

**A PRODUCTION LAWYER'S GUIDE TO
OBTAINING E & O INSURANCE
AND PREVENTING LITIGATION:
UPDATE 2005**

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Disclaimer: The article is intended as a source of general information only. Laws are subject to change and vary by jurisdiction. This article does not constitute legal advice, and it does not necessarily reflect positions taken by any clients of the author.

I. INTRODUCTION

Errors and omissions insurance (also known as "E & O" or producers liability insurance) is an inevitable part of every producer's life. It is required for the sale and distribution of virtually all films and television shows in North America today. Expensive copyright, defamation, and related claims involving films and television shows make E & O insurance protection important to producers, distributors, and exhibitors. This is because litigation costs can be astronomical even when a claim is not valid. Obtaining E & O insurance, therefore, has become a crucial part of the film and television production process for both production companies and their lawyers.

The goal of this article is to acquaint lawyers who represent producers with the "clearance procedures" that have been developed over many years of expensive mistakes by other producers. Contrary to popular belief among producers, these procedures are not the evil invention of cruel lawyers who are trying to destroy the budgets, peace of mind, and happiness of producers. Each of these clearance procedures has developed over the years because it prevents claims and litigation. Any producer who has been dragged through one of these E & O cases will tell you that it was a time-consuming, expensive, and stressful experience, even if the claim was frivolous. Despite having E & O insurance to shoulder most of the expenses of these claims, those producers will still tell you that they don't want to go through another E & O claim if they can avoid it.

The article will discuss what is and is not covered by E & O insurance. It will then give an overview of clearance issues, with some general problems to avoid. There follows a more detailed list of clearance procedures applicable to every production. After that, we will focus on some of the special issues raised by docudramas, documentaries, and fair use. I will then suggest ways of lowering the chances of copyright and related submissions claims. Finally, the article will touch on a variety of clearance issues raised by the developing areas of digital media and companion materials for film and television productions.

Throughout this paper, the emphasis will be on U.S. law. It's my view that there are far more similarities than dissimilarities between the entertainment-related laws of the U.S., Canada, and the rest of the major countries that produce and consume entertainment media. Americans have invested in suing over more topics than Canadians and others (though Canadians are unfortunately catching up), so U.S. cases provide a more complete picture of how courts will rule on many clearance matters. As you read the following recommendations, keep in mind that the goal of this paper is not to provide definitive answers on every clearance issue that will arise. The goal is to allow you, as production counsel for your clients, to spot the issues and to develop a sense of what is risky or not in the course of bringing a film or television production to fruition. Good luck, and enjoy this sometimes bumpy ride!

II. WHAT IS COVERED BY AN E & O POLICY

There are many misunderstandings about what errors and omissions policies cover. Thus, even if they do not have any claims looming on the horizon, producers and their lawyers should look at their policies to make sure they understand at least the basic coverage and exclusion provisions. (They should also acquaint themselves with requirements for matters such as giving notice to the insurance company once a claim comes in and for limitations on their communications with claimants.)

The following is a general discussion of claims that are normally covered by E & O insurance. A complete explanation of the legal theories and causes of action is beyond the

scope of this paper, so please treat the following as only a summary. Also, E & O policies provided by different carriers are quite similar, but they are not identical. Always consult your client's policy for specific coverage.

Some E & O claims involve allegations of **defamation** (also known as libel or slander). Defamation is a false statement about (or portrayal of) a person that damages that person's reputation. These claims arise when a production intentionally describes a real person (as in a docudrama), or when a show accidentally defames an actual person through unintentional similarities between a fictional character and the claimant (such as the person's name, job, or involvement in real events).

Invasion of privacy claims arise when the film or TV show discusses matters that are true, but that are private facts that society has decided should remain private. For example, portraying sexual relations between a couple would be an invasion of privacy in most all cases. In general, however, public figures are entitled to a lesser range of "private facts" because we believe that the public has a right to know about those personal matters that are relevant to their public positions. (For example, a politician's drinking habits will be fair game to the extent that the drinking affects his ability to perform his job.)

One of the most important categories of E & O claims is **copyright infringement**. This involves the assertion that the producer has taken protected portions of someone else's screenplay, book, or other work. The most obvious cases of copyright infringement involve verbatim copying or close scene-by-scene parallels in fictional stories. (Copyright infringement of nonfiction works is trickier because the actual facts themselves are *not* copyrightable; only the claimant's particular arrangement and expression of those facts is protected.)

There are rarely cases of blatant copyright infringement. Much more common is the situation where the claimant contends that there are substantial similarities between his book or screenplay and the film or television show in question, and he believes that the producer (or someone else connected to the production, like the writer, director, or star) has had access to his work in order to steal from it. Both substantial similarity and access can be difficult to disprove, so these cases are often expensive and time-consuming to defend. Their defense makes up a large percentage of dollars spent by insurers for E & O claims today. This is not to suggest that producers regularly steal other people's works; in fact I believe this rarely happens. Unfortunately, many claimants have inflated ideas of the uniqueness and merit of their works and the scope of the similarities between their and the producer's projects -- especially if the production is very profitable.

Another major field of E & O litigation is the related area of the **implied-in-fact contract** claim, also referred to as a "submissions" claim. As in copyright infringement suits, the plaintiff believes that the producer (or someone connected to the film or TV project) had access to his or her project because it was allegedly submitted to that person. However, in a submissions case, the plaintiff's project needn't be a fully developed book, script, etc. It can be as simple as a one or two sentence presentation of a story idea, and it can be oral or written. Implied-in-fact contract law allows the plaintiff to recover if the producer must have understood that the plaintiff offered the story idea with the belief that he would receive reasonable compensation for use of the idea, and the producer went ahead and read or listened to the idea, and then later used it. Sometimes the claim will involve a similar legal theory such as misappropriation.

Right of publicity claims are also part of E & O coverage. Celebrities generally have a right to control use of their names or faces in advertising and merchandising. Common right of publicity problems are those where someone falsely suggests that a famous person endorses a product or a show. For example, you can legally make a biographical movie

about an actress (within considerable limitations that will be discussed later), but you may not falsely imply that she authorized that film. (When dealing with right of publicity issues involving dead celebrities, you should generally assume that the right can be, and has been, inherited by that person's heirs.)

Unfair competition claims concerning the film's content or title are part of E & O. These claims often involve the assertion that the producer is trying to take advantage of the popularity of another film, book, etc., by causing the public to believe that this new project is connected to or endorsed by the older one or its makers. This most often occurs through advertising (using similar slogans or visual images to suggest a connection with, say, a previous popular horror film) or through use of a title (such as calling a TV series "Star Wars" without authorization). Sometimes the content of the production itself will cause the claim. Unfair competition claims may invoke legal theories like passing off, dilution, and trademark infringement allegations, and they can involve titles, publicity, or the contents of the shows themselves.

One more claim that we occasionally see is **false light privacy**, which may arise when a show states something false, but not necessarily insulting, about a real person. A good example of this was a U.S. case that involved a biographical piece about a famous baseball player in which it was falsely stated that he had been a war hero. The player, Warren Spahn, was greatly embarrassed by this misinformation, and sued the publisher. These claims are rare, but producers should keep in mind that outright fictionalization about actual people, even if it is complimentary, can still cause trouble.

III. WHAT IS NOT COVERED BY AN E&O POLICY

Sometimes producers wishfully assume that **any** kind of error that they make will be covered by the E & O policy. However, this policy is designed only for a very limited set of claims. If the claim is not of the type discussed above, then it probably is not covered. The producer's lawyer should review the policy if there are any questions about coverage. However, certain matters that are **not** covered deserve specific mention here.

Claims against the production company by partners, independent contractors, employees, and the like are not covered by these policies. Furthermore, **contract-related claims** against the producer **are not covered**. (The implied-in-fact contract claims mentioned earlier are the only contract cases that are covered, but this is a narrow exception to the rule of non-insurability of contract disputes.) Thus, if a writer or underlying book author sues because the producer supposedly breached some aspect of their contract, the E & O policy will not help. This is true even if the writer alleges copyright infringement by the producer in relation to the contract dispute.

E & O policies will not cover a claim where a producer **knowingly** violated the rights of another. Also, they do not cover fraudulent acts against others.

Keep in mind that E & O policies are designed to cover **damages that the producer causes to others** and the costs of **defending** against claims by others. They are not meant to cover the production's own losses. Thus, if someone gets an injunction against a film, the film's policy will *not* cover lost profits or production costs. (Some policies may cover advertising and related promotional costs, however.) The policy will also not cover any punitive (exemplary) damages awarded to the plaintiff.

It is crucial that the producer understand that when he fills out an application for E & O insurance, he is making representations to the insurer that form the basis for its agreeing to insure the project. **If the producer does not respond to the application's questions and**

instructions accurately, he jeopardizes his ability to depend on that policy if a claim does arise.

IV. OVERVIEW OF CLEARANCE PROCEDURES

Many of the clearance procedures that this article will discuss are detailed points that require a line by line look at the script. However, there are a number of more general issues that the producer and lawyer should consider from the beginning of development of a project.

First, keep around a copy of an E & O application for review. **The individual questions and the "clearance procedures" sections of these applications make very good checklists** for many of the steps that a production company and its counsel should take. Remind your clients that E & O insurance is unique: it *requires* that the producer's attorney be directly involved in the clearance process, and that this attorney be able to knowledgeably answer questions about the show's clearance procedures if contacted by the insurer's own lawyers.

The lawyer should read the script early in development, especially if the project involves real people or events, or if it includes controversial matter, parodies, clips, or other references to or use of pre-existing materials. If there is no script yet, or if the project is a documentary, the producer should give the lawyer a detailed outline as early as possible. In my experience, early involvement of a lawyer on E & O issues is an excellent application of the old adage, "An ounce of prevention is worth a pound of cure."

Make sure your clients are realistic in budgeting for E & O insurance and legal fees to clear projects. Get them to set aside some contingency funds in case there are problems. This is especially true with docudramas, investigative documentaries, parody, satire, and shows that involve lots of music and clip licensing, but it can apply to any kind of project. After a certain stage, no E & O insurance means no more money from your client's funding sources. Two days before principal starts is no time to find out that your project has enough risks in it that the insurer has tripled the expected premiums and that your client needs to redo the script or come up with the money. Of course, the legal fee meter is also ticking during all of this process, which only makes matters worse.

Try to give your clients some breathing room in the E & O coverage requirements in their contracts with distributors, broadcasters, and others who require that the producer obtain this insurance. Often insurers and their lawyers think that some aspect of a project is too risky to insure at all, or they are only willing to cover the risk with a higher deductible or extra premiums. In some cases producers would be happy to accept an increased deductible (above the common \$10,000 per claim deductible) rather than pay the extra premium. However, their contracts with distributors and other financiers often demand a \$10,000 deductible, and those contracts also require that there be no non-standard exclusions or special deductibles. The producers are forced to pay an increased premium to meet their contract obligations. Often everyone would be better off if the risk could be shared through a higher deductible or another creative approach. (In my view, the \$10,000 deductible is anachronistic, and producers would have more freedom in ambiguous clearance situations if they and financiers would accept higher deductibles. For example, try for the *option* to provide a distributor with a policy with a \$25,000 or \$50,000 deductible. Later, if your client gets a clean policy with a \$10,000 deductible, that's great. If not, the producer has some breathing room.)

Contacting the insurer early to discuss E & O can also be important in helping head off problems before it is too late. (Contact your client's insurance broker to arrange this.) While the majority of productions obtain their insurance without any real difficulties, some projects need considerable review by the insurer and its counsel before they can be accepted. This

review sometimes leads to script changes, or the need for new releases or contract revisions. The producer may need to budget for additional legal fees, the costs of getting new releases, extra premiums, and so on. Also, many changes are quite simple if made before shooting begins (such as changing the name of a character), but they are much more difficult if the need for the change is discovered later.

Warn your clients against being penny-wise and pound-foolish by waiting to purchase E & O policies until the last possible moment. I recommend that the policy be in place before *any* publicity or press releases on the show, and certainly before any real money is spent on preproduction or production. Claims frequently come in well before a production is finished because publicity about the project often stirs up potential plaintiffs. If the policy is not already in place when the producer is first made aware of the claim, that claim will not be covered. (You should not wait to ask for flood insurance until after the river next to your house overflows its banks. Likewise, a producer cannot expect an insurer to offer coverage on an E & O claim that already has been threatened.) Most distributors will not accept E & O policies with any sort of special exclusions on them, so even small claims made prior to the purchase of a policy can turn into big problems.

Get a copyright report on any book, play, or other underlying work which the producer is acquiring, and get one on any script or treatment that was not written as a work for hire by the production company's own personnel. A "copyright report" (or "copyright search") lists all copyright registrations, assignments, and other relevant documents that are recorded in the copyright office of the country in question. These copyright reports are important because they tell producers about any conflicting assignments that hinder or destroy their right to use the underlying work. Not too many owners will deliberately try to defraud a producer, but many of them may not have fully understood previous option agreements or other contracts, or co-owners of the rights may already have assigned film and TV rights to someone else. Sometimes the rights history is so complicated that the opinion of a copyright expert is needed, and the production attorney should not hesitate to recommend using an outside expert if the report is not obviously clean.

A smart producer ought to **get a copyright report** (if the project was not created in-house) **before** she buys the rights, but she **must** get the report before obtaining E & O insurance. Copyright reports sometimes reveal previously undisclosed transfers or licenses of copyright. Ten days before filming starts is not the time to learn that your client does not have priority of rights over some other transferee. While it is very rare, I personally have seen productions shut down because of this problem. Furthermore, once the assignment of film/TV rights to the underlying work is obtained, the producer or lawyer should register that assignment (or a short form acknowledgement if allowed) with the copyright office of the applicable country. The registration process is cheap and easy, and it prevents someone who has conflicting rights from establishing a priority of rights by beating the producer to the recording procedure.

Get a **title report** once the project's title is chosen. Title coverage is normally free under an E&O policy, but it will not be offered without a recent title report for the insurance company's lawyer to review and approve. Title reports list all previous uses of the same or similar titles, regardless of who owns those other works. The reports are obtained to uncover potential legal claims of unfair competition ("passing off") from a prior user of that same title, who will allege that the public associates this title with his film, book, etc., and that your client is misleading the public as to the origins of its project. (Since titles are seldom protected under copyright law, copyright is not the relevant legal theory here.) Interpreting legal rights in relation to others' use of the title can be a specialized skill, so you may want to have your client obtain an expert's legal opinion as to the safety of the title. Some title search companies who have lawyers in their operations will provide that opinion for a fee. (Insurance counsel may occasionally disagree with the production lawyer or the outside title

expert about the safety of a particular title, so get your client to submit the title report to the insurance company as soon as possible once you are satisfied.)

Many producers confuse title reports with copyright reports. These reports contain some overlapping information, but they are two different animals. Copyright reports cover previous rights transfers and records and thus they reveal problems in the “chain of title” to the underlying material your client has bought. However, title reports look at any uses of the same or similar titles, without regard to whether there is any connection between those other films, books, songs, etc., and the producer’s own project. Title reports deal with the risk of public confusion about *name* of a project, whereas copyright reports deal with who is currently the *proper owner of the rights to a copyrighted work*.

Early in the project’s development, ask the producer, production staff, co-producers, directors, writers and even the major stars **whether any of them has ever received any story ideas or scripts that are similar** to the project being developed. These kinds of submissions are what create copyright and implied-in-fact contract claims. Ask them if they know of any other books, films, or other creative works that inspired this project or that have noteworthy similarities. If you can spot a potential problem early enough, you can help your client fix it before it becomes a serious problem.

Look early and look carefully at the origins of the story for the film or television production. Is it based on real events? Even indirectly? The lawyer should talk directly to the screenwriter or the concept’s creator. Talk to the author of the underlying work, if there is one. Virtually every creative work draws upon the personal experiences of its author or actual events that interested him. If the story openly involves real-life events, then it is a docudrama, with all of the attendant clearance issues that will be discussed later in this article. If the parallels to real events are less obvious, are there nonetheless certain characters who would be recognizable to friends or acquaintances? Are these portrayals possibly insulting? What script changes can you make to prevent problems? *Often fact-based projects that are highly fictionalized are more difficult to deal with than those that are openly docudramas.* Don’t let your clients get hung up on the question of whether something is truly a “docudrama.” Just make them focus on the consequences of anyone recognizing the real events and people underlying the story.

Strongly urge your client to use a research service to handle many of the standard detailed clearance procedures that are discussed in the next section. Most producers, lawyers, and their staffs are not equipped to handle these procedures efficiently or adequately. (For example, it can be difficult and time-consuming to make sure that a real company doesn’t have the same name that your fictional film is using for an evil chemical manufacturer. Research companies have learned by trial and error which of multiple research resources will provide the most accurate results.) The producer who is trying to cut costs by doing without a script research report should be warned that it is much more convenient, and ultimately less expensive, to pay a research service that specializes in these matters. Insurance lawyers usually don’t look kindly on the do-it-yourselfers in this area, and this can have a negative impact on insurance premiums. (Besides, these services also provide extra information to help with authenticity and other matters in a script.)

V. STANDARD FILM AND TV CLEARANCE PROCEDURES

Each film or television production is unique in terms of the particular clearance issues that are most important or most problematic. However, all shows - whether fiction or nonfiction, comedy or drama, theatrical film or weekly TV series - need to be checked and cleared for a large number of clearance details. The following clearance procedures should be used in all productions (though some of the items will not be applicable to shows such as

documentaries). This list is not all-encompassing. Keep an eye out for potential problem areas that are unique to particular projects, and add them to this list. The lawyer's job is to make sure that all clearance procedures have been undertaken. The lawyer will either personally deal with them or will supervise the process to ensure that the production company staff and hired clearance experts have considered and completed all of the procedures.

- **Avoid the accidental use of real names of people and organizations.** Normally the script research company that your producer should have hired performs this task. It will check the names of all characters, companies, and organizations in a variety of resources (for example, phone directories for the locale where the story is set or where the character or company is from). If a character is identified by a particular occupation or even sometimes hobbies, the script researcher will also check the character's name with the appropriate national organizations (like a medical societies or specialist lists for doctors). Names of corporations and other organizations should be checked nationally or internationally. A good researcher, when checking names of persons or entities, will watch out for similar names, for alternate spellings, and for last names (even if the first name is different from the character's if the character is also identified by something else that is distinctive, such as his profession or part of town). **If there is any doubt at all about whether a name is safe to use, change it.** Sometimes writers get emotionally attached to certain characters' names, but you need to work on them to change the names anyway.

Extra care should be taken with names of characters and organizations that are portrayed negatively. The unflattering portrayals cause most (but not all) claims of this sort. Think of the issue of accidentally identifying a real person or company mainly in terms of the impact on the person or entity inadvertently portrayed: Could it harm the public's perception of a business? Cause a person to be ridiculed? Or make others think that the person has criminal associations? Along this line, it is wise to ask the writer and key creative personnel if they recognize any names in the script. More than one producer has gotten in big trouble because a writer unkindly named a character after an old school classmate!

- **Avoid identifying someone by a specific job or his/her involvement in actual events, even if the name is totally fictional.** If a character is identified as the mayor of Toronto or as a baseball player who is known for having broken the world record in most home runs in a single season, you have gone a long way toward identifying a real person, regardless of the name given your character. (Watch out for organizations, too. The same problem occurs when a business is identifiable through its characteristics, like "the biggest software manufacturer" or "a company that owns theme parks in Anaheim and Orlando.")

Likewise, if one of the characters is the head of a large, unnamed American television network, you have already suggested one of a small handful of people. Other characteristics like physical traits, gender, or previous jobs may reinforce the impression that you are talking about a certain real person from that small group.

If people may believe that you have identified a real person, **think about how the character is portrayed.** Is she a minor, innocuous character? (If so, it may not be a serious problem that some might think this is a real person.) Or is she the primary villain of the film? In general, the larger and/or less positive the role, the more important it is to avoid such accidental parallels to real people. However, even if the character is likeable, consider whether other people or organizations are also identified because of their *connection* to the real person whom you have accidentally suggested. In the

network executive example, is the character's company portrayed as covering up illegal activities? Is the character's son or daughter portrayed as a drug addict?

Get creative if your client's script has one of these kinds of problems built into it. Sometimes simply removing one or two lines of potentially defamatory dialogue will fix the situation. Or, if the actual mayor of Toronto is a white male, consider casting your mayor as a woman with a different ethnic background. In some situations, even these kinds of changes won't be enough, but they will be a good start.

- **Watch out for identifiable locations and addresses.** Depending on the context, accidental use of the actual address of a home or business might be defamatory to a person or company. Watch out for lines like: "You know that kid who lives at the corner of Maple and Washington? He's a drug dealer." If your story is set in a certain city, make sure there is no such intersection there. Or, if the script describes a travel agency in a distinctive building as one that employs inept or dishonest people, make sure there are no actual travel agencies in that building.

Of course, you will need location releases to film on someone's property. In addition, though, be aware of problems that can be caused by shooting a scene that has a distinctive building or statue in the shot. There is an argument for copyright infringement as to filming of the statue (depending on the country of filming), and there are always problems with possibly defaming people or businesses identified by their connection to that building. In addition, some owners of distinctive buildings take the position that the building's appearance is the equivalent of a trademark and therefore cannot be shown without permission.

- **Don't use real phone numbers (with or without area codes), credit card numbers, social security numbers and the like.** Note: Some of these clearance procedures might result in problems that are **not** covered by E & O. For example if someone starts getting charges on his or her credit card because your client used that number on TV, the E & O policy will not cover that claim.
- **Get permission for most uses of trademarks and logos, and avoid many dialogue references to companies and products.** Commonly seen examples of trademarks and logos include cereal boxes, beer cans, brand names on TVs and computers, magazine covers, signs, car logos, and games or other trademarks on computer screens. It's wisest to mask the trademarks or shoot from angles that make them unrecognizable. Or get a product placement deal if appropriate. Briefly showing a logo is probably not a violation of the trademark owner's rights *if* it is used in a non-defamatory context, and *if* the use does not seem to imply endorsement of or participation by the trademark owner in your client's show. However, it is better to stay away from trademarks and logos. Also, keep in mind that **many of these uses will involve copyrighted artwork in addition to the logo** (e.g., magazine covers or cereal boxes), so that your client will need separate copyright licenses (and sometimes consents of people seen on the magazine cover).

Remember that it is possible to get a trade libel/disparagement claim for just *talking* about a company and its trademark. Steer your clients away from product or company references that are even arguably negative.

- Keep an eye out for the repercussions of referring to real people in a dramatic show or in sketch comedy. Generally it is safe to make a passing, non-defamatory comment about a well-known person. (Note, however, that such comments, when used in publicity and promotional materials, can look different, especially if they seem to imply an endorsement of the show. For example, "Robin Williams loves it" can be okay as a

character's comment about improvisational comedy in the course your client's TV show, but it can sound like an endorsement if used in an ad for that show.)

If a production includes a **satire of a person** (presumably someone well-known), consider whether your client is risking a **defamation** claim. Generally, the issue is whether a portrayal of the person was so absurd that no one could believe it was true. While most satirical sketches are ridiculous enough that no one will take them seriously, sometimes they fall a little flat. When that happens, they may instead come across as tasteless or cruel, or they may seem to be intentional statements about the person or that person's family members. Be careful about those kinds of story elements and comedy sketches.

- **Unless your clients get permission from copyright holders, they should not use identifiable props that are protected by copyright.** Examples here include paintings, photographs, posters, sculptures, CD covers, and magazines. Reproducing a copyrighted work by including it on film or tape is generally copyright infringement. Do *not* let your producer's art department and props people assume that buying an art print, poster, etc., is the same thing as buying the right to reproduce it on film. Remind the production team that if they film in someone's house, the fact that the homeowners bought an original painting that is hanging on the wall does *not* give your client the right to reproduce the art work by capturing it on film. If your client doesn't want to get permission, advise the art department to make their own original props or shoot the scene in such a way that even the creators of those real works can't recognize them. Recent American case law has been unkind to producers who show copyrighted works (or even parts of them) in the background without paying the copyright owner for the use.

Keep in mind that **copyright may not be the only right pertinent to props** such as posters and photographs. Rights of publicity and privacy and even trademark rights may be involved. For example, if a model or musician has posed for a poster, that person may have placed contractual restrictions on the poster's use before agreeing to pose. (This is not an issue if the photo was a candid shot taken in a public place.) Thus, not only would your producer need to get a release from the copyright holder of the poster or photo, but he would need to assure that the model's rights are not violated by the photo's use in your client's production. This assurance might be a warranty from the poster's copyright owner (if reputable) that it has all necessary rights from the poster's subject for this kind of release, or access to the model's contract to verify for yourself that this use is permissible, or a separate release from the model or star herself.

As is generally true in clearance work, you will want to be most cautious when the stakes are highest. **Take extra care when the prop is most prominent, or its use is possibly insulting to its subject or owner, or when the prop or its subject (like a celebrity) is particularly valuable or "important."**

(As an aside, some Canadian lawyers and producers have responded to some of these warnings by saying that no one would ever bring a claim in this kind of matter because the damages are generally so small. In some cases, this is true. However, please remember that intentional violation of the rights of another is not covered by E & O policies. Additionally, the one whose copyright has been violated - whether Canadian or American - can sue for an injunction against the release of a production that contains that violation, no matter how seemingly small. Courts do not often issue injunctions, but the risk of a possible injunction can lead the producer to make an expensive settlement rather than hold up payments from distributors or the release of the production.)

- **Watch out for miscellaneous copyright problems.** For example, **get permission for quotes** from copyrighted sources. If a classroom teacher in a fictional film reads a passage from modern classic or a stanza from a poem by a recent poet, this may not be "fair use" under copyright law ("fair dealing" in Canada), so your client will need permission from the copyright owner.

One problem area involves the incorporation of public domain works in a film or television production. "Public domain" describes a work whose copyright has expired or never came into existence, so that the public can use it freely. **Whether a work has in fact gone into the public domain is a complicated legal issue.** For example, the length of copyright protection is now generally life of the author plus 70 years (except in Canada, where it is still currently life plus 50 years), but many countries, especially the U.S., have changed the term of protection in recent decades. A work's copyright status will depend on many variables. Some works that seem too old to still have copyright protection because of peculiarities of the laws in certain countries. When in doubt about a public domain question, assume the worst or get the opinion of a copyright expert.

Another particularly tricky area involves **accidental copyright violation by using a copyrighted version of a public domain work.** For example, many translations of public domain classic books are protected by copyright. (Only the original contributions of the translators are protected, though.) Also, some public domain books (especially those for children) have been published with later illustrations that are still copyrighted.

Another hazardous situation is one where a producer wants to do a **new version of a public domain story when someone else has already done another film or cartoon version.** The producer must take great care to use *just* the elements found in the public domain version, and not those that were original to the later version. Our perception of a public domain story (such as *Alice in Wonderland* or *Wizard of Oz*) is affected by popular later versions (like the Disney cartoon or the MGM musical). Unless we examine the original public domain work carefully, we may wrongly assume that some visual images, lines, or plot points are public domain elements when they are actually new elements from the other, more recent version (such as Dorothy's ruby slippers in *Oz*).

Assuming a lawyer isn't already exhausted from spotting difficult copyright issues, there is one more particularly obnoxious copyright problem to keep in mind. It is unique to U.S. copyright law, and it is known as **the Abend doctrine**, from *Stewart v. Abend*, 495 U.S. 207 (1990) ("the *Rear Window* case"). It applies to any materials first copyrighted prior to 1978 in the United States that might be included, directly or indirectly, in your clients' projects. In *Abend*, the U.S. Supreme Court held that the owners of the *Rear Window* film could no longer distribute their film because their license to use a 1942 short story upon which the film was based had terminated prematurely. The producers had originally bought film rights to both the first 28 years of U.S. copyright protection *and* the renewal term of copyright. (Under the standard contract, the author promised to renew his copyright in the 28th year, and the film rights license for the renewal term would automatically continue to vest in the film producers.)

However, despite that contract, the Supreme Court ruled that, under the 1909 Copyright Act (which controlled U.S. law until January 1, 1978), the transfer of film rights was extinguished because the author had died during the first 28 years of copyright, before he could renew the copyright himself. *If the author does not survive into the 28th year of copyright, the renewal term vests in the author's heirs, and this extinguishes any rights previously licensed by that author to others – even if those others have already made a derivative work in reliance on that license.* In this case, the new owner of the author's short story was Sheldon Abend, who had bought the copyright from the author's estate.

Abend was able to prevent further distribution of the *Rear Window* film until the film's owners, Jimmy Steward and MCA, paid him for a new film rights license.

If your client will be using any materials first copyrighted prior to 1978 in the United States, you need to be aware of the *Abend* doctrine. Watch out for any U.S. works (songs, books, film clips, etc.) that your client wishes to license if those works were first copyrighted before 1978. *This includes works from 1978 and later that incorporate pre-1978 works.* (Examples: licensing rights to use a 1950s song; using a clip from a 1970 film that includes a 1965 song; or buying remake rights in a 1980 film that was based on a 1950s book.) If the work is pre-1978, find out whether the author died prior to the 28th year of copyright protection. If he did, it's necessary to inspect the rights history to see if the current *apparent* owners of the rights got their rights from the author or whether they obtained them (or a re-confirmation of those rights) from the author's heirs after his death. Please note that this is the "simplified" explanation of the *Abend* issue, so you will need to go outside this paper's scope to confirm whether your client truly has an *Abend* problem.

There is one more difficult copyright issue that will be discussed in its own section in this paper. It is the issue of copyright's fair use rules around parody and criticism.

- **Watch out for material that could create problem if used in promotion or publicity.** This material might be acceptable within the context of the show as a whole, but might not be when seen out of context. The legal issues here can involve copyright, right of publicity, defamation, unfair competition and more. For example, what is fair use of copyrighted material in the show itself may lose its fair use label when used in an ad for the show. Or a reference to a film celebrity might be humorous or innocuous in the context of a comedy show, but in ads it might seem defamatory, or it might falsely suggest that this star endorsed or participated in the show. Also, documentaries and docudramas often include statements or lines that seem defamatory if taken out of context of the show itself. If those statements are used in publicity materials, they can invite a defamation suit.

In more sensitive projects, the lawyer will be required to review all publicity and promotional materials, as well as all packaging for home video distribution. In some cases, the insurance company will insist that the producer include provisions in all contracts that the producer (i.e., the producer's lawyer) must approve all publicity, promotional, and packaging materials in advance to ensure that no elements of the production are used inappropriately or out of context. You can save yourself some negotiating hassles later if you try to include this language in your distribution contracts for all projects (or at least for docudramas, investigative programs, and parody shows).

Be careful that your client's publicity campaign does not mislead the public into wrongly believing that a production is related to another show, book, etc., or that it is endorsed by a person or company. Sometimes this is done by direct references to the earlier project, but more often it is accomplished by using similar slogans, visual images, titles, etc. Even if done jokingly, most tie-ins to other projects are a very bad idea.

- **Clear the music.** This is an obvious point, but often people start the process later than they should, or they don't realize how many rights they may need to obtain.

Watch out for music that is incorporated into the scene while it is being shot. For example, an actor hums or whistles a part of a tune during an important scene. One of Murphy's laws says that the song that is already part of a key scene will inevitably be the one you cannot license or only for an exorbitant price. Suggest that they shoot the

scene with and without the song in case they can't clear it, or start clearing the music very early.

Do not let your clients rely on the myth that they can use a certain number of bars of a song for free because it is "fair use." Copyright lawyers everywhere would like to wring the neck of the person who started this myth. If the song is recognizable, the use may well be copyright infringement (except for limited criticism and parody exceptions, discussed later in this article). In fact, there is no magic line between the number of notes that can be used as "fair use" and the number that constitutes copyright infringement. It is an expensive roll of the dice to go to court to find out where a judge would draw that line in your client's case.

Watch out for sampling. There are some contradictory cases in the U.S. courts, so the law in this area is not fully resolved. As it currently stands, tell your clients that all sampling should be considered copyright infringement if it is not licensed.

Do not let your clients assume that certain songs are in the public domain. Some songs (like "Happy Birthday") seem like they must be public domain, but they are not. Also, a popular arrangement of a public domain song may actually be copyrighted.

The E & O application asks if the producer has obtained **both synchronization and performance licenses on all music**. Make sure your clients have taken care of both. If they use pre-existing music, they will have to negotiate synchronization licenses with the publishers of each piece. Performing rights are normally handled through blanket licenses between networks, etc., and the music performing rights societies (ASCAP, et al.). Watch out for certain issues: 1) There are no blanket licenses for movie theaters in the U.S., so those performing rights have to be obtained by you from the publishers. 2) The blanket performing licenses will not cover any of your music that is not handled by one of those societies, so you will have to take care of performing rights on that music separately. 3) Your contracts with distributors and broadcasters should make it explicit that they are responsible for performing rights, if that is what you expect.

If you use pre-recorded music, you need to obtain not only a license from the publisher of the composition ("sync license"), but also one from the copyright owner of the "master recording" ("master license"). You may also have to obtain permission from each artist or musician on the recording (unless you can get a worthwhile indemnity from the master recording owner that the owner's contracts with the musicians and performers on the album give him authority to grant this kind of license on their behalf).

If the client contracts for original music, get full warranties and representations of originality from the composer. Even then, **watch out for similarities to other music**. A producer may request that the composer provide a song that "sounds like" some other piece of music that they both know. Be careful that what the composer gives your client is not **too** much like that other piece. There are quite a few music copyright infringement cases out there, and they are very expensive to litigate.

- **Tell your client to think twice before using film clips.** The time and expense involved in clearing all needed rights for even a ten second excerpt from another movie or television show is frequently just not worth it.

Note: Generally the term "film clip" or "clip" is used to refer to footage (which may or may not include sound) that is taken from other shows and sources and is incorporated into a new production. These excerpts may have been recorded originally for film or television, on film, tape, kinescope, or any other technological format.

Some clips aren't hard to license. For example, getting rights to **stock shots** of wildlife or news footage of heads of state meeting in London is fairly simple. Still, make sure that you have decent representations and warranties from the source of the clips. Too many operations are careless about where they get their footage. Tell your client that she is the one who will get sued for copyright infringement, no matter what the stock house says. Remind her that the source's ownership of footage is not the same as ownership in the copyright to that footage, so make sure you are dealing with a reliable vendor. **Check out the vendor's licensing form before your client relies too heavily on the footage.** Some are very clever in hiding the fact that they promise nothing about the rights to the footage.

Watch out for news footage that includes a reporter or anchor. In the U.S. your client can assume that she will need to negotiate with and pay that person separately, unless she has warranties from the broadcaster otherwise. (The U.S. performers' guilds controls some or all of this.) Elsewhere, such reuses can sometimes be part of the person's contract with the broadcaster, but this must be checked out.

The real nightmares can begin if your client decides to use clips from other television or film productions. Certain lawyers experienced in clip clearances have wryly, but accurately, commented that **a producer who wants to use film clips must have "an unlimited budget and an iron stomach."** A single clip can involve two to twenty (or more) different releases, costing a few hundred to a few thousand dollars each. Save yourself some brain damage and your client some money: unless the producer's staff has lots of clip experience, convince the producer to hire an outside expert who specializes in clip clearances.

Our industry is filled with confusing information and misleading rumors about film clips. Don't let your client succumb to wishful thinking about how easy or cheap it can be to clear clips. If the footage seems like a very good bargain, then they should assume that there are risks or problems with using that footage.

Many people mistakenly believe that it is "legal" to use certain kinds of clips without permission (or with only some of the many permissions needed). They are told by friends in the business that they have used X amount of footage without permission, and there was no problem. Therefore it must be okay, right? Wrong. **In many cases, the friends' clip use was not really legal – it's just that they simply didn't get caught.** Adding to the confusion are rules in the clip licensing arena that have changed over time (especially in ambiguous areas around guild payments), and there are some technical copyright law issues that have never been resolved in the courts. Unfortunately, some sellers of clips and footage make matters worse by giving false reassurances to producers about just how safe or legal it is to use their footage. There are many highly reputable archives and stock footage businesses, but this is an area where "caveat emptor" rules. **Producers should be very careful about where they get their materials.**

The use of clips ranges from doing an entire show of them to a single scene where a character has a television on, and is watching a few seconds of, say, "Will and Grace" as another character comes into the room. (Remember that it is still a clip usage even if only the audio is heard from an unseen TV screen.) The following is a list of rights that the producer will generally have to obtain for each clip, regardless of its length or prominence in the scene. If you are dealing with a non-American clip, pay attention to each of the following rights, but you may find that some guilds in other countries allow the original producer to have bought out these reuse rights. This will simplify the clearance process. If the production staff is handling clearances, recommend that they **create a chart that covers all the various rights to be checked and cleared for**

each clip. Shows with multiple clip clearances need high levels of organization and record keeping.

- a) To start with, producers will need a release from the **copyright holder of the clip.** Make sure they have the correct owner. This can be especially hard to determine with older or less successful films, whose ownership may well have changed several times. Get a warranty and indemnification that this owner has the necessary rights to grant your client a license, especially if the licensor isn't a studio. (Getting a warranty from the large studios is almost impossible because they consider clip licensing to be a nuisance.) Licensors of clips commonly require the licensee to be responsible for all other licenses and fees for that clip (music, actors, etc.) as a condition of the copyright license.

Be wary of using a clip from a film that is supposedly in the public domain. What is the proof that it is really public domain? There are numerous tricks and loopholes that an irate owner will use to its best advantage to make you pay for what you thought was a public domain film. For example, the owners of the classic film *It's a Wonderful Life* accidentally let the U.S. copyright lapse under the old U.S. system that required copyright renewals after 28 years. A few years ago the owners managed to reassert their rights by buying rights to music and possibly some other pre-existing material in the film. Now the film itself is still in the public domain, but elements of it (especially the music soundtrack) are again owned by the studio. Thus it can't be broadcast without infringing those secondary elements of the film.

Another area of public domain problems involves the use of **American film trailers** (also known as "previews" or "coming attractions"). Again, the peculiarities of old U.S. copyright law have made it hard to know what is safe to use and what isn't. Most American film trailers from before 1960 are *probably* (note the use of the word "probably") in the public domain, and are relatively safe to use. They failed to carry the copyright notices required by American law of the era (and the owners failed to rectify this error by using U.S. registration). However, each individual trailer may contain pre-existing copyrighted music, dialogue, and more, and this material may still be protected. For trailers made 1960-1977, there are reasons to at least argue that they are in the public domain, assuming that they had no copyright notice and no copyright registration. From 1978 forward, U.S. copyright law no longer required copyright notice, so film trailers were not injected into the public domain just because they failed to contain copyright notices or to later register with the Copyright office.

- b) Watch out for the possibility that the film or television show is based on a separately copyrighted **underlying work.** Use of a clip from that production often involves use of the underlying work as well. You will need to get the permission of the owner of the underlying work if the original production's contract with the underlying work's owner was not broad enough to cover this kind of reuse.
- c) For American film and television clips your client will likely need to **make payments to each actor** appearing in the clip. (For this and any other of the guild related clearances, start by contacting the appropriate guild.) SAG and AFTRA provide rules for the amount to be paid for use of an actor's performance in a clip. *For pre-1960 clips, SAG currently waives the permission and payment requirements for theatrical feature films, but only if the film's name is "billboarded" as a voiceover or chyron while the clip is on the screen. According to AFTRA, this waiver does NOT apply to pre-1960 television clips, so actors in all TV clips must be paid. (For 1960 and later clips, SAG requires current consents from and payments to its members. SAG will allow a star to waive the required scale payments, but your client must obtain*

consents and make payments to each of the non-stars in the clip.) AFTRA's rules around consents, payments, and scales are different from SAG's.

Watch out for stunts in clips. The acting guilds' rates for reuse of a stunt are high, and you will be required to pay for most any stunt you might want to use. Many stunts involve multiple performers at once, and each of them must be paid. If your client is thinking about not paying for a stunt (or any other actor's performance), remember that SAG requires a *penalty of triple the scale rate* for not trying to locate and pay one of its members in advance for film clip usages.

- d) Your client will need to contact the DGA to arrange for payments to the **director** of the show from which you are getting the clip.
- e) Likewise, the producer will also need to arrange with the WGA to pay the **writer(s)** of the clip show. It appears that both writers and directors do not have to be paid for pre-1960 clips.
- f) If the clip contains any **music**, the producer will need to pay the copyright owner of that music (depending on the terms of the contract between the music owner and the clip show's owner). Also, if the music in the clip was from a pre-recorded source (a "master recording"), probably a new license will have to be obtained from the owner of the **master recording**. Regardless of the source of the music, the AF of M will require that your client pay **each of the musicians** who performed the music in that clip. (If the music in the clip you have chosen was performed by a full orchestra, this last element can be quite expensive.) Some clip users will avoid this expense by removing all music from the original clip and then inserting their own music.
- g) Watch out for separately copyrighted or trademarked items in the clip, such as photographs, magazine covers, artwork, etc. Your clip use could be outside the scope of any releases obtained for the original production.

For each of the rights to be obtained, keep in mind that Canadian and European **moral rights** issues may affect your ability to use the clip. An argument can be made that anyone with any sort of copyright interest in the original show must give permission for the use of a clip in a different production, unless the original contract covers this issue.

Not surprisingly, many producers and their lawyers feel that the film clip clearance steps related to guild payments are harsh or absurd. This is an understandable reaction, but it may be some consolation to know that part of the reason for these guild rules is that guilds want their members employed in as many **new** productions as possible. They want to make sure that clip usage is not so cheap that it encourages producers to replace new filming with old clips.

VI. DOCUDRAMAS

By their very nature, docudramas invite legal problems and thus insurance difficulties. Viewers aren't interested in real-life stories about ordinary people who have boring lives. Instead, they want to learn about evil corporate predators, heroic people caught in tragic events, and sympathetic victims of awful diseases. These topics involve serious potential for claims of defamation, invasion of privacy, trade libel, and much more. Thus everyone involved should expect a high level of scrutiny from the insurance company's lawyer before E & O insurance will be issued. Producers should also expect their legal fees and insurance premiums to be considerably higher than for most shows.

Please note that all of the following suggestions apply whether the story is openly labeled as a docudrama, or whether it is a fictionalized story that may well be recognized as based on real events. Either way, treat the project as a docudrama for purposes of your review.

The producer's lawyer should always be involved very early in the docudrama process. The producer, writer, and lawyer need to thoroughly discuss the concept and rights issues before the writer puts pen to paper (or fingers to keyboard). Some parts of the story or some people may be too risky to include so the writer needs to shape the story away from those problem areas. Sometimes there is no point writing a script until the producer gets rights from one or more persons to protect against claims and to get access to certain people and information. The lawyer should review all major script revisions.

An early E & O insurance application and an early phone call from the production lawyer to the insurance company's counsel can help tremendously. Contact the insurance broker for help here. **Some subjects are extremely difficult or expensive to insure or they can only be done by compromising parts of the makers' creative vision,** so it is best to know what you are facing before too much has been spent in development. There are horror stories of projects that were already filming when they were deemed to be uninsurable. There have also been projects that should have been uninsurable that were successfully produced because the producer, the insurer, and the lawyers made early, smart decisions about how to craft the project and who to approach for rights.

The balancing act that docudrama creators face is how to tell an accurate story about real events while making their project interesting for the audience to watch. A certain amount of fictionalization is inevitable in the process of turning days or weeks or years of real events into a movie or miniseries. But the docudrama creators and their lawyer must carefully examine those fictional elements for their impact on the real people (and real organizations) whom the film portrays.

In looking at a docudrama for the risk that claims will be made against it, you should answer two questions: 1) **is each aspect of the story accurate and fair?** and 2) **how are the people and organizations portrayed likely to feel about the story?** There are a number of subparts to each of these questions.

The question of **accuracy** of the docudrama involves **looking at what proof you have** for the film's version of events. The best way to keep track of the accuracy of the project is to have the writer prepare an **annotated script**. This document contains notations of the factual sources for each scene or portion of a scene. (The best format puts the sources and quotations from them on a page facing the relevant script page.) The annotations should list one or more factual sources that support what the scene portrays, or showing that a person was part of a certain event. If the specific event in the script is negative, then the writer should provide at least two independent sources for that element. Even if there isn't direct proof that characters actually said particular sentences, the dialogue must be highly consistent with facts known about that person.

Since properly annotating a script takes a lot of time and effort, it's best to make the annotation a requirement of the writer's contract. If this is a problem, there are outside researchers who can do an independent review of the writer's sources and prepare an annotation for the producer. The lawyer should definitely review the annotated script and check scenes against the actual sources.

It is best to research and **use a number of different sources** as the basis for the script. Good sources include contemporaneous news stories, recorded interviews of actual participants, court transcripts, magazine articles or books discussing the event, and

convictions and court judgments that have withstood appeals. (If your client's film relies upon court testimony and a conviction that is being appealed as your film is being made, a reversal of that conviction could seriously weaken the entire basis of the story.)

Do not rely on second-hand statements ("I heard that he was taking drugs long before the accident...") or fictionalized accounts of actual events. They are less likely to be accurate. Also, use of a fictionalized account risks a copyright infringement claim if that author's consent isn't obtained.

Also, **do not rely too heavily on any one source** (such as a nonfiction biography) without buying rights from the copyright owner(s). Facts are not copyrightable, so your client can generally use *factual* information found in most any source. However, if she uses one source too heavily, she runs the risk of taking possibly copyrightable elements (such as the author's unique arrangement of the facts or supposed conversations) or at least provoking the wrath of the author so that he may sue anyway.

When working on the accuracy of the docudrama, **watch out for information has been rejected** by the writer. Was it rejected because the source of those "facts" is a convicted perjurer? Fine. But if another apparently reliable version of what happened was rejected just because it was not as exciting or dramatic, look again. Your client is not obligated to give **every** version of events in the film, but she is obligated to give a fair representation of what probably happened, and to have a reasonable explanation for why events and people are portrayed in a certain way. In the eyes of the potential plaintiff and the courts, it is not enough to say, "We needed more dramatic tension so we made her previous husband abusive instead of just insensitive," or the "network said to spice things up, so we decided that she should sleep with her boss instead of just be his friend."

Also, when considering the question of accuracy, **look out for assumptions**. Often the people working on a docudrama get so used to believing that certain facts are true that they assume that they must be right. As you and your client review the script, keep on asking yourselves how you really know that each aspect of the script is true.

Also look for real events that the writer chose to *omit*. Those omissions can create an unjustified portrayal of real participants. Ask yourself whether the script gives a **fair and balanced view** of people who were involved in the story.

The second major question in docudramas involves **how the people and organizations portrayed will feel about the story**. In working on a docudrama, the mindset of the creative people (producer, writer, etc.) and the lawyer should be: "*How would I feel if I were the person portrayed in this story?*" In the process of trying to make a good movie, people sometimes lose sight of the fact that there are real people behind those characters, and those real people, their friends, and acquaintances will someday watch this film. Those real people will often have strong reactions to how they think they have been portrayed, and this can lead to litigation. Ask about whether anyone portrayed is known to be manipulative or litigious. Think about their personalities, reputations, previous threats, or professions. (For example, doctors and lawyers are generally more lawsuit-happy.) **Make sure the producer understands that risk assessment involves not just whether she would lose a lawsuit. You must evaluate the risk of inviting a claim that will ultimately be won, but only at great expense.** Every insurer knows from firsthand experience that the defense costs of a non-meritorious claim can be just as expensive as paying out on a valid claim.)

In looking for people's likely reactions to their portrayals in the docudrama, examine each character, but **pay particular attention to those whose roles are larger or are negative**. One of the most common problems in docudramas is that bad guys are more effective dramatically if they are made nastier than they were in real life. For example, in a story

about a woman's battle with cancer, an insensitive doctor might work better dramatically if he's portrayed as downright rude to her. If a real doctor is identifiable, his professional reputation could be harmed by that characterization.

Many times it is necessary to combine two or more real people into a single fictional character in the docudrama. Watch out for characteristics that seem to identify a composite character as a certain real person (such as occupation, relation to major characters, or participation in certain events). Creating a composite character may accidentally attribute unflattering actions or traits to the wrong person. For example, that rude doctor might be intended to be a composite of the five doctors who actually treated the cancer patient, but if you portray him as the one who did her surgery you may have told the world that the actual surgeon was rotten when in fact it was her anesthesiologist who treated her badly.

Releases and life story rights may be necessary. If a story involves well-known events and people of legitimate public interest, the law usually will not require the producer to obtain the written consents of the participants. However, most docudrama producers find it much easier to make the project with the cooperation of one or more principal figures in the story, especially if one of them has written a book or other source material. Also, keep in mind that it is valuable to include in a life story rights contract that the person will help the producer obtain releases from other participants in the events (such as family members and friends).

Don't let your client wait too long to approach people or companies for rights. A week before commencement of principal photography is too late to learn from the insurer's lawyer that you need a release to portray a major character. The producer's bargaining position is very poor and the results of not getting consents can be catastrophic.

If your client does enter into a rights contract, keep in mind that the actual participants will often be partially disappointed by the finished docudrama. They commonly feel that important events were left out or were shown incorrectly, or that they were not shown as positively as they should have been. Your contract should always include the **right to rearrange and fictionalize** events, and you should never give the person unlimited script approval. You should also get warranties and indemnities from the person about the accuracy of the information that he or she provides to your client.

Before your client gets too committed to a project, also think about the impact of interviews and contacts that the producer, writer, et al., have had that did not lead to written releases. **Did they request a release but not get one for some reason?** (Make sure your client reports this fact on the insurance application.) Is there anything in their or your correspondence or discussions with that participant or author that would support an argument that the producers knew that they should get rights from that person, but failed to do so because it was too expensive, etc.? (Plaintiffs often argue that the very fact that the producer approached them was an admission that the producer needed their cooperation. Producers should carefully word their communications with these people to avoid such an interpretation.) If your clients make any such contacts after they apply for or get E & O insurance, they are obliged to report it to the insurer because it may affect coverage.

Often it will be necessary to **disguise certain real people** because their consents can't be obtained, or because you are not sure your client has enough verification of their actions to risk identifying them. (Remember, the goal of both you and the insurance company is to keep your client from getting sued at all, not just to keep from losing a suit. The costs of litigation - financially, personally and professionally - are just too high.)

A simple **name change is often not enough to disguise someone**, so think about what else will lead people to identify that character as a particular person. Keep in mind, too, that if the film is based on a book that is identified in a screen credit, plaintiffs may argue that the

change of identification of them in the film didn't help because anyone could find out who they really were by looking at the credited book. **The portrayals of some people may simply have to be toned down.**

Don't drag a person into the story unnecessarily, and **don't drag in his or her personal life if it is not essential.** For example, in a story about a mass murderer, portraying scenes of a victim's family in their private home might be considered invasion of privacy in some jurisdictions. In fact, if the families of the victims are not working with you on the production, you may be better off omitting their names and other identifying characteristics.

Do not assume that if something was said in a book or magazine or local TV show, then it must be true, and your client won't get sued for showing the same thing in a movie. This is wrong. **Producers of docudramas are much more likely to be sued than are the authors of books or articles about the same story.** This is probably because the dramatic, visual reenactment of events is much more popular and much more powerful than written accounts of the same events.

Consider using a disclaimer at the start of the docudrama or at the *beginning* of the end credits. You can often eliminate claims by prominently stating that events have been condensed or fictionalized and characters composited. But a disclaimer does not give carte blanche to fictionalize. Regardless of the disclaimer, if the film is publicized as being based on a true story, you must watch out for the consequences of people believing that statement.

Also remember that the docudrama's publicity and promotional materials, and even its DVD packaging, can cause problems all by themselves. Keep a close watch on press releases and print and TV ads to avoid misstatements of fact and selective editing that takes an acceptable bit of dialogue out of context and makes it defamatory. Also make sure that the people who will be giving interviews understand the situation. (Don't let your star tell a reporter that his evil character is really Mr. X when you have decided to change his name in the story to Mr. Y for legal reasons.) **Sometimes the only way to prevent problems here is to make it a requirement of distribution contracts that all publicity and other such materials be approved by the producer's legal counsel.**

One final option: There are times when clearance problems of a fact-based story are just too difficult to overcome without ruining a good dramatic script. **On occasion producers decide that it is easier to disguise identifying elements and do the project as a fictional piece.** If this is the case, make sure that your distributor or network is not relying upon the "based on a real story" promotional angle as part of the deal. Also, if your clients has already agreed to give screen credit to the author of an underlying nonfiction book, you will be stuck with the fact that that credit implies that the story is factual. In addition, the circumstances of some events are so unique that they are recognizable regardless of whether the producer calls the project a docudrama or not. Plan ahead to avoid these problems.

VII. DOCUMENTARIES

Like docudramas, documentaries require a lawyer to consider the accuracy of the material, and how people will respond to being discussed on tape. Be careful that your client is not so one-sided in his presentation of facts that he unfairly omits opposing version of events. Like docudramas, **documentaries require accuracy, fairness, and balance.**

The more a documentary's statement about a person or company could cause harm, the more you need to **think about the reliability of your client's source.** Ask your client to pretend that he is in a court of law, and ask him how he would respond to an allegation that

the source he wants to use lied or omitted key facts about a person or company. What independent steps did the producer take to verify the accuracy of those allegations?

Watch out for interviewees who discuss private facts or potentially defamatory facts about others in the process of talking about themselves. (For example, a woman in a sexual abuse story may state that she was sexually abused by an uncle, and that that uncle also abused her cousin. Consider the possibility that her statements may not be accurate. Even if her statements are true, also consider how the cousin might feel about having her own sexual victimization revealed to the world.)

Make sure you **get releases** from every person interviewed in the documentary. (There are limited exceptions to this rule.) Keep in mind that many people are upset when they see how they come across or when they find that two hours of interview have been reduced to one minute on camera (especially when they believe that what is shown is taken out of context). Your release should make clear that you have the right to edit their interview. Written releases are better, but some producers replace these with taped releases carefully recorded during the interview. These taped releases include all the same disclosures as in a written release, along with the participant's consent.

Watch out for interviews with and filming of minors. Their releases must be signed by their parents (and ought to be by the minor too if she/he is a teen). Don't rely too heavily on those releases, and be careful about what you allow your client to disclose about that young person. In many jurisdictions it is difficult to make even a release by the parents hold up in court. It simply may not be appropriate to use footage that could harm the minor's reputation (such as admissions of having been sexually abused or having violated the law). Keep in mind that your client's documentary will be around long after that minor may have become a respectable adult who has outgrown his past. Often the producer's only option is to keep the child unidentifiable.

A similar problem can arise with others who are not considered competent adults, and thus **might not be able to give informed consents.** For example, filming patients in a psychiatric hospital is rarely a good idea. However, it may be acceptable if you have the consent of not only the facility, but also the patient (if appropriate or possible) and his or her guardian. Competency and informed consent are also problems when the person is under the influence of drugs or alcohol.

Often the best way to handle problems of privacy or verification of facts is to simply **disguise the person being interviewed** and omit identifying information about companies or people whom they discuss. Also, watch out for problems in labeling unidentified people as criminals, such as can happen if your client films a drug bust. All too often one or more of those arrested were later released because they were accidentally picked up in the raid. If your documentarist, unaware that this person was never prosecuted, goes on to label this innocent bystander as a drug dealer, you will have problems. Either **confirm that that person was convicted**, or mask faces or otherwise make people unrecognizable in those circumstances. However, an amazing number of people will agree to sign releases after they have been filmed in those situations, so releases may be an option too.

Another problem with innocent bystanders involves **accidentally defaming someone by the juxtaposition of certain scenes or a voiceover with a visual image.** For example, if the documentary talks about problems with prostitutes in a city, don't let your client show a young woman walking down a street while the voiceover talks about how prostitutes can be found on the streets of any neighborhood (unless you are certain of that particular woman's profession).

Even if there is no negative context to a shot of persons in a public place, be careful if your client is filming in jurisdictions like Quebec or France. Court decisions in those jurisdictions make it inadvisable to use any shots of individually identifiable people even if they are simply walking down a public street.

Don't let your producer forget about music, trademark, copyright, and other clearance issues. Just because they are doing a documentary does not give them carte blanche to totally ignore all the clearance rules that a fictional project must follow. Make sure they **turn off all TVs and radios** while filming. **Avoid copyrighted artwork on the wall** behind an interview subject. It is best to avoid shots of trademarks and copyrights on T-shirts and baseball caps. Remind them before filming to get their interview subjects to change out of their Mickey Mouse hats and Spiderman T-shirts, please.

VIII. FAIR USE: CRITICISM AND PARODY

For our purposes, "fair use" in copyright law is the copying of someone else's copyrighted material, when done in an appropriately limited way, for purposes such as comment, criticism, and parody. What will constitute **fair use in the U.S. is hard to pin down** because each case depends on the specific facts of the particular situation. As a result, producers may be frustrated by how rarely their lawyers can tell them that something is sure to be fair use. The boundaries of Canada's equivalent *fair dealing* law are still being developed, so it is prudent to be more conservative when dealing with Canadian copyrights.

American trademark law recognizes an analogous fair use defense, but with its own special rules. Many of the same concepts in copyright law have their parallels when considering trademark parodies and commentary. Keep in mind, however, that your client will be picking on large companies with access to good lawyers when they go after a well-known trademark.

Criticism and commentary have long been recognized as legitimate forms of fair use in print media. Book reviews and academic commentary are among the original "fair use" examples. Taking those fair use concepts into documentaries and other film/TV media isn't easy, and there are few circumstances where fair use is a sure thing. **Your clients must understand that any unlicensed use of copyrighted materials in their productions involves some risk.** Even if a claim can be successfully defended against, it will cost both your client and the insurer money. Thus it is unwise to count on an insurer's cooperation if your client wants to use unlicensed footage, photos, or other works under the fair use theory. If you and your producer think there is a particular justification for fair use, discuss this issue early with your client's carrier to make sure that there will be no late surprises on your client's insurance.

A reminder about **common myths in fair use**: No matter what anyone tells your client, *there is no such thing as a safe number of notes to take* from someone's song, or a safe number of seconds from someone's show, or a safe length of a quotation from someone else's work. Also, your client does not qualify for some sort of automatic fair use simply by providing a credit or a disclaimer. All fair use cases depend on multiple variables.

Look carefully if a producer does a **parody** of a film, advertisement, book, song, or the like. American law allows parodies to take just enough elements from the original work to "conjure up" the original for the viewer, but the parodist must be **careful not to take any more of the original than is absolutely necessary** to get the point across. Also, legitimate parody **must be at least partly a commentary on the parodied work itself**, not a commentary on a different topic that uses the parodied work simply as a convenient vehicle for that comment.

Music parodies are tricky. It is possible to successfully assert a fair use defense when doing a music parody, as happened when the rap group 2 Live Crew parodied Roy Orbison's "Oh, Pretty Woman." However, the U.S. Supreme Court's decision in that case made clear that the parodist is limited in what can be taken. In that case the group used only the opening musical tag and the words from the first line of Orbison's song. The rest of the lyrics and melody were different.

Regrettably, **the "best" (funniest) parody often goes beyond legal limits.** For example, Walt Disney once sued the creators of an underground comic book that made fun of Disney's squeaky-clean image by showing Mickey and Minnie Mouse as hypersexual, drug-ingesting Hollywood types. The funniest parody was to draw mice that looked just like the Disney originals, but the court held that the defendants had taken too much by doing that.

Avoid parodying comedy acts. For example, if your client dresses up actors as the Marx Brothers and has them do routines in the style of the Marx Brothers, this arguably is not a parody. Instead, their heirs will accuse your client of usurping their characters and thus violating right of publicity, unfair competition, and trademark laws.

Some producers and writers complain that lawyers and insurers unfairly stifle their creativity. They point to other comedy shows that "get away with much worse" than our producers want to do. What they don't realize is that **there are often extremely large deductibles** (or self insurance) on those shows, or that the producers have actually obtained permission to do their parodies of a copyrighted song or other material. Also, it's worth reminding them that courts seem to decide parody cases partially on whether the judge was amused by the "joke," and most judges are not necessarily known for their senses of humor.

IX. MINIMIZING THE RISK OF COPYRIGHT AND SUBMISSIONS CLAIMS

One of the reasons that producers and insurance companies spend so much time defending copyright infringement claims and other related claims (the implied-in-fact contract or submissions claims) is that it is very hard to predict when these claims will arise, and it is hard to prevent them. However, keep in mind the following points when trying to help producers minimize their risks.

Many of these copyright and submissions claims arise because of all the meetings and conversations that producers, directors, and their staffs have with people who are pitching ideas. The claims also arise out of the scripts and treatments, written by a friend of a friend, that producers and staff members and even the actors agree to read. It is inevitable that some of the concepts of scripts that are presented and soon forgotten will be similar to others that ultimately are used.

When your client produces a film or TV show, he may have forgotten that he ever saw a submitted script or treatment about a similar topic, or he may never have seen it because it was given to someone else in his company. But the person who wrote it will be intensely interested in this production because of its similarity to his work. He will indignantly believe that your client ripped him off, never considering the possibility that the client never saw his material or that he received five similar scripts or treatments in the last two or three years.

There are a number of possible ways a production company and individual producers, directors, and other employees can reduce the risk of this scenario. Commonly all submissions are held (preferably unopened) by clerical staff until they send out a form release which must be signed by the writer. Many studios and production companies refuse to review any scripts or treatments without a written waiver of any future claims by the writer.

However, the waiver sounds unfriendly because it needs to say in the strongest language possible that the producer, by agreeing to read the submission, is not promising to pay the writer anything even if the idea is used. There have been arguments about how legally enforceable these waivers are, but they do seem to help.

A particularly good approach is to **require the writer to sign a release that sets a limit on how much the writer could possibly recover** from the production company. For example, the release might say that if the producer does use the idea or script, the amount received by the author will be set by binding arbitration, or it will be no more than minimum guild scale for first draft scripts (or whatever is the relevant category).

Production companies (even one-man operations) should **create and maintain good record keeping systems of what submissions have come in**, who saw them, and how they were handled. They should also try hard to limit the number of people who actually review these projects. If a lawsuit occurs, they can use their records to show that the people connected with a particular project never even knew about the submission. Also, plaintiffs sometimes wrongly claim they sent a script to a production company. If the company has a good record system, it can be used to disprove the plaintiff's claim.

Producers should also **be careful about how they respond to these submissions**. If a producer hates the script but writes a nice rejection letter telling the writer what a great story it is and he only wishes he had the time and the finances to develop it, this polite lie may come back to haunt him someday.

Remind your clients to watch out, too, for the **cocktail party submissions**: "Hey, Joe, I've got a great idea for a TV series. Got a second to hear it?" If Joe say yes, that conversation may also come back to haunt him.

Finally, advise your clients to **keep track of where their project ideas originated**. It is possible that someone submitted a script or concept in the past that is now influencing the current project. Help the client honestly evaluate whether he or she should expect to make some sort of payment to that person, and follow through accordingly. These relatively small payments can avoid potential litigation headaches.

X. COMPANION MATERIALS, THE DIGITAL AGE, AND MORE

It is hard to consider films and television shows as stand alone products any longer. They often come complete with companion websites, soundtracks, "making of" documentaries, commentary tracks on DVDs, merchandising tie-ins, video games, books, and more. Moreover, new technologies are changing the face of entertainment. These developments require producers and their lawyers to be alert to new opportunities and new pitfalls as they make their shows and move into these companion and parallel markets.

Currently the insurance industry is adapting to these developments with some additional coverage options (usually for a fee), and with additional questions for producers to make sure that they are keeping out of trouble. Some day an entire separate article such as this will need to be devoted to all the specialized clearance issues applicable to the various new products and companion materials. In the meantime, here are a few of the issues to keep in mind as your clients enter these new areas, regardless of whether they plan to buy additional insurance coverages.

- A basic rule is to treat each one of these separate companion projects as its own separate mini-production. **The producer needs to involve his production lawyer to make sure appropriate contracts are in place, rights are cleared, and the new**

material's contents are examined. For example, the scope of a music license for a film is affected if that music will also be used on a video game or website. (Remember that geographic limitations on licenses conflict with the worldwide accessibility of the internet.) Commentary tracks need to be vetted to make sure that all statements made on those tracks are legally safe. Merchandise packaging must be free of infringing artwork, photos, and unauthorized references to real people or companies that might imply endorsement. If your client outsources any of these companion materials to subcontractors, or if the distributor is in charge of the companion projects, **make sure that your client has control (or right of review) over what goes out**, and that there is a system for you and your producer to review these materials, their clearances, their packaging, and their advertising.

- **Watch out for interactive websites.** Your producers have an obligation to monitor and control all materials appearing on their production's website, even if someone else is officially responsible for that site. Once a website has the capacity for outsiders to post messages, chat, etc., your client must make sure that a webmaster continually monitors and removes any offending statements or infringing materials. Also watch out for links to websites of others. It has been argued that a link to another site is an implied endorsement of the contents of that site. Those other sites are beyond the control of your client, which means that a link can lead to unpredictable materials.
- Due diligence requirements for E & O policies mean that the producer's clearance routines will include take all reasonable steps to avoid provoking claims involving the basic film or television production. This extends to clearing the production's companion materials, even if there is not additional insurance coverage for the materials themselves. For example, if your client's docudrama has carefully disguised a real person, the producer is obliged to make sure that the "making of" documentary does not reveal the identity of that person in an interview with, say, the writer.
- There is a bit of a "cowboy" mentality in the world of website and multimedia development – these companies (which are usually young and small) have been working in the wild frontiers of cyberspace. Many programmers believe that certain things are safe to do because they simply have not yet been caught doing them. For example, there are plenty of myths in the internet world about what is fair use. These internet and multimedia frontiers are being tamed, and potential claimants are finding it easier to locate those who steal their copyrighted materials or otherwise infringe their rights. If your client contracts with an outside multimedia or website developer, consider whether you know that the developer is providing safe and clear software programs, visual effects, music, sound effects, etc. What proof does the developer provide? Get strong warranties, but don't expect to find a deep pocket to pay up on those warranties. There are insurance policies that these developers can obtain. **Consider requiring the developers to provide proof of insurance**, and to name your client as an additional insured on their policies.

XI. CONCLUSION

This article has presented a long list of suggestions, rules, caveats, and warnings that can seem overwhelming to production lawyers and their clients. Actually, most all of them are fairly easy to incorporate into production practices. Attached to this article are additional resources and checklists that can help make your job as production counsel easier. Some of the resources in the appendix will give you more details on specific clearance issues.

The best way to minimize problems is to look for them early, before they become difficult or expensive to fix. Push your clients to get you (and their insurance brokers) involved early, especially if the project is a docudrama or one where you think there might be legal issues. And remember that if you do run up against clearance problems in a project, a little flexibility and creativity go a long way toward fixing almost anything.

APPENDIX
TO
A PRODUCTION LAWYER'S GUIDE TO
OBTAINING E & O INSURANCE
AND PREVENTING LITIGATION
UPDATE 2005

Debra Hodgson

CONTENTS:

- Useful Internet Links and Other Information Sources
- Legal Issues Questionnaire for Creators of Small Dramatic Projects
- Producer's Checklist of Clearance Procedures for Television Documentaries
- Sample Clearance Sign-off System for Production Staff
- Producers' Errors & Omissions Liability Insurance Application

USEFUL INTERNET LINKS & OTHER INFORMATION SOURCES

Below is a sampling of some online and other resources that I have found useful. Please note that the contents of these resources can change, and their inclusion on this list is not an endorsement of any particular company or statement found in them. My apologies to all the other great resources that I could have included but forgot or didn't know about. Please feel free to send me suggestions at dhodgsonlaw@earthlink.net.

Happy browsing!

COPYRIGHT RELATED SOURCES:

<http://fairuse.stanford.edu/> (great resource for U.S. copyright law issues)

http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html (excellent discussions of copyright, fair use law, parody law, public domain, getting website and other permissions, getting personal releases, academic copying, and more; based on book *Getting Permission: How to License & Clear Copyrighted Materials Online & Off* by Richard Stim)

http://fairuse.stanford.edu/web_resources/articles.html (links to dozens of useful articles on digital rights, fair use, multimedia, permissions, and more)

<http://www.unc.edu/~uncldg/public-d.htm> (chart for determining when U.S. works fall in public domain)

<http://www.templetons.com/brad/copymyths.html> (ten big myths about copyright explained; includes some internet myths)

GENERAL RESOURCES:

http://www.suzyvaughan.com/producers_guidelines.htm (detailed and good discussion of clip clearances, photo clearances, music, etc.)

<http://www.easternscript.com/3/articles.htm> (valuable short articles on various clearance issues)

<http://www.mandy.com/1/services.cfm?c=cler&t=usa> (good but incomplete list of script clearance specialists)

<http://www.clearinc.org/links.html> (helpful links put together by clearance researchers)

<http://www.suzyvaughan.com/hotlinks.htm> (lots of links to all kinds of databases and sites in and outside our industry)

<http://www.footage.info/listing/> (sample list of footage resources)

<http://www.therightscountry.com/links.htm> (links to various sites in US and Canada)

<http://www.marklitwak.com/articles/> (articles and tips by Beverly Hills entertainment lawyer/author)

http://www.indieclear.com/film_lawsuits.htm (a good list of links to film lawsuits in the news – enough to make any producer properly paranoid)

<http://www.centerforsocialmedia.org/rock/finalreport.htm#legal> (report on documentary filmmakers and their problems with rights clearances; includes lots of first hand accounts of rights clearance problems)

DATABASES:

http://www.ss.ca.gov/business/sf/sf_siisearch.htm (California government's site for finding out who claims to control the right of publicity for a deceased celebrity)

<http://www.copyright.gov/> (U.S. Copyright Office site – lots of good on-line publications, how-to guides, FAQs, and searchable copyright records from 1978)

<http://loc.gov/> (U.S. Library of Congress)

<http://strategis.ic.gc.ca/cipo/trademarks/search/tmSearch.do> (Canadian Intellectual Property Office trademark search page)

<http://www.uspto.gov/index.html> (U.S. Patent and Trademark Office searching – click on “Trademarks Search”)

<http://tyler.hrc.utexas.edu/> (database containing names and addresses of many copyright holders and contacts info for authors and artists)

PRINT MATERIALS:

Entertainment Law Reporter (information and subscriptions available at www.entertainmentlawreporter.com)

Clearance and Copyright: Everything the Independent Filmmaker Needs to Know by Michael C. Donaldson (2003 Silman-James Press)

This Business of Music by Sidney Shemel and M. William Krasilovsky (2003 Billboard Books)

Note: The following sample questionnaire is not a substitute for regular clearance procedures on any production. However, it helps focus the producer and lawyer on some key clearance issues that should be discussed on ALL production, and it is especially helpful when a lawyer is approached to work on a very low budget production. This questionnaire should be completed WELL BEFORE FILMING starts. It is much easier to fix any problems and get permissions before the production is under way.

CLEARANCE ISSUES QUESTIONNAIRE FOR CREATORS OF SMALL DRAMATIC PROJECTS

1. What is the title of your production and what was your inspiration for this title?
2. Attach a synopsis of the production. (Include setting, period and description of events.)
3. What was your inspiration for the concept for the production? (Please give details if you were inspired by any factual events, ideas from other people, personal experiences, books, films, articles, or the like.)
4. Has anyone ever approached you with the same or a similar concept? Have you had discussions with anyone about coauthoring or otherwise working together on the same or similar idea?
5. What was your inspiration for any event that takes place in the production if you were inspired by any factual events, personal experiences, books or other works?
6. Give the full name of each character, and the source of each name. Have you checked the character's name in directories (for example, in professional directories if the character has a profession and in local phone books for the city where the story is set) to make sure that you are not accidentally identifying a real person?
7. For each character, please identify any noteworthy similarities between the character's name, occupation, appearance, personality and other attributes, and those of any living or deceased real individual or any fictional character (that you're aware of).
8. List any musical compositions and recordings that you want to use, and that will not be composed or recorded specifically for the production by your composer.
9. Identify any product, brand name, trademark or logo that you want to show or to refer to in the dialogue of the production.
10. Identify any real people or organizations that you want to show or refer to in dialogue.

11. Have you contacted anyone to offer to sell them your idea or script? Have you contacted anyone about getting their permission or approval for any part of your project? (For example, if your project is about a real person, did you contact that person to obtain their cooperation?) In each case, what was the outcome of such contacts? Were any letters exchanged or deals made?
12. Please provide any other information that might be useful in understanding the origins of this project, or that might be relevant in assessing legal issues or risks in this production.

Note: This form was originally developed for use with small documentary production companies who have limited budgets for legal review. While it is not a substitute for a lawyer's involvement, it does help to give this to a documentary maker before a production starts. If the producer pays attention to the points below before filming, this can avoid one of the most frustrating problems in working on low budget projects -- having to go back and correct mistakes in clearance procedures after the production is already filmed.

PRODUCER'S CHECKLIST OF CLEARANCE PROCEDURES FOR TELEVISION DOCUMENTARIES

The following checklist is to be used by the producer or a senior staff member of the production company. Please initial each item after (1) you review it, *and* (2) you either complete the clearance or create a procedure by which you are certain it will be done before your production is finished.

- _____ Apply for E & O insurance and consult with your lawyer about clearance matters before filming. **Make sure you understand every item in the "Clearance Procedures" section at the back of the E & O insurance application.** (Among the items that you may find most relevant are those involving origins of the show's concept, needed releases and their forms, music clearances, location releases, and source materials.) **Be certain that you have followed all relevant procedures. If in doubt, consult your lawyer.** The following items on this checklist are to be considered in addition to the application's entire "Clearance Procedures" section.

- _____ Your own lawyer should be experienced in entertainment law. Do not assume that the lawyers and staff for any broadcaster or distributor will give you legal advice for your production. They are not hired to represent your interests. Furthermore, they will only be interested in potential problems in their territories, and so will not be concerned about risks that you will face in other parts of the world.

- _____ Review clearance procedures with your lawyer (and clearance experts) prior to filming. Your lawyer must read the script before filming. If there is no script, the lawyer must review a detailed synopsis of the production (including details on each episode of a series). Unless you send the insurance company an acceptable explanation of extenuating circumstances, the lawyer must also review the production itself, preferably at a "rough cut" stage. Do not wait until your lawyer reviews a rough cut of the show to discuss potential problems that you have spotted. Most problems are more easily corrected when they are first noticed.

- _____ Your lawyer should approve chain of title/ownership of the project before filming. All other contracts and release forms should be approved, before their use, by your lawyer or by lawyers for the broadcaster.

_____ Do not quote from copyrighted works or use shots of copyrighted materials (photographs, maps paintings, magazines, etc.) without permission. Shoot interviews so that artwork and other copyrighted materials are not visible. Be careful about filming public art (like a statue or mural) that is copyrighted. Also, you may need permission from persons in photographs or artwork, especially if those persons are actors or models (with rights of publicity that they can protect). If in doubt about the need for permission in a particular case, consult your lawyer.

_____ Avoid shots of logos and other trademarks, especially if the context reflects negatively on their associated products or companies.

_____ Review show contents throughout production for any materials, dialogue, or shots that could be interpreted negatively. If in doubt, consult your lawyer about the risk of defamation claims (even if you believe such claims would not be successful). Watch out for accidental defamation caused by narration about negative activities while showing innocent people on screen. (For example, showing a legitimate hunter while discussing poaching of endangered species, or showing a young woman on a street corner while discussing prostitution.) If minors are shown or interviewed, consult your lawyer about their portrayal and their releases. (It is difficult to obtain a legally binding release from or on behalf of a minor; therefore their portrayals should be carefully vetted.)

_____ Use “public domain” materials with caution. Some materials that people believe “must be” in public domain are actually protected by copyright. For example, many translations and adaptations of public domain literature and music are protected by copyright. Also, recent copyright law changes in the U.S. and Europe have extended or reactivated copyright protection for older works.

_____ Watch out for materials that probably are legally acceptable in your program itself, but that will cause problems when used in advertisements or other publicity materials (e.g., references to real people, trademarks or organizations that may seem defamatory out of context, or “fair use” (“fair dealing”) shots of copyrighted items that may not be fair use if seen in an advertisement). You must advise broadcasters and distributors that such materials should not be used in publicity materials.

_____ Be careful about licensing film/video clips and music recordings that seem inexpensive. With such “good deals” you often obtain far fewer rights than you need. Be especially wary of clips that the seller says are in the public domain. Clips from American film and television are particularly hard (and expensive) to clear properly. It is bet to hire an expert to clear such clips.

_____ Do not believe “fair use” myths about how much music you can use without authorization from the copyright holder. If you use prerecorded music, obtain all needed master use, artist and musician licenses.

- _____ Do not use shots of public performances without clearing copyrights and getting releases from the performers. While on location, get information about the songs or other materials being performed, and get names and addresses of performers so you can contact them later.

- _____ Watch out for moral rights issues, especially in copyrighted materials from Europe.

- _____ If your production includes dramatic reenactments of twentieth century events, you must consult your lawyer about defamation, privacy and other legal issues that may arise.

I understand that the E & O's application's "Clearance Procedures" section and this checklist are intended only as guides for avoiding common clearance problems. They are not substitutes for obtaining independent legal advice on this television production.

(Date)

(Signature)

(Print Names of Signator and Signator's Company)

One frustration faced by lawyers and insurers is how to make sure that the production staffers who need to understand clearance procedures actually get the guidance they should have. The following is a suggested approach, which starts with a cover sheet for producers to have their production staff acknowledge and sign off on the producer's rules. The pages after the cover sheet can include written rules and suggestions, form releases, and any other guidelines or documents that the producer and production counsel want the production team to know.

Sample Clearance Sign-off System for Production Staff

**XXXXXX PRODUCTIONS INC.
"[TITLE OF PRODUCTION]"**

MEMORANDUM

TO: DEPARTMENT HEADS

FROM: XXXXXXXXXXXXXXXXXXXX

DATE:

RE: CLEARANCE POLICIES AND PROCEDURES

Please sign this memorandum in the space below and return to the [Production Coordinator, Producer, or other appropriate person] after you and your staff have read and understood the attached "Clearance Policies and Procedures"

The undersigned and the undersigned's staff have read and understood the attached Clearance Policies and Procedures, and shall abide by same.

1. Director: _____
2. Director of Photography: _____
3. Line Producer: _____
4. Art Director: _____
5. Property Master: _____

6. **Costume Designer:** _____
7. **Transportation Coordinator:** _____
8. **Production Designer:** _____
9. **Location Manager:** _____

The following checklist is borrowed from a small studio form, which is in turn based on E&O application clearance procedures and other common checklists available in the industry. No form should be adopted wholesale without tailoring it to the particular needs of a production company.

CLEARANCE POLICIES AND PROCEDURES
“[TITLE OF PRODUCTION]”

- A. Script Clearance Report. All clearance notes in the Script Clearance Report and any updates for the project must be addressed. Any noted item that is not cleared shall not be used in the movie.
- B. Clearances. The following items must be cleared in advance of filming:
1. Names
 - a. Character Names and Names of Businesses, Organizations, Etc. All character names must be cleared. Characters without last names should not be given last names unless cleared. Names identified on badges, letters, lists, nameplates, etc. must be cleared. Real and/or fictitious names of businesses, organizations, etc., must be cleared.
 - b. Names of Actual Persons. Names of actual persons may not be used. References to “public figures” must be approved by production company’s legal affairs department [or outside production counsel].
 - c. No Personal Identification. The addresses, phone numbers, social security numbers, credit card numbers or other forms of identification of any actual person should not be used.
 2. Music (including, humming, singing, whistling and speaking of lyrics) must be cleared. All music clearances must be handled through the production company’s music department using only approved music clearance forms. Please contact XXX [individual or lawyer in charge of music clearances] regarding any music in the picture (including humming, singing, whistling and/or speaking of lyrics) used in connection with any on-camera performances, pre-recorded tracks or source music.

If a music supervisor or outside music clearance person is hired by the production company, they must contact XXX [individual or lawyer in charge of music clearances] to obtain the proper, approved clearance forms, including synchronization and master use request letters and synchronization and master use confirmation letters.
 3. Film Clips/Stock Footage must be cleared through production company’s business and legal affairs department or under supervision of outside counsel.

4. Art Works, Photographs, Posters, Prints, Etc. Unless they have entered the public domain, all of these items are protected by copyright. (“Public domain” is a complicated legal concept, and there are many myths about when a work will be in the public domain. Do not rely on those myths. Consult the production company’s legal affairs department instead.) The fact that owner of these items (e.g., prop house or printing house) represents that use is okay is also not relevant, since copyright typically does not transfer with ownership of the item, but rather remains with original artist, photographer, publisher or copyright holder. Buying a painting or statue at a yard sale does not make it any less protected under copyright law than buying it from an art gallery.
5. Newspapers, Books, Magazines, Maps, and Similar Material. If these items will be recognizable, they need to be cleared. Reading from an actual publication or attributing a fictitious article or headline to an actual publication requires further clearance. Maps are usually protected by copyright. Many U.S. government maps are in the public domain, but such public domain status must be confirmed.
6. Photographs & Likenesses of Persons. Photographs containing recognizable likeness of persons who are not cast members must be cleared. Contact the legal affairs department if in doubt. If the photograph/likeness is copyrighted, additional clearance is required from the copyright holder.
7. Logos, Trademarks, Trade Dress, Trade Names, and Likenesses. Every attempt should be made to avoid commercial identification of products, businesses, storefronts, signage, and related items. Do not modify (i.e., “Greek”) an existing label since remainder of that label, packaging artwork, or the container itself may still be identifiable. For example, old style Coke bottles and many liquor bottles will be identifiable whether the label is showing or not.
8. Phone Books/Numbers. If you use actual phone books, these must be cleared as copyrighted works, and all visible names must be cleared. Other than “0,” “411” and “911,” any telephone numbers visible on screen or spoken in dialogue must begin with the prefix “555” and should be within the range from “555-0100” to “555-0199”.
9. Cars/Trucks/Vessels. Any use of vehicles cars in which logos or trademarks will be featured must be cleared in advance. For example, camera close-ups on distinctive car logos require clearance. Trucks with signage on their sides also require clearance. Note however that, unless compelling reason necessitates signage, attempt should be made to use generic trucks. If visible, the “name” of a vessel requires permission/clearance. Any visible license plates or registration numbers must be also be cleared.
10. Addresses. Dialogue references to or depictions of actual or fictional street addresses must be cleared, along with any signage.
11. Police and Similar Public Authorities. Clearance is required for portrayal of police officers, firemen and other public authorities of identifiable departments or locations, whether or not uniforms are used.

12. Money. Avoid close-ups and single shots of money.

13. Vehicle/Aircraft Identification Numbers.

- C. Product Placement. Production personnel shall not permit the placement (i.e., commercial identification) of any product or service in the picture; however, should production personnel, in their professional capacity, determine placement of a product or service would benefit the picture, then they should present their suggestion to the picture's Producer. Production personnel shall not personally accept any fee, gratuity or other consideration in exchange for placing or seeking to place any product or service in the picture.
- D. "Faces in the Crowd" – Right of Privacy and Publicity. One must obtain permission for any living person's name, likeness, photograph, voice, etc., when used in any identifiable way in a movie. If photographing along a street, in a drive-by, at a mall, stadium, public space, etc., great care must be taken not to photograph private individuals. Public notification must be made, and, if appropriate, written releases should be obtained. (See "Crowd Scene Release Language" for placards.)
- E. Negative Publicity. Under no circumstance should an identifiable product, person, name or the like be referred to or shown in a negative light or derogatory manner without clearly obtaining permission. For example, even if MacDonald's wrapper is cleared for one scene, it should not be used in another scene where actor states: "That hamburger is going to give you a heart attack."

ANY QUESTIONS REGARDING THE ABOVE SHOULD BE DISCUSSED WITH PRODUCER'S BUSINESS AND LEGAL AFFAIRS DEPARTMENT [OR OUTSIDE PRODUCTION COUNSEL].

CLEARANCE AGREEMENT FORMS
“[TITLE OF PRODUCTION]”

Attached are the following clearance agreements which must be used for this production:

LIST HERE AND THEN ATTACH WHATEVER FORM AGREEMENTS YOU HAVE APPROVED FOR THIS PARTICULAR PRODUCTION. SUCH FORMS AND THEIR DESCRIPTIONS CAN INCLUDE:

AUTHORIZATION TO USE NAME AND LIKENESS (LOGOS, ART, PROPS OR THE LIKE):
See Clearance Policies and Procedures for instances where this form should be used.

CROWD SCENE NOTICE/RELEASE LANGUAGE. If photographing along a street, in a drive-by, at a mall, stadium, public space, etc., great care must be taken not to photograph private individuals. Public notification of filming must be made by posting this notice.

Please ensure that no changes are made to the text of the enclosed agreements without prior approval from the production company’s legal affairs department or outside production counsel.



Chubb Insurance Company of Canada

Producers' Errors & Omissions Liability Insurance Application

NOTICE This is an Application for a "NAMED PERILS" CLAIMS-MADE POLICY. Except as may be provided in the Policy, any insurance Policy which may be issued hereafter will be limited to liability for only those CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD. Please read and review this Application carefully and discuss the coverage with your insurance agent, broker or legal representative.

1. Name of Applicant(s): _____

2. Street & Mailing Address: _____

Phone number: _____ Fax (and/or e-mail): _____

3. Applicant is a: corporation individual partnership joint venture

4. Names and titles of principal officers, partners or individuals: _____

NOTE: This application should be completed on behalf of those entities that have significant control over creating and producing the insured production. If there are multiple applicants who desire "named insured" status, Questions 1 through 4 should be answered separately for each such co-applicant, using the space provided on pages 7 & 8 of this Application. Requests for coverage of any "additional insureds" cannot be made in Questions 1 through 4, but should be made through separate attachments or correspondence with broker. (Additional insureds are protected, subject to Policy limitations, for the acts, errors and omissions of named insureds, but they are not covered for their own acts, errors or omissions)

5. Name of Producer (Individual): _____

Executive Producer (Individual): _____

6. Desired effective date: _____ Desired term of policy: _____ year(s)

7. Title of Production to be insured: _____

8. Has a title report (listing uses of similar titles in all media) been obtained from a title clearance service? Yes No

If yes, name the clearance service (and attach copy of report to request title coverage): _____

9. Estimated dates for: (a) Beginning and completion of principal photography: _____
(b) First release or air date: _____

10. Limits of desired coverage: For any one claim: \$ _____ In the aggregate: \$ _____
Deductible amount: \$ _____ Indicate whether policy should be in: U.S. dollars
 Canadian dollars

11. Summary of plot, including time frame and setting: _____

12. Names and nationalities of authors and writers: (a) of underlying works: _____
(b) of screenplays, etc: _____

13. Type of production (mark all that apply):
 Motion picture for initial theatrical release Motion picture for initial television release
 T.V. Pilot T.V. Special T.V. Series or Miniseries Number of episodes: _____
 Videocassette/video
 Other (e.g., theatrical stage presentation, radio program, etc.) Describe: _____

14. Program time or running time of production: _____
15. Territory of broadcast or distribution: _____

16. If companion materials (other than general advertising and publicity) will be distributed in connection with this production, please mark all that apply:
 Merchandising Book Web site CD-ROM or other interactive multimedia format
 Soundtrack album Documentary about making of this production or about related historical events
 Extra materials on DVD or elsewhere (e.g., commentary track, documentary, interviews, historical information)
 Other Describe: _____

If any boxes are marked in Question 16, please fill out the attached Supplemental Questions on Production's Companion Materials regardless of whether coverage for such materials is desired.

17. Is coverage under this policy requested for any companion material marked in Question 16? Yes No

18. Applicant's lawyer (individual's name): _____
Firm name and address: _____

Phone: _____ Fax: _____ Email: _____

19. Has Applicant's lawyer read the Clearance Procedures attached to this application? Yes No

20. Has Applicant's lawyer approved as adequate the clearance procedures used by the Applicant in connection with the Production? Yes No

If more space is needed for any answers on this page, mark here and use an attachment sheet.

If no, have producer and lawyer arranged that the producer will give the lawyer adequate information and materials to approve clearance procedures prior to completion of the Production? Yes No

If no to any part of this question, please explain what clearance procedures lawyer has not yet approved (such as chain of title or script clearance or review of contracts):

21. Is the name or likeness of any living person used or is any living person portrayed (with or without use of name or likeness) in the Production? Yes No

If yes, have clearances been obtained in all cases? Yes No

If clearances have not been obtained, please explain: _____

22. Is the name or likeness of any deceased person used or is any deceased person portrayed (with or without name or likeness) in the Production? Yes No

If yes, have clearances been obtained in all cases from personal representatives, heirs or other owners of such rights? Yes No

If clearances have not been obtained, please explain: _____

23. Is there a plausible risk that a living person could claim (without regard to the merits) to be identifiable in the Production, whether or not the person's name or likeness is used or the Production purports to be fictional? Yes No

If yes, has a release been obtained from such person? Yes No

If a release has not been obtained from such person, please explain: _____

24. Has Applicant or any of its agents or predecessors failed to obtain an agreement or release after bargaining for: (a) any rights in literary, musical or other material; or (b) releases from any persons in connection with the above Production? Yes No Yes No

If yes to either part, please explain: _____

25. Have submissions of any similar properties been received by the Applicant or someone closely involved with the production? Yes No

If yes, please explain: _____

26. Production is:
- Entirely fictional
 - True portrayal of real events (documentary)
 - True portrayal of real events (non-documentary/using actors, etc.)
 - Entirely fictional but inspired by real events
 - Portrayal of real events, but which includes significant fictionalization

Other _____

27. Is the Production based on another work? Yes No

If yes, please give title and author: _____

28. Production is (mark all that apply): Drama Comedy Children's Show Documentary
 Docudrama Animation Quiz or Game Variety
 Interview, Panel or Forum Musical
 Other: _____

29. Are there any ambiguities or gaps in the line of copyright ownership ("chain of title")? Yes No

If yes, please explain: _____

30. Has a copyright report been obtained? Yes No

If no, please explain why not: _____

31. (a) Is there any literary, musical or other material in the production that was copyrighted in the United States before January 1, 1978? Yes No

(b) If subpart (a) is answered "yes," has Applicant's attorney (or other expert) reviewed the rights to such pre-1978 works to make sure that there are no licensing problems related to the so-called "Abend doctrine"? Yes No

(c) If subpart (a) is answered "yes," is any such pre-1978 material essential or integral to Production (e.g., underlying book or important song, art or literary piece that is incorporated in the plot of the Production)? Yes No

(d) If subpart (c) is answered "yes," please provide, for each work, the name and author of work, how work is used in Production, when work was copyrighted, whether author is still alive and if author is not alive, what year s/he died:

32. (a) Are any photographs used in this Production? Yes No

(b) If (a) is yes, have licenses been obtained from copyright holders of the photographs? Yes No

(c) If (a) is yes, have consents been obtained from persons and businesses depicted in the photographs? Yes No

If (b) or (c) is no, please explain: _____

33. Are any clips (film or video excerpts from other sources) used in this production? Yes No

If yes, have all licenses and consents for the clips been obtained as follows:

(a) From copyright owners of clips? Yes No Not applicable

(b) From copyright owners of clips' underlying works? Yes No Not applicable

(c) From performers or persons appearing in clips? Yes No Not applicable

(d) From writers and directors? Yes No Not applicable

(e) From musicians? Yes No Not applicable

(f) From music copyright owners? Yes No Not applicable

If any subpart is answered "no" or "not applicable," please explain: _____

Describe kinds of clips used (e.g., "stock footage only" or "interviews" or "dramatic film, including actors or stunts"):

34. Has a script research report been obtained (to clear character and business names, etc.)? Yes No

If yes, have suggested changes been made and suggested permissions obtained? Yes No

If either question is answered no, please explain: _____

Please provide name of research company preparing report: _____

Is the report supervised or reviewed by Applicant's lawyer? Yes No

35. Have musical rights been cleared? Yes No

(a) Recording and synchronization rights? Yes No

(b) Performing rights (cleared by applicant and/or broadcaster/distributor)? Yes No

(c) If any part is answered no, will these rights be obtained prior to release? Yes No

36. If original music was commissioned, have a warranty of originality and an indemnity against third party claims been obtained from the Composer? Yes No

If no, will they be obtained prior to use of the commissioned music? Yes No

37. Has Applicant had prior producers' errors & omissions liability insurance (for copyright, libel, etc.) on this particular Production or on a related production (e.g., a pilot episode, a "prequel," or an earlier cycle of a series)? If yes, attach a copy of prior policy and written history of any claims or threatened claims. Yes No

38. Has the Production or the Applicant ever been refused similar liability coverage by any insurer? Yes No

Has errors and omissions liability insurance for the Production been discussed with representatives of any other insurance carrier? Yes No

If yes to either question, please explain: _____

39. Applicant represents and warrants that neither it, nor any of its officers, directors or partners, or their counsel, have any knowledge, actual or constructive:

- (a) of any claims made or legal proceedings commenced against the Applicant, or any officers, directors, partners, or parent, subsidiary or related corporations within the last five (5) years for infringement of copyright, invasion of privacy, defamation, unauthorized use of titles, formats, ideas, characters, plots or other program material embodied in this or any other Production, or breach of implied contract arising out of alleged submission of any literary or musical material.

If no exceptions, please initial

Except as follows: _____

- (b) of any threatened claims or legal proceedings that are arising out of or based upon the Production or its title or its underlying material, and that would be covered by the Policy sought to be obtained by the Applicant.

If no exceptions, please initial

Except as follows: _____

- (c) of any facts, circumstances or prior negotiations by reason of which they, or any of them, believe that a claim might reasonably be asserted or legal proceedings instituted against the Applicant, and that such claim would be covered by the Policy sought to be obtained by the Applicant.

If no exceptions, please initial

Except as follows: _____

40. **Attach separate schedule of all known, suspected or reported claims.**

41. Applicant agrees to use its best efforts to acquire from third parties from whom it obtains material or services for the Production written warranties, representations and indemnities against claims arising out of the use of such material or services. Such third parties include independent contractors and others providing written materials, music, photographs, artwork and other material to be used in the Insured Production. Such third parties also include advertising agencies and distributors who add to or create their own publicity material for the Production.

Please initial

42. Applicant agrees that it has used and will continue to use due diligence to determine whether any matter or materials to be used in the production are protected by law and, where necessary, to obtain from parties owning rights therein the right to use the same in connection with the Production. Such due diligence includes asking appropriate participants in the Production whether similar ideas, treatments or scripts have been submitted to them and, if so, determining that there is no plausible risk of claims for such submitted materials.

Please initial

43. Applicant agrees to review and follow the Clearance Procedures listed at the end of this application, and to work with Applicant's lawyer to ensure that these and all other appropriate clearance procedures are completed prior to delivery and distribution of the Production.

Please initial

44. **THIS APPLICATION IS SUBMITTED WITH THE FOLLOWING SPECIFIC UNDERSTANDING:**

- (a) Applicant warrants and represents that the above answers and statements are in all respects true and material to the issuance of an Insurance Policy and that Applicant has not omitted, suppressed or misstated any facts.
- (b) If any claims, threatened claims, or other matters which affect issuance of a Policy come to the attention of Applicant after execution or filing of the Application with the Insurer but before a Policy issues, Applicant must notify the Insurer immediately.
- (c) All exclusions in the Policy apply regardless of any answers or statements in the Application.
- (d) Applicant understands that the deductible under any Policy to be issued in response hereto shall include both loss payment and claim and defense expenses as defined in the Policy.
- (e) Defense Cost Provision - Please note that, unless otherwise notified by endorsement, the Defense Cost Provision of the Policy stipulates that the limits of liability may be completely exhausted by the cost of legal defense, and any deductible or retention shall apply to investigation expenses and defense costs as well as indemnity.

Please initial

45. This Application shall be attached to and become a part of any Policy, should a Policy be issued as a result of this Application. The Application shall be deemed a schedule to such Policy, but the signing of this Application does not bind the Applicant or the Company unless and until a Policy of Insurance is issued in response to this Application.

Signature of Applicant's Representative: _____ Date: _____

Print Name and Title of Representative: _____

Statement by Applicant's Lawyer: Neither I nor my firm (if applicable) are principals in this Production, nor are we guarantors in relation to it. However, I have reviewed this application and am not aware of any inaccuracies or omissions in its answers.

Signature of Applicant's Lawyer: _____ Date: _____

IF THERE IS MORE THAN ONE APPLICANT, USE SPACE BELOW FOR EACH CO-APPLICANT'S ANSWERS TO QUESTIONS 1 THROUGH 4 OF THE APPLICATION. FOR EACH CO-APPLICANT, ALSO PROVIDE THE SIGNATURE AND TITLE OF PERSON SIGNING ON BEHALF OF THAT APPLICANT, AND DATE OF SIGNING:

Agent/Broker: _____
Phone: _____ Fax: _____
E-mail: _____

(See attached pages for clearance procedures and supplemental questions on production's companion materials.)



Clearance Procedures

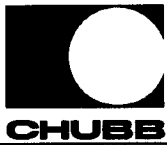
The Clearance Procedures below should not be construed as exhaustive and they do not cover all situations that may arise in any particular circumstance or any particular Production.

1. Applicant and its counsel should monitor the Production at all stages, from inception through final cut, with a view to eliminating material that could give rise to a claim.

Consideration should be given to the likelihood of any claim or litigation. Is there a potential claimant portrayed in the Production who has sued before or is likely to sue again? Is there a close copyright or other legal issue? Is the subject matter of the Production such as to require difficult and extensive discovery in the event of necessity to defend? Are sources reliable? The above factors should be considered during all clearance procedures.

2. The Producer and the lawyer need to read the script prior to commencement of Production to eliminate matter that is defamatory, invades privacy or is otherwise potentially actionable.
3. A script research report should also be prepared *before* filming to alert the Producer to potential problems. Such problems may include: names of fictional characters that are coincidentally similar to real people; script references to real products, businesses or people if not cleared; or uses of copyrighted or other protected materials, etc. Fictional character names should be checked in relevant telephone directories, professional directories or other sources to minimize the risk of accidental identification of real people. Similar checks should be done for the names of businesses, organizations and products used in the Production. Special care should be taken to check names of person, businesses, etc., that are negatively portrayed. The Producer also must be alert to elements that do not appear in the script (such as art works used on the set) but that may need clearances.
4. If the Production is a documentary and there is no script, the Producer should provide its counsel with a detailed synopsis of the project in advance of production. (If it is a documentary series, the lawyer should receive a detailed synopsis of each episode.) If the Production will involve negative statements about people or businesses, the Producer should provide counsel with full details about the allegations and their merit. Problem statements can then be identified and thus avoided while filming. During filming, the Producer should be careful to avoid (or consult with counsel about) possible problem areas. (Examples include: filming identifiable copyrighted items or performances, trademarks, persons who have not specifically consented to be filmed, or minors.) Relevant laws differ from place to place: some jurisdictions have very restrictive rules about filming persons, signs, buildings, public art, etc. Also, be careful to avoid narration or editing that accidentally implies negative things about pictured people, products and businesses.
5. A copyright report on the underlying script, book or other work must be obtained, unless the work is an unpublished original, not based on any other work, and it is certain that it was not optioned or licensed to others prior to the Applicant's acquisition of rights. Both domestic and foreign copyrights and renewal rights should be checked. If a completed film is being acquired, a similar review should be made of copyright and renewals on any copyrighted underlying property.
6. The origins of the work should be ascertained — basic idea, sequence of events and characters. Have submissions of any similar properties been received by the Applicant or someone closely involved with the Production? If so, the circumstances as to why the submitting party may not claim theft or infringement should be described in detail.

7. Prior to final title selection, a title report must be obtained. **TITLE COVERAGE WILL NOT BE OFFERED UNLESS A RECENT TITLE REPORT HAS BEEN SUBMITTED TO AND APPROVED BY THE COMPANY.**
8. Whether the Production is fictional or factual, the names, faces and likenesses of any recognizable living persons should not be used unless written releases have been obtained. A release is unnecessary if person is part of a crowd scene or shown in a fleeting background. Releases can only be dispensed with if the Applicant provides the Company with specific reasons, in writing, as to why such releases are unnecessary and such reasons are accepted by the Company. The term "living persons" includes thinly disguised versions of living persons or living persons who are readily identifiable because of identity of other characters or because of the factual, historical or geographic setting.
9. All releases must give the Applicant the rights to edit, modify, add to and/or delete material, juxtapose any part of the film with any other film, change the sequence of events or of any questions posed and/or answers given, fictionalize persons or events, and make any other changes in the film that the Applicant deems appropriate. If a minor, consent has to be legally binding.
10. If music (pre-existing or original) is used, the Applicant must obtain all necessary synchronization and performance licenses from copyright proprietors. All necessary licenses must also be obtained for recordings of such music.
11. Written agreements must exist between the Applicant and all creators, authors, writers, performers and any other persons providing material (including quotations from copyrighted works) or on-screen services.
12. If distinctive locations, buildings, businesses, personal property or products are filmed, written releases must be secured. This is not necessary if such real property is seen only as non-distinctive background.
13. If the Production involves actual events, it should be ascertained that the author's major sources are independent and primary (contemporaneous newspaper reports, court transcripts, interviews with witnesses, etc.) and not secondary (another author's copyrighted work, autobiographies, etc.).
14. Shooting script and rough-cuts should be checked to assure compliance with all of the above. During photography, persons might be photographed on location, dialogue added or other matter included that was not originally contemplated.
15. If the intent is to use the Production or its elements on videocassettes, web sites, multimedia formats or other technology, rights to manufacture, distribute and release the Production must include the above rights and must be obtained from all writers, directors, actors, musicians, composers and others necessary therefor, including proprietors of underlying materials.
16. Film/video clips are dangerous unless licenses and authorizations for the second use are obtained from the owner of the clip, as well as licenses from all persons rendering services in or supplying material contained in the clip; e.g., owners of underlying literary rights, writers, directors, actors, music owners or musicians. Special attention should be paid to music rights as music owners often take the position that new synchronization and performance licenses are required.
17. Living persons and even the deceased (through their personal representatives or heirs) may have a "right of publicity." Clearances must be obtained where necessary. Where the work is fictional in whole or in part, the names of all characters must be fictional. If for some special reason particular names need not be fictional, full details must be provided to the Company in an attachment to the Application.



Chubb Insurance Company of Canada

Producers' Errors & Omissions Liability Insurance

Supplemental Questions on Production's Companion Materials

Please answer all questions on this page if you marked off any of the items in Question 16 of the main application. If a question is not relevant to the Production's companion materials, mark it "N/A" or "Not Applicable."

A. Please describe the web site, merchandising, book and/or other companion material that will be created in conjunction with the Production to be insured:

B. Will the companion material be made under the control and direction of the Applicant? Yes No

If no, under whose control or direction will it be made, and what rights of approval will Applicant have?

(If more than one kind of companion material is to be made, please clearly indicate whether the above answer applies to each kind of companion material.)

C. For matter used in the companion material, including excerpts from the production, are licenses and rights for the use of all such matter and excerpts (such as new visual materials, text, software programming, actors' performances and likenesses, screenplay, underlying book, music, photographs or clips) clearly broad enough to allow their use in the companion material? Yes No

D. For each category of companion material, have Applicant and its counsel arranged that counsel or other appropriate representatives of Applicant will monitor the clearance procedures for and contents of the companion materials on an ongoing basis? Yes No

E. Will a soundtrack album be produced? Yes No

If yes, has the applicant acquired all necessary rights and licenses for all formats in which this soundtrack album or its contents will be distributed? Yes No

F. Will any merchandise (such as toys, dolls, clothing, colouring books, etc.) be created from this production? Yes No

(1) If yes, please describe all such merchandise: _____

(2) Have all necessary consents and licenses been obtained from performers, authors, artists, etc., to produce and distribute this merchandise? Yes No

(3) Will appropriate trademark or other searches be made before merchandising characters or other matter that might be subject to trademark, unfair competition or other similar claims? Yes No

(4) Is the merchandise being designed and/or produced by licensees of the Applicant? Yes No

If yes, are the licensees providing warranties and indemnities that their contributions to the design, marketing and production of the merchandise and packaging will not infringe upon the rights of others? Yes No

G. Will there be a web page or site for this Production? Yes No

If yes, please provide the internet address for the site (if available): _____

(1) Is the web site being designed and produced by licensees or independent contractors of the Applicant? Yes No

If yes, are the licensees and contractors providing warranties and indemnities that their contributions to the design and contents of the web site (e.g., software for operating the site, graphics, photographs, written materials, and music) will not infringe rights of others? Yes No

(2) Will the web site have any "chat rooms," "bulletin boards" or other areas in which members of the public can post materials? Yes No

If yes, what arrangements have been made for the monitoring of such areas on a continuous basis to eliminate matter that may infringe, defame or otherwise violate the rights of others?

H. Will there be any computer version of this production (e.g., video game or interactive CD)? Yes No

If yes, please describe: _____

Have all necessary rights been obtained from the performers, authors, programmers, etc., to produce and distribute this version? Yes No

If no, please explain: _____

I. With respect to any companion material, has additional or separate insurance coverage been obtained by any licensees or by Applicant? Yes No

If yes, who has obtained the insurance and what kind of coverage is it? _____

