

Copyright and Wrong: Contract Law for Designers

December 16, 2015 by [Sharon Givoni](#) – [0 Comments](#)

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This is Part Two in our “Copyright and Wrong” series by Melbourne-based intellectual property lawyer Sharon Givoni. Sharon is the author of [Owning It: A Creative’s Guide to Copyright, Contracts and the Law](#).

Contract law. Not exactly the two most exciting words, especially when put together. But contract law involves more than just boring jargon and signing on dotted lines. A binding contract can come into existence even when not formally written and signed, such as a casual conversation over a beer, through a series of emails, or even through one’s conduct.

Whether you are a freelancer, an employee or run your own business, it’s essential you have a clear understanding of your rights, responsibilities and obligations regarding contract law.

Do I need a contract?

It may be tempting to cut corners when it comes to legal documentation. After all, creating a contract takes time and legal jargon can often be overwhelming and confusing. In small creative

businesses, relationships are often informal, based on trust, and certain dealings are commonly understood without the need to put them in writing.

Nonetheless, the importance of having written contracts cannot be underestimated. They enable all parties to have a shared understanding of what has been agreed to and can assist in the event things don't go as planned. Even if you are doing a small design job for friends or family, it's usually best to have something in writing that both you and your 'client' agree to.

Okay fine – I get it. Contracts are important. So, what's a contract?

In basic terms, a contract is a legally binding agreement between two or more parties. Some people are surprised to learn that contracts may be enforceable, even if they are not in writing.

In order for a contract (written or oral) to be enforceable, essential elements must be present:

- Agreement (offer and acceptance): Basically, an agreement needs to be reached between the parties, and there must be an 'offer' by someone and an 'acceptance' by the other. For example, a designer may make an offer to a client by providing them with a quote, and the client would then accept by instructing the designer to go ahead with the job.
- Consideration: A valid contract requires that everyone provide something of value. This is known as consideration under the law and it can be anything at all (not just money but even a promise not to do something).

Additional elements such as "intention to create legal relations", "certainty of terms" and "capacity" are also required, but we can leave those for another day.

Common types of contracts and agreements

Now that you know the basic elements of a contract, a few examples of the different types of contracts that may be relevant to designers include:

Employment contracts

Employment contracts generally cover the following terms:

- an employer's obligations and an employee's duties
- details such as hours worked, probation period, salary, superannuation benefits, performance reviews, leave, and termination
- ownership of intellectual property

Contractor agreements

Creative businesses often hire designers as freelancers or sub-contractors rather than as employees. Agreements are important in this situation and they should include a description of the contractor's specific rights and responsibilities such as:

- ownership of intellectual property (generally owned by the contractor, but can be otherwise)

- confidentiality
- fees and payment terms etc.
- any special conditions

Collaboration agreements

The concept of collaboration, or working with someone to produce something, is gaining popularity in the fashion and design industry. This sort of arrangement can be mutually beneficial, but the parties must agree on certain terms. Collaboration agreements should cover things like:

- who is responsible for certain tasks
- who owns the IP in works that have been jointly created
- on what terms the joint works will be licensed
- whether a right to sublicense exists
- whose responsibility it is to take legal action against someone who copies the work
- how profits will be shared and accounted for

Licences and assignments

Licences and copyright assignments are other forms of contracts and agreements that become relevant when someone wants to use your work. As the copyright owner, you can 'license' the right to use your work, which means giving somebody else permission to use it on certain terms, while at the same time retaining copyright and ownership over the work.

Alternatively, you can 'assign' your rights in a work, which can mean giving complete ownership of the work and all rights in it to someone else. Essentially, licensing is a bit like 'renting' out your work to someone, and assigning it is 'selling' it.

Consignment agreements

Consignment agreements may be used when an artist, designer or craftsman provides a gallery or retailer with a work to sell on their behalf. Apart from the importance of stipulating when you are to be paid for items that are sold, a consignment agreement should also consider what will happen in the event that a gallery or shop goes broke or closes voluntarily.

Changes to Australian Law mean that you may need to register with the Personal Property Securities Register. If you consign your artworks to a gallery, new laws make it important for an artist to register their ownership with something called the Personal Property Securities Register or risk losing all if the gallery goes under.

Confidentiality agreements

Confidentiality agreements aim to protect information that is confidential. This may include ideas and sketches for new product designs, written content, textile designs, and more.

Obligations of confidence may arise even where a written contract has not been signed. However, for certainty and peace of mind, it's best to have a written agreement in place. Also, make sure it's signed before you show the design to others, and not after.

All of the above contracts and agreements can contain traps if you do not understand them properly. This can cost you money in the long run, so it is always best to get legal advice.

Conclusion

In an ideal world, we would all conduct business on the basis of blind trust. However, reality is quite different. Having well-drafted contracts in place, tailored to suit your specific needs, can give you or your business solid legal protection should the need arise.

Whether the contract is an employment contract, a contractor agreement, a licence or otherwise, it is beneficial to seek legal advice to ensure the contract reflects your needs, and especially if a contract submitted to you for signing contains terms that you do not understand.

Designers should be particularly aware of signing any contracts they don't understand, not giving away their intellectual property too easily, and ensuring their terms and conditions to clients are well thought out and clear.

Although contract law may not be exciting, it is important. Don't learn these lessons the hard way.

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