

THE EVOLVING USE OF LICENSE AGREEMENTS
IN REAL ESTATE-RELATED TRANSACTIONS
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A 1917 Yale Law Review Article described license agreements as “Chameleon-hued”,¹ a reference to their versatility and adaptability to so many circumstances. In today’s fast paced economy, in addition to their traditional applications, license agreements create the parties’ sometimes subtle temporary relationships, rights and obligations in shared work space environments, pop up stores and even artisanal food halls curated by celebrity chefs. The use of a license agreement may also reflect a landlord’s desire to avoid the increasingly burdensome framework inherent in the landlord/tenant relationship. Owners and users of real estate need to understand the many potential applications of a license agreement.

Traditionally, licenses agreements have been used to provide rights to install and maintain communication towers and antennae, display signs, run concession stands at sporting events and other venues, gain access during construction, and use parking spaces and storage areas.

For over a century, license agreements have been used to document the concept of a shop within a shop. For example, in a department store cosmetics section, many or all of the brands will display their products in close proximity to those of other brands, yet each brand retailer is a separate and distinct business operation. The respective rights and obligations of the store owner and the licensee are memorialized in a license agreement. This is also the case with designer shops in stores such as Bloomingdales, Saks Fifth Avenue or Macys. The designer will sell its products pursuant to a license agreement, and the department store will have the right to terminate the license if, for example, the licensee’s branding is no longer compatible with that of the store or if certain sales targets are not met. Often the licensee will invest large sums to fixture and fit out its designated area to capitalize on its exposure in the department store and the department store will want them to remain as long as both parties are profiting from the relationship.

How is a license different from a lease or an easement? According to Freidman on Leases, “a lease is a conveyance of exclusive possession of a specific property for a term less than that of the grantor usually in consideration of the payment of rent, which vests an estate in the grantee.” Generally, a lease provides for an exclusive right to use the space for a set period of time. Considerable legislation and case law in each state now define the obligations of a landlord and tenant created by a lease arrangement. In contrast, Friedman goes on to explain that a license merely makes permissible acts on the land of another that would otherwise lack permission. Critical elements of a license are (i) that it is terminable at will, and (ii) it does not grant the licensee an estate in the land.²

In determining whether an agreement is a lease, a license or an easement, courts will also consider whether the granted use is non-exclusive, whether the owner retains certain controls over the property, and whether the owner provides services essential to the licensee for the use of the property. A license is distinguishable from an easement which, like a license, permits the use of the owner’s property or restricts the owner from certain uses of it property; however, unlike a license, an easement transfers to the easement holder an interest that encumbers the property and

¹ Hohfeld, Faulty Analysis in Easements and Licenses (1917) 27 Yale Law Journal 66, 92.

² Freidman on Leases, rel #29, 11/15, p37-1 -37.3.

affects title. Easements are classified as *appurtenant* to the property in which event they benefit the holder and are transferable with the transfer of the property or *personal* to the holder of the easement in which event they do not run with the land. Unless otherwise specified, an easement is presumed to be permanent and non-exclusive, and is generally transferable.

A property owner may prefer a license over a lease because it is easier to remove a licensee than to remove a tenant. With a lease, there can be an expensive, litigious and highly technical gauntlet of legal process to remove a tenant. While the eviction winds its way through court, the landlord can face cumbersome delays, lost income, large tax expenses, lost opportunities to obtain a new responsible tenant, and burdensome legal fees. Even if a lease specifically states that a landlord may use self-help, it is a risky proposition. Section 853 of the New York Real Property Actions and Proceedings Law provides that if a tenant is ejected from real property by force or other unlawful means, the tenant may recover treble damages from the landlord and may be restored to the property if ejected before the end of the lease term.

By contrast, it is well settled that a licensor may revoke a license “at will” and can use “self-help” to remove a defaulting licensee, thus foregoing the arduous gauntlet required to regain possession of leased property. Under a license, the licensee has no estate in the property and has no right to possession. Unless expressly contradicted in the license agreement, common law principles generally apply and the licensor has the absolute right to use peaceable self-help to remove a licensee from a licensed premises. However, even though it is easier to remove a licensee than it is to remove a tenant, certain laws apply. New York Real Property Actions and Proceedings Law Section 713, which generally relates to summary holdover proceedings where no landlord-tenant relationship exists, applies to an action against a licensee if the license has expired or been revoked and would therefore require the sending of a ten day notice to quit.

Where the distinction between a license and a lease becomes blurred, there can be uncertainty as to how a court might characterize the license agreement despite how it is labeled. Besides the title of the document, a court will look at the elements of the agreement and the equities of the situation in its decision making. In American Jewish Theatre Inc. v. Roundabout Theatre, Inc 610 N.Y.S. 2d 256 (1994), the Appellate Division, First Department wrote “what defines the proprietary relationship between the parties is not its characterization or the technical language used in the instrument but rather the manifest intention of the parties. The nature of the transfer of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights. Whereas a license connotes use or occupancy of the grantor’s premises, a lease grants exclusive possession of designated space to a tenant subject to rights specifically reserved by the lessor. The former is cancellable at will without cause.” Here, the plaintiff theatre company brought an action for injunctive relief that could only be afforded to a tenant in the context of a rental dispute. Because the plaintiff had a six month fixed right to use the space that was not revocable at will, the court found that, even though the agreement between the parties was labelled a license, the relationship was a leasehold one.

In a more recent case, Nextel of N.Y. v. Time Management Corp. 746 N.Y.S.2d. 169 (2d Dept App. Div. 2002), the Supreme Court, Appellate Division Second Department, found that a roof top cellular agreement was a lease not a license because the agreement contained provisions

typical of a lease and conferred rights well beyond those of a holder of a license or a temporary privilege.

Further, it seems the courts will look at the equities of a situation to come to its decision. In Blenheim LLC v. Il Posto LLC, 827 N.Y.S. 2d 520 (2006), the Civil Court of the City of New York County found that a provision in a lease giving a restaurant a license revocable at will to use a vault space could not be revoked at will. The Court concluded on the facts of the case that the landlord knew that the tenant needed the vault for its compressors, hot water heaters and elevator machine equipment and, as such, the use of the vault space was necessary and essential for the use of the space as a restaurant and was therefore appurtenant to the lease between the parties and thus irrevocable. Accordingly, where a license is viewed as coupled with an interest or where there is reliance on the license, a court might equitably rule that there should be greater protections for the user.

Most recently, in February 2014, in Union Square Park Cmty. Coal, Inc. v. N.Y. City Department of Parks and Recreation, the New York Court of Appeals affirmed an Appellate Court decision that found that a fifteen year agreement between the NY Department of Parks and Recreation and a restaurant was a license and not a lease. Here, even though the document was entitled "License"; it had a fifteen year term and a payment structure that resembled a lease. Although in this case the use of the indoor pavilion was exclusive, the outdoor space was available to non-restaurant patrons except in certain designated areas where liquor was served.. In addition, in the agreement, the Department of Parks and Recreation retained the right to terminate the relationship at will on twenty five (25) day written notice as long as its reasons were not arbitrary or capricious.

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In examining the distinction between a license and a lease, the New York Court of Appeals stated:

A document is a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy the land. It is the conveyance of absolute control and possession of the property at an agreed rental which differentiates a lease from other arrangements dealing with property rights (Feder v. Caliquira, 8 NY2d 400,440 [1960]). A license, on the other hand, is a revocable privilege given to one, without interest in the lands of another, to do one or more acts of a temporary nature on the lands. (Trustee of Town of Southampton v. Jessup 162 NY 122, 126 [1900]; see also Lordi v. County of Nassau, 20 Ad2d 658, 659 [2nd Dept 1964] affd without opinion 14 NY2d 699 [1964]). Generally, contracts permitting a party to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services, are construed as licenses. That a writing refers to itself as a license or lease is not determinative; rather the true nature of the transaction must be gleaned from the rights and obligations set forth therein. Finally a broad termination clause reserving to the grantor the right to cancel whenever it decides in good faith to do so is strongly indicative of a license as opposed to a lease, (Miller, 15 NY2d at 38) .

Although its analysis of the law was not so novel, the Union Square decision may indicate a critical turning point since it underscores the willingness of the Court of Appeals to find a license rather than a lease, even though: (i) the term was fifteen years, (ii) the user was required to invest \$700,000 in capital investments that were not refundable upon termination, (iii) the annual fees were substantial starting at \$350,000 and increasing to \$400,000 or more if percentage rent was greater, and (iv) the owner was required not to be arbitrary and capricious in exercising its at will termination right. Further, in deciding Union Square, the Court of Appeals ignored its earlier precedent in Miller v. City of New York (255 NY2d 81, 1964) where, under similar facts, it found that an agreement by New York City's Parks Commissioner allowing a private corporation to use a golf-driving range was a lease not a license.

As the referenced cases indicate, there can be benefits to characterizing an agreement as a license agreement rather than a lease, but the instrument must be drafted carefully and, *caveat emptor*: the title of the agreement may not be dispositive. Courts seem apt to find a document is (i) a lease, if it is for an exclusive use for a set period of time and (ii) a license, if it for a non-exclusive use which is terminable at will. Further, there may be an element of equity which influences the courts' decision. Skilled real estate lawyers will assess which form of agreement—license or lease—will best serve their respective clients' needs.

Since one indicia of a license is a broad licensor termination right, a licensee may resist its use where a significant financial commitment is needed to prepare the space for its use. However, licensors are increasingly using creative financing arrangements whereby they agree to return an unamortized portion of the licensee's installation investment upon termination to encourage the use of a license rather than a lease. Licensors are agreeing to these provisions where they want the flexibility of an absolute right to terminate the license for any reason (such as the ability to pursue a development deal).

What developing trends lend themselves to license agreement arrangements?

Traditionally, "Pop up" stores have been used for seasonal Halloween or Christmas outlets and designer sample sales. However, today, social media has made it easier and less expensive than ever to advertise the availability of pop up space. Web sites such as thestorefront.com connect property owners who have short term retail space to rent with artists, brands and boutiques in need of temporary quarters, something in the nature of airbnb. Lately, national brands and known entities have been using "pop up" spaces: Kate Spade opened one to launch a new line, Kanye West had a pop up space at 355 Bowery in New York City to sell tickets, hats and bags in connection with a concert tour, and tech giants Google and Microsoft have opened temporary locations to capitalize on the holiday rush. These pop up stores provide a landlord income while it seeks a more permanent tenant, waits for longer term rents to rise, or, perhaps, works through a zoning change. Pop up tenants can add positive visibility or buzz to a location, increasing its desirability.

When entering into a license agreement for a pop up store, a property owner should be careful not to hinder its pursuit of a more profitable long term tenant or, in a mall setting, violate existing tenants' exclusive uses or other rights. Likewise, the owner should keep in mind that a

pop up occupant may not be as vested in the location as a tenant with a lease and may be less concerned with running a quality operation or being a good neighbor. In all events, liability insurance should be in place because accidents can happen even if the pop up use is only for a few days.

License agreements provide an attractive flexible short term use option for a specific limited purpose whereby a retailer can experiment with a location or create a splash in a heavily trafficked area that it could not afford otherwise. Because there is typically not a large fit out investment, users are agreeable to the licensor's right to terminate at will upon notice. In fact, in certain circumstances, there might not even be a grant of a specific space to the user. For example, in a retail context, the pop up space can be integrated into another non-exclusive use such as where an art gallery agrees to place a certain number of pictures on its walls or a cigar vendor has the right to have a concession stand at a hotel.

Another growing use of license agreements is in shared space situations. With the popularity of temporary work arrangements, a user may not even be devised a specific work space and could have non exclusive rights to use a conference room, reception area, and available secretarial services (for an extra fee). The user need not make a long term commitment to the space nor invest in outfitting an office since it typically comes furnished. The owner gets optimal use of its space and the ability to charge for a la carte services. Depending on the facts and circumstances, these arrangements may be appropriately characterized (and documented) as licenses. Where the occupant does not have exclusive use of a particular office space for a set period and the agreement is terminable upon thirty days' notice, it seems unlikely the transaction would run awry of any court-imposed license/lease distinction.

Food halls are increasingly popular today, in particular, those where a celebrity chef "curates" a food court. For example, it has been reported that Anthony Bourdain is opening Bourdain Market at Pier 58 on the Hudson River by the Meatpacking District³. The build-out may include a Singapore-style open area hawker market with moveable stalls selling a variety of inexpensive foods surrounded by a communal eating space. In a food hall, the curator sells different vendors the right to use a designated portion of the space. The curator typically retains the right to change the vendor mix (upon reasonable notice) and the food vendor gets profits and positive exposure without investing in fixturing and promoting a traditional restaurant. Again, since occupancy can be terminated at will after notice and the use is not exclusive, a license agreement seems to be the right legal vehicle.

We live in a fast changing world where information is exchanged via social media at hyper-speed and flexible short term associations are increasingly important. Like a chameleon in the jungle, the license agreement is an often over-looked instrument that can be adapted to a myriad of different transaction types to create win/win situations for the parties.

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³ [The Faithfull Shopper: All Hall the Food Halls](#), Faith Hope Consolo, Douglas Elliman Real Estate, January 2016.

