

Making Art Public: Artists, the Law, and the Making of Art in Public Spaces

Contracts are important instruments to protect the rights of artists and clarify the expectations of the artist and the owner. There are two phases to a public art commission: **design development** and **fabrication/installation**.

Tip #1 There should be two separate contracts to address each phase.

Tip #2 The negotiation of a contract is part of the process – enter it openly. Seek advice from peers and seek counsel where necessary.

Design

Tip #3 Consider whether you want the design documents and/or maquette returned once you have completed the proposal process.

The who: The architect is the registered coordinating professional on a project.

Tip #4 Know what the role of the architect and public art consultant are on the project.

The when: Contracts set out a schedule for the construction and installation of the artwork.

Tip #5 Make sure that you have a clause that addresses changes in the construction schedule.

Rights

Copyright:

There are two sets of rights inherent in your artwork. The first is the copyright: the right to reproduce, perform or exhibit all or a substantial part of an artistic work, and to authorize others to do such acts. Copyright generally lasts for the life of the artist, plus 50 years after the year of the artist's death. Usually, copyright is either jointly shared with the owner or transferred to the owner. Joint copyright, or joint authorship, occurs where a work is produced by the collaboration of two or more artists, where the contributions of each artist are not distinguishable. Neither artist is the exclusive owner of the copyright. The approval of each of the joint authors must be obtained before the work can be used.

Tip #6 Clarify questions about the use of images for promotional purposes with the owner. Make sure you retain the right to include the work in your portfolio. If you are working as a collaborator, clarify expectations about how the artwork will be exhibited and potentially exploited in other settings before your start.

Moral Rights:

The second set of rights is the moral rights. These are the right of paternity and the right of integrity. A moral right gives the artist the right to prevent the use or modification of his or her artistic work in any way that could affect the integrity of the artwork and the honour or reputation of the artist. Moral rights also give the artist the right to be associated with the piece, either under his or her name, pseudonym, or the right to remain anonymous.

The person who created the artistic work also holds the moral right. Moral rights cannot be given away. They can be waived – that is, the artist can choose not to exercise moral rights.

According to the *Copyright Act*, an artist's moral rights may be violated in a number ways:

- any act or omission that is contrary to any of the moral rights the artist has in a work, that occurs without the consent of the artist (*Copyright Act*, section 28.1);

- any act that distorts, mutilates or modifies the work and affects the honour or reputation of the artist (*Copyright Act*, section 28.2(1)(a)); and
- using the work in association with a product, service, cause or institution without the consent of the artist and in a manner that affects the honour or reputation of the author (*Copyright Act*, section 28.2(1)(b)).

For a sculpture, painting, or engraving, the artists' honour or reputation is assumed to be affected when any distortion, mutilation or other modification occurs (*Copyright Act*, section 28.2(2)). The artist doesn't have to find evidence that his or her reputation has actually been harmed.

Some activities alone do not infringe an artists' moral rights: (*Copyright Act*, section 28.2(3))

- changing the location of the work, the physical means by which a work is exposed or the physical structure that the work is contained in; or
- taking steps in good faith to restore or preserve the work.

Maintaining the Integrity of Art in Public Spaces

Art in public spaces has a unique quality: it is subject to the forces of time, environment, tourism and vandalism. If the artist has agreed to give ownership and copyright of the artistic work to the government, then the government has the right to reproduce or exhibit the work in public. However, the artist still retains his or her moral rights. For example, if the artistic work is a sculpture, then the government cannot paint stripes on the sculpture, or use the sculpture in association with a service, cause or institution that may harm the honour or reputation of the artist. In a court case involving the vandalism and degradation of a public sculpture, the court found that "[a]t the very least, the City owes a duty of care to protect the sculpture as it would its own property and return it ... in its original condition." (From the Baggage Handler Case, involving artist Michael Hermesh and the City of Penticton)

The integrity of an artwork is an individual question. Many contracts try to address any conceivable impact of the environment on the artwork including material deterioration, degradation, and vandalism.

Tip #7 There may be parts of these clauses that can be altered to better reflect your vision. Read them over carefully and suggest revisions.

Maintenance:

The question of responsibility for maintenance is addressed in every contract and depends on the nature and scope of the artwork as well as the contract.

Tip #8 Ensure that you are clear about who is responsible for the maintenance. Make sure that you have the required insurance in place.

Tip #9 Tell the owner when you move so that they can find you.

What to do if there is a problem?

Problems happen. Talk to the public art consultant and architect if required. Most problems are addressed effectively as they arise.

Tip #10 Seek counsel where necessary. The Artists' Legal Outreach can help you find a lawyer. Find out more at www.allianceforarts.com.

Please note that the information provided above should be viewed as general information, not legal advice. If you have a legal or business issue, we recommend that you consult a lawyer who is knowledgeable about the area in question to obtain tailored legal advice.