



The Artist-Agent Relationship

Partnerships between artists and licensing agents can be a tricky business. Agreements need to be carefully drafted regarding core obligations, commissions, and post-termination.



BY JOSHUA J. KAUFMAN, ESQ.

The artist-agent relationship often is compared to marriage. But that analogy isn't entirely correct. While the artist-agent relationship must be based on trust, artists don't have to love their agents or vice versa. Affection certainly helps, but the basis of the relationship must be mutual trust and a similar view of the development of the artist's career and how to market the artist's work. The more the

agent believes in the artist's work, the better the relationship will work. However, an agent need not and, in fact, probably should not, be as emotionally invested in the art as the artist. Artists should be passionate about their work. The agent needs to appreciate the work and understand its beauty, but more important, needs to analyze its place in the marketplace and identify suitable products and placement for it.

The agent often plays the role of the businessperson so artists don't have to, at least on the surface. Artists who don't look after their careers in a businesslike manner eventually will run into difficulty and ultimately failure. A successful artist creates marketable art, meets deadlines, and establishes a strong team comprising a knowledgeable attorney, accountant, perhaps a consultant, and often an agent.

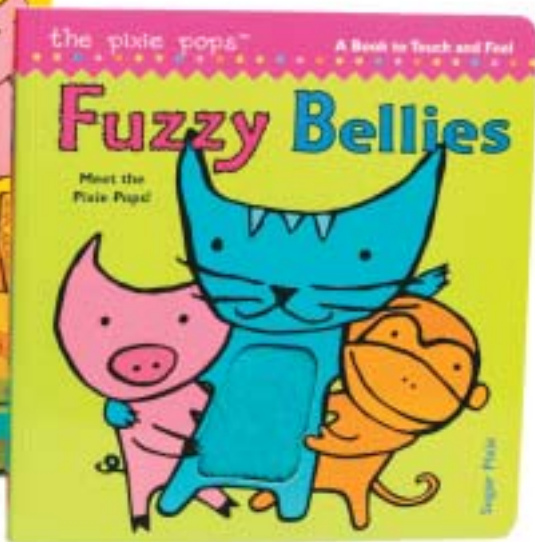
An agent is critical for an artist starting out in the licensing arena. No matter how good and/or commercial an artist's work is, if it does not reach the right people with the appropriate product lines, it will languish unnoticed in the artist's studio. The most important thing agents can do for artists, at the outset of the relationship, is to help them develop their art in a manner that makes it attractive to manufacturers; then once the line is ready to show, to exhibit it at various trade shows and make private presentations and pitches to the right manufacturers. Successful agents can use their contacts to bring their artists to the notice of buyers. Tens of thousands of images are marketed for potential license every year; the successful agent is the one who has the ability and



Mary Engelbreit's
Motto Tote.



Two "touch-and-feel" Pixie Pops books brokered by agent Lally Inc.



instincts to know which works to bring to which licensees. An agent who indiscriminately pitches image after image at potential licensees does no one any good.

The Agreement

Once an agent and artist have identified each other as compatible partners in the licensing arena, agreeing on the artist's career path, brand marketing, and product differentiation, the parties need to enter into a binding and enforceable agreement that makes sense and is fair to both sides. The problem, of course, is there is an inherent difference between the parties as to what they consider fair. This is only natural. Both parties need to understand that while there is a great deal of overlapping territory, there are certain areas on which they will fundamentally differ. It is a matter of pure negotiations as to who will prevail in areas of these differences.

In a review of the "standard artist-agent agreement," there are several important points and much boilerplate (which people often overlook but is important). What most people, of course, are interested in first and foremost is the money. The vast majority of artist-agent arrangements contain 50/50 splits between the parties. This is for artists starting out, as well as established ones. The more successful artists after time might find they are in a position to negotiate a 60/40 split in their favor. The 50/50 and 60/40 splits encompass probably 90 percent of the transactions in the marketplace. There are, of course, exceptions on both sides. Very successful artists might negotiate a deal better than 60/40. However, often when artists are that successful, they

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ARTIST-AGENT *(continued)*



Jody Winger's school supplies line, brokered by The Buffalo Works.

take their business in-house once their contract expires with their agent (meaning the artist hires a staff to help run the operation). At the other extreme, one art licensing agent I know takes a 75 percent commission, giving the artist a mere 25 percent.

The average term of a licensing agent contract is three years. However, an artist with clout may demand certain thresholds be met in the initial year or the artist can terminate the agreement. For example, a designated number of contracts need to be signed in the initial year. Due to the nature of licensing agreements, money does not usually flow until the second or third year of a contract, so pegging any performance criteria early on to monetary receipts does not work. For a five-year contract, financial performance criteria can be built into it based on revenues after two or three years. If those criteria are not met, such an agreement

would provide the artist with the option to terminate.

Artists who have been licensing on their own and have a certain track record in revenues might be able to obtain guarantees from newly signed agents. If an agent tells the artist he or she will earn more money by signing with the agent, the artist often demands a guarantee comparable to the money he or she has earned in the past. Of course, accommodations and/or carve-outs have to be made for the lag time in ramping up, securing licenses, and the beginning of the revenue stream.

All artist-agent agreements tend to be exclusive in nature. For pre-existing contracts, there might be a carve-out. However, if the agent starts to manage and handle those licenses, they eventually are rolled into the agreement.

The name in which license agreements are entered into is often a bone



of contention. Many licensing agents want all contracts in their name as they believe they obtain more control that way. Licensing agents who put contracts in their own names should be aware that while they may obtain more control over the process (especially in post-termination matters), they assume a great deal more risk exposure. If the contract is entered into between the agent and the licensee, and if the artist defaults (for example, does not provide the artwork), the licensee has a claim against the agent, not against the artist. On the

other hand, if the licensee does not pay the agent the monies, or it breaches the agreement, the agent may still be liable to the artist. Therefore, an agent should think long and hard about whether or not the additional potential control is worth the risk.

Post-Termination

The greatest area of tension and dispute between artists and their agents pertains to post-termination issues.

Mary Engelbreit-illustrated book.



For whatever reason, artist-agent relationships do not tend to be life-long affairs. After a term or two, most of them seem to end. How long an agent is entitled to keep receiving a commission after the contract terminates is often a sore point in negotiations.

Agents, of course, wish to be compensated for not only the full term of their contract but for the term of the licensing agreement and of all extensions and renewals. Artists want to limit the payment to the agent after their contract expires. Agents believe they secured the contract, they worked long and hard, had to wait for their money, and should be entitled to their receipts throughout the term of the contract. Artists, on the other hand, might feel that when their contract is over, so is the agent's right to receive funds, in part because what agents do for their fee is manage the agreement. After the relationship terminates, either the agent will not be in the position to manage the license agreement, or the artist doesn't want the agent to because the relationship has soured. As such, artists don't believe agents are entitled to as much of the revenues. Also, when contracts are renewed and incorporate other products or artwork, does the agent receive a commission on the additions? If the artist has a new agent who negotiated the extension into other product lines or renewals under more favorable terms, how is the new agent compensated if the first agent is still receiving a commission?

Many agreements contain prohibitions against dealings by an artist, post-termination, with the agent's clients. First, there is a question (which depends on which state law applies) whether those clauses are

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ARTIST-AGENT *(continued)*

enforceable and to what extent. The more successful the agent and the larger his or her client base, the greater the likelihood such a clause will not be enforceable. If the agent's client list is very large, and there is a blanket restriction against dealing with the agent's clients, and this precluded or hampered the artist from doing business, many states will disallow the restriction. Moderation is the key in

an enforceable non-compete clause.

Obligations Clauses

The core obligations of the parties also should be addressed. There is usually simple language to the effect that the agent will attempt to or perhaps exercise best efforts to try to find contracts and the artist will cooperate. What if the agent, for whatever reason, chooses not to

Finding the Right Agent

An artist who learned the hard way offers some advice on getting into licensing and choosing an agent:

- Learn the market. Attend as many seminars as you can. The more educated and experienced you are, the more pull you have in negotiations.
- Be aware it can take a long time to find a licensee and even longer for the revenue to roll in. You might want to consider another form of income revenue (like a part-time art job).
- Know what you want from your agent. Do you want an agent who will merely find you licensees and then bow out, or do you want an agent who will continue to act as a liaison throughout the relationship with the licensee, ensuring you get samples and final approvals, etc.? Some artists like to take full control; others want a buffer. It is a personal choice.
- Know exactly what you are signing when it comes to the agent contract. Hire a lawyer proficient in licensing agreements to review the contract. Do not skimp and think you can do it yourself. I made this mistake, and it cost me thousands of dollars.
- Carefully weigh the pros and cons of having your agent sign license contracts instead of you. Some agents prefer taking ultimate control, and sign their name on a licensee contract instead of yours, but it essentially leaves you powerless. My advice: Don't ever allow your agent to sign your contracts instead of you. Co-signing is fine.
- Don't think that hiring an agent will make you rich. An agent is not a magic pill.

Tips from other artists:

- Read "Licensing Art and Design," by Caryn Leland, particularly Chapter 6 ("Engaging a Licensing Agent") and read the "Licensing Book Handbook" by Karen Raugust, suggest Bill Rosenfeld and

market the artist's work, and the parties are locked into a three-year exclusive contract? The artist would have no licensing revenue and little recourse. On the other hand, if the artist refuses to provide the artwork to the licensing agent or refuses to sign off on the licensee contracts, then the agent would have spent a great deal of time, money, and energy for nothing. Obligations clauses

should be discussed in much greater detail than they generally are in the industry. ❄️

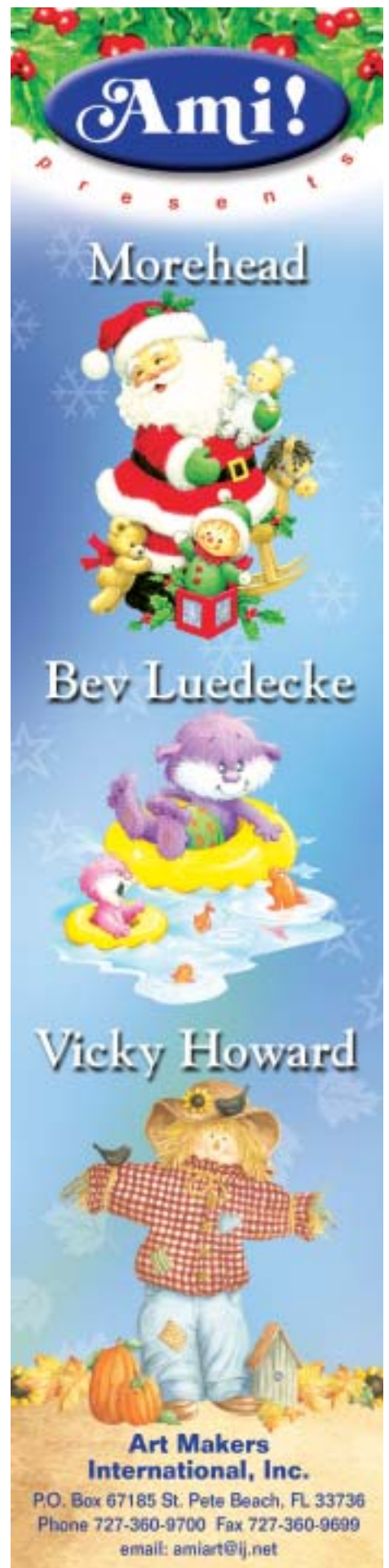
Joshua Kaufman, Esq. is a partner in the law firm of Venable, LLP. Based in Washington, D.C., his practice is national in scope. One of the country's foremost attorneys in the field of art and licensing law, he has published more than 200 articles. He is also an adjunct professor of law at American University Law School. Many of his other articles can be read and downloaded from www.jjk Kaufman.com.

Jody Winger, The Jody Winger Company. "If possible, meet with the potential agent in person to see if it's a good fit. For example, several years ago, we flew to New York City specifically to meet with an agent to discuss his possible representation of Jody. Finally, go with your gut. You need to have very positive feelings about the person representing you."

- "In negotiating an agency agreement, an artist should retain the right to terminate that agency agreement and retain a new agent," stresses Greg Hoffman, CEO, Mary Engelbreit Studios. "The quid pro quo for this termination right, to be embodied in the agency agreement, will require that the artist continue to pay a percentage of royalties emanating from products and/or licensees that were obtained by the original agent for a specific, negotiable period of time."


The agents say:

- "Identify if your style is competitive by going to SURTEX and Licensing International Show, as most agents exhibit there," advises Linda Balogh, president, Courtney Davis. "See how the agent presents, see what your competition is doing."
- "Have a basic understanding about what licensing is...you would be amazed how many artists have no idea what licensing is but believe they need a licensing agent," says Kathy Lally, president of Lally Inc. "[After you determine what you want from an agent, consider] what are you willing to do for the agent? The agent cannot promise anything, except the work will be seen and considered by decision-makers."
- "I have a certain direction or philosophy and there is a place I want to get to in the licensing world within a certain amount of time," explains Joanne Olds, president, The Buffalo Works. "The artists I work with need to have similar goals and dreams, or at least the same underlying philosophy on business ideas regarding licensing."




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