

# **CLEARING RIGHTS FOR FILM AND TELEVISION PRODUCTIONS**

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## INTRODUCTION

WHAT IS THIS PROCESS OF CLEARING RIGHTS? Clearing rights in motion picture and television programs is the process of determining whether the production violates the rights of third parties or is otherwise in violation of any law. Materials finding their way into motion pictures and television productions come from many sources. Third parties may have rights relative to or ownership in those materials. In this article I do not address the types of claims that can be made by third parties resulting from use of materials in motion pictures and television works.

## WHAT TO LOOK FOR: THE TYPES OF MATERIALS THAT RAISE CONTENT CLEARANCE ISSUES

Different types of sources raise different types of clearance issues. Keep in mind the producer's use of some materials may qualify for an exemption from the requirement to clear rights in those materials. For example, exemptions such as fair use and First Amendment free speech may, in certain circumstances, allow the producer the right to use materials such as other film or television productions without permission.

### **1. Ideas.**

Ideas cannot be protected by copyright (although the expression of ideas can be). But ideas can be protected by contract and by the nature of the relationship. If the film or television production is based on an idea by a third party or if ideas of third parties are used, a written agreement should be entered into with the third parties in the form of an assignment or option and purchase agreement.

*Unsolicited materials policy.* Many production companies do not accept unsolicited materials and to return unsolicited packages unopened. The fact that a production company does not accept an unsolicited submission should prevent the formation of an implied contract. Not opening the unsolicited package will help in maintaining that the production company did not have access to copyrighted materials contained in the package.

### **2. Music.**

Use of pre-existing music in motion pictures and television productions involves two sets of rights: the rights in a musical composition (i.e., the words and music) and the sound recording of the composition. The U.S. Copyright Act grants the copyright owner of a composition the exclusive rights to (i) reproduce and distribute copies of his/her composition (such as in synchronization with moving images); and (ii) publicly perform his/her composition. The Act grants the copyright owner of the sound recording the exclusive rights to (i) reproduce and (ii) distribute copies of his/her work such as in synchronization with moving images. Therefore, the producer who wants to use the sound recording of a composition in its production must secure three licenses: the synchronization license, the public performance license and the master use license. Clearing music takes a long time and can be very expensive.

*Compositions (words and music).* The copyright in a composition is usually owned initially by the songwriter or composer. In most situations, those rights are transferred to a music publishing company who administers the copyright in the composition. It can sometimes be difficult to locate publishers. The names of publishers are usually listed with the song title on the packaging of the record, tape or CD. The publisher's address and telephone number can be found in industry directories or by contacting the Harry Fox Agency (212 370 5330). Where the song title is known but not the name of the publisher, American Society of Composers and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) can also be helpful in identifying the publisher and contact information for the publisher.

*Synchronization license.* This license grants the producer the right to reproduce and make copies of the composition in synchronization with moving images. This license is obtained from the owner of the copyright in the musical composition (usually the publisher). Since there is no statutory compulsory license concerning synchronization rights, as there is for mechanical rights, the rates for synchronization rights vary greatly depending on the perceived value of the composition. If the producer uses the text of lyrics and/or music in written form, a print license must be obtained.

*Performing rights license for compositions.* The producer must also secure a performing rights license in certain situations. Producers secure these licenses in the following manner: if the work is released theatrically in the U.S. the performing rights license is included in the synchronization license; in other cases the public performing rights in the U.S. are generally secured by use of licenses from performing rights organizations such as ASCAP and BMI. ASCAP and BMI have special performing rights licenses for broadcasters and venues that publicly perform songs. It is common for songwriters and publishers to specify their performing rights organization next to the song title on the packaging of the sound recording (the record, tape, or CD). ASCAP can be contacted at 212 621 6000 and BMI at 212 830 2569.

#### *Sound recordings.*

*Master use license.* The master use license grants the producer the right to reproduce the sound recording in the sound track of the work and make copies of the sound recording in connection with the sale of the work. This license is obtained from the owner of the copyright in the sound recording. Typically, the owner of the sound recording is a record company, but the owner could be the recording artist. The packaging of the record, tape or CD should identify the recording company and contact information. Like the rates for synchronization licenses, rates for master use licenses vary greatly depending on the perceived value of the song. It is common for these rates to equal the rates for the master use license. If the rates demanded by the owner of the sound recording are too high, it may be more cost effective for the producer to create a new recording of the composition. In such situations the master would be owned by the producer and the producer avoids the master use license altogether, but not the synchronization license.

*A note about sampling.* It is important to make sure the rights holder in the masters controls all rights in the masters and can convey the contracted rights to the producer. More and more popular music contains samples. Samples are portions (usually short clips) of pre-existing sound recordings that are integrated into a new sound recording. The producer must be watchful for music contains samples. At a minimum, the master use license should contain the licensor's representations and warranties that the recording contains no infringing material. In addition, it is advisable to make a careful examination of the recording and investigate any suspicious material.

Other rights that may be included in the synchronization and master use licenses. Other rights which may be included in the synchronization and master use licenses include home video distribution rights; right to adapt the music and change it for the production; grand rights; sound-track album rights; territory; duration; other mediums (television, theatrical, home video, digital, new technologies); the right to use the master and composition in derivative works.

*Commissioned music.*

*Composer agreements.* It may be cheaper or artistically and commercially better for the producer to hire a composer to write music and musicians to record the sound track for the producer's work. Often this is a work-for-hire relationship and the producer acquires the copyrights in the compositions and the sound recording as the employer of the composer.

*Studio musicians and vocalists agreements.* Musicians and vocalists who perform for the sound recordings included in the production are generally employed on a work-for-hire basis. If the musical performers are not working under a union agreement, then a work-for-hire agreement should be signed by the performer.

*Union issues in sound recordings.* Use of sound recordings (including both pre-existing and commissioned works) in motion picture and television productions trigger a number of union issues. Where the sound recording was originally recorded for other use (such as a song recorded for release as an album, now being used in a motion picture or television production), re-use and step-up fees may be owed to members of American Federation of Musicians (AFM) and American Federation of Television and Radio Actors (AFTRA). Those fees may be owed to musicians, studio orchestra, and vocalists who performed on the sound recordings selected for the production.

*Use of music from production music libraries.* Library music is sometimes used as background music, especially for independent productions. License fees are often less expensive compared to fees for commissioned music or existing popular songs. Also use of library music generally involves a single agreement with the library, thereby simplifying the clearance procedure.

**3. Art and photographs (pictorial, graphic and sculptural works).** Like other works protected by copyright, the producer must acquire a license to use visual works in the motion picture or television production. Note that there are compulsory licenses for public television use of non-dramatic use of published pictorial, graphic and sculptural works. (17 USC '118). That license does not currently extend to internet use by public television entities.

**4. Stock library footage.** If stock footage is used in the Production, it must be cleared. All of the issues raised in this article about acquiring rights from third parties for material included in the production also apply to video and film footage from other sources, such as stock footage libraries. This means the stock footage must be examined to identify third party rights (copyrights, trademark, right of privacy and publicity, obscenity, defamation, etc.). Next, it must be determined whether the party licensing the footage to the producer has cleared all of those rights. Finally, the license agreement for the footage must have the appropriate representations, warranties, and indemnifications.

**5. Books, articles, and other text.** The production may be based on a script, book or other written source. If so and if the source is protected by copyright, agreements must be secured for their use unless that use is permissible under some exception to the copyright law. The agreement commonly used to acquire such pre-existing works is the option and purchase agreement. A discussion of the option and purchase agreement begins at page 9 below.

**6. Persons appearing in the production.** Use of a person's name, likeness, image, and/or photograph without consent can lead to claims of invasion of privacy (or publicity) and defamation. Any person who appears in the production, who is not employed as an actor by the producer, should sign a release agreement. In situations, such as documentaries, where release agreements cannot be secured, the production should be evaluated to determine whether use would be permitted under the First Amendment.

*Issues regarding professional actors.* Use of the performances of actors may be subject to union or other agreements. Although subject to the union agreement, agreements between the producer and the talent are necessary to spell out particular terms of the engagement of the talent's services. Use of performances in acquired footage or distribution of the production into markets beyond the initial market may require payment of re-use or step-up fees.

*Right of Publicity; Sound-a-likes and look-a-likes.* The right of publicity is closely related to invasion of privacy by appropriation. This right gives a celebrity the exclusive right to commercially exploit his/her name, likeness and persona. The right of publicity creates a property right in a person's name, likeness and persona so as to prevent others from commercially exploiting that right. Look-a-likes and Sound-a-likes claims are based on the injury to the plaintiff arising out of misleading the public into thinking that a celebrity endorses a product.

Where an imitation of a celebrity's voice or likeness is used, a release should be secured from the celebrity in most cases. Where releases cannot be secured, in some cases disclaimers may be useful to avoid liability.

**7. Trademarks and Service Marks.** Most claims of injury to another party's trademark in a motion picture or television production do not involve the direct infringement of a mark as in the usual case of two competitors using the same or similar marks to identify their products. Instead, the producer is more likely to face complaints that the work makes reference to a mark in a way that injures the trademark owner in some way. These claims range from trademark infringement, to unfair competition, to injury to trademark by dilution, tarnishment, and false endorsement.

A mark may be used without the permission of the owner in a motion picture or television production in a factually accurate reference to the trademark owner's products (or services) for the purpose of news reporting or comparative advertising. The use of a mark that constitutes comment, criticism, editorializing, satire or an artistic parody of the mark or the products may, depending on the circumstances, be protected as free speech under the First Amendment. In most cases it is advisable to obtain written consent from owners of trademarks and service marks depicted in the production.

**8. Use of fictional characters.** The physical/visual appearance of a fictitious character may be protected by copyright. Copyright protection does not exist for fictional characters apart from the work in which they appear. It is the work, not the character that is protected by copyright. Visual characters (e.g. Mickey Mouse, Superman) are more protectable by copyright law than strictly literary characters. However, distinctively delineated characters (even if strictly literary) may receive some copyright protection but the less developed the characters the less they can be protected by copyright. Character names and identifying graphics may be protected by trademark and unfair competition laws.

As in the use of other property protected by trademark and/or copyright, the use of fictional characters in a motion picture or television program without consent may be permissible in special cases. But in most cases, a written consent from the owners of the fictional characters should be obtained.

**9. Locations depicted in the production.** Release agreements should be secured from owners of real estate and/or business locations shown or depicted in the production, especially where the location is distinctive and/or by use of business signage or otherwise, a business is associated with the location.

**10. Obscenity and indecency.** The creation and distribution of obscene material (you'll know it when you see it) may be punished under state criminal statutes. All state statutes must comply with the Constitution [see: *Miller v. California* (413 US 15, 93 S Ct 2607)] which determined that

material is obscene if the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and taken as a whole, lacks serious literary, artistic, political or scientific value]. Since most productions are distributed throughout the US (and even the world), the jurisdiction with the most restrictive definition of obscenity determines what will be considered obscene.

## TIPS FOR CLEARING RIGHTS

**Start clearance process early.** Address rights clearance issues as they come up -- even during the pre-production and production stages. The earlier those issues are identified the easier it will be to acquire the rights or make adjustments, in either case it will be less expensive. Review the script before production begins. Review the final edit.

**Make a list of all third party material.** Make lists third party material such as music and acquired footage cue sheets. Cue sheets often describe the type and nature of use. For example, music cue sheets specify the visual/vocal, background, voice over, length of use, title of composition, songwriter and publisher, copyright date, etc. With respect to third party materials, make sure the rights holder of the licensed work controls all rights in the work and can convey contracted rights to the producer. This is especially important in sound recordings (where there may be samples) and in acquired film footage (where music, art work, persons appearing in the work, and other works may be incorporated into the footage and where the rights therein are not controlled by the party owning the film footage).

**Determine which rights are needed.** One of the first questions to consider is in which markets and territories the production will be distributed and for how long will the production be distributed. The costs of clearing rights are often directly affected by the answer to these questions. With respect to specific third party works, you will need to know how those works are used in the production. For example, the publisher of a song will want to know in which markets the production will be distributed, how much of the song is used, how many times the song is used, is it used as theme music, is it used under the credits, is it incidental or is the theme of the song part of the action of the scene in which it appears, is the song performed by the characters.

**Final review of the production.** Go through the work and have an attorney review the work for potential problems. It is useful to review the entire work and see how materials are used in context.

**Check facts and source materials.** If the work includes fact statements or materials, make sure facts have been checked for accuracy. An annotated version of the script that cites the sources of facts and third party materials is very useful for this review. Identify the sources for factual statements and determine whether they are protected by copyright.

**Use of materials without consents.** If the producer intends to use material without consent by relying on exemptions such as fair use or first amendment - free speech, it is useful to build a file of contemporaneously created documentation that specifies factual or other justification for the exemption. This documentation should be communicated only to the attorney and preserved as privileged attorney-client communication. A similar procedure should be used for indecent and potentially obscene materials.

**Ideas.** Ask the officers, partners, employees and agents of the producer about whether they received any submissions of materials or proposals similar to the concepts on which the production is based.

**Copyright reports.** Copyright reports are used to verify ownership, control and other aspects of the copyright status of copyrighted work. Although it may not be feasible to check all copyrighted material in the production, at a minimum, a copyright report should be run for works (e.g., books, plays) on which the production is based. Also, consider whether foreign copyright reports should be ordered. A note on checking claim of title: under the ruling of the Court in *Stewart v. Abend* (the REAR WINDOW case) (110 S.Ct. 1789; 1990) grants by authors who died prior to the expiration of the copyright term are void at the time of renewal of the copyright.

**Title reports.** Title reports are used to evaluate whether the title of the production is confusingly similar to and potentially infringing upon other works. Title reports can be secured from commercial services such as DeForest, Thompson and Thompson, and the Dennis Angel Law Offices. Registered copyrights and trademarks can be searched on-line on a limited basis through the Copyright Office and the Patent and Trademark Office web-sites. Limited protection for a title of a work can be secured by registering the title with the Motion Picture Association of America and/or the script with the Writer's Guild.

**Compliance with union issues.** If the production company is a signatory to any union or guild agreements, check the work for compliance with applicable union agreements.

**Filing of copyright assignments and exclusive licenses.** If rights in a work have been acquired from a copyright owner in the form of a transfer (an assignment) of all rights or certain exclusive rights, then the agreement or a signed memorandum (or short form summary) of the agreement should be filed with the copyright office. Failure to do so may allow another party to secure a superior claim to the rights.

**Examine agreements.** Examine all agreements with third parties. If the work is based on an underlying work, examine agreements related to the underlying work. Do agreements grant the rights they are supposed to grant? Do they grant rights in the market and territories the producer wants to explore? Are there any agreements with minors? Agreements with minors are voidable by the minor in most states unless approved by courts. Do agreements with rights holders allow the producer to modify and alter the work and place it in the context of other works? Are all agreements in writing signed by the appropriate parties? Do work-for-hire agreements meet the requirements of the copyright statute? If an option and purchase agreement is used to acquire rights in the underlying work, check to make sure the option was properly exercised and the rights purchased.

**Opinion of counsel.** Attorneys can review works and render opinions as to the potential problems in a work and the steps necessary to remedy those problems.

**Errors and Omissions liability insurance.** Consider the use of E&O insurance to manage risk of liability. This is a special form of liability insurance that is used to insure against claims that may arise in the use, publication, distribution and exhibition of works. E&O policies typically provide coverage for claims in the nature of defamation, invasion of privacy and publicity, copyright and trademark infringement, wrongful portrayal, plagiarism, piracy, or unfair competition resulting from the alleged unauthorized use of titles, formats, ideas, characters, plots, performances of artists or performers or other material.

**Use of Disclaimers.** A well-drafted disclaimer may be an adequate defense against false endorsement claims (e.g. sound-a-likes and look-a-likes).

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include Academy Award, Emmy Award, and Peabody Award winning independent producers, directors, writers, and television stations in the film and television industry; Grammy award winning songwriters, recording and performing artists, producers, publishers, record companies, and studios in the music industry; and authors and publishers in the literary and electronic publishing industry. Contact Dan at IDS Center, Suite 2000, 80 South Eighth Street, Minneapolis, MN 55402. Phone: (612) 336-9332. Email: [dan@satoriuslawfirm.com](mailto:dan@satoriuslawfirm.com).

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