



CONTRACT BASICS FOR ARTISTS

By: James Williams, Esq.
Tingen Law, PLLC

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- I am not your attorney, yet, and nothing in this presentation is intended to create an attorney-client relationship.
- Names and businesses included within this presentation are only used for nominative and educational purposes unrelated to statements regarding quality of their services or sponsorship/association.

James Williams (he/him)

- Attorney at Tingen Law, PLLC in Richmond, Virginia
- Chair of the Lawyers for the Arts group in Virginia
- I help clients specifically with family, immigration, and intellectual property issues
- For more information visit <https://tingen.law>
- You may also schedule an appointment by calling 804-477-1720



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Who needs contracts?

- Taylor Swift (music copyrights, trademarks, NIL, etc.)
- Marvel (M&A deals, work made for hire, contractor deals)
- Galleries & Businesses (exhibition, acquisition deals)
- You! (& really anyone)

Intro to Intellectual Property

- Intellectual Property includes trademarks, copyrights, patents, and trade secrets
- We'll focus on copyright and trademark basics

Copyright – What It Does

- Based upon federal law and not state laws (Title 17 of the U.S. Code)
- Protects creative expression of ideas or content
- Abstraction-Expression Dichotomy
- Rights are instilled when work is created, but you cannot sue or enforce the rights until registration is received
- Licensing must be tied to original rights

Copyright – What It Does NOT Cover

- Does not protect ideas or most functional aspects of items (covered by patents, potentially)
- Does not protect a brand from unfair competition (think false sponsorship or confusing consumers)
- Does not cover methods or processes of creating art, generally

Rights tied to Copyright law (17 USC 106)

- Reproduction of copies
- Preparation of Derivative Works
- Distribution of copies
- Public Performance
- Public Display

Infringement

- Unlicensed uses unless they meet an exception such as fair use
- Counterfeits and intentional infringement lead to higher damages
- Most common remedy to infringement is filing DMCA claims, sending cease and desist letters, or filing lawsuits

Fan Art

- Starts as copyright infringement
- Only becomes licensed work by contacting the rights holder and receiving a license
- Risk of publisher/rights holders shutting down the business at any time they discover you
- Generally, rights holders may not notice you or care until you start to sell work or become viral
- Some rights holders are more aggressive than others (consider Disney and Nintendo)

Fair Use (17 USC 107)

- Limited to uses tied to “criticism, comment, news reporting, teaching, scholarship, or research”
- Determined ONLY by a court (some argue platforms assess fair use through the DMCA process)
- Court must consider (1) the purpose and character of the use, (2) nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) effect of the use upon the potential market for or value of the copyrighted work

Trademark

- Federal v. State options
- A source of origin for goods or services
- Based upon unfair competition laws
- Consumer protection by mitigating likelihood of confusion
- General aim is to prevent (1) false association for quality reasons, (2) false sponsorship, and (3) others from deriving benefit from your unique brand

Types of Trademarks

- Words (text names, phrases, slogans, etc.)
- Designs (logos that may also be separately copyrightable)
- Smells (Play-Doh® has registered the smell for clay)
- Colors (Tiffany & Co. registered the unique blue color for product packaging)
- Sounds (jingles are obnoxious for a reason!)
- Product Packaging – “trade dress”

Perspective on the Artist Contract

- You want to make money
- You want to set up a set of rules for commissions
- Generally trying to protect the art or yourself
- Work made for hire versus independent contractor
- Physical rights of art versus intangibles (copyrights)

Perspective on the Business Contract

- Work made for hire or independent contractor terms
- Rights ownership (generally want to retain control)
- Royalties
- Large template agreements because either (1) have had some rough business deals, or (2) they grabbed a template with unnecessary language
- Counter-offers and proposed revisions are acceptable for contract negotiations

10 Important Provisions of Contracts

1. Ownership (work made for hire, assignment, etc.)
2. Compensation (do you have a payment schedule in place)
3. Choice of law (is it a Virginia contract, or will you have to litigate it elsewhere?)

Important Provisions - Continued

4. Breach of Contract (how does someone violate the terms?)
5. Force Majeure (when one party cannot perform due to unexpected events)
6. Termination (what happens when one/both parties agree to end the contract? Money/returns/refunds?)

Important Provisions - Continued

7. Indemnification (liability to third parties for infringement)
8. Representations (statements of facts regarding the parties)
9. Warranties (guarantees about statements of fact)
10. Covenants (promises to abide by terms or not to infringe rights of others)

Conclusion

- Contracts are important tools for anyone offering or receiving goods or services
- Contracts are negotiable and merely record an agreement
- Contracts should reflect the interests of the parties clearly and reasonably
- The strength of a contract comes down to validity and ability to enforce

Q&A

- Please feel free to ask questions.
- James Williams
- Email: james@tingen.law
- Office Phone: 804-477-1720
- Twitch Channel Office Hours: Monday 7-9PM, Friday 12-1PM on [twitch.tv/teamgavel](https://www.twitch.tv/teamgavel)