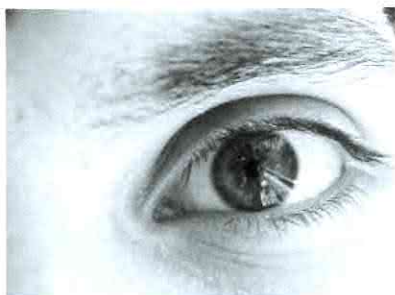




AMERICAN  
COMPOSERS  
FORUM

## Composing With Eyes Open: A Discussion of Commissions and Contracts



By Jeremy J. Beck

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Ever since I first started working as a composer in the early 1980s, long before I began practicing law, I was negotiating and drafting my own contracts. There are some folks out there who prefer to work and collaborate based on a handshake and another party's good word. But even where there is no reason to doubt that "good word," such an approach to one's professional work is a mistake. Misunderstandings and unforeseen events occur in life, at times leading to stress, tension, and disputes. The purpose of a contract is to spell out an agreement *in advance* so the parties know what to expect from one another and how to address such events should any crop up. Arguably, now more than ever, given today's uncertain financial times as well as the challenges and opportunities provided by new media, it is important to start any collaborative project (such as a commission) with a clear understanding of each party's obligations and responsibilities.

Different projects and ventures call for diverse types of contracts. In this article, I will be focusing on contract provisions related to the commission of new works. None of the following information should be taken as legal advice, for every situation is different, but this article provides points of reference for those working in the field.

Ideally, any successful contract balances the interests of the parties. In other words, it should not greatly favor one party's interests over the other's. This type of balance not only generates a better sense of trust and agreement between the parties to the contract, it also lends support to the enforceability of the contract, should a dispute actually end up in court.

Specifically regarding commissions, a successful contract should address (a) the scope of the composition; (b) the scheduling associated with the creation of the new work and its premiere; and (c) certain other matters related to the creation of the new work (such as copyright ownership).

### What is the Scope of the Composition?

The contract should address the nature of the composition in as much detail as possible. Broadly speaking, the contract should state for which medium the new work is intended, i.e., for orchestra, band, chamber ensemble, chorus, or the stage. More specifically, the instrumentation and voicings should be delineated, or at least a framework should be defined. Will the piece for orchestra allow for doublings in the wind instruments? May the composer utilize *divisi* in the strings or in the chorus? Are all of the usual percussion instruments available? Will the composer need to supply any less usual instruments, or will the commissioning party agree to purchase or rent such instruments? These are just a few of the many questions that one might need to raise in formulating this section of the contract.

In addition to basic decisions regarding the medium and the general length of the piece (e.g., 8-10 minutes), if there is a text and it is not in the public domain,

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## Composers Selected for 2010 Minnesota Orchestra Composer Institute

Seven emerging composers have been selected as participants in the **Minnesota Orchestra's 10th Annual Composer Institute**, a national program offered in partnership with the **American Composers Forum** and the **American Music Center**. Composer **Aaron Jay Kernis**, the *Institute's* director, recently announced the winners, who were chosen from a pool of 168 candidates through a competitive process. The seven composers selected represent four nationalities and reside throughout the U.S., and their scores encompass a variety of musical styles.

The 2010 *Composer Institute* participants are **Taylor Brizendine** (Los Angeles, California); Chinese-born **Wang Jie** (Philadelphia, Pennsylvania); Russian-born **Polina Nazaykinskaya** (Austin, Texas); **Clint Needham** (Bloomington, Indiana); **Ben Phelps** (Los Angeles, California); Thailand native **Narong Prangcharoen** (Kansas City, Missouri); and **David Weaver** (Philadelphia, Pennsylvania). Photos and short bios of all seven composers appear on page 3 inside.

"We received dozens of exceptionally-crafted scores, which made the final choices difficult," says Kernis, who chaired the selection panel. "The high quality of submissions confirms what we know from past *Institutes*: the future of new orchestral music is vibrant and strong." Other panel members included composers **Augusta Read Thomas**, **Bright Sheng**, and **Stacy Garrop** (an *Institute* alumnus) as well as the Minnesota Orchestra's assistant conductor **Courtney Lewis**.

In addition to the seven composers chosen to participate in the 2010 *Institute*, the panel designated the following as runners-up: **Michael Djupstrom**, **Max Giteck Duykers**, **Irving Feng-Hsu Lee**, **Michael Gilbertson**, **Tomas Ignacio Gueglia-Saccone**, **Robert Honstein**, **Daniel Nelson**, **Christopher Trapani**, and **Nicholas Vines**. Cited for honorable mention are: **Karl Blench**, **Sung Hong**, **Ann Millikan**, **Andreia Pinto Correia**, and **Evan Ware**.

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## Composing With Eyes Open

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who is responsible for acquiring the rights to that text? Will the commissioning party pay any license fees for the use of the text, or must the composer bear that cost?

Is the commission for a professional ensemble where the sky's the limit, or for a community group where discretion may be required? In other words, are there any concerns about limitations to the players' abilities which the composer must take into consideration? It is not that the contract needs to limit a composer to writing solely in 4/4, but it may be prudent to generally indicate what the commissioner expects. This type of explication can help to avoid later misunderstandings should a composer complete and deliver a piece that a commissioner might consider "inappropriate" for her particular group (for whatever reason).

It is also useful to include information about the performance space for the premiere, as this could impact the nature of the new work. For example, if the commission is for a performance at an outdoor music festival as opposed to a concert hall, it could affect a composer's approach to the new work.

Finally, it is important that the specific words of dedication be agreed upon between the parties, again, to avoid any later misunderstandings.

## Scheduling Associated with the Creation of the New Work and its Premiere

*The creation of the new work*

In determining one's fee for the commission, it is necessary to address the scope of what is included in that fee as well as the time and method of payment.

Is the fee all-inclusive? In other words, does it include copying costs, shipping of the music, and travel expenses? The fee may include all, some, or none of these things. It is essential to articulate the parties' expectations and understanding in this area. For example, if the composer is expected or wishes to attend the premiere, is that attendance (and its related costs) included in the commission, or will separate fees and reimbursements be involved?

Regardless of scope, it is prudent to insist upon payment in parts, i.e., a down payment upon the signing of the contract, with further payments or the balance upon delivery of the score and/or parts by a certain date. These payments should be tied to specific deadlines for delivery of the full score, any rehearsal score (i.e., piano reduction) and a full set of parts. The composer must adhere to these deadlines, unless prior notice has been given to the commissioning party.

Certain composers have at times lost commissions or performance opportunities by failing to meet their contractual obligations. While it is certainly true that any number of reasonable and unexpected events could prevent a composer from meeting a deadline or even completing a commission, the contract should address the scope of such events (illness, accident, etc.) and the remedy for such an occurrence, depending upon how the occurrence may impact the commissioner. For example, if the parties are in agreement, there



Photo: Luigi Diamanti (FreeDigitalPhotos.net)

may be no harm in merely delaying a premiere. But if a piece is not simply delayed but cannot be finished, the commissioner's remedy may be the composer's reimbursement of any fees paid, perhaps minus reasonable expenses incurred.

In reference to the parts, is the commissioning party acquiring a set of parts, or is the composer renting that set to the commissioner? If the latter, will the composer waive a rental fee for the premiere performance? In either case, is the composer waiving a performance fee for the premiere? The answers to all such questions should be part of any negotiation, with the results being included in the contract.

In addition to the above, it is also important to address a composer's remedies where a commissioner may fail to meet its obligations. For example, if a composer delivers the full score by the agreed-upon deadline but the commissioner fails to pay the sum due the composer, the contract could include a late-payment provision, i.e., one that increases the contract sum by a certain amount or percentage. Or, in the circumstances where the premiere performance of the new work is cancelled (so that a set of parts is no longer needed from the composer), the parties may agree that the entire balance of the commission comes due at that time.

Regardless how all of the above matters are decided, and whatever the scope of the agreement between the parties, putting that agreement in writing avoids later disputes about such issues.

### *The premiere of the new work*

When considering the premiere of a new work, all the usual suspects must be included here, i.e., the when, where and by whom. The commissioner should likely be granted an exclusive right to give the premiere, but that exclusive right must be for a limited period, otherwise a new piece could be locked up for years without a performance. Moreover, that limited exclusive right needs to be nontransferable, i.e., a composer should know who will be performing her new composition.

Furthermore, the composer should be provided with a free copy of the audio and/or video recording of the performance, to be delivered to her by a date certain. The composer should have the nonexclusive right to make use of such recordings, including posting them on the web.



As previously mentioned, the contract needs to address the circumstances where the premiere is postponed or cancelled due to no fault of the composer. As noted above, the commissioner's exclusive right of first performance should be limited, but there may be a second level to this limitation, i.e., if the performance is cancelled through no fault of the composer, the limited exclusive right of first performance is waived by the commissioner. Such a provision allows a composer to immediately seek out an alternative premiere performance for her finished piece.

In conjunction with the above, it would be critical to require that all fees payable to the composer come immediately due upon any such cancellation.

### Other Matters to Consider

A detailed and full discussion of copyright law is outside the scope of this article, but suffice it to say that the contract should clarify that ownership of the new work's copyright for all purposes stays with the composer. In addition, the contract must make clear that the composer is an independent contractor, not an employee of the commissioner, and that the relationship between the parties does not involve a "work for hire." This clarification is important, for under the "work for hire" provisions of copyright law, simply stated, an employee's creation for her employer is owned by the employer. Similarly, even where a party is not a commissioner's employee, if the "work for hire" doctrine is in play, the commissioner may be deemed the owner of the commissioned work. In order to avoid any ambiguity on this question, it is best to make the parties' relationship clear in the contract.

The contract must also address whether or not a commissioning party may photocopy additional copies of the parts for rehearsal purposes. If so allowed, the contract should require that such photocopies be destroyed immediately following the premiere.

Where the parties have agreed that the set of parts for the premiere is on loan or being rented, the return of those parts to the composer or the composer's agent must be guaranteed by a certain date, with the return postage paid by the commissioner. In addition, the composer may or may not wish for the parts to be returned cleaned of all players' markings (sometimes it is useful for a composer to review such markings following the premiere, to better understand some of the individual players' concerns).

Furthermore, it should be made clear that no changes may be

made to the music by anyone without the composer's express permission. The composer should also retain the right to make changes herself in the work up to perhaps 10 days or so before the premiere.

If possible, the contract should clearly outline the number of rehearsals that will be allocated towards preparation of the new work, that the composer may attend all such rehearsals and offer comments, and -- where a conductor is involved -- that the conductor will consult with the composer in preparation of the new work. There should be provisions addressing publicity associated with the commission and performance, i.e., that the composer's name will be associated with all such materials relating to the new composition. The composer also should be provided with a certain number of complimentary tickets to the premiere.

Finally, it would be prudent to include provisions addressing the possibility of non-binding mediation for any disputes that may arise between the parties, which state's law will govern the terms of the contract, and which state's venue will be applicable should litigation ensue.

### Composing with Eyes Open

Securing a commission can be a great event in a composer's life. Besides the obvious financial benefit, it may provide encouragement and can communicate an appreciation for that composer's particular creative approach. By keeping an eye out for the contractual details involved in finalizing the deal, the composer frees herself from some of the possible concerns surrounding the mechanics of the commission. And since the focus of any commission should be on the music and the art, taking care of the mechanics with eyes open assists the composer in keeping that focus clear of unnecessary distractions.

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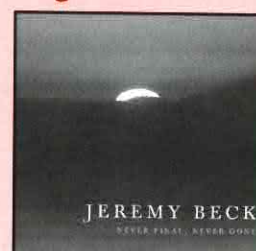
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