

The Commissioning of Artworks

The relationship between the artist and the commissioner of an artwork is a complex one. The following material examines the problems that can arise in accepting commissions and suggests a legal framework by which these difficulties either can be avoided from the outset or resolved when they arise. The chapter follows the usual course of a commission, discussing the legal aspects of the preliminary design, the commission and the sale of the work. Specimen contracts are provided.

Commissions for the creation of artworks are fraught with potential misunderstandings between the parties. Most of these difficulties can be overcome if, at the outset, the parties consider and communicate their respective needs and intentions and then come to an agreement. This agreement should be put into writing, because if at a later time there is dispute among the parties as to its terms, memories will surely conflict. Furthermore, it is simply good business practice to spell out the mutual obligations of the parties so that each knows exactly what they may do, and when and how they may do it.

PRELIMINARY DESIGNS

Where preliminary designs are necessary, the artist should consider several points.

It is vital to determine who is offering the commission. This is not always as easy as it might at first appear. The person paying for the work is not necessarily the commissioner. For example, the commissioner may be a city council but the money may be provided by a grant from a government department, a private foundation or a private citizen. The agreement must be with the right body.

The parties should agree upon the form that the design will take (e.g. sketch, model, maquette), how many are expected, and when they are to be ready. The materials and approximate dimensions of the finished work should also be stated.

The commissioner should be given a set period within which to accept or reject the designs or to request changes in those designs.

The agreed design fee can be made payable upon signing the agreement or upon completion of the designs. (The specimen contract provides for the latter.) Further, artists should ensure that they are recompensed for any substantial changes or additional designs that are requested. If the design is rejected, the fee must at least cover the expenses of the materials, plus fair reward for the time spent on the designs. If the preparation of the designs also involves travelling to inspect the site or view the subject, the design fee should also include those expenses.

The artist should also ensure that in the event that the commissioner decides not to proceed with the project, it is clear who owns and controls the rejected designs. In all but the most exceptional cases, artists should ensure that they retain the copyright in their designs. Many sculptors in particular, have found that after the rejection of their designs the commissioner has simply got cheaper (and often unskilled) labour to build the piece. If this is to be avoided, the artist creating the design must ensure that he or she does not assign the copyright.

Finally, the parties must agree that if the commissioner agrees to proceed, they will enter into a commission agreement which will set out their further mutual responsibilities. A copy of this commission agreement should be appended to the design agreement.

COMMISSIONED DESIGN AGREEMENT

THIS AGREEMENT is made the day of 19..... between

Name

Address

Telephone (the ``Artist"')

and

Name

Address

Telephone (the ``Commissioner"')

by which we agree as follows:

1. Submission of Designs. The Artist agrees to submitdesign(s)/model(s) /maquette(s)/sketch(es), (the ``designs") on or about the day of 19....., for the following proposed work of art (the ``Work"):
Description
2. Approval. The Commissioner shall, within days after submission of the design(s) notify the Artist as to approval of the design and intention to proceed with the Work.
3. Changes. If requested in writing by the Commissioner, the Artist agrees to submit up to additional designs for the Work.
4. Fees. The Commissioner shall upon receipt of the design pay the Artist a design fee of \$..... If requesting any additional designs under clause 3 of this Agreement, the Commissioner shall pay the Artist an additional design fee of \$..... per design.
5. Copyright. Subject to clause 7 of this Agreement, copyright in all designs for the Work is retained by the Artist/assigned to the Commissioner.*
6. Commission. If the Commissioner notifies the Artist of intention to proceed with the Work, both parties agree to sign the Commission Agreement (a copy of which is attached hereto).
7. Alteration after Acceptance. The parties recognise that some changes of design may be necessary in completing the commissioned Work. Any such substantial change must be approved by both the Artist and the Commissioner.

8. Termination.

- (a) Prior to delivery of the design, both Artist and Commissioner may terminate this agreement by notice in writing. However if the Commissioner so terminates, for any reason other than the Artist's failure to submit the design within the time specified in clause 1, the Artist shall be entitled to all design fees payable under clause 4 of this Agreement.
- (b) After delivery of the designs, the Artist may terminate if the Commissioner does not approve the design within the period described in clause 2. In such event, the Artist shall be entitled to all payments stipulated in clause 4.
- (c) Further, in the event of termination by either party, the title to the design and all rights therein shall be retained by the Artist.

Signed:

(the Commissioner)

.....

(the Artist)

* Delete whichever is inappropriate.

THE COMMISSION

The agreement should set out a description of the work, including the dimensions of the work and the materials from which it is to be constructed. It should then state the fee that is to be paid for the work and set out a schedule of instalments for payment. Normally one-third of the fee is payable upon signing the agreement, another third when the work is approximately two-thirds completed, and the final instalment upon completion of the work. The payment of one-third of the fee in advance is a very simple and effective way of avoiding the usual problems which surround the purchasing of materials, rental of equipment and so on.

``Completion" is frequently accompanied by two difficulties: who is to say when a work is ``finished", and does the final work have to be ``satisfactory" to the commissioner?

Unless the commissioner specifically reserves the right to be ``the sole judge in determining when a work is completed" it will be the artist's opinion which counts in the end. It is appropriate that this be a matter for the aesthetic judgment of the artist. It is sometimes a more difficult matter to determine whether the work is ``satisfactory". Where a commissioner insists on including a clause in the agreement to the effect that payment will be made upon ``satisfactory completion" of the work, the artist should obtain the commissioner's approval in writing at various stages throughout the creation of the work. Then, should the commissioner refuse the work when it is completed, the artist will at least be entitled to payment up to the time of the last approval. ``Satisfactory completion" clauses tend to act unfairly against artists and should be avoided. (An alternative approach, which protects both parties, can be seen in the specimen commission contract set out below: see clauses 3 and 7.)

Access to the work in progress is important to both parties. Where the work is being created on site it is not uncommon for the artist to experience difficulty obtaining access to the work after business hours. This sort of thing should be worked out at the beginning. On the other hand, the commissioner will want to see how the work is going and if this means attending the artist's studio, it is only reasonable that notice of such visits be given beforehand.

If the work is not going to be created on site, who is responsible for its delivery? What about insurance of the work for the period of its construction? (No provision is made for this in the specimen contract but the parties may wish to include a clause covering responsibility for insurance.)

Then there is the vital matter of who is to own the work. (Refer to clause 6 of the specimen commission agreement.) Any artist accepting commission work must appreciate that a commission does not necessarily involve sale. Paying for an artist to create a work does not mean that the commissioner is paying for the right to own the work. Indeed, as Henry Lydiate points out (in *Collected Artlaw Articles*, Artlaw Services, 1981, p. 13), some commissioners may not want the ownership of the work, and the responsibilities that that may bring. Thus a local body may be prepared to commission a public mural, so long as the company upon whose wall the work is painted is prepared to accept the ownership of it, and the consequent responsibilities of maintenance. This is an important and often overlooked distinction that can have considerable consequences for both parties, so the intentions of the parties should be made clear from the outset. (In this chapter the sale of the work has been dealt within a separate document, but sometimes the one contract will deal with both commission and sale. There is no problem with this, but the artist must try to ensure that such a contract includes the clauses set out in the contract of sale that follows.)

Finally, there is the matter of termination. What rights should each party have to bring the transaction to a premature end? In the specimen contract, the commissioner may terminate upon written notice at any time so long as the artist is paid the expenses already incurred and all design fees due. The artist is permitted to terminate the relationship if the commissioner is more than 60 days late in making any payment. The death of the artist automatically terminates the contract.

One question that must be determined by the parties is what is to happen to the designs and the work in progress in the event of termination. Should they be the property of the artist or the commissioner? Should the answer depend upon who terminated the contract? If they belong to the artist, can the artist finish the work and sell it to another purchaser? Unless there is a written contract, in which all these matters have been spelt out, it seems to be common experience that the artist will be left with little more than dreams of what might have been.

COMMISSION AGREEMENT

THIS AGREEMENT is made the day of 19..... between

Name

Address

Telephone (the ``Artist")

and

Name

Address

Telephone (the "Commissioner")

by which we agree as follows:

1. Commission. The Artist agrees to complete on or about the

day of 19..... the following proposed work of art

(the "Work"):

Description

Dimensions

Materials

2. Payments.

(a) In consideration for creating the Work the Commissioner agrees to pay the Artist the sum of \$..... in the following instalments:

- (i) One-third upon signing this Agreement, and
- (ii) One-third where the Artist notifies the Commissioner that the Work is approximately two-thirds completed, and
- (iii) One-third when the Artist notifies the Commissioner that the Work is completed.

For these purposes, the Artist shall notify the Commissioner in writing.

(b) Subject to clause 7 of this Agreement, the Artist shall retain title of the Work, and all rights therein, until payment of the final instalment.

3. Acceptance.

It is understood that the Artist will use his/her aesthetic skill and judgment to create the Work, and the Commissioner agrees to accept the completed Work unless he/she/it can show that the Work was not executed substantially in accordance with the description agreed upon under clause 1 of this Agreement.

4. Access.

If the Work is to be created on site, the Commissioner shall arrange for the Artist and his/her authorised agents to have access at all reasonable times to the site.

If the Work is not to be created on site, the Commissioner may, upon reasonable notice, inspect the Work.

5. Delivery.

- (a) Unless the Work is to be created on site, the Artist/ Commissioner* shall arrange for the delivery of the completed Work to the site on or about the day of 19.....
- (b) The costs of delivery (including packaging, transport, and insurance) shall be paid by the Artist/Commissioner.*

5. Sale.

Upon completion of the Work if created on site, or upon delivery of the completed Work, both parties shall sign the Contract of Sale (a copy of which is attached hereto).

7. Termination.

- (a) The Commissioner may terminate this Agreement at any time upon giving written notice to the Artist, who shall be entitled to receive or retain payment for all work done in pursuance of this Agreement up to the date of receiving such notice.
- (b) The Artist may terminate this Agreement by notice in writing, if pursuant to clause 2, the Commissioner is more than sixty (60) days late in making any payment. However, nothing herein shall prevent the Artist from bringing suit based upon the Commissioner's breach of contract.
- (c) In the event of termination on the grounds provided in subsection (a) or (b) of this clause, title to the Work and all rights therein, shall be retained by the Artist. Further the Artist shall have the sole right to complete, exhibit and sell the Work and any preliminary designs for it.
- (d) Upon the death of the Artist this Agreement shall terminate automatically, except that:
 - (i) the Artist's estate shall retain all payments made and owed to the Artist pursuant to clause 2; and
 - (ii) the Commissioner shall have the right to keep copies of the preliminary designs and the Work in progress, for the sole purpose of completing the Work, provided however, that the Work be completed by an artist acceptable both to the estate and to the Commissioner.

If the Commissioner decides not to have the Work completed by another artist, then all copies of the preliminary designs, incidental works, and the Work in progress, immediately become the property of the Artist's estate and shall be returned to the Artist's estate.

1. Non-Assignability.

Neither party hereto shall have the right to assign this Agreement without the prior written consent of the other party. The Artist, however, retains the right to assign moneys due pursuant to the Agreement.

2. Disputes.

Should any dispute arise concerning any matter referred to in this contract, the dispute will be referred to the informal arbitration of two arbitrators, one to be appointed by each party. In the event of the arbitrators disagreeing,

the dispute will be referred to an umpire selected by the arbitrators. No action or suit will be brought or maintained by either party against the other party until a decision has first been obtained from the arbitrators or umpire.

Signed:

(the Commissioner)

.....

(The Artist)

*Delete whichever is inapplicable.

THE CONTRACT OF SALE

Should the commissioner wish to own the work when it is completed, it is necessary to complete a contract of sale. Often the commissioner is not the same person or body as the intended owner. Thus, for simplicity's sake, the commission contract has been separated from the sale contract in this text. However, where the commissioner intends to own the completed work, the agreement to sell may be included in the commission agreement. The important point to appreciate is that a commission agreement in itself is not one of sale -- unless it specifically is stated to be so.

The contract of sale is also important to the artist because it provides a means of protecting the future well-being of the work. It will be noticed in the specimen contract that there is a clause protecting the work against alteration, mutilation and destruction. The same clause attempts to ensure that the work will be properly cleaned, maintained and protected.

If the work does get damaged, it is important to ensure that restorations are approved by the artist and, where possible, the artist should be given an opportunity to effect the repairs and be paid a reasonable fee for that service.

It is also useful (though surprisingly unusual) to stipulate that the purchaser will provide and display with the work a notice identifying it to be the work of the artist. If more artists did this, there would be considerably fewer anonymous public artworks.

By way of tit for tat, the artist is often asked to provide the purchaser with a warranty against defective workmanship or materials. A one-year period is quite long enough.

CONTRACT OF SALE

Place

Date

1. Description of the Work.

(i) Title

(ii) Medium

(iii) Size

(iv) Name of Artist

2. Terms of Payment.

3. Authorship. A notice including the Artist's name, shall be provided by the Purchaser, and shall be publicly displayed and identified with the Work.

4. Non-Destruction, Alteration and Maintenance. The Purchaser agrees not to destroy, damage, alter or modify intentionally, the Work in any way whatsoever. Further, the Purchaser shall be responsible for the proper cleaning, maintenance and protection of the Work.

5. Repairs and Indemnity. All repairs and restorations which are made during the lifetime of the Artist shall have the Artist's written approval. This requirement will be deemed to have been satisfied if the Purchaser writes to the last known address of the Artist and does not receive a reply within twelve weeks. To the extent that it is practicable the Artist shall be given the opportunity to accomplish the repairs for a reasonable fee, except that any repairs due to faulty workmanship or materials that need to be made within one year of delivery, shall be carried out by the Artist to the best of his/her ability, without fee.

Dated the day of 19.....

Signed:

(the Artist)(the Purchaser)

The Ron Robertson-Swann Clause

When a commissioned work is designed for a particular location it is vital to the integrity of the work that it be installed in that place. A cityscape sculpture loses its meaning when it is installed in a children's playground on a muddy riverbank. To avoid such problems, artists creating works of public art may include in their contracts for commission and sale the following clause:

Relocation. The Work shall be properly installed and displayed by

..... at

..... (specify location)

The Artist shall be notified if the Work is to be relocated. The Owner of the Work shall notify the Artist of any proposed alteration of the site or adjoining areas that would affect the intended character and appearance of the Work, and shall consult the Artist in the planning of any such alteration. If any alteration of such Site or Areas or of the Work is made without the express written approval of the Artist, the Artist may elect to enter upon the Site and at the expense of the Owner to remove or obliterate any notice signature or other emblem identifying the Artist with the Work. This clause shall apply to any alteration of the Site, such areas, or the Work, whether intentional, accidental, within or without the control of the Owner or otherwise.

If the creators of public art insisted on a clause such as this, they might not be able to prevent the relocation but they would at least have the opportunity of consultation, and in extremis, be able to formally dissociate themselves from the work.

THE ARTIST-ARCHITECT RELATIONSHIP

Many artists do much of their work for architects. Such commissioned work is lucrative and often provides the artist with a high public profile. In spite of these advantages, artists should accept such work with a professional reserve. The architect has a contract with his or her employer, which is so complex as to make the I Ching seem simple. The architect has this contract for the mutual protection of the parties. For identical reasons, the artist should have a contract with the architect.

A specimen contract which was specifically drafted for this purpose on behalf of Artists' Equity Association (U.S.A.) is set out in Appendix A. It is long, couched in reasonably technical language, but certainly covers everything that is crucial to the continuing happiness of artist and architect. In most situations the contracts provided earlier in this chapter will offer perfectly adequate protection, but the American document presents an interesting example of the lengths to which a contract can go, in protecting the rights of both artist and architect.

THE DESIGN AND COMMISSION OF CRAFT WORKS

The principles discussed in relation to the commissioning of artworks are of course relevant to the commissioning of craftworks. The following contract was prepared by the Arts Law Centre of Australia after consultation with the Crafts Council of Australia, the State Crafts Councils, commissioning bodies and practitioners. It was also used as the basis of the commission contract used to commission works for the new Parliament House in Canberra -- the biggest commissioning project in Australian history.

THE COMMISSION OF CRAFT WORK WHERE NO PRELIMINARY DESIGN IS NECESSARY

Much craft commissioning does not demand the formal preparation of preliminary designs for presentation to and approval by the commissioner. This is particularly so when the commission is merely of stock items.

Such situations should not be cluttered by legalities, yet the craftsperson needs to know that the time effort skill and resources that are being put into the order, will be protected. Again, the following example was prepared by the Arts Law Centre of Australia after wide consultation with practitioners. It is now in common use.

ARTIST/COMMISSIONER CHECKLIST

Stage 1 -- Preliminary Designs

1. Who is offering the commission? (Remember that it is not necessarily the person paying!)
2. What form will the preliminary design take?

3. How many are expected?

4. When must they be completed?

What are the materials to be used in the finished work?

What will be the approximate dimensions of the finished work?

7. Within what period must the commissioner accept or reject the designs -- or request changes in them?

How much is the design fee?

9. Will the fee be paid upon entering the agreement to do the designs, or when the designs are completed?

10. What expenses will be incurred (e.g. travel to the site), and who will pay them?

11. If the commissioner decides not to proceed who owns the designs? Who owns the copyright in them?

Stage 2 -- The Commission

1. Describe the work -- description, dimension, materials.

2. What is the schedule for payment? (It is usual practice for a third to be paid in advance.)

3. How is completion determined? (Avoid "satisfactory completion" clauses!)

4. What provision is made for access to the site by the artist; by the commissioner?

5. If the work is not being made on the site, who is responsible for its delivery?

6. By what date must the work be completed?

7. Who will own the work when completed?

8. How can the parties terminate their relationship?

9. In the event of termination:

(i) What arrangements about payment have been made?

(ii) Who will own what?

10. What will be the procedure in the event of a dispute?

(Copies of this checklist are available from the Arts Law Centre of Australia.)