



## IMAGE REPRODUCTION LICENCE FOR A PUBLICATION

### EXPLANATORY NOTES

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#### 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 information only. You should contact Arts Law for specific 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 Owner. 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 (ARBN), 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.

#### LICENCE (CLAUSE 1)

In clause 1, the Owner grants the Licensee permission to use the Image in the Publication and communication of the Publication. The Publication must be described in the Schedule. The licence is subject to the terms set out in the rest of the agreement.

The Owner must choose between an **exclusive**, a **sole** or a **non-exclusive** licence of the Image. If the Owner chooses an exclusive licence, the Owner cannot allow anyone else to do the things covered by the licence, and the Owner cannot do those things. As a result, a higher fee or royalty is usually payable for an exclusive licence. Under a sole licence, the Owner cannot permit anyone else to do the things covered by the licence, but can do those things. If the Owner grants a non-exclusive licence, the Owner can permit others to do the things covered by the licence.



### Scope of the licence

This agreement gives the Licensee a **limited** licence to reproduce the Image for the Publication. This means that the Licensee can only do the things listed - and nothing else - with the Image.

The parties are free to specify whatever limitations they wish. Limits could include:

- permitted dimensions and colours of the reproductions in the Publication;
- the kind of media or multimedia platforms in which reproduction of the Image is permitted;
- the print run of the Publication;
- the permitted use of the Image in any promotional brochure for the Publication.

The advantage to the Owner of using a carefully limited licence of this kind is that further uses of the Image must be separately negotiated and paid for.

Clause 1.2 states the territory in which the Licensee may supply the Publication. If the licence is for internet use, the territory is usually the world. In other cases, the territory can be limited to specific towns, regions or countries. The Owner can then license the Image for publication to third parties outside the Territory.

### Multimedia images

Special considerations may apply to a multimedia image that will be supplied for use in digitised or computer program form, particularly if it can be manipulated. The Owner should seek specific advice on the kinds of limitations that may be necessary to include under this clause in order to protect the Owner's rights.

### TERM OF AGREEMENT (CLAUSE 2)

Clause 2 sets out the period during which the Licensee may **reproduce** the Image. If a flat fee is being paid, the length of the term should be considered when negotiating the fee. The term is of greater importance if the licence is exclusive.

If the licence is limited to reproduction on a set number of items, a term may not be necessary as the licence will end when the total number of copies is made. In this case, clause 1 should include the number of items on which the Image can be reproduced.

### DEALINGS WITH RIGHTS IN THE IMAGE (CLAUSE 3)

Clause 3 is concerned with the possible transfer (novation, assignment) of the Licensee's rights under the agreement to someone else, as well as with other dealings in relation to those rights. For example, the Licensee might want to sell those rights to another company as part of a sale of the Licensee's business.

The alternatives either totally prohibit any dealings with the rights, or subject dealings to the Owner's consent, or allow only a sub-licence, to the exclusion of other dealings, of the Licensee's rights to named persons or organisations. The parties should choose clause 3.3 if the Licensee does not actually produce the Publication, and therefore needs to delegate some of the Image reproduction rights to a third party (**Sub-licensee**). Under clause 3.3, such a delegation (sub-licence) is only possible if the Licensee has named the third party and agrees to use the Licensee's best endeavours to ensure that the third party does not go



beyond the scope of the Licence. If the Sub-licensee breaches the Licence, clause 3.4 provides that the Licensee, not the Sub-licensee, must indemnify the Owner.

#### **ATTRIBUTION AND ALTERATION (CLAUSE 4)**

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 Images 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 Image 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 Image’s author or creator (*the right of attribution*);
2. not to have his/her Image (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her Image 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 Image is defined in the Copyright Act as:

- “(a) *the doing, in relation to the Image, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the Image that is prejudicial to the author’s honour or reputation; or*
- (b) *an exhibition in public of the Image 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 Image that is prejudicial to the author’s honour or reputation.*”

Arts Law recommends that artists refuse to agree to any term whereby they give up (“waive”) 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 Images could potentially breach the *Trade Practices Act 1974* (Cth) and similar State legislation. 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 an Artist to consent to certain acts or omissions in respect to his/her moral rights. For example, the Artist may consent to the Licensee altering the Image 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 Owner as creator of the Image (if that is in fact the case) under clause 4.1 implements the moral right of attribution. The Owner can specify the form of attribution, for example: "Original Image by Neslon Trianti © 2008"; or "*Smiling Dog* © Heidi Chung 2004". The parties can also determine where and how the attribution should appear. For example, the Owner could require the attribution to appear underneath every reproduction, and specify the minimum font size.

If the Owner is not the creator of the Image, 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 Image is subject either to an express agreement in clause 1 or to the Owner's consent. The Owner may enforce the right of integrity even if the Owner is not the creator of the Image. If the Owner is not the creator of the Image, the Licensee must obtain both the Owner's and the creator's consent to any material alteration other than as allowed by the licence.

#### **ORIGINAL PROOF OF IMAGE (CLAUSE 5)**

The Owner must deliver an original proof of the Image suitable for reproduction to the Licensee within a specified time after the agreement is signed. The proof will differ depending on the type of image being reproduced. For example, the proof could be a transparency, a digital file or a high resolution print-out. The Licensee must return the proof to the Owner.

The Licensee is responsible for the safekeeping of the proof while in the Licensee's possession and during its return to the Owner. Therefore, the Licensee should consider taking out insurance which is appropriate and sufficient to cover loss, theft or destruction of, or damage to, the proof.

#### **OWNER'S INSPECTION OF PROOFS OF PUBLICATION (CLAUSE 6)**

Clause 6 gives the Owner the right to inspect at least one proof of at least that part of the Publication and any promotional materials which reproduce the Image to ensure that the quality of the reproduction is satisfactory. Clause 6.2 gives the Owner certain rights if the reproduction is unsatisfactory.

#### **REPRESENTATIONS, WARRANTIES AND INDEMNITIES (CLAUSE 7)**

The agreement is drafted on the basis that the Owner owns the copyright in the Image. Clause 7.2 provides that the Owner will be required to compensate the Licensee for any damage suffered as a consequence of any breach of the Owner's representations and warranties (i.e. promises) under clause 7.1.

The Owner must also "warrant" to the Licensee that the Owner is the sole creator of the Image, and the Owner has the power to enter into the agreement. The parties must amend clause 7.1 if any of the representations and warranties is incorrect, for instance if the Owner is not the creator of the Image, to avoid the Owner making any false promise and being in breach of the agreement.



## **PAYMENT (CLAUSE 8)**

Clause 8 should set out the agreed fee that the Licensee will pay the Owner. 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 Image (either as central feature of the Publication or a background image), the Owner's reputation, the extent and territory of manufacture and sale of the Publication, etc. VISCOPY may be able to assist with payment rates.

Any cost in delivering or producing a quality proof of the image for reproduction should be incorporated into the fee or reimbursed, for instance on presentation of receipts.

Clause 8.3 is important if the parties agree on a royalty, as it places an obligation on the Licensee to account to the Owner for sales made. 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 8.4 and 8.5 give the Owner the ability to inspect the Licensee's accounts and deal with the consequences of any error.

## **GOODS AND SERVICES TAX (CLAUSE 9)**

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 9 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](http://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.

## **TERMINATION (CLAUSE 11)**

Clause 11 specifies the circumstances in which the Owner may terminate the Licence before the expiry of the Term under clause 2, and deals with the consequences of a termination for the Licensee.

## **DISPUTES (CLAUSE 12)**

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 12 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 the Visual Arts Copyright Collecting Agency (VISCOPY). Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

### **GENERAL PROVISIONS (CLAUSE 13)**

Clause 13.1 defines the relationship between the Owner and the Licensee 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 in reality the Owner is an employee or partner of the Licensee.

Clause 13.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

Clause 13.3 is included to ensure that the parties entering the agreement will solely be responsible for their obligations. If any responsibilities are to be delegated or subcontracted, the subcontractors and their obligations should be first agreed to.

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 13.4 seeks to ensure that the written agreement contains all relevant terms. 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 and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 13.5 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.

Clause 13.6 specifies that the validity of the agreement as a whole and of its individual clauses is not affected by the invalidity of any clause, unless that invalidity has an impact on any other clause.

Amend clause 13.7 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 12. 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.