

PROBLEMATIC CLAUSES WITH CLIENT INITIATED COMMISSIONING AGREEMENTS.

From time to time the AIPP is approached by photographers concerned that a commissioning agreement offered by one company or another is, in all the circumstances, unfair to them, and wondering what the AIPP can do to assist. The problem of an unfair contract is bad enough when it just relates to a single shoot, but worse when the terms or conditions offered are stated to apply to any commission the photographer undertakes for that company at any time into the future ...

While the AIPP is unable to intervene in individual contract negotiations, and while it has no role in setting industry terms or conditions, it can provide commentary on potentially problematic clauses. The following comments are based on its knowledge of the types of clauses that companies often include in commissioning agreements and that, in its view, are unfair.

PAYMENT DOESN'T MATCH USAGE

It's not uncommon for companies to engage you on the basis they need some photos for a particular purpose, for which they have only a limited budget – and yet they'll expect you to hand over rights for basically all and any purposes – “a world-wide, irrevocable ... licence” to use your images.

One way of handling this can be to discuss how, if the commissioning party only has a limited budget, then you can give them the licence they need for the purpose to which the budget relates – or otherwise you would have to charge more. Sometimes, giving them a range of figures can persuade them either to pay more for a broader licence (or even a buy-out) or to stay with the more limited licence for the lower cost.

On a related note, always also check that the payment will match the services you are asked to provide (including, if relevant, any additional equipment hire, rights clearances or talent costs).

ASSIGNMENT OF ALL RIGHTS TO THE COMPANY

Clearly this is related to our comments immediately above – and we repeat those comments in relation to agreements that ask you to assign all copyright to the company in return, essentially, for a day-rate payment.

Unfortunately, companies who expect an assignment of copyright from you get to build up their own stock libraries at your expense – which they can then use themselves and licence to others without any further payment to you.

At the very least, if you decide to go ahead with an agreement that provides for you to assign all rights to the commissioning company, look to negotiate a licence back to use your images for CV, competition and promotional purposes (including on your website).

In the case of “blanket” agreements covering all future commissions with a company, one approach may be to give quotes to the people who engage you stating that a higher cost will apply if the existing agreement applies to the job, but a lower figure if they agree in writing to vary that agreement for these particular photos.

WAIVER OF ALL MORAL RIGHTS

Moral rights cover things such as you being attributed for your images when it's usual to do so, and images you take not being used in ways that harm your reputation.

Generally, why would anyone say it's OK not to give you attribution or to be able to use images to harm your reputation? But nonetheless, such waivers are not uncommon, particularly in agreements offered by larger companies, who often simply don't want the hassle of worrying about such things, even though in both cases your ability to get more work may depend on these things.

A couple of ways of approaching this include:

- asking the person offering the contract why they don't want to attribute you and what they want to do with the images that will likely harm your reputation (and surprisingly often, the person you deal with will have no idea – or just say that it's something the lawyers said they had to have in the agreement);
- if they insist on including a moral rights waiver, negotiate for a modification so that the company only has to take “reasonable steps to ensure you are attributed where it is usual to do so” and “to take reasonable steps to ensure your reputation is not reasonably likely to be damaged” by the way the company uses the images; and
- in cases where attribution and reputation may be particularly important to you, yet where you are covered by a “blanket” agreement that has waived your rights, ask for the company to agree in writing that that waiver will not apply in this particular instance (using instead words such as those suggested in the previous bullet point).

OBLIGATION TO CLEAR ALL THIRD-PARTY RIGHTS

It is often the case that commissioning agreements put the obligation to clear all relevant rights on the photographer, when this should clearly be the responsibility of the company commissioning the images.

Unless such an obligation is removed, you may be liable for any or all of the following:

- all talent releases;
- all location releases (including any location permits from local councils or government bodies – for example, in relation to areas such as Sydney Harbour foreshore areas, national parks and Indigenous-controlled lands); and
- all third-party copyright material that might be included in a shot (such as any posters, artworks, brand labels and so on).

Depending on what rights you give to the company under the agreement (for example, an assignment of all your copyright), you would generally need to clear all relevant rights worldwide and for the term of copyright. Note also that the clearances and releases you would need to get would likely need to cover both editorial and advertising uses.

Quite apart from the time you might spend clearing rights and getting releases, if relevant rights are forthcoming, they may cost far more than what you are being paid and leave you severely out of pocket.

In the alternative, you may need to consider simply refusing to include any third-party material or any people or relevant locations in your shots.

Obligation to indemnify the company for the company's use of rights other than those for which photographer is paid

This point is really a follow-on from the previous point.

Not only may you be up for clearing all rights and getting all releases and permits, but you may also be up for paying for the company's costs if you fail to get all the clearances you undertook to get and then a rights holder makes a claim on the company (including for uses of the relevant image by a third party or far beyond what you thought it would be used for).

“NON-COMPETE” CLAUSES

Our view is that it will rarely if ever be appropriate for a freelance photographer to agree not to work for a rival or competing company, particularly if the agreement offered doesn't offer a large and long-term fixed weekly or monthly retainer, whether or not you take you are asked to provide any images, or doesn't ensure a minimum number of guaranteed days' work.

You should therefore generally negotiate to delete such clauses.

“TO THE COMPANY'S SATISFACTION”

This formulation pops up in different contexts in commissioning agreements – and can be problematic because it makes decision making entirely subjective.

Generally, if the relevant wording can't be deleted, negotiate for the wording to state to the effect that the relevant action or product will be “to the Company's reasonable satisfaction”.

“REPUTATION” CLAUSES

Following the #MeToo movement, many companies are beginning to insert “reputation” clauses that give them the right to terminate agreements (and even ask for damages) if someone they have been working with is involved in a scandal.

Such clauses may be appropriate for brand ambassadors, key actors in movies and television series, high-profile authors and other “celebrities”, but are rarely either relevant or appropriate to photographers – whose names in many cases are not even known to the public or suppressed by the publisher.

OTHER CLAUSES TO CHECK ON

In a short information sheet, we can't discuss every clause that is potentially problematic – and ultimately, whether you agree to a deal will depend not just on individual clauses but whether, as a whole and on balance, the contract is acceptable to you.

However, other clauses to watch include:

- insurance clauses (both in relation to what insurances you are required to have in place (and in what amount) and whether the company will have any that may cover you);
- limitation of liability clauses (which sometimes even look to make you effectively liable for the company's negligence or for its breaches of the contract, including if you're injured by the company or people for whom the company should properly take responsibility);



- indemnity clauses (which should be read carefully so you appreciate what risks you are taking on if something goes wrong); and
- “further assistance” clauses (which should usually be amended to provide that, if the company requires further assistance from you – for example, to enforce its copyright rights – then such assistance will be at its cost).

WHAT IF THE COMPANY WON'T AGREE TO THE CHANGES YOU WANT?

If a company won't agree to changes you want, you may have a hard decision to make as to whether or not you will accept the commission or series of commissions with that company.

That said, before walking away from a commission or accepting terms that are problematic, it's always worth asking the person offering you a contract what relevant terms mean or why they're in there. If they can't explain these, that can often be a good way of opening up a conversation about getting the relevant clause clarified, amended or deleted entirely.

Deciding to go ahead when a contract contains problem clauses is not ideal but can be in some cases inevitable. At least in such situations, you go in with your eyes open, and you avoid nasty surprises down the track!

Of course, if uncertain as to what a clause means or how it might apply to your situation, consider getting legal advice.

These notes were prepared for the AIPP by Ian McDonald, Senior Counsel at Simpsons Solicitors, a specialist IP, arts and entertainment law firm (www.simpsons.com.au). They are provided by way of information only and do not constitute legal advice. If you are concerned as to how this information relates to your situation, contact a lawyer with copyright expertise.

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