

# **Contract and Copyright Drafting Skills**

Deborah Fosbrook  
Adrian C. Laing

B L O O M S B U R Y

# **Contract and Copyright Drafting Skills**

**First Edition**

**Deborah Fosbrook, BA (Hons)  
Barrister of the Honourable Society of Gray's Inn**

**and**

**Adrian C Laing, LLB (Exon)  
Barrister of the Honourable Society of Inner Temple  
Solicitor of the Supreme Court of England and Wales**

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# **Contract and Copyright Drafting Skills**

Dedicated with love to our children Katie, David, William, George and Peter.

# Preface

## Benefits of Contract and Copyright Drafting Skills:

- This book is designed to improve your knowledge of contract clauses and develop your drafting skills.
- We focus on 56 main headings for contract clauses which are set out in the content list and look at each topic in detail.
- You will be able to understand the meaning and scope and purpose of the subject heading of that contract clause and the issues which relate to it.
- Actual clauses from **The A-Z of Contract Clauses Sixth Edition** are reproduced in full in this book. References in this book to the **A-Z** are to text from that edition. You can use this book on its own or in conjunction with the **A-Z**.
- You will also find cross references to other main clause headings in the **A-Z**. The aim of this is to highlight other topics that you may need to consider.
- When drafting contracts and agreements you should not consider them as unchangeable and static with only one correct way of drafting them.
- Every precedent which you draft can be improved as your skills develop and also be adapted to take account of new forms of exploitation.
- Our aim is to provide you with a solid foundation to develop your own style and technique for drafting, reviewing and amending agreements in any jurisdiction in the world.
- Whether you are completely new to the world of contracts and copyright, or have acquired some skill at drafting and are at an intermediate level, this book will improve and advance your understanding so that you can deal with a wide variety of types of agreements across many industries.
- It will enable you to analyse and assess individual clauses in an agreement and to edit and change those sections which are too broad or too narrow.
- It will also encourage you to remove clauses from an agreement and to substitute others which are more suited to your long term strategy.
- It will improve your ability to understand how and why clauses have been drafted in a certain way and what the consequences might be if they were accepted without any changes.

- It will increase your ability to adapt and edit clauses to your commercial advantage.
- You will gain the confidence to suggest new clauses which you have already drafted which you want added to an agreement.
- It will allow you to be able to review contracts quickly and deal with an agent or supplier with greater insight and scrutiny.
- If increasing the revenue streams from the exploitation of copyright and other intellectual property rights is your goal then this book will help you achieve that aim.
- You will be able to understand the distinction between an exclusive licence and an assignment.
- You will also be able to consider and weigh up the different financial impact of a high percentage royalty of net receipts as opposed to a low percentage of gross receipts.
- It should help you comprehend not only the significance of different types of contract clauses but also how they impact on each other in an agreement.
- This book is not about legislation, case law or any of the issues you usually find when looking at a book on contracts. It is about the skill of drafting and how to create clauses which reflect accurately what the parties have agreed in principle.
- It will also show you how to go beyond the often rather limited original terms which the parties have discussed which may form the brief outline of the agreement.
- You will recognise the stages of negotiation; drafting and issuing the agreement is a key stage where you are provided with the opportunity to add some terms and conditions which have not been discussed between the parties.
- You will be made aware of clauses which protect your interests and limit your liability.
- Such clauses may include for example the title and ownership of rights and material and the potential to gain additional revenue in the future based on the way rights are defined or how royalties are calculated.
- If you are providing services to a company then you will appreciate the need to retain and own both the existing copyright and intellectual property rights in your work as well as new rights and material which may be created as a consequence of the agreement.

- If you are a commercial company it will encourage you to ensure that you acquire copyright and intellectual property rights as part of any project as well as those in any adaptations which you may license to third parties.
- The breadth of the subjects covered in this book will enable you to evaluate and review contracts more efficiently and to be more aware of the potential cost and budget implications of a project.
- The failure to cover effectively the issue of copyright clearance and costs and payments due to collecting societies in an agreement is not unusual.
- You may use the contract clause headings to remind yourself of subjects which may be missing from an agreement and need to be added.
- Although we do not cover every subject and contract clause which may arise in relation to all agreements and licences or assignments this book will increase your ability to deal with a wider variety of agreements across more industries.
- As you experience the difficulties, problems and issues that arise in the day-to-day operation and management of a business it becomes clearer which clauses need to be included in a contract. Either to avoid problems you have had in the past or to make clear how matters will be dealt with if there is a problem or dispute in the future.

## **Basic Drafting Principles and Guidance**

- We set out just some of the concepts and strategies which you need to know when drafting any type of agreement and addressing copyright ownership, clearance or licensing or transfer of rights by assignment. Further matters are raised under each section.
- It is important to realise that many different industries come at contracts from different angles, may have very contrasting terms and conditions and may also prioritise completely different aspects of the terms and conditions. Some may even seek to propose and issue completely unreadable, badly drafted and nonsensical agreements in a pre-printed format in order to give the impression that the terms are fixed, non-negotiable and cannot be changed.
- Many companies have an archive of previous agreements, templates and documents either in paper form or as part of a central software programme. These are then often used for many years without being updated, amended or adapted to suit the technologically developing world in which we live.



- When you are learning these drafting skills in a business environment many agreements are routinely issued based on a previous existing templates that have been used in the past as a quick and easy way to deal with a matter. This is often done without sufficient regard as to whether that old template is actually relevant in the current climate and deals with all the issue and problems that may arise.
- Drafting an effective contract is a skill distinct from being aware of the background of case law, statutes or trade practices. There are many people who have mastered those skills but cannot translate and accumulate that knowledge and apply it to starting from a blank page and creating a completely new document based on a new business collaboration and licence or to acquire rights to store as a company asset for the future.
- When looking at case law we look at what lesson can be drawn from that issue to avoid such a dispute happening again. What could have been included in the agreement which would have meant that the parties had already discussed and agreed that potential issue at the time of concluding the agreement?
- Or if a problem does arise in the future there should be a procedure and structure set out in the agreement which endeavours to provide a pathway for discussions and settlement – avoiding costly litigation.
- Documents are often drafted in a work or business environment where there is only a limited time to agree, draft and conclude the agreement so that it can be signed and payments made as required.
- You may be expected to create and draft documents based on only part of the story as to the relationship and terms between the parties.
- You may have only been supplied with five or six key facts or bullet points and be expected to make your own judgement as to which other terms should be added and how they should be applied.
- Do not assume that all the facts you have been supplied with to create the agreement are necessarily accurate, comprehensive or conclusive as to the type of contract needed.
- It is important to conduct your own background research on the parties to the agreement so that you understand the scope and depth of their business; what they actually produce, sell and exploit and how and where they do so. Are they acting through third parties such as sub-licensees and distributors?
- Research the website of the business and any company reports and accounts, press releases as well as the corporate and investor section of their site and their marketing and sales.

- There may be a history between the parties to an agreement so that there are precedents and templates of documents and also expectations for the future.
- You may have a Chief Executive Officer who has not in fact negotiated the best terms or even seen the full view of the situation but who has agreed skeleton terms with the expectation that you will create and draft a suitable agreement.
- On that basis you are expected to take the agreement forward into draft form. The Chief Executive Officer or another senior executive may, as part of your corporate structure, review or approve the draft agreement before it is issued or be one of a few named signatories for agreements.
- That is not always the case however and it is now increasingly common that quite junior personnel in many departments are authorised to issue and conclude pro forma precedents or to conclude agreements within financial limits.
- This corporate practice may result in a failure to safeguard and acquire copyright and intellectual property rights as part of a corporate strategy. Often companies only find out they do not own material when they try to exploit it at some later date.
- There may not even be a formalised document, but an exchange of emails. This approach has many pitfalls not least the failure to keep proper long term records which may be needed for due diligence if a company is sold on. Also such an approach often results in the failure to acquire copyright and other intellectual property rights which can be used to create an asset base for future exploitation.
- No contract will ever be perfect – neither will it ever cover all the potential situations that may arise. For example – you are in a new job and there is a large file on the business dealings with a company. Terms and conditions are basically repeated historically over a long period. If, after reviewing the background, you believe that replicating those terms is not the best way forward or the most advantageous, do not just rush ahead creating a completely new agreement. First, discuss the matter with the Chief Executive Officer and Finance Director and try and explain the need for a revised or totally new agreement. Summarise in note form the essence of the new agreement and the advantages or errors and omissions in the previous format. You need to get the management on board to support your actions to create a completely new or revised agreement.
- You may try and incorporate some elements in the new agreement which were covered before which in your view do not cause any

problems and may even at first sight appear unnecessary or not important.

- In any agreement always consider adding a significant number of clauses which do not really matter to you which the other party may ask to delete, amend or add to. These clauses, when amended or deleted, give the impression to the other party that they have gained some advantage. In reality these were not terms which had any weight for you except as negotiating tools to provide some concessions to the other party.
- This book is not about drafting the longest agreement possible. Most businesses do not want months of delay before an agreement is concluded.
- You should aim to get the deal done within the timescale permitted for the benefit of the company. The impact of this may mean that it is not the best agreement that could have been reached if you had six months to agree terms. It is however the best within the pressures imposed to allow the company to receive payment once the contract is signed or to be able to promote the conclusion of the agreement or to formalise an ongoing process which has in fact already started.
- There are key factors which matter whatever the type of agreement you are negotiating. Take into account the cost implications or planned budgeted expenditure to your company.
- Try and decide what the potential profit position would be to your company and how this is being calculated and achieved. Is there any way that the potential profit position can be improved?
- What services or products are you getting or supplying? Is there any way the use of services from third parties can be improved so that you get more?
- What material is created in the process? How is it reproduced and exploited and who owns it in each of the forms in which it is created and reproduced and exploited?
- The subject headings of the contract clauses may apply to one or both parties in an agreement.
- The clauses can be a mirror image or be very different. There may be different aspects of the same issue that need to be set out in a clause.
- A clause may not only be about what you are granting but also what is not being covered by the agreement and what is not permitted. You may specifically exclude certain copyright, intellectual property rights or uses.

- You also need to ensure that you consider rights and material that may be created in the future by either of the parties or a third party.
- The essence of any good agreement is in the detail of the descriptions and the definitions. You must always remember that this document will be relied on in the future as evidence of what the parties agreed and so the more specific you are the better.
- You will find that there are a number of commons expressions which are useful tools. Such as:
  - ‘for the avoidance of doubt’
  - ‘expressly reserved’
  - ‘including but not limited to’
  - ‘subject to prior written approval’
  - ‘such approval not be unreasonably withheld or delayed’
- There is no rule that you cannot adopt clauses from other industries and that is why the **A-Z** provides a wider picture so that you are able to examine clauses across a variety of industries.
- It is always important to have clauses which set a standard for the quality which is expected under an agreement and in particular the content. There may be many stages of review and assessment of prototypes, samples and the final version before production commences. The quality control provisions should be linked to clauses relating to rejection or termination.
- You may also want to obtain draft copies of packaging, marketing and promotional material for review. So that a licence complies with all the necessary copyright notices, trade marks and other obligations.

## Jurisdiction

- References to legislation are to the United Kingdom but the clauses in this book from the **A-Z** have been used by companies worldwide. The jurisdiction of this book includes the United Kingdom, Europe, the Commonwealth and worldwide.
- The short references to legislation in this book are reproduced and licensed under Open Government Licence v3.0 at [www.nationalarchives.gov.uk/doc/open-government-licence/version/3/](http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/).
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## About the authors

- Deborah Fosbrook is a Barrister of the Honourable Society of Gray's Inn. Her experience includes Thorn EMI, Business Affairs Programme Acquisition at the BBC and Head of Legal and Business Affairs and Company Secretary at TVam plc and all its subsidiaries. As part of the senior management team which turned the company into a financial success, she was appointed Company Secretary to manage the legal and business affairs aspects of the flotation on the Stock Exchange. Deborah Fosbrook is a consultant and author.
- Adrian C Laing is a Barrister of the Honourable Society of the Inner Temple and was enrolled as a Solicitor of the Supreme Court in 2003. Adrian Laing first practised as a tenant in Chambers (2 Pump Court) and then embarked on a career as a commercial lawyer and consultant working for the IBA (later the ITC) as Assistant Head of Licensing during the Channel 3 franchise round. Subsequent appointments included: Consultant to the Chief Executive of Thames Television plc; Senior Broadcasting Lawyer at Hammonds, Solicitors; Director of Legal Affairs and Company Secretary to Harper Collins Publishers; Company Director Harper Collins (India) and Proprietor, Laing & Co (2004–2015). Adrian Laing currently acts as a private consultant and lawyer to a number of companies and organisations in addition to being a director of a film production company.
- Deborah Fosbrook and Adrian C Laing are co-authors of **The A-Z of Contract Clauses Sixth Edition** and **The Media and Business Contracts Handbooks Fifth Edition** both of which are published by Bloomsbury Professional.

Deborah Fosbrook and Adrian C Laing  
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# ABSENCE

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- This section is from **A-Z A.001** to **A-Z A.050** in the **A-Z**.

It can also be cross referenced with other application main subject headings such as **Bank Holidays, Death, Gardening Leave, Health, Holidays, Invalidity, Medical Report, Policies** and **Termination**.

- Absences of all different types can have an impact on both the work completed and the consequences within a contract. The exact wording of a clause regarding absence may allow you to terminate an agreement with confidence as a person has not complied with that term.
- Or you may avoid having a notice served upon you personally for breach of a clause due to absence if it was not authorised in advance. If the clause within the contract allows you to notify the company as soon as possible after the event has started which resulted in you being absent without prior agreed notice.
- There are different types of absences which may or may not apply and the clauses are adjusted accordingly depending on whether you are drafting very strictly and do not want someone to be away without a significant reason or whether you are being more liberal and accepting that there may be circumstances which are unplanned where a person's absence may arise, but that does not mean that it should necessarily follow that notice is served to terminate the contract.
- There is obviously a connection between absence and whether or not any payment of fees should be made for those days taken away. Payment may be adjusted over a period of time to take account of the actual reason for absence and the verification of the facts whether it be in the form of a medical certificate, a personal note or some other evidence.
- Some of the information required may be set out in the staff handbook which is a separate document quite often supplied after the agreement is signed and not actually referred to in the main agreement. It then becomes arguable as to whether it formed any part of the terms of the original agreement. If it was not seen by the other party until after terms were agreed then there is a very strong argument that it cannot form part of the terms even if it was referred to in the contract.
- The better route is to include any significant document or brochure which forms part of the agreement either in the main body of the



contract in the text or as an attachment to the main agreement which is specifically referred to as forming part of the main agreement as in **A-Z A.002** in Employment below.

- The employee will only get those payments due for injury or ill health set out in the staff handbook if a medical certificate or other evidence is provided in accordance with the timescales set out. The payments will only apply after the employee has completed a minimum number of months work.

### **A-Z A.002**

In the event of the inability of the [Employee] to work for the [Employer] due to the [Employee's] illness or injury after the first [number] months. Then the [Employee] shall be entitled to the sickness or injury benefits in accordance with the [Employer's] staff handbook in existence at that time provided that medical certificates and/or a detailed medical report are supplied to the [Employer] upon request within the stipulated deadlines. The [Employer] will ensure that its obligation to pay statutory sick pay to the [Employee] in accordance with all statutory provisions in force at the time in the [United Kingdom] are fulfilled. The [Employee] acknowledges receipt of the staff handbook dated [date] which forms part of this Agreement.

- There are two aspects to this: firstly the precise hours and detail of the type of work the person or company is expected to provide; and secondly, clarification as to what constitutes an absence and what the consequences are of this fact. In **A-Z A.008** in Employment the Executive is working on a full time basis and the days and hours are specified.

### **A-Z A.008**

The [Executive] shall provide his/her exclusive services to the best of their skill and ability on a full-time basis and normal working days shall be [specify days/hours/breaks]. The [Executive] shall perform all his/her duties in a professional and diligent manner and shall not supply services of the same or similar nature to the job description under this Agreement to any third party without the prior written consent of the [Company].

- Absence and payment are also linked and so payment may be made only for certain days or not at all dependent on the terms drafted. In **A-Z A.009** in Employment the Executive is required to have given notice of the reason for his or her absence as soon as he or she can.