Lawyers Alliance FOR NEW YORK
Connecting Lawyers, Nonprofits, and Communities

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Community Arts Q&A Series

Negotiating Real Estate Leases and Licenses

As part of its Community Arts program area, Lawyers Alliance is providing a series of Q&As to help community arts organizations better understand how the law applies to them. This Q&A is the fourth in that series. Other Q&As in the series can be found here.

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Like many for-profit companies, community arts nonprofits need to rely on leased or licensed real estate to conduct their activities. However, arts nonprofits have unique needs and circumstances given their arts-driven missions and programming. What are some of the unique legal issues that arise when these organizations negotiate for access to theaters, galleries, or pop-up shops? Note that the answers here are generalizations only and that, in all circumstances, actual negotiation of a contractual legal document (such as a lease or license agreement) should be handled by legal counsel.

This Legal Alert addresses the following common questions relating to the negotiation of a real estate lease or license for an art space:[1]

- What is the difference between a lease and license?
- Is it common for a theater owner to request a portion of the income earned by a production taking place at the theater?
- Can a theater owner terminate a rental agreement if ticket sales are low?
- If an arts nonprofit requires a certain number of square feet for an exhibition, how should it move forward with a space rental?
- When an arts nonprofit leases space for a show, it can do whatever it wants in the space, right?
- What are the legal considerations around a "pop-up"?
- What are the legal considerations around altering a leased space?

[1] Note that this Legal Alert addresses issues under New York law only.

- Can an arts nonprofit tenant leave some property in the space its leasing when the term ends?

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Question: What is the difference between a lease and a license?

Answer: Leases and licenses are both contractual agreements between temporary users of real estate and the real estate's owner. Primarily, the difference between the two arrangements lies in the degree of control that a temporary user of real estate can exert over the property. A lease is a possessory interest in real estate; it entitles the lessee or tenant to full and exclusive control over the space subject to the lease.[2] For example, even a landlord could not, generally speaking, enter into property leased to someone else absent the tenant's express permission. By contrast, a license does not grant the holder, or licensee, exclusive possession or control over a space. In a license, other persons, such as the landlord, have a right to access the space. In other contexts, the two arrangements are similar, and have provisions for rent, maintenance and repairs, alterations, uses, services provided by the landlord, etc. In this Legal Alert, the terms will be used interchangeably, though do keep in mind that they are different types of arrangements.

Question: Is it common for a theater owner to request a portion of the income earned by a production using the theater?

Answer: An arrangement in which an arts nonprofit renting a theater provides the owner with a portion of the income earned from the production is indeed common. There are generally two different ways this type of arrangement may be structured. The first is when a portion of the show's earnings are shared after a break-even point is agreed upon by the nonprofit renter and the theater owner. In this structure, no revenue sharing will occur until a show takes in "x" dollars or earns a certain return. Thereafter, some portion of the excess above the threshold is tendered to the owner. In the second structure, the owner takes a cut without regard to a break-even point. In this instance, the portion reserved for the owner is typically smaller than it would be if a break-even point were established. Thus, if an arts nonprofit anticipates its show to do well and easily expects it to meet or exceed its break-even point, it may be more advantageous for a show to tender a smaller portion of its earnings to the owner upfront.

Question: Can a theater owner terminate a rental agreement if ticket sales are low?

Answer: Potential termination of a rental agreement due to low ticket sales depends on what termination provision was agreed to by the parties. In many theater leases, a clause may allow the theater owner to remove a tenant if a given production does not gross a certain amount of money in a given period of time. Understandably, if the owner expects a portion of its income to be dependent on the quality or popularity of a production, it wants to ensure the production is successful. A nonprofit renter may even prefer to have such a clause in its lease; after all, leases and licenses are expensive and if an unsuccessful production can shut down and negate its leasing costs, so much the better. Otherwise, if no such clause is present, the theater owner could always try to breach the lease, but in that case the owner may be liable for damages resulting from the contract breach.

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[2] Mirasola v. Advanced Capital Group, Inc., 73 A.D.3d 875, 876 (N.Y. App. Div. 2010).

Question: If an arts nonprofit requires a certain number of square feet for an exhibition, how should it move forward with a space rental?

Answer: The arts nonprofit should ask the landlord what the usable area of the space to be licensed or leased is. Often, the subject space of a lease or license is described in terms of rentable square feet. However, rentable square feet is a metric that often includes some portion of a space that cannot be used, because it may be occupied by a piece of furniture, a fixture, or piece of equipment. A wall or large divider running the length of a floor would, for example, take up some portion of the rentable square footage. Landlords may not be keen to actually reveal the usable square footage of a space, but it doesn't hurt a tenant to ask if the actual, usable area is an important consideration. This might apply when an arts nonprofit is contracting with another end user who may need to understand the amount of space available for an instillation or production.

Question: When an arts nonprofit leases space for a show, it can do whatever it wants in the space, right?

Answer: Not necessarily. Typically, a lease or license will have a section on permitted uses. These uses are dictated by many factors, including governmental regulations and the landlord's own preferences about how its space is used. A theater group or artist collective might want to make sure there are no contractual limitations on the content if the shows they may produce or display. Organizations should think through the myriad ways in which their space may be used and ensure that they are permitted under their lease. For example, if a group that is running a gallery space intends on having a reception and making alcohol available to patrons, it should ensure the landlord has no prohibitions against alcohol being served in the space or understand whatever requirements (such as additional insurance) the landlord may impose if alcohol is to be served. Bear in mind that an arts nonprofit that misuses its space may be liable for a breach of contract claim by the landlord.

Question: What are the legal considerations around a "pop-up"?

Answer: A pop-up is a temporary occupancy arrangement between a landlord and a tenant. Pop-ups are popular when it becomes difficult for landlords to find tenants willing to commit to long-term rental agreements. For an arts nonprofit, pop-ups may be advantageous if the organization does not want to commit to a long-term rental contract but does want to garner attention or needs to use space for a short period of time, such as for an exhibition. In some cases, landlords may be particularly interested in attracting short-term occupancy from arts nonprofits that will draw life to the street and serve as an advertisement for the building. One thing that organizations should consider is whether they want the option of allowing the pop-up arrangement to turn into a more permanent one, in which case an option to renew or expand the occupancy agreement should be included in the contract establishing the pop-up relationship.

Question: What are the legal considerations around altering a leased space?

Answer: Alterations are very common when a tenant leases space. Arts nonprofits may have unique space or design needs, which alterations can be used to fulfill. There are many issues to consider when handling alterations. First, make sure that the lease allows the tenant to conduct alterations, whether with the landlord's consent (an unfavorable provision for a tenant but most common), or not (a more favorable provision for the tenant). Keep in mind that not all alterations are created

equal; a landlord may require consent for structural alterations, in addition to a bevy of other requirements, because of the effect such alterations have on the space, whereas non-structural alterations (such as installing carpeting or a partition) probably wouldn't rise to the level of requiring the landlord's consent. Additionally, the lease should include provisions for what happens to the alterations when the lease or license term ends. Do the materials brought into the space become the property of the landlord, or remain in the tenant's possession? Note that a tenant may be required to return the space to its original condition at the end of the lease term.

Finally, tenants should be aware of the distinction between fixtures and trade fixtures, and whether the same can be removed or become the property of the landlord at the conclusion of a lease term. The distinction between the two types of fixtures isn't precise under New York law, though generally speaking, trade fixtures are articles of property that are brought into a leased space and attached to it for the purposes of the tenant's trade or business.[3] Machinery and equipment are common examples. Courts generally find that these items are removable by the tenant and do not become a part of the landlord's estate. Some personal property, by contrast, may become characterized as a fixture and thus become the property of the landlord. To determine whether personalty (defined as movable property) is a fixture, New York courts rely on a three-part test: (i) whether the personalty is actually annexed, or attached, to the real property, (ii) whether the personalty is applied to the use or purpose for which the part of the real property it is attached to is applied and (iii) whether the personalty was intended by the parties to be a permanent annexation to the real estate.[4] For example, a shelving unit brought into the premises by a tenant could become a fixture if it met these conditions, though again, there would need to be evidence that the parties intended for the shelving unit to remain after the conclusion of the tenant's lease. If these factors are met, even though a tenant may have purchased and installed the movable property, a court could find that upon attachment they became a part of the landlord's property. To avoid this, parties should clearly set forth what happens to movable property at the conclusion of a lease or license term and note in the relevant agreement that it is not the intention of the parties for the item to become a fixture.

Question: Can an arts nonprofit tenant leave some property in the space its leasing when the term ends?

Answer: It depends. A tenant should review its lease or license agreement carefully to see what the end of term requirements are. In some cases, a landlord may permit a tenant to leave its personal property in a space, thereby becoming the landlord's property. In others, the lease may require the tenant to remove any personal property and, if such removal is not accomplished by the end of term, the tenant could be subjected to a holdover action or an argument that it has not fully vacated a space by the required time. A tenant should never assume that it can leave even immaterial items behind thinking the landlord will take care of disposing of such items.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Elizabeth Wytock at ewytock@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

[3] Chittenden Falls Realty Corp. v. Cray Valley Prods., Inc., 208 A.D.2d 1114, 1115 (N.Y. App. Div. 1994).
[4] Mastrangelo v. Manning, 17 A.D.3d 326, 327 (N.Y. App. Div. 2005).

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