthly payments.

Artist receives a draw increasing yearly over the term of the contract.

4.1. Gallery shall pay Artist the sum of _____ dollars (\$_____) for each serigraphic edition produced and signed in full by Artist for the first two (2) years of this Agreement subject to Gallery's recouping any advances paid to Artist pursuant to paragraph 4.7 below. In year number three (3) (the first option year), Gallery shall pay Artist _____ dollars (\$_____) per edition. In years number four (4) and five (5) (the second and third option years), Gallery shall pay Artist _____ dollars (\$_____) per edition.

From the gallery's perspective, paying the artist a lump sum increasing yearly over the term of the agreement may be preferable to sharing royalties on sales of prints. From the artist's perspective, agreeing to accept a lump sum for serigraphic editions should be weighed against the possible income the artist could earn from a 20 to 75% royalty. An escalating royalty combined with a minimum guarantee lump sum payment schedule is probably the best arrangement for the artist.

4.2. For each edition published, Gallery shall pay Artist twenty-five percent (25%) of the agreed edition signing fee once the Atelier has been selected and Gallery submits the physical painting to that Atelier. Upon the completion of each edition by Gallery and upon the completion by the Artist of signing and numbering of each edition piece, as well as the completion of the ten (10) Washes, Gallery shall pay Artist in full the balance owed on each edition, or seventy-five percent (75%) of Artist's fee.

From the gallery's perspective, holding back a significant percentage of the artist's fee is a type of insurance, helping to guarantee the artist's timely signing and delivering all prints and completion of all washes and other materials, especially in the light of the onerous burdens imposed on the artist under the terms of the agreement. Unsigned proofs have little or no value to the gallery. From the artist's perspective, a 75% holdback may be totally unacceptable and punitive, indicating a lack of trust between the parties and might create a cash flow hardship for the artist, amounting to something akin to indentured servitude.

4.3. Artist shall receive his twenty-five (25) Artist's Proofs as further compensation for signing a completed edition on the same day as Artist completes his signing of an edition, unless the parties otherwise agree in writing.

4.4. Gallery shall collect a fifty percent (50%) deposit on all commissioned work and fifty percent (50%) of that amount will be paid to Artist before the work begins, subject to the terms and conditions set forth below.

Specially commissioned works, particularly those received from the artist's pre-existing clients, are exactly the type of works that are often excluded from exclusive agreements such as this. In any event, the artist should not have to advance the cost of materials on commissioned works.

4.5. All expenses and costs incurred for the production, copyrighting, handling, advertising, insurance, marketing, storage, shipping, selling, accounting and legal expenses relating to the publishing of fine print editions under this Agreement shall be the sole responsibility of Gallery unless otherwise provided in this Agreement.

In agreements where the artist receives a 20 to 75% royalty on sales of each print, the gallery commonly has the right to recoup its production costs before paying royalties to the artist. In this agreement, however, where no royalty is paid, the gallery's deducting production costs would be unfair.

4.6. Subject to compliance by the Artist with the terms and conditions hereof, Gallery guarantees a minimum total payment to Artist of _____ dollars (\$_____) for the first two (2) years of this Agreement. This amount does not include Artist's share of profits from the sale of the additional twenty-six (26) paintings per year that Artist has agreed to deliver to Gallery during the term of this Agreement and as set forth in paragraph 3 above. The guaranteed minimum of _____ dollars (\$_____) for the first two (2) years or Initial Term of this Agreement does not include signing fees for Artist's Proofs received by Artist as compensation for Gallery's publishing of the serigraphic editions over and above the minimum of five (5) serigraphic editions for the first two (2) years as set forth in paragraph 3 above.

For both the gallery's and the artist's financial planning, it may be desirable to have a definite minimum guaranteed payment. In this agreement, signing fees for serigraphic editions during only the first and second years are included in this guarantee.

4.7. Gallery shall pay Artist a nonreturnable, recoupable advance of _____ dollars (\$_____) upon signing of this Agreement. Said advance shall be recouped by Gallery from fees for the first serigraphic edition published by Gallery during the first year of this Agreement.

A non-returnable, recoupable advance may be appropriate in an exclusive agreement. From the artist's perspective, it is reasonable to request the advance paid by the gallery be non-recoupable; more of a signing bonus than an advance. From the gallery's perspective, it may be preferable to pay the advance in two installments: half on execution of the agreement, half when the image is selected for publication.

4.8. Artist shall be entitled to compensation equal to ten percent (10%) of all net profits generated by Gallery or its assignees in connection with Artist's works if Gallery exercises any of the rights set forth in paragraph 11.1 below after termination of the Agreement. This does not relate to sales of editions created during the term of this Agreement that are sold after the Agreement is terminated.

This provision relates to a later paragraph (11.1) wherein the artist grants all copyrights to the gallery in any work created during the term of the agreement. Not only is the assignment of the artist's copyright unusual

and unfair, the payment of a meagre 10% royalty is an outrageously low price to pay for the granting of such valuable rights. In a rare instance where this provision is agreed to by an artist, the artist should limit its scope to apply to only one or two selected images; the gallery's share would normally not exceed 50% and could be as low as 5%.

4.9. If an original work is chosen to be the subject of a serigraphic edition, and if at the time said original is selected it has not yet been sold to Gallery or to a third party, then Gallery agrees to share in the eventual sale of said original on a 50/50 basis with Artist as provided in paragraph 3 above. If Gallery has already purchased said original as one of the guaranteed works, then Gallery shall pay an additional _____ dollars (\$_____) to Artist upon the selection of such piece as an edition to be published.

5. Artist's Duties

Artist shall deliver to Gallery during each year of this Agreement a minimum of fifty (50) original paintings (size 36 × 48-inches or larger) painted in either oil or acrylic or both. Artist shall deliver to Gallery no less than four (4) paintings per month during the Initial Term and any option years of this Agreement.

As stated previously, this is an enormous commitment for any artist regardless of how prolific he or she may be. A greedy gallery may 'kill the golden goose' by drafting an agreement that forces the artist to create a large body of work that is mediocre, diminishing the value of all of the artist's previous and subsequent works.

5.1. Artist agrees to sign all artwork, both original and multiples, pursuant to the terms of this Agreement. Specifically, Artist agrees to sign each and every serigraphic edition piece in the *tirage* of each serigraphic edition and agrees to sign a Certificate of Authenticity for each piece in the *tirage* of each edition published by Gallery pursuant to this Agreement within five (5) working days of the completion of each serigraphic edition, unless otherwise agreed to in writing by Artist and Gallery. Further, Artist agrees to sign each Wash created in conjunction with each serigraphic edition. Artist understands and agrees that Artist's failure to sign the completed works shall be a material breach of this Agreement, which breach shall cause Gallery damages which are unique, unusual, irreparable and not readily calculable in nature, and shall entitle Gallery to Injunctive Relief against Artist if Artist does not cure such breach within five (5) days of receiving written notice from Gallery. The Injunctive Relief sought by Gallery will restrain Artist or anyone acting on Artist's behalf from selling, delivering or furnishing to, or completing, exhibiting, publicizing or signing Artist's paintings, watercolors, drawings, graphic works, sculptural works by, any other works to any person or firm other than Gallery until the terms of this Agreement are fulfilled by Artist or Artist's breach has been cured. Further, no bond shall be required for such Injunctive Relief. If any court or law requires a bond to be posted, then the parties agree that a minimum amount for a bond shall be acceptable.

As discussed in regard to paragraph 4.2 above, from the gallery's perspective, it is crucial to ensure the artist's signing of all multiples without delay. Unsigned

multiples have little if any value to the gallery. Recitations that the gallery's damages in such event would be irreparable and not readily calculable are intended to strengthen the gallery's case if a court order is sought to restrain the artist from selling art to anyone else while the artist is in breach. From the artist's perspective, in rare cases, obtaining injunctive relief may be warranted, but the strict scrutiny applied by courts to applications for injunctions provides some built-in protection for the artist. The waiver of the gallery's duty to post a bond in such event, however, is unfair and the artist or the artist's representative should request this provision be deleted.

5.2. Artist agrees to make up to six (6) personal appearances per year upon Gallery's request upon reasonable notice to Artist. Artist's airfare and reasonable accommodations will be paid for by Gallery.

If the artist has sufficient bargaining leverage, first-class travel and lodging should be requested. A reasonable *per diem* expense allowance, ground transportation and even the use of a telephone credit card or cellular phone are not unusual courtesies extended to soften the discomfort of promotional travel. A limit on the number of total days spent out of town is also a reasonable request.

5.3. Artist warrants that all artwork created by Artist hereunder shall be the original work of Artist and shall not infringe upon any copyright or any other right of any person or entity. Artist further warrants that Artist is under no obligation, agreement or disability as to any other person or entity to provide any services covered in this Agreement. If a copyright infringement action is brought against Gallery by some person or entity claiming copyright ownership of any work which is the subject of this Agreement, Artist shall indemnify and hold Gallery harmless from any and all costs, attorney's fees and/or judgments resulting from any such action.

Warranties of originality and an indemnity clause by which the artist agrees to pay for any damages to the gallery resulting from the artist's breach (including attorney's fees) is standard and reasonable. From the gallery's perspective, the indemnity could be broader than stated here, covering all claims in the generic sense, rather than just copyright infringement actions. From the artist's perspective, not only should the indemnity be drawn as narrowly as possible, applying only to claims reduced to non-appealable judgments, for example, but should be made mutual, that is, the gallery should likewise indemnify the artist from any claims resulting from the gallery's wrongful acts or omissions.

6. Pricing of Artworks

Gallery shall use its best efforts to sell the original works and serigraphic editions or any other fine prints created under this Agreement. It is understood that all marketing decisions shall be in the sole discretion of Gallery, including without limitation the pricing of any prints in editions created hereunder, with due regard to prevailing market conditions. Further, the pricing of all original works shall be at the sole discretion of Gallery although Gallery may, from time to time, consult with Artist concerning the pricing of original paintings. Artist expressly understands and agrees that Gallery may sell original and graphic works at both wholesale and retail prices.

Price of works is often a disputed issue between artists and galleries. Objective guidelines such as minimum and maximum prices for certain types of works can help ameliorate disagreements between the parties that arise when the gallery's marketing discretion collides with the artist's valuation of a particular work.

7. Advertising and Publicity

In accordance with paragraph 3.6 above, the form and content of any advertising or promotion, including without limitation, the design, printing and dissemination of promotional and publicity materials with respect to the sale of Artist's artworks hereunder shall be determined in Gallery's sole discretion. Artist agrees to supply Gallery with a photograph of Artist and Artist hereby authorizes Gallery to use Artist's name, biographical material and likeness in any advertising material developed by Gallery to promote the sale of Artist's works purchased or published during the term of this Agreement.

From the gallery's perspective, advertising expenses can be enormous. Four-colour exhibition announcements and national magazine display advertisements can cost thousands of dollars and yield negligible results in terms of art sold. For some artists, no amount of advertising or publicity is enough. From the artist's perspective, in an exclusive contract such as this, the artist is entirely dependent on the gallery's sales efforts. Definite, objective advertising and promotion activities should be discussed, agreed upon and spelled out in the agreement. Full-colour announcements, mailings to the gallery's and the artist's mailing lists, commitments to one-quarter, one-half or full-page display ads in prestigious art publications, and colour brochures featuring the artist's work, are fair and legitimate requests. Further, the artist should reserve the right to approve the artist's photograph or biographical material contained in any publicity or advertising arranged by the gallery.

8. Sculptures

All projects relating to sculptures shall be agreed to in writing separate from this Agreement between Artist and Gallery. It is agreed that all sculptures shall be published and sold exclusively through Gallery unless otherwise agreed to between Artist and Gallery in writing.

An agreement to agree is unenforceable and invalid. If the gallery plans to deal in sculptural or other works, at a minimum, the artist's share of income from such sales should be specified in this agreement.

9. Commissioned Monumental Works

If Artist produces a major, monumental mural or sculpture, fifty percent (50%) of the selling price or commission price shall be retained by Artist and fifty percent (50%) shall be retained by Gallery. The profit split will occur after all expenses relating to travel, production and sale of such work are deducted from the net selling price.

From the gallery's perspective, commissioning monumental work is fair and reasonable, since such works are time-consuming and may interfere with the artist's delivery of painting and prints. From the artist's perspective, the artist is bound to deliver a minimum number of paintings and prints, therefore the gallery should not be permitted to commission such special works. The second sentence here is too vague. What happens

to the expenses for travel, production and sale? Do they go to the artist or the gallery? This should be specified with greater certainty.

10. Poster Editions

During the term of this Agreement or any extensions thereof, Gallery shall be entitled to create two (2) poster editions per year. These poster editions when produced shall be the sole property of Gallery, however, Gallery shall give Artist one hundred (100) posters as compensation for each poster edition.

From the gallery's perspective, poster editions create more visibility for the artist and may encourage sales of the artist's more expensive pieces. It is not unreasonable for the artist to be requested to sign a reasonable number of posters. From the artist's perspective, if posters are truly to be used merely for promotional purposes, the gallery should be prohibited from selling posters unless the artist is paid a fair royalty.

11. Copyrights

Artist hereby agrees to affix a proper notice of copyright on each and every original work created by Artist under the terms of this Agreement.

Since the United States joined the Berne International Copyright Convention on 1 March 1989, copyright notice is no longer required to protect US copyrights. However, affixing a proper copyright notice is nevertheless highly desirable to discourage unauthorised reproduction and to give notice to the world of the name of the copyright owner. In nearly every case the copyright owner will be the artist. Rare exceptions exist however. (See paragraph 11.1 below.)

11.1. Artist hereby expressly grants an assignment of copyright in each and every original work produced for Gallery under the terms of this Agreement or sold or consigned to Gallery by Artist under the terms of this Agreement. Said assignment of copyright in each and every original work to Gallery does hereby irrevocably assign, set over and transfer to Gallery, in perpetuity, any and all right, title or interest, including the sole exclusive rights comprised in copyright, which Artist may have or claim in or to any of the original works described herein. These rights conveyed to Gallery include but are not limited to the sole and exclusive right to file, claim or renew any copyrights relating thereto, to grant licenses relating thereto, to collect and retain royalties, fees or other payments generated thereby, to copy and produce 'copies' of any or all of said works of art at any time by any means in any media, to create different versions thereof at any time by any means and in any media, and to create collective works, compilations and derivative works therefrom at any time by any means and in any media.

From the artist's perspective, this provision is unusual, unfair and overreaching, and should be deleted. Copyright ownership of the artist's original works (including the right to create reproductions thereof) usually lasts for the life of the artist plus 50 years. For many artists this is a valuable legacy to be passed on to surviving spouses, children and heirs. From the perspective of most artists, the forfeiture of the artist's copyrights is beyond the bounds of reasonableness, and would be grounds for refusing to sign the agreement. In certain rare cases, however, it may be

reasonable for a gallery to acquire a perpetual licence to specified images embodied in one or two serigraphic editions, or even an assignment of copyright in one or two images, but only in highly unusual instances. Such assignments, of course, may be terminated by the artist or by the artist's surviving spouse or children after 35 years pursuant to US copyright law, and the copyright thereupon will revert to the artist or said heirs.

11.2. For each and every serigraphic edition or other fine art limited edition published by Gallery under the terms of this Agreement, Gallery agrees to register the copyright in Gallery's name. Further, Gallery shall affix a copyright notice in Gallery's name on all limited editions, poster editions, brochures, advertising material and other reproductions of Artist's images.

Although not a prerequisite to copyright protection, copyright registration entitles the copyright owner to statutory damages and attorney's fees if the registration occurs prior to infringement or within three months of first publication of a work. For this reason, regardless of who owns the copyright, it should be registered with the US Copyright Office before copies are sold, offered for sale, or otherwise offered or distributed to the public.

11.3. Artist understands and agrees that the copyrights granted hereunder comprise community property. Artist's spouse _____ hereby grants to Gallery all right, title and interest in and to any community property interest he/she may have in any copyright granted hereunder. Artist's spouse shall indicate his/her consent to said grant of community property by signing a copy of this Agreement in the space provided below.

In community property states such as California, copyrights, like other personal property earned or acquired during the term of a marriage, are considered community property. From the gallery's perspective, out of an abundance of caution, it is prudent to have an artist's spouse join in any assignment of copyrights.

11.4. Artist may desire to create a book of Artist's collected works at some time after the expiration of this Agreement. Consequently, and only for the express purposes of creating a book of Artist's works, Gallery shall grant Artist a limited license to reproduce said images for purposes of such a 'retrospective book' without compensation. Further, Gallery shall cooperate with Artist in making available transparencies or film needed for such a book. Artist agrees to return such transparencies and film used after the making of the book is completed.

In certain exclusive work made for hire employment contracts, such as agreements often imposed on salaried animation artists or comic book illustrators, the employer is automatically deemed the author and copyright owner of all works created under the contract. In such cases, as here, it is not unreasonable for the artist or the artist's estate to be given a licence by the gallery or copyright owner to use the artist's works for a catalogue, retrospective exhibition or book, without payment to the gallery. From the gallery's perspective, such publications cost the gallery nothing and can enhance the artist's notoriety, the value of the artist's works and the gallery's profits.

12. Life/Disability Insurance

It is understood and agreed by the parties that Gallery shall be entitled but not required to purchase a life

insurance policy and a disability policy taken out on Artist. The disability policy shall be no more than Ten Thousand Dollars (\$10,000) per month. The life insurance policy shall be no more than One Million Dollars (\$1,000,000). Artist agrees to cooperate with Gallery or Gallery's agents in securing said insurance, including without limitation, upon reasonable notice to appear at medical examinations and shall also disclose prior medical history to Gallery or Gallery's agents. The insurance policies shall run for the term of this Agreement (and option periods, if exercised) and no longer, and Gallery shall be the sole beneficiary on these policies.

In certain rare cases, a gallery may attempt to protect its investment in the artist by purchasing life and/or disability insurance, naming the gallery as the beneficiary. From the gallery's perspective, although rather morbid, such a policy may be warranted if the artist is elderly, engages in high-risk recreational practices, or commonly works with toxic resins, pigments or other dangerous substances.

From the artist's perspective, such a provision epitomises what could be perceived as crass, mercenary exploitation, permitting an unwarranted intrusion into the artist's medical history and could literally make the artist worth more to the gallery dead than alive.

13. Accountings and Records

Gallery agrees to keep accurate books and accounts covering all transactions relating to the publication and sale of Artist's works. Artist and Artist's authorized representative shall have the right on reasonable notice and at reasonable hours to examine Gallery's books and records relating to the sale of Artist's works. Artist shall conduct no more than two examinations during any calendar year of the term of this Agreement or any extensions thereof. All books and records shall be available for inspection by Artist for at least one year after the term of the Agreement or at the termination of any extension thereof, and Gallery agrees to permit inspection thereof at Gallery's premises during such one-year period. As is indicated elsewhere in this Agreement, Gallery shall account to Artist for the sale of original works or any other works where Artist shares in the profits of such sales, no less than at least once every ninety (90) days during the term of this Agreement.

From the perspective of both the artist and the gallery, regular accounting and audit rights are reasonable, provided they are done during normal business hours by qualified representatives. From the artist's perspective, quarterly accountings are better than semi-annual accountings. If a shortfall is found in excess of 5 to 10% of the compensation owed to the artist in any accounting period, the gallery should reimburse the artist for the cost of the audit.

14. Right To Cure Breach

In the event of any breach of any provision of this Agreement or of any warranty or representation of Gallery or Artist contained herein, Gallery or Artist shall have the opportunity to cure said breach within thirty (30) days from receipt of written notice of said breach or notice of default, except as to the provisions of paragraph 5.1 above.

15. Arbitration and Attorneys' Fees

If any dispute arises between the parties concerning any matters relating to this Agreement, the parties agree to

submit said dispute to binding arbitration. In the event of any arbitration or lawsuit, the prevailing party shall be awarded its attorneys' fees and costs reasonably incurred in connection with such dispute.

As with paragraph 15 above, an express mediation or arbitration clause combined with an attorneys' fees clause can help resolve disputes and avoid costly court battles. A party who knows he or she will be entitled to reimbursement of his or her attorneys' fees may be encouraged to protect and enforce his or her rights by arbitration or otherwise. Conversely, a party is less likely to bring a frivolous claim if he or she will be charged with attorneys' fees incurred by the opposing party if such claim is unsuccessful.

16. Assignment

This Agreement shall bind and inure to the benefit of the parties, their legal representatives and successors, provided however that Artist may not assign this Agreement or the performance or services to be performed by Artist herein to any other person or entity unless that entity is entirely owned by Artist, in which case Artist may so assign only with the written permission of Gallery. Gallery may assign its interests or duties to any third party.

Most artist/gallery relationships are highly personal in nature. The reason such a relationship comes into existence is usually because of a strong personal belief in the aesthetic quality of the artist's work on the part of a principal of the gallery. If the gallery has the right to assign its rights, the artist may find himself or herself in a long-term, exclusive contract with an individual having little or no interest in or appreciation of the artist's work, with little or no incentive in promoting the artist's career. From the gallery's perspective, an exclusive long-term contract binding a successful artist is a highly valuable asset that the gallery may wish to sell.

17. Notices

Notices required by this Agreement shall be in writing and mailed to the parties at the addresses set forth below by Certified or Registered Mail, Return Receipt Requested.

Artist: _____ Gallery: _____

18. Miscellaneous Provisions

No modification or change to this Agreement shall be valid unless it is in writing, signed by the party against whom the enforcement of such modification or change is sought.

18.1. A waiver by any party of any of the terms or conditions of this Agreement in any one instance shall not be construed to be a waiver of such terms or conditions for any future instances, or any subsequent breach hereof.

18.2. Time is of the essence in the performance of anything required hereunder.

18.3. This Agreement may be executed in counterparts, and the counterparts, taken together shall constitute the original Agreement of the parties.

18.4. Each of the parties hereto has been represented by independent counsel during the negotiation of the Agreement, has reviewed the Agreement, and has agreed to its terms upon the advice of independent counsel.

18.5. This Agreement shall be construed and enforced in accordance with the laws of the State of _____ applicable to contracts entered into and fully performed therein.

18.6. This Agreement contains the entire understanding between the parties relating to the matters discussed herein, and all prior or contemporaneous agreements, understandings, representations or statements, oral or written, are superseded hereby.

Understood, Agreed and Accepted To:

_____	_____
ARTIST	DATED
_____	_____
ARTIST'S SPOUSE	DATED
_____	_____
GALLERY	DATED