



COPYRIGHT LICENSING AGREEMENT EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample agreement** or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the agreement and should not be included in your final redrafted agreement.

The Explanatory Notes are not intended as legal advice and should be considered as information only. Contact Arts Law for legal advice.

PARTIES

The agreement should clearly identify the name and address, and preferably the telephone and fax numbers, of the persons or organisations entering into the agreement (**parties**). Throughout the rest of the agreement, the parties are referred to or "defined" by shorthand terms for ease of reference, for example Artist. Other terms could be used, or the parties could simply use their own names.

If a party has an Australian Business Number (**ABN**), Australian Company Number (ACN) or Australian Registered Body Number (**ARB**N), the number must be included. The ABN is important for GST purposes.

If either party is a company, its Australian Company Number (**ACN**) and the address of its registered office must be stated.

DEFINITIONS (CLAUSE 1)

This clause clarifies the meaning of certain terms that may appear in the agreement. This avoids diverging understanding of the agreement and may help preventing future disputes in relation to the agreement.

Defined terms are capitalised throughout the agreement.

LICENCE (CLAUSE 2)

This clause is the grant of licence from the Artist to the Licensee. The parties must determine the nature of the licence granted, as well as its term and territory.

The parties must determine the nature of the licence in clause 2.1 by choosing between an exclusive, a sole or a non-exclusive licence. If the Artist chooses an exclusive licence, the Artist cannot allow anyone else to exercise the rights covered by the licence, and the Artist cannot exercise those rights themselves. As a result, a higher fee or royalty is usually payable for an exclusive licence. Under a sole licence, the Artist cannot permit anyone else to exercise the rights covered by the licence, but can exercise them him or herself. If the Artist grants a non-exclusive licence, the Artist can exercise, and permit other third parties in addition to this licensee to exercise, the rights covered by the licence.



The purpose of clause 2.3 is to clarify that the Artist retains the right to reproduce the Works for his or her promotional portfolio, irrespective of the nature of the licence. This would not be a problem in the case of a non-exclusive or a sole licence, but would not be possible without an express reservation of right if the licence is exclusive.

Clause 2.4 clarifies that the licence does not have any impact on copyright ownership, which remains with the Artist.

DEALING WITH RIGHTS IN THE WORKS (CLAUSE 3)

The Licensee may want to sell the licence or deal with it in another way. This clause sets out the limits of dealing with the acquired rights.

ATTRIBUTION AND ALTERATIONS (CLAUSE 4)

The Artist has moral rights in relation to the Work. Moral rights are personal rights of an artist, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be bought or assigned (i.e. sold). They belong to an artist regardless of whether the artist is still the copyright owner. Moral rights apply to artistic, literary, dramatic and musical works and films. Since 26 July 2007 moral rights have also existed for performers in live performances (so far as the performance consists of sounds) and sound recordings of those live performances.

In Australia, there is no need to “assert” your moral rights. However, this is required in some other countries, including the United Kingdom and New Zealand. You should include a clause dealing with this if your work is likely to be sold or distributed in these countries.

In Australia there are 3 moral rights, namely the right of a creator:

1. to be named as the work’s author or creator (*the right of attribution*);
2. not to have his/her work (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her work from unauthorised alteration, distortion or other derogatory treatment that prejudices his/her honour and reputation (*the right of integrity*).

“*Derogatory treatment*” in relation to an artistic work is defined in the Copyright Act as:

- (a) *the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author’s honour or reputation; or*
- (b) *an exhibition in public of the work that is prejudicial to the author’s honour or reputation because of the manner or place in which the exhibition occurs; or*
- (c) *the doing of anything else in relation to the work that is prejudicial to the author’s honour or reputation.”*

Sometimes contracts ask creators to waive (i.e. give up) their moral rights. Arts Law recommends that artists refuse to agree to any term whereby they give up their moral rights. The Copyright Act does not specifically allow for the “waiver” of moral rights. However, it does contemplate that artists can give consent in writing to the future infringement of their moral rights. Arts Law considers that general consents or purported waivers of moral rights in relation to all copyright works could potentially breach Australian Consumer Law. A moral rights consent that is unfair may also be open to attack under various State legislation regulating contracts and industrial relations.



In some circumstances it may be necessary or appropriate for the Artist to consent to certain acts or omissions in respect to their moral rights. For example, the Artist may consent to the Licensee altering the Work in some way (see clause 4.2). You should always carefully consider any consent and seek advice if you are uncertain of the terms of the consent.

The Licensee's obligation to credit the Artist as creator of the Work (if that is in fact the case) under clause 4.1 implements the moral right of attribution. The Artist can specify the form of attribution in the schedule, for example: "Original work by Nelson Trianti © 2008"; or "*Smiling Dog* © Heidi Chung 2004". The parties can also determine where and how the attribution should appear. For example, the Artist could require the attribution to appear underneath every reproduction and specify the minimum font size.

If, contrary to the premise on which this agreement is based, the person granting the licence is not the creator of the Work but just the copyright owner, the parties might consider contacting the creator to determine whether, and if so how, the creator wishes to be attributed. Only the creator's name should be attributed as creator.

Clause 4.2 implements the right of integrity, by providing that any material alteration, distortion or other derogatory treatment of the Work is subject either to an express agreement in clause 1 or to the Artist's consent. The person granting the licence may enforce the right of integrity even if they are not the creator of the Work; In that situation, the Licensee must obtain the consent of both the copyright owner and the creator to any material alteration other than as allowed by the licence.

Clause 4 also refers to ICIP (Indigenous Cultural or Intellectual Property) and sets up an obligation to respect its rules (see also above, "Other information").

REPRESENTATIONS, WARRANTIES AND INDEMNITIES (CLAUSE 5)

Clauses 5.1 and 5.2 contain the legally binding promises of the parties that they have the capacity to enter the agreement, that the person granting the licence actually is the owner of the copyright in the work etc. If ever a dispute arises over these matters, the inclusion of this clause will give the other party a forceful legal instrument against the party who has breached the agreement by turning these general obligations into contractual obligations.

The breach of those obligations entitles the party not in breach to call upon the indemnity under clause 5.3.

PAYMENT (CLAUSE 6)

Clause 6.1 sets out the agreed fee that the Licensee will pay the Artist. There are various options for payment. However, most licences would contain either a flat fee or royalties or a combination of both. The payment figure will vary according to a number of factors such as the proposed use of the Work, the Artist's reputation, etc. Collecting societies, such as [VISCOPY \(www.viscopy.com.au\)](http://www.viscopy.com.au), [Copyright Agency \(www.copyright.com.au\)](http://www.copyright.com.au) or [Aboriginal Artists Agency Limited \(www.aboriginalartists.com.au\)](http://www.aboriginalartists.com.au) may be able to assist with payment rates.

Clause 6.2 is important if the parties agree on a royalty, as it places an obligation on the Licensee to account to the Artist for sales. The Licensee needs to provide comprehensive information about the profit they derive from the granted rights, so that the parties can calculate correctly the amount payable. It is essential to include clear rules on this point in order to avoid future disputes. The Licensee may want to change the time when statements and royalties are due to some other frequency that ties in with the Licensee's current business arrangements.

Clause 6.3 and 6.4 give the Artist the ability to inspect the Licensee's accounts and deal with the consequences of any error.



GOODS AND SERVICES TAX (CLAUSE 7)

The parties to the agreement must consider their obligations with respect to taxation and other statutory fees and charges.

GST is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for consideration (e.g. money or payment in kind) will be subject to GST. Clause 7 provides that payments are *exclusive* of GST. If this does not suit your situation, you will need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published [Artefacts: the Arts and Tax - a practical tax workbook for the arts sector](#) which can be downloaded free from the Australia Council website.

NAME, LIKENESS, VOICE AND BIOGRAPHY (CLAUSE 8)

This clause enables the Licensee to refer to the name, likeness and biography of the Artist when exploiting the licence. This may be a valuable way of promoting the items created by use of the Works.

Clause 8.1 may not be appropriate if the person granting the licence is not also the creator of the Works.

TERMINATION (CLAUSE 9)

While the term of the agreement, i.e. the period after which the agreement expires automatically, is to be specified in the schedule, the termination clause defines the circumstances under which the parties may terminate the agreement prematurely. Especially if one party is in breach of his or her obligations, the other party may not wish to be held to the agreement.

Clause 9.2 determines the effects of termination.

DISPUTES (CLAUSE 10)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 10 provides that a party which wants to access the dispute resolution procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate another independent body within their industry such as CAL, APRA or Screenrights. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.



GENERAL PROVISIONS (CLAUSE 11)

Clause 11.1 defines the relationship between the parties as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but may not be legally effective if the one party is in reality an employee or partner of the other party.

Clause 11.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

A legally enforceable agreement can comprise both written and verbal (oral) terms. Oral terms can be expressly stated or implied from the circumstances. In the interests of certainty, clause 11.3 seeks to ensure that the written agreement contains all relevant terms and is the only valid agreement on this subject matter. Anything that might have been canvassed during negotiations which is not actually set out in the agreement will generally be excluded by this clause. However, there are exceptions, for example, where terms cannot be excluded by statute or where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 11.4 requires any changes to this agreement to be in writing signed by both parties. This avoids confusion over the terms of the agreement and prevents a party arguing that an agreement was varied orally.

Amend clause 11.5 to state the appropriate governing law for the agreement and the place where possible litigation should be conducted if the parties fail to resolve any conflict under clause 10. This is particularly important if the agreement is between people in different states or different countries where laws may vary.

SIGNING THE AGREEMENT

If you are an individual, sign your name and write in the date of signing where indicated at the bottom of the agreement. This is sometimes called "executing" the agreement.

If a company or association rather than an individual is a party to the agreement, the organisation's rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the agreement. It may also be necessary to stamp or "affix" the document with the company's or association's seal if this is required under its constitution or articles of association. In that situation, replace the existing wording "Signed for and on behalf of ..." as follows:

"The Common Seal of the [party] was fixed to this agreement ..."

If someone else is signing on behalf of either party as that party's agent, you should insert the following sentence into the signature section:

"I am the authorised agent for ..."

If any of the parties is under the age of 18, that party's parent or legal guardian will need to sign the agreement "on behalf" of the child. This does not mean that the parent or legal guardian becomes a party to the agreement in the parent's or legal guardian's own right.

If there is a change to the agreement at the last minute before signing, you can either type up a new agreement, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the agreement. You may also wish to initial each page in order to make sure no new pages can be inserted after you have signed, but this is not strictly necessary.



KEEP RECORDS OF YOUR AGREEMENT

Signing the agreement is evidence that you agreed to its written terms. You will usually be bound to perform the agreement as it is written. For this reason it is a good idea to get the same number of identical originals of the agreement as there are parties to it and have all originals signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a copy of the original agreement so that you can remember what you have signed.

STAMP DUTY

Stamp duty is a tax which is enforced and collected by State and Territory governments on certain "instruments" (that is, documents) and transactions relating to property such as partnership interests or shares, or in some cases, intellectual property such as copyright. You should check with the Office of State Revenue in your State or Territory as to what stamp duty, if any, may be payable on your document or transaction.