Contracts and Licensing Issues

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Contracts and Licensing

Me:

- 11 years of legal experience concentrating in the areas of entertainment and IP.
- 10 years of experience teaching legal and business issues to aspiring artists.
- Prior to becoming an attorney, worked in broadcasting for seven years in various production, programming, and management roles.
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Me:

- Sr. Procurement Analyst, IT, YRC Worldwide, Inc.
- Teaching various communications and business courses and The Art Institutes International - Kansas City and at Avila University.
- Co-Owner, MudStomp Records, LLC.
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Early Considerations

– You’ve been offered a deal for your work! Congratulations! Now what?
– As excited as you may be about the opportunity to sell your work or license copies of it for distribution, it’s important to not lose your head.
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Early Considerations

– Careful consideration at the outset can prevent major headaches in the long run.
– Being sued for breach of contract, or suing another for the same, is expensive, time-consuming, and energy-depleting.
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Early Considerations

- Selling your art through a dealer, gallery, or agent is a business relationship.
- A successful business relationship means negotiating and implementing a contract that works for both you and the seller or licensee.
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Early Considerations

– To help in the contracts and licensing process, it is best to understand just what exactly is being sold or licensed.

– In a nutshell, it involves your copyrights in and to the work and perhaps physical copies of it as well.
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Copyright Law

**OFF THE MARK**

**NEW YEAR’S RESOLUTIONS**

**FULL VERSION**

- Spread joy
- Stick to beliefs
- Take care of body, mind and soul
- Show others respect
- Laugh everyday
- Show bravery
- Be generous
- Enjoy life

**ABBREVIATED**

- Emulate George Harrison

Copyright 2001 Mark Parisi

www.offthemark.com

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Copyright Law

– Allows artists to reap the economic benefits of their creative endeavors.

– Enables creators, publishers, and distributors to control how, when, and whether their works are used.
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Copyright Law

– No particular degree of literary or artist merit is required—just some expressive effort.

– It protects the particular way an “author” has expressed him or herself.
Copyright Law

- It does not protect ideas, systems, or factual information conveyed in the work.
- It does not protect titles.
- Think of it as a “bundle of rights.”
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Copyright Law

- Protects “original works of authorship” that are “fixed in a tangible medium of expression.”
- Owners are afforded virtual monopolies:
  1. To reproduce the work;
  2. To prepare derivative works;
  3. To distribute copies;
  4. To perform the work publicly; and
  5. To display the work publicly.

The “bundle of rights!”
Contracts and Licensing

Copyright Law

- The right to use, control, or own pieces of the “bundle of rights” often involves the execution of contracts and, in particular, license agreements.
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Contracts

I think I can feel pretty secure that these contracts won't be binding...
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Contracts

– A contract (“K”) is one of the most common types of legal transactions.
– To be valid, a K must be based on each party bargaining to give something of value (usually money) to the other party.
Contracts

In legal terminology, this bargain is called “consideration” and is what distinguishes a K from a gift.
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Contracts

- Every K must contain an offer, and acceptance of the offer, and consideration.

  • E.g.: A dance company approaches a composer about writing music for a new piece (the “offer”). The composer says she likes the concept for the piece and wants to collaborate (“acceptance”). They agree on deadlines and a fee (“consideration”).
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Contracts

- Ks can be oral or written.
- In some situations, as in the transfer of copyright ownership, sale of goods over $500, or consignment arrangements (in MO), the deal must be in writing.
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Contracts

– Even if a K is not required by law to be in writing, it still makes good business sense to memorialize the transaction in writing.
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Contracts

– Although many in the arts still prefer to conduct business with a simple handshake, vague verbal agreements can result in ugly misunderstandings.

– Oral Ks are often difficult to enforce in court.
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Contracts

“A verbal contract is not worth the paper it is written on.”

Sam Goldwyn
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Contracts

– Putting the agreement in writing:
  1. Demonstrates that you are operating with the highest standards of professionalism.
  2. Reinforces the commitment.
  3. Clarifies the agreement.
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Contracts

– Putting the agreement in writing:
  4. Encourages the parties to take their promises seriously.
  5. Keeps the parties from making up the rules as they go along.
  6. Guards against forgetfulness.
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Contracts

– Putting the agreement in writing:

7. Indicates that the negotiation stage is over and that the final terms have been reached.

8. Serves as a record of the agreement for others who were not the original negotiators or signatories.

9. Provides reasonable assurance that the contract will be enforceable in court.
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Question?

You: “OK, OK! I’ll get it in writing! But what terms should be in the contract? This seems very confusing.”

Simon: “It can be confusing. But here’s a checklist of terms to consider when striking a deal.”
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Common Deal Terms

– Ks do not have to be long and intimidating.
– Instead, they should be written in terms both parties can understand.
– Ks should be clear and specific. Vague language leads to misunderstandings, disputes, and lawsuits.
Use simple language that accurately expresses the agreement.
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Common Deal Terms

– The K should spell out the rights and obligations of each party in detail.
– Don’t leave anything out!
– If you discuss something verbally and shake on it but it’s not in the K, it will be nearly impossible to enforce.
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Common Deal Terms

1. The date of the agreement.
2. Names of the parties: if a business is an LLC or a corporation, it should be identified as such.
3. A detailed description of the work being sold or licensed or the service being performed.
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Common Deal Terms

4. The price or fee.

5. Payment schedule: who pays whom and when? How are royalties calculated? Minimum amounts?

- Money is often a contentious issue, so this part should be very detailed. More on this in a moment...
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Common Deal Terms

6. **Term**: how long will the K be in effect? What are its renewal provisions?
   - Beware of lengthy first-time deals.
7. **Termination**: how can the parties terminate the contract?

- Watch out for clauses that require you to pay back advances or initial payments made to you.
- Advances are yours to keep (unless you fail to uphold your end of the deal).
8. **Territory**: specify and geographic restrictions on distribution.

9. **Media and formats**: detail any restrictions on how the work will be reproduced.
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Common Deal Terms

10. **Exclusivity**: watch out when sellers or licensees demand exclusive rights over large geographic areas, particularly if this is a first-time agreement.

11. **Freelance**: parties are independent from one another for tax and other liability purposes.
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Common Deal Terms

12. **Work-For-Hire**: who owns the CR to the work?

- If it’s a licensing deal, make sure that the K is clear about your continued ownership.
- If it’s a commissioned work, will the buyer own the CR?
13. **Loss, damage, and theft**: know whose responsibility is it to insure your art and/or reimburse you in the event of problems.

14. **Escape clause**: if your art doesn’t sell after a period of time, preferably six months, the K is over.
15. Dispute resolution: what you and the other party will do if something goes wrong.

- You can decide that you will handle your dispute through arbitration or mediation instead of going to court, which takes up a lot of time and money.
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Common Deal Terms

15. Dispute resolution:

• Try as much as possible to avoid using lawyers to resolve legal disputes.

• “Getting justice” or “punishing” someone for doing something to you costs money (lots of it), wastes time (lots of it), takes your focus off of your art, compromises your reputation, and jeopardizes future business relationships.
16. The signatures of the two parties.
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Question?

You: “What about negotiation and money? I don’t want to seem materialistic, pushy, or greedy.”

Simon: “Negotiation and money are touchy subjects. Remember: it is fair and reasonable to charge enough money to earn a living.”
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Negotiation

- Constructing a good deal for yourself may include a bit of negotiation.
- It is encompasses areas of psychology, communication, sociology, and conflict management.
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Negotiation

– It is not easy for many artists, especially those who are just starting out.
– It is a skill that comes with experience.
– If you’re not that experienced, think about hiring an art consultant, mediator, or even an attorney to review any Ks or discuss details of any deal.
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Negotiation

– Keep in mind: the earlier you are in your career, the less negotiating power you have, and the less negotiating skills you have.

– When you’re done negotiating, put the agreement in writing, in other words, write and sign a K that covers all the basic points.
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Negotiation

- **Tips for Negotiating Deals:**
  1. Don’t think of negotiation as a game.
  2. Be prepared.
  3. Know thyself.
  4. Know your counterpart.
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Negotiation

- Tips Negotiating Deals:
  5. Use effective listening and speaking skills.
  7. Look for common ground and goals.
  8. Know when to walk away.
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Negotiation

- **Tips Negotiating Deals:**
  9. Maintain your personal integrity.
  10. Negotiate with someone who has authority.
  11. Confirm the status of the negotiation.
  12. Put it in writing as soon as possible.
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A Word About Money...

– Don’t be afraid to talk about money.
– When you’re not sure about the dollars and cents details that a seller proposes, ask.
– If you think you deserve more money for your art than the seller is offering you, or you have questions about percentage arrangements, ask.
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A Word About Money...

- Don’t enter into negotiations unless you have a good idea of what your art is worth.

- Get a sense of that worth by talking to artists who have representation and/or show at galleries, preferably artists with similar career experience to yours.
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A Word About Money...

- **REMEMBER**: never sign a bad K just to get a show or make a sale.
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