CHAPTER 16

# COLLABORATION AND GHOSTWRITING AGREEMENTS

"Collaboration is gelt by association." Playwright George S. Kaufman uttered this quip when describing his work with Moss Hart, Edna Ferber and others. You can be sure these professionals had collaboration agreements between them. If you are collaborating, either as a ghost or an "as told to" writer, an equal contributor to a project, or otherwise, you need one, too.

Under copyright law, the moment two or more creators begin working together on a single project, they might be subjecting themselves to legal obligations to each other that they do not intend. Whether or not you have a friendship or a highly productive creative relationship with your collaborator(s), a written agreement is absolutely necessary to ensure that your expectations regarding control over the work and the sharing of the rewards are mutually understood and binding. Ideally, your agreement should be finalized as soon as you decide that you will create an integrated work product together.

## COPYRIGHT AND JOINT AUTHORSHIP

Under US copyright law, certain contributors share the copyright in a "joint work." A "joint work" is defined as a copyrightable work prepared

by two or more authors with the intention, at the time the work is created, that their contributions be merged into inseparable or interdependent parts of a unitary whole. No contract is required to give rise to a joint work and all that it entails. In fact, unless they otherwise agree, authors who create a joint work are co-owners of the undivided copyright in the work, meaning that each of them owns all the rights in the work, but shares them equally with the other. Any coauthor may license the work on a nonexclusive basis without the others' consent, but she must share the proceeds equally among all other coauthors. On the other hand, no coauthor may grant an exclusive license without the consent of all other joint owners. These legal rules apply—unless agreed otherwise—to all participants who make a copyrightable contribution of any size if the collaborators intend at the time for their contributions to be merged into a unitary whole.[116]

For some collaborators, these terms might be acceptable, but there are many situations in which they are not ideal. Also, the law is silent about some important matters and is of no help in many potential scenarios—especially, although not only, when things do not go as planned. The fact that no joint owner can license exclusive rights in the work unless the other consents in effect gives each partner veto power over most deals to publish and otherwise exploit the work (because publishers and other licensees usually require exclusive rights). In the worst case scenario, one party could pull out of the partnership when the work is finished, or nearly so, leaving the other with limited rights to bring in a third party to help finish or revise the work and no meaningful way to market it.

Fortunately, you can alter the statutory rules by agreement. If you so choose, for example, you and your collaborator can agree that each retains a distinct copyright in your own contributions, or that the work will not be considered a "joint work" unless and until each party completes her part. You can provide that the term of the collaboration agreement will be the same as the length of copyright,[117] or make the term shorter (after

[116] Chapter 4 discusses the concept of "joint works" in more detail, including the judicial precedent in most jurisdictions, including New York and California, that requires each collaborator to make a copyrightable contribution in order to claim an interest in a joint work.

[117] The term of copyright in a joint work is 70 years after the death of the last surviving joint author.

which the default provisions under copyright or another arrangement can apply). You can give one (or both) the right to negotiate and sign licenses, exclusive and nonexclusive, and you can allocate to each other any share of the proceeds as you agree. You can—and should—also determine attribution protocols.

## COLLABORATION AGREEMENTS

To devise your agreement, you will need to discuss and resolve the following issues: ownership and control of the rights in finished, unfinished, published, and unpublished works; editorial control over the final work product(s); competition and confidentiality; how earnings will be shared; authorial credit; and responsibility in the event of legal liability. Consider also including terms that address disputes, such as mediation and arbitration clauses, and the future, such as whether and when the agreement should end. Once your mutual understandings are settled, they should be reduced to a writing signed by both of you. It is a good idea to hire a knowledgeable attorney to draft the contract and negotiate on your behalf, especially if you do not know your collaborator well or if you have less negotiating leverage (for example, if you are ghostwriting). If your relationship is more equitable and your understanding is straightforward, you might both be able to hire one attorney to prepare the contract or possibly to write your own using a form.[118]

### *DEFINING THE JOINT WORK*

The agreement should define and describe the nature of the project and the responsibilities of each collaborator in enough detail that a reasonable person (that is, a jury) could readily determine what each is responsible for and whether each has met her responsibilities. If you plan to create multiple specified works together, a list and description of each contemplated work that is separately appended to and referenced in the contract is a good idea. Alternatively, you could state that the terms of your agree-

[118] *Business and Legal Forms for Authors and Self-Publishers* by Tad Crawford (3d ed. Allworth Press, 2005) has a good collaboration agreement template; the Authors Guild can supply one also. Of course, it is always safer to have a competent attorney review your specific situation and prepare a contract.

ment will apply to any work you create together as long as the contract lasts. If feasible and desirable, lay out deadlines for each portion (and as applicable, sequential deadlines for each stage of the project, such as a book proposal and sections of the manuscript) to be contributed by each collaborator.

If you are ghostwriting or collaborating on an "as told to" book, make sure the contract requires the other party to grant you the necessary access to interview subjects (including herself) and materials such as letters, diaries, etc., on a timely basis. The more concretely you describe such access obligations in terms of number of hours and deadlines, the better.

### *CONTROL OF THE WORK*

*Ownership*. By contract, the parties can provide that one contributor will own the copyright in the final work product, that each will own it jointly (as the Copyright Act provides), or that each will own the copyright only in her own contributions to the project (either permanently, or until the work is complete). What you decide should depend on the nature of your collaboration and of the project (and possibly on the parties' relative negotiating positions). Has one party been retained to ghostwrite the work? What are your collective plans to exploit the final product commercially? Are your respective contributions readily severable? Does it make sense for one or both of you to reserve the right to repurpose and reuse your contributions independently if the joint project does not sell or after it goes out of print?[119]

When each party retains the copyright to their contributions, the possibility of one collaborator competing with the joint work must also be addressed. If the joint work finds a publisher, each partner will be bound by the publishing contract not to reuse her contribution independently. But in case the project does not find a publisher, the parties should consider allowing for termination of the agreement under the circumstances, which would free each to revise and reuse or assign the rights to their contributions. (Termination is discussed more fully below.) If this would not be

[119] It is likely that the subject of an "as told to" or ghostwritten book will want the right to take her story to another writer and terminate your right to use your work if the joint project does not sell. Although this is understandable, make sure your contract guarantees you satisfactory compensation and credit for your time and work.

feasible given the nature of the project (for example, if the contributions are inseparable or would unacceptably compete with each other), you might agree that one party may buy out the other's interests in the project, freeing the buyer to use, revise, and market the entire work freely.

If relevant, also provide for possible future editions and prequels/sequels. Ask yourselves: if one party no longer wishes to work with the other after the project is completed or abandoned, should either of them have the right to create sequels or new editions on their own? If so, to what extent, if at all, will the other party be compensated and what form of attribution should she receive? If you agree on a buyout clause, it should specifically address sequels and revised editions.

Depending on what you decide, the contract should indicate that the parties intend all contributions to the defined work either: to be merged into a single joint work(s) the copyright of which shall be jointly and severally owned by each contributor; or to be merged into a single work, the copyright of which shall be owned solely by one named party; or to remain separately owned by each contributor. No matter who owns the copyright, the matters of editorial control, marketing, sharing the proceeds, and attribution can and should all be separately addressed in the contract.

*Editorial Control*. The Copyright Act assumes a joint work is a collaboration of equal contributors, but in reality, it could be that one person has the greater vision, industry clout or reputational interest (such as in a ghostwritten memoir), and/or contributes the lion's share of the work comprising the project. Consider whether creative decisions over the project, including final approval of the proposal and the manuscript to be submitted to a publisher, should be made jointly by the coauthors or assigned to one. The collaboration agreement should state who will have decision-making authority during the process of creation and who will have final approval of works submitted to publishers. Also, consider providing that in the event either contributor dies after substantially delivering her share of the work, the survivor will have full editorial and licensing control over the work, subject to the obligation to remit the deceased's share of the proceeds to her heirs.

*Competition and Confidentiality*. The agreement should address the extent to which the coauthors may publish works that compete with the collaboration if the project is published (or while it is being marketed). A common practice among collaborators is to specify a period of time during

which neither may publish any work that competes with the joint work; it is a good idea to define "competing work" in terms of format, market, and subject matter.

Regardless of the nature of the work, but especially if it is a ghostwritten book, each collaborator should agree to keep the project and the other party's information strictly confidential, except to the extent needed to carry out the intentions of the contract.

*Marketing, Negotiating, and Administering Licenses*. As a practical matter, the collaborators (or one of them) will probably have a literary agent who will exclusively market the work, but if there is no agent, it generally makes sense to state that the parties will coordinate in marketing the work (and that neither will commit the other to marketing expenses without consent). If only one writer has an agent or the inclination to negotiate, the contract might give that party the right and responsibility to negotiate the licensing of the work, though if the other party holds a copyright interest in the work, she will also need to sign any licenses. If one party does not hold copyright and thus will not sign licenses, the collaboration agreement might provide that the nonsignatory has the right to approve any proposed license prior to execution. In either case, it is a good idea to specify that one party's agreement to what the other party has negotiated will not be unreasonably withheld, delayed, or conditioned. Each collaborator should receive a copy of any executed license.

You should decide which coauthor (or whose agent) will be assigned to receive, account for, and distribute the proceeds earned. Some agreements provide that all funds will pass through one of the authors or agents, to be distributed according to the agreed shares, but it might be more practical and less burdensome to provide for direct payment by the publisher to each coauthor. If you agree, state in the contract that the parties will use their best efforts to ensure that any license will require the licensee to account directly to each collaborator for her share of any advances, fees, and royalties. Also provide that if either of the collaborators receives payments that should go to the other, she will forward them promptly with a written accounting.

### *INCOME AND EXPENSES*

*Shares of the Proceeds*. Although the Copyright Act by default gives joint work contributors equal shares of the proceeds, collaborators are free to agree to alter that formula and allocate the earnings from a work in any

way they wish. If each is an equal partner in the collaboration, then equal shares are typical. In some cases, the parties agree to divide the shares differently for specific types of exploitation (such as film/TV or audio rights). With ghostwritten or "as told to" works, where one party does most of the writing, that person often gets a larger portion of the advance and the other party then receives all earned royalties until each has received an agreed amount (after which royalties are shared).

If you are retained to help a celebrity or other nonwriter prepare a proposal for a ghostwritten or "as told to" book, make sure in your contract that you will receive a fee for writing the proposal whether or not it leads to a publishing agreement and some portion of the proceeds if it does. Provide also that any advance portion you receive will be nonrefundable. Such terms are some protection against being dropped from the project in favor of another writer after your proposal sells or having your collaborator pull out after you have worked on the manuscript.

*Expenses*. The parties should devise a system for authorizing and sharing expenses. One way to do this is to set a budget that lists specific expenses and allows for some miscellaneous costs. Expenses are often shared in the same proportion as the allocation of proceeds from the work. If expenses are to be shared, the agreement should provide who will own any tangible purchases as well as the results of such purchases, such as recordings of interviews, research notes, and photographs. Another expense involves obtaining permission to use copyrighted work. If fair, you might choose to make each party responsible for the costs of third party releases needed for her portion of the work.

### *ATTRIBUTION*

Will the product(s) of your collaboration be credited as "by A *and* B," "by A *with* B," "by A, *as told to* B," "by A" alone, or in some other way? The copyright law says nothing about how a joint work should be credited, though a contributor who is wrongly omitted might be able to use unfair competition laws to remedy the bald misattribution of a work. You should decide on authorship credit and specify it in both your collaboration agreement and any contracts to publish or otherwise license the work. If the work is a book, specify the order, size, and prominence of the authors' names as they will appear in each edition and in all promotional materials and advertisements.

### *COPYRIGHT REGISTRATION*

The copyright registration should mirror your agreement on who will own the copyright and the collaboration and publishing contracts should both specify in whose name(s) the work will be registered. If the work does not find a publisher, copyright should still be registered as the parties have agreed.

### *LEGAL RESPONSIBILITY*

In general, it makes sense to hold each collaborator individually responsible if their contribution infringes a copyright or defames or otherwise injures a third party. But publishing contracts will likely make all signatories jointly and severally responsible for any liability the publisher incurs based on the book. Depending on the nature of the project, collaboration agreements typically provide that each coauthor warrants to the other that her contributions are original, that she is free to enter the contract and to license her contributions and that they do not infringe upon the copyright or violate any rights of any third party. Each party then agrees to indemnify the other for any expenses (including reasonable attorneys' fees and out of court settlements) suffered as a result of a breach of these warranties. Agreeing to this will be trickier for the ghost or "as told to" writer, because her work is controlled by the other party more than in an equal collaboration. If you are in this position, try to exclude specifically from your warranties any material provided or approved, in writing or verbally, by the other party.

### *THE FUTURE*

*Term and Termination of the Collaboration*. Collaborators can allow the term of their contract to last as long as the copyright in the work,[120] or they can make it shorter. They might also agree that either party can terminate the agreement if, for example, the work is not published or subsequently goes out of print, or if one collaborator cannot or does not satisfactorily complete her contribution. The advantage of a shorter term and a right to terminate is that either party might, depending on the nature of the work, be able to reuse and market their contributions (but not the other's) without obligation to the other. The disadvantage is that it effectively kills any

[120] In effect, this is the default for a joint work under the Copyright Act; the length of the term is seventy years after the death of the last surviving coauthor.

future for the joint work, unless the contract also provides for a buyout of one party's rights in her contribution upon termination.

*Mediation or Arbitration*. The agreement should provide a method for resolving disputes between the coauthors, such as a disagreement over whether a contribution is satisfactory, whether the project is ready to market, which publishers to show the work, or whether to accept an offer. Disagreements arising between a surviving writer and the estate of a coauthor who has died can be especially thorny. An agreement to mediate disputes can save the parties considerably in anxiety, time, and legal fees. Using an independent mediator, who does not decide disputes but rather helps the parties reach a settlement, often results in amicable resolutions.

Arbitration is akin to litigation, but it is private, cheaper, simpler and less time-consuming than a lawsuit. Here, an arbitrator chosen and paid by the parties hears both sides of the dispute and decides in favor of one side or the other. The parties can present their cases without hiring lawyers (though in complex matters, lawyers might be necessary) according to rules set by the arbitrator or, if the parties choose, by a body such as the American Arbitration Association. They can also choose whether the decision will be legally binding or leave them free to pursue litigation.

Although the parties can decide on mediation and/or arbitration when a dispute arises even if their agreement does not require them, it is obviously better to include them in the contract. If you do not, then either party can decline to use them, possibly leaving the other with only the options to concede, see the project paralyzed, or deal with costly litigation.

*Assignment and Succession*. Without limiting the collaborators' obligations to each other, it is a good idea to allow each the freedom to assign her ownership interest and/or her right to receive income to a third party. It is also wise to state that the collaboration agreement will bind and inure to the benefit of the heirs, executors, administrators, representatives, and assigns of the coauthors.

## THE PUBLISHING CONTRACT

If one collaborator holds the copyright, she alone will execute the publishing contract (and other licenses). If both own copyright, then either the collaborators will enter one publishing contract jointly or (less likely) they will sign separate contracts. In either case, negotiate realistic delivery dead-

lines for each collaborator because failing to meet them can lead to cancellation of the contract and a requirement that the advance be returned.[121] The publishing contract should incorporate, or at least not conflict with, the payment terms to which the collaborators have agreed and should include to the letter the agreed attribution provisions. The publisher will usually insist that all signatories jointly warrant and indemnify the publisher against legal claims. If only one signs the contract, make sure you have ensured in the collaboration agreement (as appropriate) the responsibility of each party to the other for a breach of warranty in her contribution.

[121] This is another argument for why a ghostwriter should get a higher portion—or all—of the advance, even if the parties agree to share the royalties in a different proportion. She might need the advance to live on while preparing the manuscript for timely delivery.