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When is a 'deal' a deal?

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Any law student can rotely recite that a contract requires "offer, acceptance, and legal consideration;" indeed, one need not have the acumen of Mitch McDeere to understand this concept. It represents an incomplete and facile statement of the law, however, because, as seasoned practitioners know, there can be no contract unless and until there is a meeting of the minds on all of an agreement's *material* terms, including non-economic terms. (A narrow exception to this rule may allow a court to interpret or imply a term, "where no contrary intent appears from the contract," based upon "custom and usage" in a particular industry, *e.g.*, in the entertainment area, a terminated talent agent's potential entitlement to post-termination commissions — continuing commission payments for the "run of the show," even after being fired. *See, e.g., Howard Entm't, Inc. v. Kudrow,* 208 Cal. App. 4th 1102 (2012).) Relatedly, although under certain circumstances — especially in fast-paced "let's do lunch" Hollywood — an oral agreement may be enforceable (assuming, again, there is a clear agreement on all material terms), where parties intend to reduce an agreement to a signed "long-form" document, California law makes clear that in the absence of a written, signed, long-form, there is no enforceable agreement.

Despite these rules, questions of *when* and *whether* a purported "deal" actually becomes an enforceable *contract* nevertheless often arise. Nowhere is this more prevalent than in industries like film or television, where handshake "deals" remain common. The ease and speed of communication can also exacerbate the challenge of pinpointing formation, with enthusiastic text messages or emails giving the appearance that a deal has "closed" even when material terms remain open, undocumented, or unsigned, thus obviating any actual, binding contract.

Given the above, a refresher on California contract law is a helpful starting point, beginning with the lessons from *Banner Entertainment, Inc. v. Superior Court*, 62 Cal. App. 4th 348 (1998), which despite being published more than twenty-five years ago, continues to be a linchpin for resolving modern contract formation disputes.

Banner involved a dispute between a film producer and a promoter regarding whether they formed an enforceable film marketing contract. As with many disputes of this nature, the case involved a complex and conflicting history of oral negotiations, exchanges of draft longform agreements, and partial performance by conduct, culminating in the producer ultimately declining to sign a longform and then terminating the promoter, who then sued the producer. *Id.* at 359-360.

Despite the case's convoluted history, and cutting through the Gordian knot of the parties' correspondence, the court resolved whether the parties agreed to the terms in question and thus whether there was a contract, through a focused inquiry: did the parties expect their proposed agreement to be reduced to a signed longform agreement? *Id.* at 358. Through this lens, the court analyzed common practice and the parties' dealings, including their understanding that a signed longform agreement was required, which never occurred. *Id.* at 362. Thus, the court ruled that no contract was formed.

In the years since *Banner*, federal and state courts have applied similar frameworks to resolve formation disputes. In *Atlantique Prods., S.A. v. Ion Media Networks, Inc.*, No.

CV 12-8632 DMG (PLAx), 2014 U.S. Dist. LEXIS 184949 (C.D. Cal. Jan. 31, 2014), for example, a French producer engaged in extended negotiations with a cable broadcast network for an agreement to acquire the U.S. rights to a television series. The network's executive emailed a "final" document and approval letter with an execution protocol providing that, in terms of sequencing, the producer would sign and then the network would countersign. *Id.* at * 7-8. The producer repeatedly confirmed agreement to the documents–stating, for example, that *"we're closed"*–and then sent his side's signatures. *Id.* at * 8-9. The network executive responded by email stating he was "look[ing] forward to a great collaborative success[,]" but the network never countersigned. *Id.* at * 9.

A dispute arose, and the producer sued the network for breach of contract, among other claims. The Honorable Dolly Gee (now Chief Judge of the Central District of California) dismissed all claims, holding that despite correspondence expressly stating the deal had *"closed,"* an actual binding contract was never formed. The Ninth Circuit affirmed, holding that no contract was formed because it was evident, *even after* the parties agreed to all material terms, that the parties understood signatures were required for the contract to be binding. *Atlantique Prods. v. Ion Media Networks*, 644 F. App'x 800, 801 (9th Cir. 2016). As for the remaining claims, the Ninth Circuit endorsed Judge Gee's conclusion that, where parties expect a contract to be signed for it to be binding (as is the norm in a settlement agreement, for example), it is ineffective and unreasonable as a matter of law to rely on any alleged contractual promises before execution.

Similarly, and more recently, in 2024 a Los Angeles County Superior Court dismissed a lawsuit by actor James Van Der Beek seeking to enforce an alleged agreement concerning a podcast about the television show *Dawson's Creek*. *See Van Der Beek v. Stitcher Media LLC, et al.*, No. 22STCV27977 (Cal. Sup. Ct. L.A. Cnty. Jan. 19, 2024). Despite contentions that the parties' attorneys had stated negotiations were *"closed," and even though both parties had actually begun performance*, the court ruled that the lack of a mutually signed final agreement doomed the claims. *Id.* at * 8-9. Citing the terms of a draft agreement calling for a signed final agreement, the court found the draft manifested that the parties would be bound only by a final written agreement signed by each side. *Id.* at * 8-9. Thus, as in *Atlantique*, without that signed definitive agreement containing all material terms, there was no contract.

In addition to these common law principles, where disputes arise over alleged contracts to transfer copyright ownership–for example, transfers of rights in musical works, film or television scripts, or literary works –copyright law also makes clear that a signed agreement is necessary. Specifically, as Judge Alex Kozinski explained in addressing claims brought by film producers to enforce a supposed oral agreement regarding *The Mummy* against the famous gothic fiction writer Ann Rice, under Section 204 of the Copyright Act (sometimes called the "copyright statute of frauds"), "[a] transfer of copyright ownership . . . 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 or such owner's duly authorized agent." 17 U.S.C. § 204(a). *See eSilicon Corp. v. Silicon Space Tech. Corp.*, No. C -11-06184 EDL, 2012 U.S. Dist. LEXIS 194575, at * 4-5 (N.D. Cal. Oct. 2, 2012). Although analogous to the statute of frauds, as Judge Kozinski pointed out in the Ann Rice litigation, Section 204 "actually differs materially from the statute of frauds. While the latter may be satisfied by a writing not intended as a memorandum of contract, not communicated to the other party, and even made in pleadings or testimony years after the alleged agreement, section 204 may not." *Konigsberg Int'l v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994).

"'The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so.'" *Id.* (citing *Konigsberg Int'l v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994) and *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990)). Thus, as the Ann Rice litigation instructs, where disputes over an alleged oral contract arise under California common law, if the context concerns the transfer of copyright ownership in a dramatic or musical work, Section 204 can be asserted to drive a stake in the heart of a contract claim.

In short, and copyright considerations aside, practitioners and businesses seeking certainty about the moment of contract formation, if any, should consider the following:

- For the sake of clarity, when exchanging draft longform agreements, include conditions precedent, including the prerequisite of full execution and exchange of the final longform document containing all material terms.
- As explained in *Atlantique*, incorporate execution protocols concerning sequencing at the conclusion of drafting and "agreement."
- Avoid beginning performance of any contractual obligations under a purported agreement (i.e., rendering services or making payments) until mutual execution and exchange by all parties, if possible; or, if performance begins, understand such performance might be a factor militating in favor of an enforceable contract. On the other hand, to the extent the client anticipates arguing that an agreement is, in fact, a binding contract, begin performance (and accept the other party's performance, e.g., payment).
- Counsel relies at her or his peril on statements that a deal is "closed" or "done," unless those statements are actually accompanied by the signed longform document.
- To understand when, if ever, a "deal" is really a deal, engage experienced litigation counsel before terminating negotiations so that imperfect records may be clarified and strengthened prior to a dispute ensuing.

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