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Key Provisions Artists' Should Be Aware Of In Commission Agreements

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When it comes to commission agreements it only takes one provision to change an otherwise positive experience and turn it into an absolute nightmare. This isn't always attributable to an artists' lack of knowledge, but usually results from a failure to take their knowledge of the industry and fully translate it onto paper. Even when important concepts are addressed, its with vague, static boilerplate that fails to protect the artist and, more often than not, obligates them for more than they intended.

The fact that the other side is usually an institution sophisticated with contracts doesn't tend to help either. So below I've listed provisions artists will want to pay attention to, and suggested details they may want to account for, when entering commission agreements.

Contract Provisions To Be Aware Of

Delivery and Delays

Delivery is one of those details that can completely unravel a project. Because it doesn't come into the picture until the end, parties tend to forget how complicated the entire process can be. To protect against any last minute breach on your part:

- Detail deadlines with specificity. Where does the piece need to be delivered and is that address listed in the agreement?

- Who will be responsible for the costs of delivery and who will be responsible for the logistics of delivery? If the owner is responsible for the logistics does the piece require any special type of packaging or delivery instructions?
- Account for unforeseen delays that may come up during the project. List what events will constitute as a delay (such as fire, theft, inability to obtain materials at no fault of the artist, etc.) as well as what effect delays will have on deadlines and delivery. Will the deadlines or milestones be extended? Will the price for the piece have to be adjusted? A provision like this is particularly important if dealing in certain raw materials such as ore or copper.
- Discuss what happens when the owner causes a delay.

Payment

Payment is everything. Without it, your project probably won't go very far, or be very much fun. You'll want to ensure that you're timely compensated by:

- Working out some type of payment schedule to ensure that your work and time are compensated for. One popular structure is 33% of the price paid at the conceptualization/acceptance phase, 33% of the price paid in the middle of the project and 34% of the price paid once the project is finished.
- Laying out milestones and aligning payment respectively. You don't want to wait until the very end of the project to get one lump-sum payment. You leave yourself more exposed for the commissioner to pull out of the deal.
- Clearly specifying when payment must be made. For example, you might provide that payment be made within X number of days of a progress meeting or notification that a milestone has been met.
- Making the payment due for consultation/conceptualization/and acceptance of the contract non-refundable. In making this initial commitment the commissioner generally becomes more serious about the project and the possibility of being out that money gives them a vested interest to see that the project is carried through.

Changes

A commission is generally a collaborative and organic experience. Consequently, it only makes sense that changes may need to be made throughout its duration. But you don't want to be left holding the bag for work a commissioner claims they did not approve. You'll have better protection against OCD and indecisive commissioners if you:

- Address how changes must be submitted and accepted. I suggest this be done in writing so that you have some way of tracking the route the project took. You'll want this documentation if the commissioner rejects the final piece claiming they didn't approve a particular change.
- Address when changes can be made. To avoid incessant nagging you may want to be strategic with this. Provide certain stages where changes can most easily be accepted such as during the conceptual phase, once the work is half-way done and shortly before completion.

- Cut down on changes by charging for each change or placing a limit on the number of changes that may be made.

Ownership

I think this one pretty much speaks for itself. Who owns what will be one of those issues you will not want work out when the mood strikes you. Address any ownership issues in advance by:

- Clearly laying out who owns the piece at certain points throughout the project. Generally, the artist owns title to the work until fully paid for and delivery is completed. Then the commissioner gains title.
- Working out who owns any mock-ups, concepts, drawings and any other materials used to create the concept of the work.
- Addressing who owns the materials that were used to fabricate the piece such as brushes, paints and other materials. Often times, if these materials were paid for by the commissioner they will want to retain ownership.

Copyright Rights

Copyright is another one of those touchy issues you don't want to be figuring out at the end. Though discussions surrounding copyright can often get sticky, make resolving potential copyright issues a top priority. When doing so a few things to remember are:

- If you the artist retains the copyright then you will need to grant a license to the commissioner so that they may do things such as publishing and exhibiting the piece.
- Along those same lines, lay out what your moral rights will be. Will the commissioner be able to change, alter or damage the piece? If not, you may want to have some provision providing that commissioner may not hold out a piece being authored by you if any alterations are made without prior consent.
- If you do decide to give a commissioner the copyright, which you don't necessarily have to do, then you will want to charge accordingly. From what I've seen, industry standard seems to be between 150-200% the value of the piece.

Termination

Termination is an extremely important as well. It allows you to not only get out of a bad relationship, but a bad contract as well. As a result, you'll want to focus on things such as:

- Being able to terminate the agreement if the commissioner puts you in a precarious situation such as failing to pay, or asking that you engage in any criminal behavior.
- Allowing termination if any unforeseen delays continue for a prolonged amount of time.
- Watching out for provisions where commissioners reserve the ability to terminate the agreement if the piece isn't to their satisfaction. One way of addressing conditions like this would be providing that the agreement cannot be terminated unless the piece deviates materially (or substantially) from any conceptual drawings or mock-ups initially provided.
- Making sure to reserve your right, upon termination before completion, to do with the piece as you want whether that be selling, publishing, exhibiting etc.

Damage/Repairs

Just like delivery, damage to the piece is one aspect of the commission that is often overlooked. Because its often left completely undiscussed, these type of issues don't get addressed until much later when a dispute erupts. You'll want to stay out of court by:

- Getting a representation (or promise) from the commissioner that they will not alter, modify or damage the piece intentionally.
- Detail what type of repairs you as an artist will be responsible for. These repairs should be within the scope of your role as an artist and, unless you say otherwise, result from a defect in workmanship.
- Determining whether you want to be the first person the commissioner must call when repairs are needed. If so, you'll also want to address payment terms for such repairs.
- Writing up and providing the commissioner an explanation and/or documentation detailing how the piece must be repaired. You'll want to provide that commissioner's failure to contact you or repair as provided for in the documentation will excuse you of any further liability and void any warranties made by you expressly or provided under law.

Installation/Maintenance

Installation may be something that doesn't come into play with many commissions, but maintenance certainly does. Much like repairs, this may be something a commissioner expects you to take care of. Clarify your obligations and:

- Provide a maintenance schedule detailing how the piece should be maintained and when. If there are any special installation, conservation or environmental requirements, detail these.
- Decide whether you want to charge for maintenance services or whether they come provided with the commission.
- Detail what type of maintenance you will be responsible for. If the piece involves certain mechanical parts you're not comfortable repairing you'll want to make this clear. If staff or certain types of professional assistance is required, negotiate and provide for this as well.
- Make sure to provide a reasonable cap on how long you will be responsible for maintaining the piece.

Miscellaneous Provisions

A few other provisions you'll want to pay particular attention to are:

- *Risk of Loss*
 - Who is responsible for loss of the piece and at what point? Generally the artist is responsible while the work is in their custody and under their control. Once delivery is completed, risk of loss is passed to the commissioner. The one gray situation that may need to be addressed is delivery. (You may also want to work out who will be responsible for insurance while the piece is being worked on and delivered.)
- *Dispute Resolution*
 - You never hope that it gets to this point, but if it does, you'll want to make sure that your rights are covered. What type of dispute resolution would you prefer to have and is it set to take place somewhere that is convenient for you?
- *Laws/Licenses/Permits*
 - Who is responsible for obtaining all applicable licenses and permits?
- *Indemnities*
 - This provision covers any instances where either party suffers damages resulting from the commission. After surveying all the possible risks and damages, you'll want to determine what type of liability you should be responsible for.

These suggestions aren't meant to serve as a template nor do they address all the considerations that must be made. Most transactions require a certain amount of tailoring but the number of variables that play into a commission require particular attention to be paid.

Rather, these suggestions should serve as a proverbial step in the right direction. They should get you to start thinking about what it is you may not be thinking about. The key to a successful commission will not only hinge on using the right language but understanding what issues you should have language covering as well.