



ANSWERS FOR ARTISTS

A GUIDE TO BASIC
LEGAL ISSUES FOR
CREATORS

Disclaimer

The information in this publication is general and is intended as a guide to the law only. It does not constitute, and should not be relied on as, legal advice. Arts Law recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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This information in this publication applies to people who live in or are affected by the law as it applies in Australia as at May 2017.

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About Arts Law

Arts Law is the only national community legal centre for the arts. We provide free or low cost legal advice and information on a wide range of arts related legal and business matters including copyright, contracts, business structures, wills, defamation, insurance, employment and taxation to artists and arts organisations across all art forms.

OUR LEGAL SERVICES

Free or Low Cost Telephone Legal Advice

Arts Law provides a free (subject to a means test) telephone legal advice service for creators covering all art forms nationally. Arts organisations can also access this service at a low cost by becoming a subscriber. Our lawyers give free or low cost telephone legal advice where the enquiry does not involve the review of any document. You can lodge a request online using our legal query form or find out more about this service at artslaw.com.au

Document Review Service for all subscribers

Subscribers have exclusive access to Arts Law lawyers who carry out a document review of any document related to your legal query and provide you with legal advice in relation to that document. To lodge a request head to our website and fill out our legal query form.

Alternative Dispute Resolution

Mediation is increasingly acknowledged as an important alternative dispute resolution mechanism. Arts Law subscribers have exclusive access to Arts Law's affordable and accessible mediation services for artists and arts organisations.



Photo by Jo Teng, 2010

Referrals

If the matter is beyond the limits of our services, or requires a lawyer to act on your behalf, Arts Law can assist by recommending a suitably qualified lawyer or accountant from our national referral panel.

Information Resources

Arts Law publishes a range of materials online. This includes free information sheets as well as affordable guides, checklists, template contracts and seminar papers. Subscribers are entitled to generous discounts on Arts Law publications. Our email newsletter includes the most recently published resources from Arts Law as well as useful links and news stories. You can sign up to receive our newsletter at our website.

Educational programs

We present a range of seminars and workshops on legal issues relating to the arts throughout the year. Tailor-made workshops are available on a fee-paying basis for organisations and businesses.

Advocacy and Law Reform

Arts Law undertakes a crucial role in researching and responding to legislative and policy issues in order to support and enhance creative practice.

Artists in the Black Service

This service aims to increase the access of Indigenous artists and organisations to legal advice and information about their rights on all arts related matters. Visit Arts Law's Artists in the Black website for more information at aitb.com.au

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Your low cost annual subscription (\$160 artist or student/\$320 arts organisations/\$230 bands/\$500 councils or non-arts organisations*) gives a greater level of access to legal advice and information on law and the arts.

Importantly, your subscription to Arts Law provides essential financial support for our delivery of legal and business services to Australian artists and creators.

* Subscription price as at May 2017

Benefits of Subscribing:

- Supporting Australia's only national legal service for artists
- Ongoing legal advice, assistance and information at a substantially subsidised cost
- Exclusive access to our document review and alternative dispute resolution services
- Generous discounts on our publications and contract templates and free downloads of guides, checklists and letters of demand
- Discounts on education seminars

Subscription and purchases from Arts Law may be tax deductible.

You can subscribe online at artslaw.com.au or by calling 02 9356 2566.

Copyright ©

WHAT IS COPYRIGHT?

Copyright gives you various exclusive rights over your creative work (eg. artwork, music, literature, film, script, play or dance). It stops a person from copying or using your work without your permission.

Copyright does not protect your ideas – it protects the material form (expression) of your ideas. This means for example, if you share an idea with someone and that person uses your idea in their own painting, the person has not infringed any copyright (and will own the copyright in their painting). There may however be a breach of confidentiality.

Copyright protects 2 categories:

1. “Works” (ie literary, dramatic, artistic and musical works); and
2. Subject matter other than Works (ie sound recordings, cinematograph films, television and sound broadcasts and published editions of Works).

All Australian citizens and permanent residents can benefit from copyright protection. This copyright is recognised in many other countries under the International Berne Convention for the Protection of Literary and Artistic Works. Similarly, the Berne Convention means that residents and citizens of other countries will generally have their copyright recognised in Australia.



Arts Law 2013

WHO OWNS COPYRIGHT?

Literary, dramatic, artistic and musical works

Copyright in a literary, dramatic, artistic and musical work usually belongs to the person who made the work – the creator. (Films made before 1 May 1969 are treated as dramatic or artistic works.)

Even if you sell your work, you still own the copyright. For example, if a buyer purchases your artwork from a gallery they can hang it on a wall but they can't make copies of it without your permission.

SCENARIO

Your organisation asks volunteers to take photos of an upcoming festival and create artwork for posters to advertise the festival.

As the festival director, you should consider the copyright issues. Unlike employees, volunteers generally retain copyright in the artistic works (photographs and other artworks) they create for your organisation. You should seek legal advice and consider entering into a written licence agreement with the volunteers so that your organisation can use the photographs and artwork you have requested.



Geoffrey Goodes drawing at the Arts Law 30th Anniversary Gala.
Photo by Jay La, 2014



Krista Pav
Photo by Jay La, 2014

Sound recordings

Copyright in a sound recording is separate from copyright in the underlying music and lyrics. If you pay someone (whether for money or in exchange for something else of value) to make a sound recording for you, the general rule is that you own the copyright in that sound recording. This is called a “commissioned” sound recording. The commissioner/copyright owner could be anyone – a performer, a relative, the entire band, a film producer or an advertising agency. This general rule can be changed by entering into a written agreement that says otherwise.

If a sound recording is not commissioned, the copyright is owned by the person who owned the recording medium (eg. disc, tape, iPod) on which the recording was made (such as a recording studio, record producer, or record label) unless it is a sound recording of a live performance made after 1 January 2005. In that case, the owners of copyright in the sound recording are: the person who owned the recording medium (eg. disc, tape, iPod), each of the performers and the conductor (if any). If any performer or conductor participated in making the sound recording as an employee (a one off payment to a session musician is not usually ‘employment’), then their employer will own their copyright share. These people will each own an equal share of copyright in the sound recording. Again, this general rule can be varied if there is a written agreement that provides otherwise.

Audio-visual recordings

Copyright in an audio-visual recording (eg film or video) is separate from copyright in the underlying works (eg. in the script, music or set designs). Copyright in a commissioned audio-visual recording (eg film or video) is owned by the person who commissions it. So the person who pays someone else to make the film will be the copyright owner. This can be changed by written

agreement. If an audio-visual recording is not commissioned, then the general rule is that the copyright is owned by the person who made the financial or administrative arrangements to create the audio-visual recording (usually the producer). However, for films made after 19 December 2005, the director (or the person employing the director) also has a copyright interest but only in respect of the right to include the film in a retransmission of a free-to-air broadcast. Again, this can be all changed by written agreement. Performers do not own any copyright in audio-visual recordings of their performances.

Copyright does not belong to you if:

- you make your creative work as part of your employment – your employer is the copyright owner.
- you are commissioned (ie paid) to paint a portrait, or take a photograph for a person or draw for a private or domestic use – the person who pays you is the copyright owner.
- you make your creative work under the direction or control of a State or Federal government – the government owns the copyright.
- you have signed a contract that assigns your copyright to someone else.

In all these cases, you still keep your moral rights in the work (keep reading for more information on Moral Rights).

HOW LONG DOES COPYRIGHT LAST?

Generally, there is copyright in your artistic, literary, dramatic or musical work for your life plus 70 years.

Copyright in sound recordings lasts for 70 years from the year the recording was first published (released).

For films, the copyright has expired if the film was made before 1 January 1955. Films made between 1 January 1955 and 1 May 1969 are protected as dramatic or artistic works with copyright lasting for the life of the creator plus 70 years. The copyright in films made after 1 May 1969 lasts for 70 years from the year the film was first published.

SCENARIO

An artist discovers that one of her artworks is being printed onto t-shirts and sold at a market without her permission. What can she do?

If the artwork is being reproduced without the artist's permission, this is an infringement of copyright. Any person who wants to reproduce an artwork must get permission to do so from the artist. As the copyright owner, the artist has the right to charge a fee for the use of her artwork. If you or someone you know is in this position you can contact Arts Law for help.

WHAT CAN I DO WITH MY COPYRIGHT?

For a literary, dramatic or musical work you have the exclusive right to:

- copy the work;
- make the work public for the first time eg. by selling copies of it;
- perform the work in public;



Next Wave Artist Development Intensive.
Photo by Eugene Howard, 2015

- communicate the work to the public (including by putting it on the internet);
- make an adaptation of the work.

For an artistic work (eg paintings, sculptures, drawings, engravings, photographs, buildings, pottery and embroidery) you have the exclusive right to:

- copy the work;
- make the work public for the first time eg. by selling copies of it (but this does not include the right to prevent exhibition); and
- communicate the work to the public (including by putting it on the internet).

For films and sound recordings you have the exclusive rights to:

- make copies;
- cause the film to be seen or the sound recording to be heard in public;
- communicate it to the public (including by putting it on the internet); and
- enter into a commercial rental arrangement in respect of a sound recording.

You can license your copyright to allow another person to do any or all of these things (this should be in writing) or you can sell (assign) all of your copyright to someone else, so that you no longer own it (this must be in writing and signed by the seller (assignor)).

WHAT IF SOMEONE IS USING MY COPYRIGHT, WITHOUT MY PERMISSION?

If someone copies your artwork without your permission (ie. infringes your copyright) you may be able to take legal action to stop this. You should speak to a lawyer or the Arts Law Centre of Australia.

Universities and schools are allowed to copy your work for educational use but they should generally pay a fee.

HOT TIPS!

- It is a good idea to take photos or keep drawings of your artwork to show that you made it.
- You do not need to use a notice or the © symbol, but it is useful and recommended. You could state:

This work is copyright. Apart from any use permitted under the *Copyright Act 1968* no part may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of (name and address of copyright owner and the year in which the work was made).

- To make sure that people know that you are the copyright owner of an artwork use:
© + your name + the year that it was made (eg. © Your Name 2016)
- Arts Law has a template Copyright Licensing Agreement available for download at artslaw.com.au

OPPOSITE PAGE: Baskets.
Photo by Delwyn Everard, 2008

Moral Rights

WHAT ARE MORAL RIGHTS?

Moral rights recognise your ongoing connection with your creative work (eg artwork, music, literature, film, script, play, dance or performance).

There are 3 types of moral rights:

1. Right of attribution – you can make sure that you are named and acknowledged for your work.
2. Right against false attribution – you can stop other people from claiming that they created your work.
3. Right of integrity – you can stop your work being used in a way that harms your honour or reputation.

SCENARIO

You have been asked to write music for a film and want to know what this means in relation to your moral rights.

As the creator of the music you have moral rights in the music. This means that even if you have sold or licensed the copyright to the film producer, you are still entitled to be named as the composer (eg. in the end credits). Along with this right, you have the right against false attribution, which means the film maker cannot state that someone else wrote the music. You also have a moral right to have the integrity of your composition respected, so the music cannot be changed or altered in a way that would harm your reputation. In practice it is common for a filmmaker to seek consent from the composer of the music to allow the filmmaker to edit the music. However, it is important that you make sure that this consent is not open-ended but instead is limited to what is necessary for the purpose of the film.

WHO OWNS MORAL RIGHTS?

Only you as the creator of the work will own the moral rights. Moral rights are personal to you (the original creator of the work) and you cannot give them away, sell or transfer them. You can waive your moral rights although this is generally not advisable.

Example 1

If you create art at work, your employer usually owns the work and the copyright in it, but you still keep the moral rights.

Example 2

If someone purchases your work and/or the copyright, your moral rights mean that your name should still appear on or with the work and you can stop the purchaser from making changes to your work that damage your reputation.

If someone wants to make changes to your work, your permission is generally required.

HOW LONG DO MY MORAL RIGHTS LAST?

Your moral rights in your creative work last for your life plus 70 years.

What can I do if someone misuses my creative work or I'm not acknowledged?

You can take legal action against a person who does not properly acknowledge you or who changes or uses your artwork in a way that harms your honour or reputation.

If the court agrees that such actions (infringements) have occurred, you may be entitled to get an order from the court that:

- the person must stop the infringement (injunction); or
- you are paid money for the loss caused to you (damages);
- there is a declaration that a moral right has been infringed;
- you get a public apology;
- any false attribution or derogatory treatment is removed or reversed.

HOT TIPS!

Remember, there is no infringement of your moral rights if:

- you have signed a document to allow the actions; or
- the other person's actions are reasonable.

Always read all written documents that you are given and NEVER sign anything that you don't understand.

You can download a detailed information sheet on Moral Rights from **artslaw.com.au**





Simon Tedeschi & Kevin Hunt at Arts Law's Fundraising Concert.
Photo by D. Hasan, 2015

Contracts

WHAT IS A CONTRACT?

A contract or agreement is a promise between two or more parties (people, businesses and/or organisations) which is legally enforceable (ie. a party can insist on the other party fulfilling its promise and ask for damages if it doesn't).

How to make a contract

You can make a contract:

- orally (eg. in a phone call or when meeting in person);
- in writing (eg. a letter or email);
- partly orally and partly in writing (eg. by having a meeting and sending an email); or
- by your own acts and actions.

However, it is advisable to put your contracts in writing as a record of the agreement.

When is a contract made?

Four conditions must be satisfied to make a contract enforceable:

1. Offer – an offer from one party to another (eg if you perform at my festival, I will pay you \$500).
2. Acceptance – the other party accepts the whole offer without conditions (eg. yes, that sounds good, I'll do it).

3. Consideration – what each party agrees to give each other (eg. the \$500 in exchange for the performance. It does not have to be money).
4. Intention – each party must want to create a legal relationship. If the parties agree that their agreement is not legally binding, they have not made an enforceable contract and they cannot be forced to honour their promises.

SCENARIO

An arts and community centre has been funded to provide an artist residency. The artist will be using studio space in the centre and will be teaching 3 short art classes each week to people in the community.

The community centre should have a written contract between itself and the artist to help everyone understand their rights and obligations. It can purchase a template contract from Arts Law. The contract needs to be signed by someone who has authority to sign on the centre's behalf as set out in the centre's rules. Both the centre and the artist should get a lawyer to look at the contract before they sign it to explain anything that they don't understand. You can contact Arts Law for assistance if you can't afford or find a lawyer to do this for you.

HOW TO SAFEGUARD YOURSELF

Ask yourself, “Is it a good deal?” – make sure the contract meets your requirements and covers your concerns.

Don't give away more than you need – try to keep control of your artistic property (copyright).

Remember, you can negotiate – while some companies may refuse to change their 'standard' contract, it is always worthwhile trying to negotiate better terms for yourself. If you are still unsure, maybe you should walk away.

Get legal advice – if you don't understand a document or conversation, contact a lawyer or Arts Law .

Do your research – make sure you know who the other party is and that they are reliable and not bankrupt. Check with the Australian Securities and Investment Commission (**asic.gov.au**) and the consumer affairs department in your state.

Only promise what you can deliver – you should not offer something that you do not have or cannot deliver.

Always keep a copy of all documents that you sign – you can make identical copies for each party to sign or you can photocopy the signed documents.

Again, always read all written documents that you are given and never sign anything that you don't understand.

HOT TIPS!

- Get your contract in writing – this will document what was agreed between the parties and help avoid disputes.
- If someone is hesitant about putting things in writing you should explain that it is not a sign of distrust but a clear way to understand each other's rights and obligations.
- You can use a 'formal' contract (the kind a lawyer uses). Arts Law has template contracts for a range of art forms and situations that you can buy on our website.
- You can write your own contract in clear, simple words so that the parties understand it. It can be in a letter that you ask them to check, sign if they agree with it and return a copy to you.
- If the other party still does not agree to putting it in writing then write them a letter to confirm what each party has agreed on. That will be your record of what you believe is in the contract.

Liability and Insurance

WHAT IS LIABILITY?

Liability is your legal responsibility, duty, or obligation to compensate a person for the harm you have caused by breaching your legal duties to that person. It consists of three elements:

1. Duty of care

The law requires you to take reasonable care to avoid hurting or damaging a person or their property when your actions (or inaction) are likely to affect them.

2. Breach of duty

If what you do (or fail to do) causes harm to a person to whom you owed a duty of care, you may be legally responsible or liable.

3. Consequences

If a court finds that you have done the wrong thing and are responsible for the harm caused, you may have to pay money to the person who was hurt or for the property that was damaged.

The court will look at what precautions you took to prevent harm to the people to whom you owed a duty of care.

HOW TO SAFEGUARD YOURSELF?

Identify risks

You need to identify the risks involved in your arts activity or event. Think about everyone who will be involved from the artists to the crew to the audience members.

Minimise or avoid risks

Once you have identified the risks, you must plan how to avoid or minimise the risks. This could include:

- warning signs (eg. label poisonous substances with a clear warning);
- security (eg. alarms, smoke detectors, sprinklers);
- waivers or release forms (eg. workshop participants sign a release form absolving or at least limiting your liability in case of injury or accident);
- training (eg. occupational, health and safety training); and
- insurance (eg. public liability, property, workers compensation).

SCENARIO 1

You are organising a music workshop at your local community centre. Many people from the community will attend. You will need a speaker and microphone set up so that all the people can hear you. You are worried about what might happen if someone trips over the microphone cord during the class.

You should always think about the possible risks, even if you may not be able to think of everything. Now you have identified a possible risk you can do things to minimise it, such as placing warning signs and taping down the microphone cords. You should make sure that you have public liability insurance so that your insurance will pay for any injuries that the workshop participants sustain if they do trip over and hurt themselves. In addition, you could get people to sign what is called a 'Waiver' or 'Release'. These forms say that you are not liable for any injury to the workshop participants. However, even a waiver or release may not protect you against liability for an injury caused by your negligence (eg. injury due to your failure to fix faulty sound equipment).



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INSURANCE

You can buy insurance to protect you against risk.

Insurance basics

When you buy insurance you are paying a sum of money (premium) for an agreement (insurance policy) that if you harm someone or damage someone's property then the insurer will pay the person for the harm you caused.

Public liability insurance pays for harm you cause to a person or their property. It does not usually cover volunteers unless specified.

Product liability insurance pays for harm the products you design, make, repair or sell cause to a person.

Workers compensation insurance pays for harm to your employees (but not volunteers) injured at work (eg. in Victoria **workcover.vic.gov.au**).

Professional indemnity insurance pays for harm you cause to a person in your professional work (eg. a person relies on the professional opinions that you expressed in an article or film and suffers damage because the opinions were incorrect).

Property (building and contents) insurance pays for replacement and repair of things in the insured property (eg. damage to your studio or materials that were stolen).

Transit insurance pays for replacement and repair of the insured item stolen, lost, destroyed or damaged during delivery or possibly while on loan.

Volunteer insurance pays for harm caused to a volunteer working for you.

You may need more than one type of insurance to protect you. For example, for a music festival you might protect against:

- harm caused to people coming to the festival (public liability insurance);
- transporting instruments for musicians (transit insurance); and
- harm caused to the students helping run the festival (volunteer insurance).

SCENARIO 2

Temporary seating built for a performance collapses injuring members of the audience.

As the event organiser you owe a duty of care to each member of the audience. You should take all necessary precautions to prevent harm to the audience. You do this by identifying the risks and taking all reasonable steps to prevent the risks including taking out public liability insurance. If you have no insurance and the court finds that you have not taken steps to prevent the risk (eg. checking the safety of the temporary seating) you will be liable and required to pay damages (money) to the injured members of the audience.

TIPS FOR BUYING INSURANCE

Group insurance may be a cheaper option. For example:

- Ausdance provides a members-only public and product liability and professional indemnity insurance package for dance teachers, dancers and dance companies (ausdance.org.au).
- Community Broadcasting Association of Australia provides discounts to members for defamation, public liability, property and volunteer insurance (cbaa.org.au).
- Guildhouse provides property, transit, public and product liability insurance to members (guildhouse.org.au).
- Duck for Cover provides members-only, public liability insurance for performance-based artists (duckforcover.com.au).
- Flying Arts Alliance Inc. offers public liability, professional indemnity and products liability insurance cover as part of an Accredited Membership package. It is suitable for visual artists, designers and craft practitioners engaged in activities related to professional practice. Similar cover is also available for curators, arts administrators, installers, conservators, musicians, writers and multi-disciplinary artists (flyingarts.org.au).
- Local Community Insurance Services provide insurance to not for profit clubs and community groups (localcommunityinsurance.com.au).
- NAVA provides general advice on insurance for visual and media artists, craft and design practitioners. NAVA also provides a comprehensive Artists Insurance Package as part of NAVA's Premium Plus membership which includes transit and exhibition insurance (visualarts.net.au).
- Regional Arts NSW provides public liability insurance and volunteer insurance cover for incorporated entities in New South Wales, provided the

entity is an affiliate of Regional Arts NSW (regionalartsnsw.com.au).

- Regional Arts Victoria provides public liability and volunteer insurance cover for local arts groups and individuals. Although the organisation focuses on Victorian artists, its insurance policy is available to artists throughout Australia (rav.net.au).
- Victorian Woodworkers Association provides public and product liability insurance to members (vwa.org.au).

HOT TIPS!

- Public liability insurance should cover the damages (money) you owe to the injured audience members and the performer.
- You can download our publication *Business Structures and Governance: A Practical Guide for the Arts* from artslaw.com.au for more help with setting up a secure business including information about insurance.
- We also have an 'Organising a Festival' checklist available on our website.



Photo by Jo Teng

Supporting Arts Law

VOLUNTEER

Arts Law could not function without the support of our amazing volunteers. If you are interested in volunteering for Arts Law, there are opportunities for lawyers with appropriate experience to provide pro bono help, and for law and arts administration students to gain valuable experience in the areas of arts law, research and arts administration. You can submit a volunteer application any time at artslaw.com.au

DONATING TO ARTS LAW

Your support of Arts Law equals our support of Australian creators.

More than ever before, Arts Law needs to provide a strong voice for arts community, especially Indigenous artists.

By supporting Arts Law you can help us to:

- give Australian artists the recognition they deserve;
- stop exploitation and empower artists to deal with the legal and business issues affecting them throughout their career;
- stand up for artists' rights and provide leadership on issues affecting artists so they have a voice;
- make sure that Artists in the Black continues to provide a unique service to Aboriginal and Torres Strait Island artists, wherever their art is seen in Australia.

We cannot do this alone. Please consider making a tax deductible donation to Arts Law today through our website or by calling us on 02 9356 2566.



Sydney Dance Company reproduced with permission.
Photo by Jeff Busby

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