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# CONTESTS, CONTRACTS, & COPYRIGHT: SOMETIMES A GREAT CONTEST

*Pamela S. Evers*[*]

## I. Introduction

You have seen the advertisements for the photo or essay contests; you may have even entered one or more of them. The contests are designed to entice you with creative themes and the potential for recognition or a prize as the reward for winning the contest. Contest sponsors may be a small business, government entity, a member of the media, or a well-known corporation.[1] Many contests are well-designed opportunities for the entrant and the sponsoring company, but some contests are outright scams designed to collect entrance fees and avoid payment of prizes.[2]

Frequently, contest rules state that all submitted photos or essays become the property of the sponsoring organization or that the entrant grants the sponsor a license in perpetuity. In addition, by submitting an entry to the contest, the entrant may agree to indemnify the sponsoring organization and waive other legal rights. This author wanted to know if these contest rules are legal and contacted the U.S. Copyright Office to find out. Neither the Copyright Office nor a review of the literature concerning contest and gaming law answered the question. Therefore, the purpose of this article is to discuss the applicable law related to contests and determine whether a contest sponsor has the right to claim ownership of an entrant's intellectual property.

Section II of this article reviews the law of contests and gaming. Section III applies contract and copyright law to artistic and literary contests, demonstrating that some contests may violate federal copyright law or state contract law. Section IV provides a few examples of contests that fully comply with contract and copyright law. Section V concludes with some suggestions for best practices.

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[1] Examples of contests include: *Can't Stop the Serenity 2009 Art Contest* sponsored by Can't Stop the Serenity.com, *available at* http://community.cantstoptheserenity.com/viewtopic.php?f=30&t=490 (last visited June 21, 2010); *GreatAmericanPhotoContest.com* sponsored by Great American Photo Contest, LLC, *available at* https://www.greatamericanphotocontest.com/ (last visited June 21, 2010; *Celebrate Achievement Contest* sponsored by The J.M. Smucker Company (on file with author); *2010 Summer Photo Contest* sponsored by the InforME (Information Resource of Maine) Network of the State of Maine, *available at* http://www.maine.gov/portal/photo_contest/index.php (last visited June 21, 2010); *Stonyfield and You Photo Contest* sponsored by Stonyfield Farm, Inc. (on file with author); and *Monthly Photo Contest* sponsored by Washingtonian Magazine, Inc., *available at* http://www.washingtonian.com/index.html (last visited June 21, 2010).

[2] The About.com website, http://contests.about.com/, provides useful information about contests, offering tips for winning contests and how to avoid scams.

## II. The Law Concerning Contests and Gaming

The journal literature concerning contests primarily address the question of whether a particular contest constitutes gambling or a lottery,[3] the legality of particular games,[4] taxation issues,[5] the intellectual property rights attached to a particular game,[6] or whether a contest constitutes a contract.[7] Statutes and case law related to contests and games focus on establishing whether a particular gaming enterprise is illegal or legal. The language in many of these statutes and judicial opinions could include the apparently innocuous photo or essay contest within the scope of gaming laws originally intended to cover only gambling or betting events.

A person who *gambles* risks *something of value* in a contest of *chance* and agrees or understands that he or she will receive something valuable in the event of a certain outcome.[8] A majority of the states, by statute or case law, declare an activity to be gambling if winning depends predominantly on chance.[9] Determining whether winning depends predominately on chance or skill is generally referred to as the dominant factor test.[10] Under this test, if the entrant must predominantly use skill to win, then the event generally is deemed a contest outside the scope of gambling laws. Some states specifically exclude contests of skill in a statutory definition of gambling.[11] In a number of states, case law establishes that gambling regulations do not apply to games and contests of skill, including those with entrance fees.[12] Several states

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[3] Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197 (2003); Tsan Abrahamson, *The Promotion That Went South: A Look at The Hazards of Product Sweepstakes and Contests*, BUS. L. TODAY July/Aug. 2006, at 25; Natasha Shabani, *Running an Online Contest Without Running Afoul of the Law*, L.A. LAW. July/Aug. 2007, at 21.

[4] Jon Boswell, *Fantasy Sports: A Game of Skill that is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257 (2008).

[5] Bruce I. Kogan, *The Taxation of Prizes and Awards – Tax Policy Winners and Losers*, 63 WASH. L. REV. 257 (1988).

[6] Derek Webb, *The Importance of Intellectual Property Rights as a Regulatory Concern*, 4 CASINO LAW. No. 2, 24 (2008).

[7] John M. Norwood, *Gambling in the Twenty-First Century: Judicial Resolution of Current Issues,* 74 MISS. L.J. 779, 795 (2005); Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526 (2003).

[8] *See, e.g.*, ALA. CODE § 13A-12-20(4) (2009) (Alabama definition of gambling); COLO. REV. STAT. § 18-10-102(2) (2009) (Colorado definition of gambling); N.J. STAT. ANN. § 2C:37-1(b) (2009) (New Jersey definition of gambling). *See generally*, ANTHONY N. CABOT, INTERNET GAMBLING REPORT IV (Trace Publications 2001); INTERNATIONAL CASINO LAW (Anthony N. Cabot et. al. eds., University of Nevada Press 1991).

[9] *See, e.g.*, HAW. REV. STAT. § 712-1220(3), (4) (2009); MONT. CODE ANN. § 23-5-112 (12) (2009). *See also, e.g.,* Opinion of the Justices, 385 A.2d 695, 710-11 (Del. 1978) (McNeilly, J., opinion); State v. Stroupe, 76 S.E.2d 313, 316 (N.C. 1953); Middlemas v. Strutz, 299 N.W. 589, 590 (N.D. 1941). *See generally*, Norwood, *supra* note 7.

[10] Chance is generally defined as "a lack of control over events or the absence of 'controllable causation'-'the opposite of intention.' " Opinion of the Justices, 795 So. 2d 630, 635-36 (Ala. 2001) (quoting BLACK'S LAW DICTIONARY 231 (6th ed. 1990) and explaining the basis for, and legal opinions that apply to, the dominant factor test). For a good chart of states implementing the dominant factor test, *see* Chuck Humphrey, *State Gambling Law Summary*, *available at* http://www.gambling-law-us.com/State-Law-Summary/ (last updated Sept. 30, 2007).

[11] *See, e.g.*, § 18-10-102(2)(b); KAN. STAT. ANN. § 21-4302(a)(1) (2009); WIS. STAT. § 945.01(1)(b) (2009).

[12] *See, e.g.*, Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007); State v. Am. Holiday Ass'n., 727 P.2d 807, 812 (Ariz. 1986). New York case law on this issue is particularly interesting when

do not differentiate at all between games of skill and chance, declaring both types of games illegal.[13] Thus, the use of skill is not necessarily dispositive, particularly in the case of a lottery. A lottery is generally defined as a specialized form of contest or gambling in which something of value is given as a consideration for participation, even if chance is accompanied by some skill to receive the reward.[14] A lottery requires three elements: (1) a prize, (2) chance, and (3) consideration.[15] Consideration, in the gaming context, typically is defined as (a) money or property, any token, object or article exchangeable for money or property, or (b) anything which has commercial or financial advantage to the promoter/sponsor or a disadvantage to any participant.[16] One method of avoiding the consideration element and designation as a lottery is to provide an alternate method of entry (AMOE), but this would not make sense in the case of a contest in which the entrant must submit an artistic or literary work.[17] Does this type of intellectual property constitute the requisite consideration in the gaming context?

Intellectual property is exchangeable for money or property, even if the property is of nominal value. Reasonably, then, intellectual property satisfies definition (a) of consideration in the gaming context. Classifying intellectual property as consideration under definition (b) is dependent upon whether the intellectual property submitted to the contest has commercial or financial advantage to the promoter/sponsor or a disadvantage to any participant. Since the point of a contest or game is to generate publicity and gain market advantage, then a submission of intellectual property must give some, even if nominal, commercial or financial advantage to the promoter/sponsor. This point is exemplified by the science fiction fan club art contest in which the winning design was attached to various promotional (and profitable) items[18] or the dairy

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comparing People v. Mohammed, 724 N.Y.S.2d 803 (N.Y.C. Crim. Ct. 2001) (shell game is one of skill, thus it is not gambling) with People v. Denson, 745 N.Y.S.2d 852 (N.Y.C. Crim. Ct. 2002) (three card monte is a game of chance).

[13] *See, e.g.*, FLA. STAT. ANN. § 849.14 (2010); TENN. CODE ANN. § 39-17-501(1) (2010) ("Gambling . . . means risking anything of value for a profit whose return is to any degree contingent on chance . . . .").

[14] *See, e.g.*, WIS. STATS. § 945.01(5)(a) (2009). In the United States, most states follow the American Rule for defining a lottery, declaring a lottery to be a form of gambling even if a degree of skill is involved in obtaining the reward. The key is whether skill or chance is the dominant factor. *See, e.g.,* Ex Parte Ted's Game Enterprises, 893 So. 2d 376, 378 (Ala. 2004); Op. Att'y Gen. Fla. 94-72 (1994). For a discussion comparing the American Rule to the English Rule, *see* Opinion of the Justices at 635-36 (quoting BLACK'S LAW DICTIONARY *supra* note 10, at 231).

[15] *See, e.g.*, FLA. STAT. ANN. § 849.09 (West 2010); WIS. STATS. § 945.01(5)(a) (2009). *See also, e.g.*, Commonwealth v. Lane, 363 A.2d 1271, 1272 (Pa. Super. Ct. 1976); People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473 (Ill. 1964); Lucky Calendar Co. v. Cohen, 117 A.2d 487, 494 (N.J. 1955).

[16] *See, e.g.*, section 21-4302(c) of the Kansas Statutes and section 945.01(5)(b)(1) of the Wisconsin Statutes for the definition that consideration is "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." *See, e.g.*, section 13A-12-20(11) of the Alabama Laws and section 225.00(6) of the New York Penal Law for the definition that consideration is "money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein."

[17] Shabani, *supra* note 3.

[18] *Can't Stop the Serenity 2009 Art Contest* sponsored by Can't Stop the Serenity.com, a fan club for the science fiction work of Joss Whedon. The reward for winning the contest was "world fame," a plaque and a poster. Contest rules stated that the entrant's artwork would be used by the organization "for T-shirts, posters and promo" and that "no other remuneration will be given to the winner." Ostensibly, profits from promotional activities would be donated to a charitable organization, but the website failed to provide information about a non-profit corporation established to engage in charitable donations. *Can't Stop the Serenity*, *supra* note 1.

company that applied photos of the babies that won a photo contest to products.[19] More importantly, if the participant making the submission of intellectual property has been placed at a disadvantage, such as not able to license or submit the property elsewhere, then the submission qualifies as consideration in the gaming context. More often than not, contest rules declare that entrants cannot submit or license their artistic or literary work elsewhere,[20] the work becomes the property of the sponsor,[21] and that remuneration other than notoriety or a prize will not be given for the property.[22] Consequently, in these games and contests, the submitted intellectual property constitutes consideration within the context of gaming.

## III. Contract and Copyright Law Applied to Contests

Hundreds of contests each year require submissions of audio, visual or literary works that, under the U.S. Copyright Act §102(a) (Copyright Act), are protected upon creation in a tangible form from infringement or an unauthorized use. Three aspects of artistic and literary contests are of particular concern. First, these contests may require the author and entrant to waive their copyright or agree to transfer all ownership in the submitted work to the contest promoter or sponsor, and this requirement often is buried within the contest rules.[23] Are these agreements enforceable under the common law of contracts? Second, and far more compelling, the U.S. Copyright Act requires a specific writing to effect transfer of the copyright. Do artistic and literary contests violate federal law? Finally, if transfer to a contest sponsor is effected, does the author of the artistic or literary work have any control over what happens to the work?

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[19] *YoBaby Cover Contest* sponsored by Stonyfield Farm, Inc., 10 Burton Dr., Londonderry, NH 03053. The contest rules estimated the value of the reward for winning the photo contest to be $25,520.00. However, entrants agree under the contest rules that they "...will receive no compensation from Sponsor for the photographs." Contest winners have been shown in YoBaby advertisements and their photos have been placed on product packaging. Stonyfield, *supra* note 1.

[20] *See, e.g.*, *2009 NATIONAL BEEF COOK-OFF®* [herein, *NATIONAL BEEF COOK-OFF®*], *available at* http://www.beefcookoff.org/cookoff/default.aspx (last visited June 21, 2010). The content is sponsored by the Cattlemen's Beef Board, the Federation of State Beef Councils, and the American National CattleWomen, Inc., P.O. Box 3881, Englewood, CO 80155. The contest rules stated: "Judges will disqualify previously published recipes including, without limitation, those that are the legal property of or are included on any restaurant menu, in any cookbook, magazine, from food companies, on food or recipe websites and entries in other recipe contests . . . ."

[21] *See, e.g.*, *Celebrate Achievement Contest*, *supra* note 1. *Celebrate Achievement Contest* [herein, *Celebrate Achievement Contest*] sponsored by The J.M. Smucker Company, One Strawberry Lane, Orrville, OH 44667 (on file with author). The contest rules stated: "All entries become the property of Sponsor and none will be returned."

[22] *See, e.g.*, *Great American Photo Contest*, *supra* note 1. *GreatAmericanPhotoContest.com* [herein *GreatAmerican PhotoContest*] sponsored by Great American Photo Contest, LLC, 24 W. Railroad Ave., #139, Tenafly, NJ 07670. The contest rules stated: "Entrants waive any and all rights to photographs and give Great American the right to publish same in any medium without compensating entrants."

[23] *See, e.g.*, *Celebrate Achievement Contest*, *supra* note 1. The contest rules state: "Submission of a Contest entry grants Sponsor and its agents the right to publish, use, adapt, edit and/or modify the entry in any way, in commerce and in any and all media worldwide now known or hereinafter developed, without time limitation and without further consideration to the entrant. Submission of any entry further constitutes the entrant's (or his/her parent's or guardian's) consent to irrevocably assign and transfer to the Sponsor any and all rights, title and interest in and to the entry, including, without limitation, all intellectual property rights."

a. *Contests and Contract Law*

The Copyright Act does not specifically address whether consideration is required in order for an author to transfer ownership in the protected work to another. However, in absence of a federal statutory directive, the common law of contracts or state contract law would apply to a transfer of ownership. An essential element of any enforceable contract is that there be "some consideration, good cause, or sufficient motive in law," for fulfilling the contract.[24] Without such consideration, the advantage is all on one side and the agreement is a naked promise, or *nuda pacta*.[25] Mutual promises and a mutuality of obligation provide valid consideration of both parties to a contract, but a mere revocable offer or proposal by one party to which the other party does not assent renders the contract incomplete.[26] A common practice is for the promoter or sponsor to declare that they have the right to modify the rules or suspend, terminate, or cancel the contest.[27] A contest that is a mere revocable offer should render the contract incomplete, though an entrant's acceptance of the rules by submitting an artistic or literary work arguably constitutes ratification. If there is mutuality of obligation, then valid consideration exists for an enforceable contract.

All artistic or literary contests require the entrant to provide consideration in the form of intellectual property. In many artistic or literary games or contests, an author or creator who submits their work of intellectual property promises that the promoter or sponsor may publish, display, or perform the work and grants a license – generally irrevocable – in the work.[28] While some contests allow the author and entrant to retain the copyright to the work,[29] others are

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[24] C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU 17 (Lea & Blanchard 1847).

[25] *Id.* at 19.

[26] *Id.* at 36.

[27] *See, e.g., Spay Day 2010 Online Photo Contest* sponsored by The Humane Society of the United States (HSUS) (on file with author). The contest rules stated: "The HSUS reserves the right at its sole discretion to disqualify any entry or entrant and/or to cancel, terminate, modify, or suspend the . . . Contest," *available at* http://photocontest.humanesociety.org/contest.html?page=rules&contestId=2 (last visited June 20, 2010). *See also, e.g., NATIONAL BEEF COOK-OFF®, supra* note 20, which declared: "Sponsor reserves the right, in its sole discretion, to change these Official Rules, adjust the dates herein or cancel the Contest."

[28] *See, e.g., Great American Photo Contest, supra* note 1; *Celebrate Achievement Contest, supra* note 1. The assignment itself could be deemed an essential part of the consideration. In *Ketelbey v. Maggett*, a composer submitted a musical composition to a contest in return for a prize and the promise that the publisher would publish and sell the winning composition, but the court held that the contract failed because there was no promise that the winner would assign the copyright to the publisher. Louis D. Frohlich & Charles Schwartz, THE LAW OF MOTION PICTURES (Baker, Voorhis & Co. 1918) (citing Ketelbey v. Maggett (Eng.), Times, Feb. 8, 1911). However, as will be discussed *infra*, this decision probably would be overturned today.

[29] *See, e.g., Smithsonian Magazine's 8th Annual Photo Contest* [herein, *Smithsonian Photo Contest*] sponsored by the Smithsonian Institution. The Smithsonian photo contest rules stated: "By entering the contest, entrants grant the Smithsonian Institution a royalty-free, world-wide, perpetual, non-exclusive license to display, distribute, reproduce, and create derivative works of the entries, in whole or in part, in any media now existing or subsequently developed, for any educational, promotional, publicity, exhibition, archival, scholarly, and all other standard Smithsonian purposes," *available at* http://www.smithsonianmag.com/photocontest/8th-annual/Photo-Contest-Rules.html (last visited June 21, 2010). More than 17,000 entries were submitted to the *Smithsonian's Sixth Annual Photo Contest*.

particularly severe in the rules language, applying the transfer of copyright ownership to all submissions, whether a winning submission or not, and wholly taking possession of the work.[30]

The promise provided by a contest sponsor or promoter is that the participant in the contest will have a chance to win some sort of reward, in the form of a monetary payment, prize, or notoriety. A contest winner receives a prize or recognition, thus mutuality of obligation exists to support the contract. A promoter or sponsor who fails to provide the prize or recognition theoretically could face a breach of contract claim. Significantly, most contests require all contestants (winning or not) to waive all claims against the sponsor[31] or submit the dispute to arbitration.[32] In general, arbitration agreements are enforceable as any other contractual provision. However, the proposed Arbitration Fairness Act of 2009 could preclude many pre-dispute arbitration agreements, including those related to contests.[33]

For those contestants who do not win, the mere offer of a chance to win may still be enough to satisfy the requirement of consideration and a breach of contract claim. In *Chaplin v. Hicks*, the seminal English "loss of chance" case, the plaintiff was one of 6,000 women who had submitted photos to a beauty contest in which the reward was an interview and chance to receive one of twelve spots in a chorus line.[34] The defendant promoter changed the terms of the contest and the plaintiff could not attend on the only day set aside for interviews. In dismissing the defendant's appeal, the judges agreed that the jury rightfully concluded that taking the chance of competition away from the plaintiff deprived the plaintiff of something which had a monetary value.[35] The value awarded by the jury was based on the salary for employment in the chorus line. In the *Chaplin v. Hicks* decision, Vaughan Williams L.J. opined, "[T]he fact that damages cannot be assessed with certainty does not relieve the wrong-doer [sic] of the necessity of paying

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[30] *See, e.g., NATIONAL BEEF COOK-OFF®, supra* note 20. Contest rules stated: "All entries and all legal rights and interests in them, including the rights of copyright, become the exclusive joint property of the Promotion Parties who reserve the right to edit, adapt, copyright, publish, transfer and use any or all of them, without compensation to you or any third party and will not be acknowledged or returned, or any portion thereof." *See also, e.g., Club Med® Photo Contest,* sponsored by All-Travel, 2001 S. Barrington Ave. Ste. 315, Los Angeles, CA 90025. The Club Med contest rules stated: "Submission of any entry further constitutes the entrant's (with his/her her parent's or guardian's consent, if applicable) assignment and transfer to the Sponsor of any and all rights, title, and interest in and to the entry, including, without limitation, all intellectual property rights," *available at* http://www.cmphotocontest.com /site/rules (last visited June 21, 2010).

[31] *See, e.g., 2010 National Wildlife Photo Contest* [herein, *NWPC Contest*], sponsored by the National Wildlife Federation (NWF), 11100 Wildlife Center Drive, Reston, VA 20190. The contest rules stated: "By entering, participants release and hold harmless NWF, its affiliated organizations, and each of their directors, officers, employees, attorneys, agents and representatives (collectively, the "Companies") from any and all liability for any injuries, loss, claim, action, demand or damage of any kind arising from or related to the NWPC, any prize won, any use of the entry materials by NWF, the warranties participants make, any misuse or malfunction of any prize awarded, participation in any NWPC-related activity, or participation in the NWPC," *available at* http://www.nwf.org/photocontest/photocontestrules.aspx (last visited June 21, 2010).

[32] See, *e.g.*, *Club Med® Photo Contest*, *supra* note 30. The Club Med contest rules stated: "Any and all disputes, claims and causes of action arising out of or connected with the Contest, or the prize awarded, shall be resolved individually, without resort to any form of class action, and exclusively by arbitration."

[33] H.R. Res. 1020, 111th Cong. (2009); S. Res. 931, 111th Cong. (2009). The bills, each entitled the Arbitration Fairness Act of 2009, propose to amend the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

[34] Chaplin v. Hicks, (1911) 2 K.B. 786.

[35] *Id.*

damages." [36] A majority of U.S. courts specifically have adopted the loss of chance doctrine in the context of medical malpractice.[37] The doctrine is also a part of U.S. law in breach of contract cases[38] and in the context of gaming.

b. *Contests and Copyright Law – Transferring Copyright*

Section 102(a) of the Copyright Act protection for "original works of authorship, fixed in any tangible medium of expression, now known or later developed." The statute specifically defines works of authorship to include literary works; musical works (including lyrics); dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[39] An owner of a copyright has exclusive rights to the copyrighted work, including the right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," as well as to perform or display the copyrighted work publicly.[40] A transfer of ownership is defined as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright."[41] Combining this part of the Copyright Act with basic contract law would suggest that a contestant's submission of his or her original work to a contest with rules that require transfer of the copyright to the promoter or sponsor is an effective transaction and creates an enforceable contract. However, there is more to the Copyright Act.

Chapter 2 of the Copyright Act, 17 U.S.C. § 204(a), specifically addresses the requirements for transfer of ownership and declares that, "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed."[42] While § 204(a) seems to expand the statute of frauds, it is not a statement that the courts will not enforce a contract for transfer of copyright ownership, but a declaration that the contract is simply not valid.[43]

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[36] *Id.* at 792. Interestingly, Vaughn Williams L.J. was one of the three appellate judges in one of the famed coronation cases, Krell v. Henry, (1903) 2 K.B. 740.

[37] The jurisdictions include: Arizona, Connecticut, District of Columbia, Kansas, Illinois, Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[38] RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1981). *See* Robert H. Sturgess, *The "Loss of Chance" Doctrine of Damages for Breach of Contract*, 79 FLA. B.J. 29 (2005). *See also,* Grimes v. State, 178 So. 73 (1937) (opportunity for free chances to play does not nullify the element of consideration).

[39] 17 U.S.C. § 102(a) (2006).

[40] 17 U.S.C. § 106 (2006).

[41] 17 U.S.C. § 101 (2006).

[42] 117 U.S.C. § 204(a) (2006) (this section was based upon long-standing principles of common law and English statutory law concerning the assignment or transfer of copyright). *See* ADDISON, *supra* note 24, at 94 (citing 53 Geo. 3, c. 141; 6 Geo. 4, c. 110); Power v. Walker (1814) 3 Mau. & S. 7; 5 & 6 Vict. C. 45. *See also,* INTERNATIONAL COPYRIGHT ACT, 1838, 1 & 2 Vict. c. 59.

[43] Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).

According to case law, the writing for a transfer of copyright ownership does not require specific language and may be a simple statement.[44] The key to satisfying the writing requirement of the Copyright Act is that the writing must demonstrate the intent to transfer ownership.[45] In *Effects Assocs., Inc. v. Cohen*, the Ninth Circuit held that the § 204(a) writing requirement serves several purposes, including that it "forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price."[46] Other federal cases have held that a series of faxes, internal memos, or letters referencing a deal or agreement do not satisfy the § 204(a) writing requirement unless these lead to some statement that indicates finality of negotiations. [47] However, if a person submits a work of intellectual property to a contest and signs the contest sponsor's submission form, either by hand for a mailed submission or in digital form for an online submission, then the opportunity for negotiation between the creator and the contest sponsor may be inhibited.

A promoter or sponsor that requires an entrant and author to submit to a standard entry form and contest rules without negotiation creates a contract of adhesion; essentially, a type of browsewrap or clickwrap agreement.[48] While adhesion contracts are generally enforceable, the "take it or leave it" nature of the contract carries a strong implication that the contract was not freely negotiated. Specifically, the contract may lack mutual assent.[49] Indeed, probably few people actually read, much less understand, clickwrap agreements.[50] However, the law concerning adhesion contracts is not well-settled.[51] For example, the Seventh Circuit ruled that shrinkwrap licenses are valid and enforceable unless the terms are unconscionable or violate a rule of positive law. [52] The court held that where only one form is used, the Uniform

[44] Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922, 927 (9th Cir. 1999) (no "magic words" required); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990) (one-line statement adequate).

[45] Radio Television Espanola, 183 F.3d at 927.

[46] Effects Assocs., 908 F.2d at 557.

[47] Lyrick Studios, Inc. v. Big Idea Prod., 420 F.3d 388 (5th Cir. 2005) (faxes do not establish a final signed contract and language used demonstrates faxes were part of negotiations); Radio Television Espanola, 183 F.3d at 927 (comments "merely a part of negotiations"); Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).

[48] Under a clickwrap, browsewrap, or shrinkwrap arrangement, potential licensees are offered the license terms and must expressly, and without any reservation, manifest either assent or rejection before access to the product. These agreements are common in e-commerce and refer to the offers of one party that may be accepted by a second party when clicking on a "submit" or "I agree" icon. *See also* Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999); Specht v. Netscape Communs. Corp., 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001); *aff'd*, 306 F.3d 17 (2d Cir. N.Y. 2002). *See generally* Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123 (2008).

[49] RESTATEMENT (SECOND) OF CONTRACTS, § 19(2) (1981) (conduct of a party may manifest assent if "he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). *See generally* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1 (2d ed. 2000).

[50] Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 975-82 (2005). *See also* Nat'l Cyber Alert Sys., *Cyber Security Tip ST05-005, Reviewing End-User License Agreements*, http://www.us-cert.gov/cas/tips/ST05-005.html (last visited June 21, 2010); Mike Masnick, *Proof That (Almost) No One Reads End User License Agreements* (Feb. 23, 2005, 17:46 PST), http://www.techdirt.com/articles/20050223/1745244.shtml.

[51] Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking,* 41 U.C. DAVIS L. REV. 45, 97-98 (November 2007).

[52] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). *See also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997) (arbitration clause contained in shrinkwrap agreement was binding).

Commercial Code 2-207 (battle of the forms provision) does not apply. The Seventh Circuit did not follow an earlier Third Circuit opinion holding that the Uniform Commercial Code did apply to shrinkwrap licenses where the licensee did not assent to the terms despite use of the product.[53] State courts vary as to which of the two lines of thought they have followed.[54]

Given that a purpose of § 204(a) is to encourage negotiation, an adhesion contract that benefits a contest sponsor far more than the creator of the intellectual property would seem to evidence a lack of mutual assent to the terms of the contract in form of contest rules. Moreover, the contest rules to which an author must agree if they submit an artistic or literary entry may rise to the level of unconscionability since it fails to offer the author and entrant a meaningful choice, especially if the contest sponsor requires an irrevocable and perpetual license or wholly takes ownership of the property.[55] Thus, without further negotiation and a final agreement for transfer of copyright ownership between the creator and the contest sponsor, a key purpose of § 204(a) has been thwarted at best and, worse, probably violates federal law.

### c. *Contests and Copyright Law – Controlling Use and Moral Rights*

Contest rules typically declare that the contest sponsor may "reproduce, print, publish, transmit, modify, edit, adapt, distribute, license, sell, perform, dispose of, modify, enhance, display or otherwise use such submission for any and all purposes, in perpetuity, throughout the world."[56] Some contests go far beyond controlling the use of the intellectual property to allow any type of alteration, use of the work anywhere, or use by third parties.[57] One well-known contest avowed in the contest rules that the entrant waived his or her moral rights.[58] For visual works of art, such as a photograph or video submission to a contest, this rule may violate

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[53] Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 98, 100, 103-04 (3d Cir. 1991).

[54] Zhang, *supra* note 48.

[55] Unconscionability is an "absence of meaningful choice" for one party combined with contract terms that are unreasonably favorable to the other party. U.C.C. § 2-302 (2008); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). *See also*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003).

[56] *Macy's Keeps America Cooking* contest, sponsored by Macy's Home Store LLC and Macy's Wedding & Gift Registry, 1120 Avenue of the Americas, New York, New York 10036.

[57] *See, e.g., Create Dunkin's Next Donut Contest* [herein, *Dunkin's Donut Contest*] sponsored by Dunkin' Brands, Inc., as Master Servicer and DB Adfund Administrator, LLC, 130 Royall Street, Canton, MA 02021 (on file with author). The Dunkin' Donut contest was particularly inflexible in its control over the intellectual property: "By submitting a [sic] Entry, entrant grants and assigns to Sponsor all title to the Entry, including all its copyright, trademark and other intellectual property rights, and grants and assigns to Sponsor and its designees a worldwide, royalty-free, perpetual, unrestricted, irrevocable and fully sub-licensable right and license to consider, disclose, use, re-use, reproduce, modify, digitize or enhance, adapt, change, edit, publish, translate, create derivative works from, distribute, redistribute and/or display his/her Entry (in whole or in part) including any and all images or likenesses that appear in his/her Entry and/or incorporate all or part of his/her Entry in other works, all in any manner and in any form, format, or media anywhere in the world at any time, as well as in connection with any distribution or syndication arrangement with third parties or third-party sites, in any media format or medium and through any media channels and for any purpose, without further notice or compensation to entrant."

[58] *Dunkin's Donut Contest, supra* note 57: "Entrant waives any and all "moral rights" s/he may have in the Entry." The Dunkin' Donuts contest was highlighted by Promo Magazine. Patricia Odell, *Dunkin' Donuts Returns to Its Roots – Doughnuts – in a $10 Million Campaign*, PROMO MAGAZINE (Mar. 18, 2009), http://promomagazine.com/contests/dunkindonutscampaign/.

Copyright Act § 106A, known as the Visual Artists Rights Act of 1990 (VARA). This section of the Copyright Act refers to the "moral rights" of visual artists and asserts that the rights of attribution or integrity of a work of visual art cannot be transferred and are exclusive to the author, even if the author is not the owner of the work.[59] The VARA recognizes and preserves the protection of moral rights included in the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is signatory.[60] While the rights of attribution and integrity for a visual work may not be transferred, these rights may be waived by the author under § 106A(e)(1) "if the author expressly agrees to such waiver in a written instrument signed by the author."[61] As with the transfer of copyright in general, few contests (if any) would satisfy the requirements of the written instrument without further negotiation between the author and entrant and the contest sponsor.

## IV. Examples of Contests

According to a 2001 survey, forty-six percent of the respondents reported that they surfed the Internet specifically to search for special offers, promotions, and contests.[62] Given the boom in contests available online and websites touting or warning about those contests,[63] those in the promotion industry clearly believe that the number has increased since the turn of the millennium. Many of these contests are designed to provide a good consumer experience and avoid legal entanglements by allowing authors and contestants to retain ownership and copyright of their work. These contests include, but are not limited to, the following:

**Washingtonian.com Monthly Photo Contest:** The sponsor's stated policy – and only statement of rules – is that the photographer retains the copyright, but provides the magazine the limited license "to print the winning photograph in the current issue of the magazine and online as well as in any future issues as long as usage is related to the photo contest."[64] No prize offered except publication, but that is one reason it is such a clearly-delineated contest.

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[59] 17 U.S.C. § 106A (2006).

[60] Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, *as amended* on September 28, 1979. *See generally,* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997). Several states enacted moral rights laws including, *e.g.,* California Art Pres. Act, CAL. CIV. CODE § 987 (1979) and New York (Artists Authorship Rights Act, N.Y. Arts & Clut. Aff. § 14.03 (1983). However, in 2003, a court held that the New York law was preempted by federal copyright law. Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. May 13, 2005), *prior decisions,* 2004 U.S. Dist. LEXIS 17807 (S.D.N.Y. Sept. 8, 2004), 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. July 13, 2003), 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. June 17, 2001).

[61] 17 U.S.C. § 106A. Specifically, "Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified." 17 U.S.C. § 106A(e)(1).

[62] Randy Scasny, *The New Pastime of Promotion Surfing*, SMALLBUSINESSCOMPUTING.COM, February 13, 2001, http://www.smallbusinesscomputing.com/article.php/588191 (last visited June 20, 2010) (quoting a 2001 commercial survey co-sponsored by StartSampling, Inc. and other companies, and conducted by NFO Worldwide, Inc., now known as Taylor Nelson Sofres, or TNS, for PROMO Magazine).

[63] About.com, Contests, http://contests.about.com/ (last visited June 20, 2010) (providing links to and commentary about contests).

[64] *Monthly Photo Contest* Sponsored by Washingtonian Magazine, Inc., *available at* http://www.washingtonian.com

**KODAK Colors of Life Photo Contest:** The sponsor provides many rules related to contestant eligibility and subject matter, but a limited license for use of the contestant's intellectual property: "To the extent permitted by law, winners will also be required to grant Kodak and Hachette Fillipacchi Media use of the winning photo, together with their names, likenesses and biographical information, in advertising and publicity about the Contest or future contests without further compensation." Monetary and publication prizes plus photographic credit offered.[65]

**Maine.gov Photo Contest:** The sponsor is the State of Maine via the statutorily-authorized Internet gateway, InforME (Information Resource of Maine). [66] The rules declare that the photographer retains the copyright to the photograph, but provides a license to the Maine.gov website to display the photos without any fee or other form of compensation. The only reward is photographic credit. Uniquely, this contest states that all photos submitted to the website may be selected for display or use in other Maine state government web pages, but only with permission of the author. Moreover, the rules guarantee non-commercial use only: "Entries will never be used by InforME in any manner for advertising or sale."[67]

**PoetrySoup.com Poetry Contest:** The contest rules are almost entirely about intellectual property, declaring that, "All Poems submitted to PoetrySoup, by the poet, is [*sic*] published as the poet's original work and under the poet's copyright."[68] The contest website suggests that the poet may wish to register their copyright with the U.S. Copyright Office and offers the requisite link. The only reward is online publication and notoriety.

**Warner Bros. Records Contest:** In this contest, a contestant artist uploads his or her original song to the Triframe website.[69] While there is no specific recognition of an artist's copyright, the contest rules are straightforward and make no claim to ownership of the artist's intellectual property. The contest sponsors require, if allowed by law, signed releases and an assignment of copyright *after* a contestant has been selected as a contest winner.[70] The prize is a private phone

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/index/html (last visited June 20, 2010).

[65] *Kodak Colors of Life Photo Contest* sponsored by Eastman Kodak Company, http://www.kodak.com/US/en/professional/contests/colorsOfLife/rules.jhtml (last visited June 20, 2010).

[66] *2009 Summer Photo Contest* Sponsored by the InforME (Information Resource of Maine) Network of the State of Maine, *available at* http://www.maine.gov/portal/photo_contest/index.php (last visited June 21, 2010).

[67] *Id.*

[68] *PoetrySoup.com Poetry Contest* sponsored by Poetry Soup. Poetry Soup does not publish print books, which is an important point since poetry contests that engage in publishing books or obtaining reading fees may be suspect. *See, e.g.,* the poetry contest sponsored by Creative Communication at http://www.poeticpower.com/howitworks2.html (last visited June 18, 2010). *See generally*, articles published on the About.com website at http://poetry.about.com/od/onlinecontests/Poetry_Contests_Competitions_Prizes.htm (last visited June 19, 2010).

[69] TriFrame is an interactive website designed to allow users to submit artistic works for notoriety and prizes. There is no effort by TriFrame to claim the copyright or ownership of the work submitted by a user except to the extent required for display on the TriFrame website.

[70] Warner Bros. Records Contest, sponsored by TRIFAME, LLC, 20 Island Avenue, Suite 1103, Miami Beach, FL 33139 and Warner Bros Records, Inc., 3300 Warner Blvd., Burbank, CA 91505 (on file with author).

call with an Artists & Recordings representative of Warner Bros. Records and record deal consideration.

## V. Conclusion

Many contests available to the public as part of an organization's promotions and marketing strategy probably are illegal under contract and/or copyright law. Intellectual property submitted by an author and the opportunity for a prize or chance of a reward by the sponsor should satisfy the element of consideration in contract formation. This factor, though, may run the risk that a contest could be deemed a lottery in many jurisdictions. Since online contests are accessible by anyone anywhere, artistic and literary contests may be risky business.

The key issue for artistic and literary contests is that the U.S. Copyright Act requires a specific writing to effect transfer of the copyright. Contests that require the author and entrant to waive their copyright or agree to transfer all ownership by submitting a work to the contest promoter or sponsor may not be enforceable contracts under state statutory or common law. Authors may not realize the gravity of the contest rule transferring copyright to the sponsor, especially if the term is buried within the contest rules. While adhesion contracts generally are enforceable, courts could hold that the contract fails because the author has not genuinely assented to the terms of the agreement. Consequently, if an organization insists on claiming ownership, control, or a perpetual license of the submitted work, an opportunity to further negotiate terms of the agreement should be offered to any author whose work will be used by the contest sponsor whether the author won the contest or not.

Finally, visual artists have specific rights–moral rights–under the Copyright Act to attribution and integrity of the work. While an author might waive these rights, an instrument signed by the author is required to effectuate the waiver and most contest entry forms should not satisfy the writing requirement. Why would an organization run the risk of trampling an author's moral rights when the organization probably is trying to obtain a strategic benefit and positive image by offering the contest? More to the point, there simply is no strategic or logical reason to force an author to waive his or her moral rights in an artistic work.

The common element among the well-drafted and designed online contests is the recognition of the author's copyright as well as the sponsor's abstention from claiming a license in perpetuity, full control over the intellectual property, or outright ownership. Not only is such recognition in keeping with the promotional spirit of a contest and the sponsor's goal of goodwill and positive image in the marketplace, recognizing the value of the intellectual property submitted by an author and contestant complies with contract and copyright law.