



INTERVIEWEES RELEASE SHORT FORM (NO PAYMENT)

EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample deed of release (release)** or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the deed of release and should not be included in your final redrafted release.

The Explanatory Notes are not intended as legal advice and should be considered information only. You should contact Arts Law for specific legal advice.

COPYRIGHT

Copyright in the interview

Copyright does not protect ideas, opinions or information. Copyright only protects the actual expression of those ideas, opinions or information. Accordingly, the ideas, opinions or information expressed by the interviewee in a verbal interview are not of themselves protected by copyright. An interview may, however, attract copyright protection within the meaning of the Copyright Act once that interview is reduced to some material form (for example in writing, by sound recording or film), provided the work is original. In order to be original under the Copyright Act, a work is not required to show aesthetic qualities or creativity from the author. A work is original and attracts copyright if it has not been copied, i.e. if it is the result of the author's application of knowledge, judgment, skill or labour.

If the interview in a material form attracts copyright, the copyright owner must authorise any reproduction, publication, public performance, communication to the public or adaptation of the interview.

Who owns the copyright in the transcript?

Generally, the author (or creator) of a literary work is the owner of any copyright in that work. As copyright exists in the material form in which any idea, opinion or information is expressed rather than in the ideas, opinions or information themselves, the person conducting the interview and arranging to record the words spoken by the interviewee by way of written notes or transcript is generally considered to be the



author of the interview. The case for the interviewer owning copyright in the interview is even stronger if the interviewer directs the interview following a question and answer format, structures the interview and edits the final work rather than merely applying his/her knowledge, judgment, skill or labour to recording the words of the interviewee.

If the interviewer is an employed journalist who conducts the interview in the course of his/her employment for a newspaper, magazine or similar periodical, the employer owns copyright in the notes or written transcript.

If the interviewer merely reproduces the interviewee's words as they were spoken, the interviewer will only own copyright in the material if he/she demonstrates sufficient skill and judgment for the interview to gain protection as an original literary work of which he/she is the author. For example when the interviewee relates an oral history of his/her life or particular personal life experiences, it is possible that the interviewee will in fact be the owner of any copyright in the transcript, similar to the case where a novelist employs someone to write down the story the novelist is composing.

Further, in some cases, the interviewee or a third party may have an underlying copyright in material provided to the interviewer by the interviewee either verbally or in some material form. For example, if the interviewee answers the interviewer's questions by reading from notes he/she prepared, or reads excerpts from a book the interviewee wrote, the interviewee and interviewer might jointly own copyright in the interview. If a third party owns the copyright in the underlying material, for example in a poem the interviewee recites, the interviewee and interviewer must ensure that he/she is not infringing that third party's copyright. The interviewer should seek assurances to that effect from the interviewee.

Copyright in the recording

In addition to copyright in the written record of the interview there will be a separate copyright in the sound or audio visual recording of the interview (**Recording**).

The copyright in a **sound recording** (audio only) is owned by the maker of the sound recording, i.e. the person who owned the recording medium on which the recording is made (eg. the person who owns the disc, tape, electronic file) at the time of its making.

If the interviewee's participation in the interview amounts to a live performance (see "Performers' rights" below), copyright in the sound recording of the interview will be held jointly by the person or entity who, at the time of the recording, owns the recording medium on which the recording is made and by the interviewee/performer. Those principles do not apply if the interviewer/interviewee has made an agreement to the contrary. Further, if the sound recording is commissioned for valuable consideration (i.e. for a fee or some other form of compensation), the commissioner owns the copyright.

The copyright in an audio-visual recording (a film or video), including the soundtrack, is owned by the film maker, i.e. the person who undertakes the necessary arrangements to make the film (usually the producer). This, however, may be varied if the producer makes a different agreement. As for sound recordings, the commissioner will own copyright in the film or video if the audio-visual recording is commissioned for valuable consideration,

This release does not address the issue of ownership of copyright in any underlying work reproduced in the Interview or any Recording or Transcript of the Interview. Therefore, ownership of any existing copyright is governed by the Copyright Act



according to the principles stated above. The purpose of this release is essentially to ensure that the Interviewer can use the record he/she made of the Interviewee's spoken ideas, opinions, information, etc in any intended manner without the risk of the Interviewee making any claim in relation to any right he/she might have in the Interview and its Recording and/or Transcript.

PERFORMERS' RIGHTS

Generally, answering questions in an interview is not a performance. In some cases however, the interviewee's participation in the interview may amount to a performance (eg. an interview with a musician who "performs" a song or the conduct of a hypothetical interview where the answers are largely scripted). In such cases, the interviewee may be entitled to claim performers' rights under the Copyright Act. Performers have had limited rights in their performances.

An interviewee who is an Australian citizen or resident (and foreigners in certain circumstances) may have performers' rights if he/she participates in a live interview, whether in the presence of an audience or not, and the interview includes:

- i. a performance (including an improvisation) of a dramatic work, or part of such a work, including a performance given with the use of puppets;
- ii. a performance (including an improvisation) of a musical work or part of a musical work;
- iii. the reading, recitation or delivery of a literary work or part of a literary work, or the recitation or delivery of an improvised literary work;
- iv. a performance of a dance;
- v. a performance of a circus act or a variety act or any similar presentation or show; and
- vi. a performance of an expression of folklore.

If the interviewee's participation in the interview falls within one of these categories, the interviewer should either obtain the necessary release from the interviewee/performer or seek further legal advice from Arts Law as to whether a performer's release is necessary.

If the interview (or part of it) does not fall into any of these categories, the interviewee has no performers' rights in that interview. Certain performances do not attract performers' rights, such as performances by teachers and students in class, reading news and information, performing sporting activities, participation by members of an audience and certain performances by teachers and students in the course of educational instruction.

What permission must be obtained from performers?

The interviewee/performer's permission is required for the following:

- i. record the performance by sound recording or film, whether directly from a live performance or indirectly from a broadcast or cable transmission (see notes below on authorised recordings);
- ii. communicate the live performance to the public; and
- iii. further distribute and use a recording.

Authorised recordings

Once the interviewee/performer has authorised the recording or broadcast of his/her performance, the interviewee generally has no further right in relation to that



recording and cannot prevent its use (including copying, broadcasting, transmission or other use) unless the interviewee has expressly limited the use at the time the performance was recorded. Further, the interviewee/performer's permission is required to use the recording in the soundtrack of a film.

Exempt recordings

The interviewee/performer's permission is not required in relation to "exempt" recordings. "Exempt" recordings include certain recordings for domestic use, scientific research, and educational purposes and for use by handicapped readers or institutions assisting them. Further, recordings may be made and used for reporting news or current affairs, criticism or review, parody or satire, or for the purpose of judicial proceedings or legal advice.

POSSIBLE RESTRICTIONS ON THE MAKING AND USE OF INTERVIEWS

Property

Every entry onto another person's land (including some of the air space above that land) that is not permitted by the owner and/or occupier of the land is a trespass and is illegal regardless of any damage suffered by the other person. Further, substantial and unreasonable interference with someone's use of private or public land amounts to illegal nuisance. Nuisance may occur when you are not trespassing but are still restricting the occupier's ability to use and enjoy the property or the public's ability to use and enjoy a public place.

If the interview is being conducted in premises which are not a public place or a place occupied by the interviewer (such as a studio), the interviewer must obtain permission from the owner and occupier to use the premises for the interview. Arts Law's sample Film Location Release, for use where a film producer wants to shoot a film or video on private property, provides some guidance as to the permission required to avoid being liable for trespass.

Confidential Information

If an interviewee agrees to give an interview but makes it known that the interview is confidential and cannot be used or disclosed without the interviewee's permission, any unauthorised use of that interview may entitle the interviewee to bring an action for breach of confidence.

The purpose of this release is to discharge the Interviewer from any liability for breach of confidence or any other claim the Interviewee might otherwise have against the Interviewer.

Defamation

Any use of an interview that damages the interviewee's reputation may entitle the interviewee to bring an action in defamation. For example, it could be defamatory to use an interview in a way that is not authorised by the interviewee and wrongly implies the interviewee has given his/her consent. It could also be defamatory to use an interview in a way that juxtaposes the interview with other material so as to impute false or demeaning attributes to the interviewee. Material may be defamatory if it lowers the reputation of the interviewee or exposes the interviewee to hatred, ridicule or contempt.

Further, it is important to consider whether any comment or information given in the interview may be defamatory of some other person. Please refer to Arts Law's Information Sheet *Defamation* for more information.



Contracting and working with children

The enforceability of a contract with a minor will depend on various things such as the purpose of the contract, the needs of the minor and the terms of the contract. The law in relation to people under the age of 18 entering enforceable contracts varies across the States and territories. We recommend that you get a parent or guardian to sign the document on behalf of the minor if you are interviewing a person under the age of 18.

Beware that if the interviewee is a child, laws might apply which govern working with children. Working should be here understood broadly rather than only in an employment relationship. The law in your State or territory determines whether you are “working with a child”. Please refer to Arts Law’s Information Sheet *Children in the creative process: information for artists and arts organisations* for more information.

INTERVIEWS ACROSS COUNTRIES

When you are conducting an interview from Australia with a person who lives overseas you should be aware of the legal rights and remedies of interviewee’s in the other country as well. For example, in the USA people have a right to publicity which is not provided for by Australian law. The right to publicity means that you cannot use a person’s name or likeness for a commercial purpose. This right overlaps in part with Australia’s trade practices law but is likely to prevent some conduct which may be permitted in Australia. The USA also has different defamation rules which in effect mean that something may be defamatory in Australia, but not defamatory in the USA. You should contact a lawyer with expertise in the other country’s laws if you have any concerns.

PARTIES

The release should clearly identify, in the Schedule, the name and address, and preferably the telephone and fax numbers, of the persons or organisations entering into the release (**parties**). Throughout the rest of the release, the parties are referred to or “defined” by shorthand terms for ease of reference, for example Interviewee. Other terms could be used, or the parties could simply use their own names.

If a party has an Australian Business Number (**ABN**), Australian Company Number (**ACN**) or Australian Registered Body Number (**ARBAN**), the number must be included. The ABN is important for GST purposes.

If either party is a company, its Australian Company Number (ACN) and the address of its registered office must be stated.

PRODUCTION

The release should identify, in the Schedule, the name or working title of the production. This illustrates that the Interviewee knows what the Recording and Transcript will be used for.

DATE OF INTERVIEW

The release should identify the date of the Interview.

CREDIT

The release, in the Schedule, should indicate the credit the Interviewee will receive. Delete clause 1.4 from your release if you do not wish to credit the Interviewee in



your Production. The Interviewee might, however request to be identified in and in relation to the Interview.

INTERVIEW (CLAUSE 1)

Clause 1.1 expresses the Interviewee's consent to give the Interview for free and to have his/her words recorded in some form for the use the Interviewer intends to make of the Material for the Production.

Clause 1.2 allows for a general consent to certain acts which would otherwise infringe the Interviewee's moral rights. For more information on moral rights, see Arts Law'. This consent is, however, only given to the extent the acts are reasonably necessary to enable the Interviewer to exercise the Licence granted under the Deed. What is reasonably necessary will depend on the specific circumstances. For further information on moral rights see Arts Law's Information Sheet *Moral Rights*.

Clause 1.3 assigns (i.e. transfers) any copyright the Interviewee owns in the Interview to the Interviewer and recognises that the Interviewer owns copyright in the Material, and can accordingly exercise any right of a copyright owner. Such a transfer is in the Interviewer's best interest, as it maximises the Interviewer's control over the uses of the Interview and limits any future involvement of the Interviewee. Owners of copyright in literary works have the exclusive right to:

- i. reproduce the work;
- ii. make the work public for the first time;
- iii. communicate the work to the public;
- iv. perform the work in public; and
- v. make an adaptation of the work.

Owners of copyright in sound recordings and films have the exclusive right to:

- i. copy the films and recordings;
- ii. cause the recordings and films to be heard and seen in public; and
- iii. communicate the recordings and films to the public.

INTERVIEWER'S RIGHTS (CLAUSE 2)

Despite the fact the Interviewee has assigned all copyright in the Interview and the Material to the Interviewer, clause 2.1 confirms that the Interviewer has the right to use the Material in any way as part of the Production or otherwise.

Clause 2.2 grants the Interviewer the right to any use of the Interviewee's name, likeness, voice and biography in connection with the Production. This is important as any use of an interview that suggests that the interviewee is endorsing or affiliated with any product or service when this is not the case may entitle the interviewee to bring an action under the law of passing off, under trade practices legislation or both. If successful, the interviewee may be awarded damages (money) and use of the interview may be prohibited.

REPRESENTATIONS, WARRANTIES AND INDEMNITY (CLAUSE 3)

Clause 3 contains the Interviewee's representations and warranties (i.e. promises) that the Interviewee is not breaching any law by giving the Interview.

An indemnity is a promise to reimburse a person if the person suffers loss or damage in the circumstances that are the subject of the indemnity. In clause 3 the Interviewee



indemnifies the Interviewer for any loss or damage of that party resulting from a breach of the Interviewee's representations or warranties under clause 3 or the Interviewer's exercise of the rights in the Deed.

SIGNING THE DEED OF RELEASE

If you are an individual, sign your name and write in the date of signing where indicated at the bottom of the release. This is sometimes called "executing" the release.

If a company or association rather than an individual is a party to the release, the organisation's rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the release. It may also be necessary to stamp or "affix" the document with the company's or association's seal if this is required under its constitution or articles of association. In that situation, replace the existing wording "Signed for and on behalf of ..." as follows:

"The Common Seal of the [party] was fixed to this deed of release ..."

If someone else is signing on behalf of either party as that party's agent, you should insert the following sentence into the signature section:

"I am the authorised agent for ..."

If any of the parties is under the age of 18, that party's parent or legal guardian needs to sign the release "on behalf" of the child. This does not mean that the parent or legal guardian becomes a party to the release in the parent's or legal guardian's own right.

If there is a change to the release at the last minute before signing, you can either type up a new release, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the release. You may also wish to initial each page in order to make sure no new pages can be inserted after you have signed, but this is not strictly necessary.

KEEP RECORDS OF YOUR DEED OF RELEASE

Signing the release is evidence that you agreed to its written terms. You will usually be bound to perform the release as it is written. For this reason it is a good idea to get the same number of identical originals of the release as there are parties to it and have all originals signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a copy of the original release so that you can remember what you have signed.



