

Filmmaking and Copyright Law: Negotiations, Rights and Releases in Film Contracts.

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Filmmaking is a complex business. It is the one entertainment industry that seems to embrace all aspects of copyright law relating to works and performances. Generally speaking a filmmaking contract would cover the acquisition of literary works, procurement of talent, distribution and bonding, financing and music licensing. Music licensing can be easily regarded as the most complex item for negotiation. Film is the common moniker for a cinematographic work. Cinematographic work has been defined by the Copyright Act (“the Act”) as including “any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack.” [\[1\]](#)

Cinematography has not been defined in the Act. It has been otherwise defined as the “art or science of motion picture photography.” [\[2\]](#)

The Act defines copyright in a work as being the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof ...” [\[3\]](#) The works that are protected by copyright and which would be of concern to the film maker are literary, dramatic or musical work and sound recording. This is because the owner of these works has the exclusive right “to reproduce, adapt and publicly

present the work as a cinematographic work.”^[4] It is difficult to perceive of a film being made without utilising any or all of these works at some point. The works that are most likely to be excluded are musical works and sound recordings. This can occur where silent films, which are not very popular these days, are made. It is therefore true to say that these works form the substratum of a film. They can therefore be referred to as underlying works. Moral rights and performance rights also need to be cleared in when making a film. One method of protecting an aspect of moral rights is to include a clause in the contract for the owner of the right to be credited for the work.

The underlying works have to be cleared if the filmmaker is to be protected from infringement actions. Securing rights for these works accomplish this. Rights protection is also necessary for the producer in relation to the copyright right in the screen play in relation to the narrative from the original script in narration type films. The rights are normally secured in the form of option/purchase agreements. These agreements are usually for a specified duration at the end of which the purchaser usually the producer is required to purchase all the rights to the work for the agreed price failing which they revert to the owner. The option is usually irrevocable prior to the expiration of the term for its exercise. The option price is different from the purchase price but it may be set off against the purchase price. Option agreements are usually for a period of six months to a

year and usually have a clause providing for an extension for at least a further six months.

It is not enough to purchase the work, as this is no defence to a suit for infringement. The purchaser must take steps to ensure that the work is original and that the seller is the owner of the work. In this context it is not unusual for clauses to be included in the agreement, which places an obligation on the seller to allow the purchaser access to sources of information on which the work is based. This can also be accomplished through agents whose sole job is to search for copyrights – copyright search firms. In addition to this it is instructive to secure from the purchaser representations and warranties in relation to the authenticity of his claim that the work is his, that it does not in any way impinge or infringe the rights of third parties, that it has not previously been produced dramatically for film, television or radio and that it has not been assigned licensed or otherwise encumbered. To better secure these warranties and representations it is important to have the seller ‘guarantee’ that these representations are not empty. This can be achieved by including an indemnity clause in the agreement. It means that if any of the representations turn out to be false and the purchaser is sued and found liable then the purchaser can pay the judgment and recoup the damages from the seller. This assumes that he has not made himself judgment proof.

It is usual for the grant of rights of the purchase agreement to exclusively convey to the producer all motion picture, television and limited radio broadcast rights throughout the universe in perpetuity. This is subject to all the rights to exploit the work save those reserved to the seller. A reservation clause is necessary because it imposes an obligation on the seller to use the work, it enables the owner of the work to exploit those reserved and to have the work revert to him where the work is not be exploited by the seller for whatever reason.

Nevertheless it is important to for the producer to insist on certain ancillary rights such as multimedia and merchandising rights. It is important for these rights to be negotiated because the distributors are likely to insist on these rights from the producer when the distribution agreement is being negotiated. It is in order however, to reserve rights relating to print, live radio, live stage and author written sequel rights as these are of little value to the film producer.

It is instructive for the producer to insist on a clause that enables him to make modifications to the work once he has exercised the option. This is necessary to protect the producer against a claim by the author his heirs and/or assigns in relation to moral rights in relation to the underlying work. A provision to assign the work to others by the producer should also be included in the contract. This makes it easy for the producer to transfer the rights and duties of the producer to a distributor if necessary.

A release is required to obtain permission to use someone else's property in your film. The permission may be expressed or implied but it is generally advisable to obtain it in writing. In a documentary type film for example, four releases are generally required. These are an appearance release, a material release, a location release and a music release. An appearance release is required to obtain permission to use someone's image, voice or performance in a film. This is normally obtained at the beginning of an off or on-camera interview. In relation to producers working on narratives this is normally taken care of in the contract when the producer is signing on the talent for the film. A material release is required in relation to images, archival or personal footage, the text of documents, or audio recordings in the film. Material releases may avoid even actions for trademark infringements in relation to images that are captured during filming. A location release relates to the site of the shoot or filming. The location may be private or public.

In relation to the music release permission is required from the music publisher to use a particular piece of copyrighted music in the film. If the music is pre-recorded then the permission of the record label is required for the use of the sound recording. Copyright in music is complex in at least three ways. First as with any other copyrighted work it contains a bundle of rights in terms of the work. Second it combines the work of many authors or creators as it relates to

different aspects of the work and there are usually more than one owner whose ownership may be mutually exclusive. Third, there is the need to determine the kind of arrangement that the songwriter is working under whether recording or publishing as different considerations apply in relation to each. This clarification is necessary because most exclusive song writing agreements vest ownership rights in the publisher. The publisher may also co-own rights to musical compositions written during the term of the agreement. The various owners would include the composer who owns the copyright in the composition, the lyricist who owns the copyright to the lyrics, the musicians who own the copyright to their performances and as aforesaid the record label who owns the copyright in the sound recording. The rights might have been transferred to someone else such as a music publisher. It is therefore important for the producer to determine who has what rights and to appropriately enter into licensing arrangements in respect of those rights. In negotiating these licenses the producer should obtain theatrical synchronization and performance licenses to use such music in the film. The theatrical synchronization license permits the producer to use the music in association with a particular part of the audio-visual work. The theatrical performance licence is required in relation to the performance of the music in public theatres.

If the film includes a soundtrack it is also recommended that the producer enter

into a separate agreement with the recording company that will eventually distribute, if this decision is taken, the sound track album. If it includes artistes from other labels than the distributing record company then their consent is also required in order to use their artistes on the soundtrack album. In addition to this if the soundtrack includes a pre-recorded song the producer must ensure that the record company that owns the sound recording rights has not granted exclusive licences to foreign record distributors. If that is the case then their consent is also required where it is intended to distribute the sound track in their territory.

The owner of these works also owns the copyright to any mechanical device in which the work is fixed which would necessarily include the Masters. A Master Use Licence is prepared for this purpose. If the artistes have approval rights over the use of the Masters then their permission must also be obtained.

It has been suggested that one way for owners to escape these complex licensing and rights release arrangements is to use works that are in the public domain. In this context it is necessary to conduct searches to ensure that all the rights in relation to that work are in the public domain.

In copyright the owner of the work or right is the first owner of the copyright. In the case of photographs, engravings or portrait made for valuable consideration the owner of the copyright is the person who commissioned the photograph, engraving or portrait.^[5] It is therefore necessary to ensure that these rights are

cleared as well. It is important to ensure that the photographer owns the copyright in the work.

Where someone in the course of employment creates a work the author of the work is the employer. [\[6\]](#) This is so in the absence of any agreement to the contrary. This is very important, as it does not address the situation when the actors are working for ‘free’ although this is very rare. In this case, it is instructive for the producer to have them execute a ‘work for hire’ agreement in order to make it clear that they have no ownership rights in the final film project.

Where however, “the work is an article or other contribution to a newspaper or magazine or similar periodical the author reserves the right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.”[\[7\]](#) For this reason special attention is to be paid to the purpose for which the work was created.

The contract contains all the usual terms. These include the remuneration for the services of the actor, the services, which the actor is to perform, the time period for which they are to be retained and the screen credit. Synchronization rights also need to be secured in relation to the use of the name, image, and biographical information of the actors in any promotional advertising in relation to the film.

Overall filmmaking seems to be a complex web of negotiations and clearances prior to production. Apart from issues of contract producers have to employ

counsel and agents to ensure that all the pre-production nuts and bolts are in place in relation to copyright protection. They have to take steps to ensure that they are not later sued for copyright infringement or worst that an injunction is not sought and obtained on the eve of production to prevent release.

[1] R. S. C. 42, s. 2

[2] Merriam-Webster Online, **online:** <<http://www.m-w.com/cgi.bin/dictionary>> (last visited 16 March 2002)

[3] R. S. C. 42, s. 3.

[4] *Ibid*

[5] *Ibid* s. 13

[6] *Ibid*

[7] *Ibid*