100Reporters / Double Exposure Investigative Film Festival



TRAPS IN MEDIA CONTRACTS

HOW TO SPOT THEM, HOW TO ESCAPE THEM

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Prepared for 100Reporters/Double Exposure Investigative Film Festival and Symposium

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1 INTRODUCTION

Freelance journalism has never been a more valuable vehicle for disseminating information to the public. At the same time, the COVID-19 crisis has had a particularly negative effect on freelance journalists and on media outlets more generally.[1] This manual seeks to arm such journalists -- and their counterparts in the indie filmmaking industry -- with the information and forms necessary to protect their work in these especially challenging times.

In the following pages, we address the principal intellectual property issues of which a journalist, photojournalist or filmmaker should be aware in protecting his or her work, in particular, in negotiating for publication or distribution of that work.

We start from the premise that any creator worth her salt must protect her rights in her work in writing. A written agreement will protect the author by describing and defining the parties' roles, rights and responsibilities so that the publisher cannot take advantage of a journalist or filmmaker's inexperience or unrealistic expectations. In summary, the following chapters discuss:

1. The author's ownership of the article or other work

2. Defining the scope of the work and the deadlines for completion.

3. Grant of rights to the publisher: Key provisions defining the scope of the author's work; serialization, syndication, and other licenses

4. An author's use of a third party content: What is covered by the "fair use" doctrine? What does "right of publicity" mean and how does an author address use of a third party's image or likeness? What is the architectural works exception? What works should be in the public domain, free for all to use?

5. Other copyright formalities (notice and registration)

6. Protecting an author's trademark rights, if any

7. Compensation to the author, including: Specifying a schedule for compensation; protecting the author's right to compensation; and using customary measures for determining appropriate compensation.

8. Representations and warranties by the parties to a publishing agreement

[1] Monica Castillo, "Freelancing was never easy. The coronavirus made it nearly impossible," https://www.poynter.org/business-work/2020/freelancing-was-never-easy-the-coronavirus-made-it-nearly-impossible/.

9. Indemnification by the parties to a publishing agreement

10. Insurance obligations by the parties to a publishing agreement

11. Other contractual features, including: Dispute resolution; governing law; defining the author as an independent contractor; boilerplate (standard) provisions

12. Special Considerations for Filmmakers and Podcasters

The Appendices include several useful form agreements, namely: A Model Freelance Publishing Agreement between a freelance writer/photographer and publisher; a Release that an individual executes in favor of a photographer or filmmaker to use his or her image and likeness; a Copyright Assignment from a third party to a freelancer (whether a writer or filmmaker); and a Distribution Agreement.

2 CHAPTER I: COPYRIGHT OWNERSHIP, SCOPE AND LICENSE GRANT

The key to any creator's success is understanding the proprietary rights that she has developed and owns in her work, and taking measures to avoid alienating those rights. In so doing, a creator can best use those rights as leverage in negotiating with a publisher or distributor.

The Nature of Copyright; Ownership

As the U.S. Copyright Act provides, copyright subsists in any "original works of authorship fixed in any tangible medium of expression."[2] This means that, when the writer of an article puts pen to paper so to speak, and creates his or her original work, copyright subsists in that work. The same is true when a photographer takes a picture, a scriptwriter creates a movie script, or a videographer engages in filming an audiovisual work.

Originality is key. A work must contain some modicum of originality to be subject to copyright protection. As discussed later, mere facts are not subject to copyright protection, although expressions of those facts do merit copyright protection.[3] In addition, if there is only one way to express an idea, then that expression of the idea is not copyrightable under the **Merger** doctrine. An old, but well-recognized case illustrating this involved a jeweled pin in the shape of a bee. The plaintiffs sued the defendants asking them to stop making these pins. The court found that the jewel-shaped bee pin was an idea that anyone was free to copy, and, because it could only be expressed in a few ways, it was not copyrightable.[4]



Copyrights in a "**Work**" (such as an article, photograph, blog, or independent film) originally vest with the creator or creators. A copyright owner has a set of rights in a copyright: to reproduce, distribute, adapt (modify), display and perform (if capable of being performed) the work.[5] Notably, these rights are divisible. You might envision them as a bundle of sticks, which a copyright owner may hand out (by licensing or assigning) in whole or in part.

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[2] 17 U.S.C. § 102.
[3] *See, e.g.*, Melville B. Nimmer and David Nimmer, 1 Nimmer on Copyright § 2.11 (Matthew Bender, Rev. Ed.).
[4] *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).
[5] 17 U.S.C. § 106.

Example 1: You write an article on counterfeiting of luxury goods in China. You might grant to The New York Times the non-exclusive right to reproduce, distribute and display that article online, but retain the right to modify it and license it to others.

Example 2: As a young photojournalist, you travelled to Cambodia and filmed footage of the Khmer Rouge engaged in massive genocide in 1979. You have retained all rights in that footage, and may license a major news network to stream the footage online in connection with news stories about more recent genocides, while maintaining all other rights in that footage.

Example 3: You author the script for, and produce, an indie film on indigenous peoples in Papua New Guinea. Your friend, a videographer, does the filming without engaging in any sort of agreement with you. You own a copyright in the script but he owns a separate copyright in the film.

As explained further in Chapter II, many publications in which writers' and photojournalists' works appear will be "**Collective Works**", defined as a work, "such as a periodical issue, anthology… in which a number of contributions, constituting separate and independent works themselves, are assembled into a collective whole."[6] This could include a newspaper or magazine. The Copyright Act provides that each separate contribution to a collective work (*i.e*., article in a newspaper) is distinct from copyright in the collective work as a whole and vests in the first instance *in the copyright owner*. So, the owner in the collective work (such as the newspaper or magazine) "is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[7] This means that a publisher cannot license an author's work for inclusion in a digital publication without the author's permission to use the author's work in that medium—or in all media. *See* II. A. 4, below. This licensing right, instead, is leverage for an author when negotiating a contract with the publisher.

Key Provisions Defining the Scope of the Author's Work

A good publishing agreement will define and describe the scope of the author's work, *i.e*., its subject matter. Think of this provision like a school English composition assignment. The provision should guard against a publisher rejecting the work on the basis that it does not meet the publisher's requirements. For example, if the publisher anticipates that the journalist will write a story on the effects of a specific tropical storm in Puerto Rico, that should be spelled out in the publishing agreement, rather than simply referring to a "story on weather conditions and their effects."

Many publishing agreements also specify a word count (a range of words for the piece) or minimum or maximum length. The specified word count should include sidebars (boxed text alongside the article with additional explanations) as well as the body of the article.

[6] 17 U.S.C. § 101.
[7] 17 U.S.C. § 201.

The scope provision should also set a deadline for completion of the piece. This is useful for both parties so that they understand each other's expectations. An author would benefit from the ability to request and receive time extensions, so he or she should try to build those in to the deadline section. A template for a Publishing Agreement is attached as Appendix A.

Options for the Author to License Rights in His Work

As explained earlier, an author may license all or part of the rights that he has in his work. Generally speaking, to the extent an author wishes to retain the benefits and rights in an article, he should not grant any "exclusive" rights to the publisher, even by license. This is because an exclusive license is tantamount to an assignment of those rights licensed.[8] Many publishers, however, expect as a matter of course that they will receive an exclusive license from an author (if not an assignment) of the copyrights in the author's content.[9] Moreover, a publisher is usually willing to pay less for a non-exclusive license grant and may require a representation that the writer's work was not previously published anywhere else. Thus, it may be advisable to grant the publisher an exclusive but narrowly tailored publication right in the article or other work.

> *Example 1: Author hereby grants to publisher the exclusive right to publish the work entitled [insert title] for a duration of one year from the Effective Date of this agreement in the English language only.*
>
> *Example 2: Author hereby grants to publisher the exclusive right to publish the work entitled [insert title] for a duration of two years from the Effective Date, but solely within the United States in print (specifically excluding the Internet and any other digital medium).*

A writer who retains for himself the copyrights in his work has a multitude of options for licensing those rights. These include:

Syndication: One of the rights that an author may grant is the right syndicate his or her work. ***Syndication*** is the reproduction of original content that has already been published elsewhere. In journalism, syndication often occurs when publishers come to agreements (forming a "syndicate") through which one member of the syndicate authorizes other members to reprint articles it has previously published. A news publication might join a nationwide syndicate of publishers so that the syndicate can obtain a limited license to reprint content that the sole news publication is unable to produce on its own, such as articles or photographs from different geographic areas, or certain types of feature stories.

Syndication rights tend to be flexible. An author may limit a grant of syndication rights by, for example, geographic area, duration, or format. Syndication rights may be exclusive or non-exclusive, and any grant of exclusive rights may also be similarly

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[8] *See* 17 U.S.C. §201(d)(2) ("The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title").
[9] *See, e.g.*, *Copyright Guidance: Copyright for Authors & Creators*, Yale University Library, https://guides.library.yale.edu/copyright-guidance/CopyrightForAuthors

limited. For example, an author might grant a publisher exclusive syndication rights for only the first three months after original publication, after which the publisher is granted non-exclusive syndication rights for the following nine months. Publisher-drafted publication agreements for journalists or other authors will often seek a broad license to syndicate the writer's work "throughout the world" or on similar terms. Depending on the agreement, the publisher may also seek to allocate to itself some, most, or even all of the proceeds from syndication.

> *Example 1: An author may originally grant a non-exclusive license to The Washington Post to publish an article on trade between the United States and Vietnam. The publishing agreement grants The Washington Post a license to syndicate the article "throughout the world." A local paper in California reprints the article under its syndication rights. Here, both publishers -- The Washington Post and the local paper -- are members of a syndicate through which the local paper purchased or otherwise acquired a limited license to reprint The Washington Post article.*

Example 2: An author may grant a license to The Wall Street Journal to publish online an opinion piece on the future of commodities exchanges worldwide on an exclusive basis for six months and a license to syndicate the article only after the first six months . After six months, other members of the relevant syndicate, including other online publishers, have a limited license to reprint the opinion piece on a nonexclusive basis as permitted by the agreement among the members of the syndicate. Syndication is also common for non-news content, such as media reviews, advice columns, horoscopes, and crossword puzzles, as publishers may prefer to purchase these types of content rather than produce them internally. Syndication of web journalism is less typical for content that is available at no cost online, as it does not usually make sense for a publisher to purchase a license to run syndicated content available elsewhere free of charge. Syndication of web journalism is more common, however, where the publications provide paid or subscription-only content.



Best Practices for Granting Syndication Rights:

- ❖ Authors may only grant syndication rights if they retain ownership copyright ownership. Accordingly, authors should avoid agreeing to "work for hire" provisions (discussed below) that require the author to surrender copyright ownership. *See infra* § II.E.

- ❖ If allowing syndication of her work, an author must ensure that this grant is not inconsistent with any other grant of rights she has made. In addition, it is generally wise to, if feasible, place some limitation on syndication rights in terms of duration or scope.

- ❖ If a publisher is seeking to include a grant of syndication rights in a publishing agreement, the author should consider whether to include a provision requiring that the publisher give reasonable advance notice to the author of when and to whom the publisher is authorizing reprinting of the author's work.

Serialization: The phrase "serial publishing" might invoke Charles Dicken's *The Pickwick Papers* and other nineteenth century fiction among some students of literature. "**Serialization**", however, also applies more broadly; it is a printing format whereby a single larger work is published in smaller, sequential installments. Licensing of serial rights may take several forms. Specifically, a writer may license the "**First Serial Right**" to her work, which is the right to be the first to publish the work. Obviously, an author can only grant first serialization rights to one licensee. A license for first serial rights may contain limitations on the publisher's first-publication right, such as "**First North American Serial Rights**" ("**FNASR**"), which is limited to the right to publish the work first in North America, leaving the freelancer the right to publish the work outside of North America; "first English language serial rights", or "first electronic serial rights."

After a work has already been published, any rights to reprint or to syndicate the work are considered "**Second Serial Rights**" and need not be exclusive. As with other types of exclusive rights, first serial rights may also contain time limitations so that the author may seek other publishers in the event that the first serial licensee chooses *not* to publish the work within the specified time period.

Best Practices for Granting First Serial Rights: In journalism, publishers may be interested in obtaining a license to first serial rights in order to prevent the author from simultaneously licensing an article to a competing publisher. Journalists should take care to understand whether a publishing agreement grants a license to first serial rights, and, if it does, what limitations, if any, the license grants on the author's right to license the work to other publishers at a later time, in different locations, or in different formats.

Licensing of Digital Rights (to Publish on the Internet): There are an increasing number of legal cases addressing whether or not a publisher has the right to publish a freelance writer's articles, originally contributed in print, in an electronic database, which differs from magazine or newspaper to which the writer originally contributed. The freelancer should be aware that some courts -- including the U.S. Supreme Court -- have held that a freelancer has the right to the electronic publication of his/her works, and that a publisher licensed to use those works in print does not also automatically have the right to publish those works electronically absent an agreement with the freelancer providing the publisher with these rights.

Although this manual is not intended to be a treatise on the law, but instead a more practical guide, writers, photographers and filmmakers alike should be aware of the

key case in this area, *New York Times v. Tasini*[10], which addressed the limitations on the rights of a publisher of a "collective work" such as a newspaper or magazine. At issue in *Tasini* was part of the Copyright Act (Section 201) that provides that each separate contribution to a collective work (such as an article in a newspaper) is distinct from copyright in the collective work as a whole and each separate contribution vests in the first instance *in the copyright owner not the publisher*. So, the owner in the collective work "is presumed to have acquired *only* the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[11]

In *Tasini*, six freelancers sued publishers of major periodicals including *The New York Times* and *Time* magazine. The publishers had licensed the freelancers' works to an electronic database provider without authorization from the writers, allowing the database provider to copy and sell the articles. Each article appeared separate and isolated in the databases. The U.S. Supreme Court held that publishers that had published works of freelancer writers in their electronic databases infringed the freelancers' copyrights. This was because the writers had not authorized such publications and the digitized versions of newspapers were not "revisions" as used in Section 201(c) publications and were not part of a "collective work" under the Copyright Act.[12]

Many publishers are aware of the "Tasini problem" and thus might require that an author agree in writing that the publisher has rights to digitize the author's work. Even beyond this, a publisher might insert a clause in a publishing agreement requiring a license to publish the author's work "in all media now known an hereinafter created" -- obviously a very broad right for the publisher.

> In light of this, one authority suggests the following as a pro-writer clause to include in a publisher contract to protect the author's rights:[13] **Pro-Author**: The use of the copyrighted work that is the subject of this agreement is limited to the uses expressly mentioned herein and solely in connection with technology in widespread use as of the date of the execution of this agreement. Such technologies are limited to [_A_], [_B_], and [_C_]. All rights not herein granted

[10] 533 U.S. 483 (2001)
[11] 17 U.S.C. §201. (Emphasis added.)
[12] Referring to Section 201(c), 17 U.S.C. §201(c). Other cases involving the inclusion of single articles in collective works reached varying conclusions depending upon whether or not the work was considered a privileged revision (and thus not an infringement) or a new, infringing work not authorized by the copyright owned. Compare *Faulkner v. National Geographic Enterprises. Inc.*. 409 F.3d 26, 38 (2d Cir. 2005), *cert. denied,* 126 S. Ct. 833 (2005) (where a magazine publisher's electronic reproduction of back issues of its magazine presented articles as they originally appeared in the print versions of the magazine, there was no infringement of the authors' copyrights; the new material on the DVD, such as an opening montage sequence in which several photographs originally appearing in its magazines were used, was similar to a new index for a bound volume of past issues and, thus, the electronic reproduction was a privileged revision) *with Greenberg v. National Geographic Soc'y*,. 244 F.3d 1267, 1269 (11th Cir.), *cert. denied,* 534 U.S. 951 (2001) **(**addition of new material to the reproduction of the back issue of magazines, including an opening montage sequence in which several photographs originally appearing in its magazines were used and transformed into moving visual sequence, made the DVD a new product in a new medium, for a new market beyond any mere revisions in §2.01(c) so that author's copyrights were infringed).
[13] 1 Alexander Lindey, *Lindey on Entertainment, Publ. & the Arts*, §1.33 (3d ed. 2020).

and future uses of technology or delivery systems now in development, but not currently in widespread use, or technology or delivery systems developed in the future are expressly reserved for the grantor.

Other Options for Licensing Rights to a Publisher: Other options for a writer or photographer to give limited publication rights include, without limitation, the following:

- Granting to the publisher the right to offer second, reprint rights to a different publication.

- Allowing the publisher to have a non-exclusive right to publish the article once, but not necessarily first.

- Granting the publisher the right to sublicense, which means the right to allow third parties to use the author's work. This is a bargaining chip. The author should consider whether or not this is desirable because the author will lose some control over the manner and placement of the work.

- Allowing the publisher to assign its rights and obligations under the publishing agreement to a third party. This is also a bargaining chip for the author.[14]

Avoiding the "Work for Hire" Pitfall

Even if you have simply dabbled in the journalism industry, you have probably heard the phrase "**Work for Hire."** This is an arrangement that you, as an author, should seek to avoid, because it means transferring your copyright rights in your work to someone else, either by an employer/employee arrangement or other agreement. In the context of a publication agreement, a work for hire effectively conveys the copyright in a journalist, filmmaker or photographer's work to the publisher, thus stripping the creator of control over the work and the opportunity to maximize monetization of the work. As the U.S. Supreme Court has cautioned: "The contours of the work for hire doctrine therefore carry profound significance for freelance creators - including artists, writers, photographers, designers, composers, and computer programmers - and for the publishing, advertising, music, and other industries which commission their works."[15]

Technically, a "work for hire", according to the U.S. Copyright Act, is: "A work prepared by an employee within the scope of his or her employment" or a work within one of nine narrow statutory categories: a work specially ordered or commissioned for

[14] An author may be presented with language asking that he or she waive the "moral rights" in his or her work. Generally speaking, this language is irrelevant to writers and agreeing to it is not a problem. U.S. law only recognizes "moral rights" in very limited circumstances, and then only involving some visual (not textual) material. Specifically, the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. §106A, grants rights to prevent distortion, mutilation, or modification that would prejudice the author's honor or reputation. And, this law only works that are produced for exhibition, existing in single copes or editions of 200 or less, signed and numbered by the artist.

[15] *See Cmty. for Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (emphasis added).

use if (a) both the organization and creator of the work agree in writing before the work is created that the work shall be considered a work made for hire and the work falls into one of nine statutory categories, which are: (1) *as a contribution to a collective work*, (2) as a part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material for a test, or (9) as an atlas, if the parties expressly agree in writing that it is a work for hire.[16] A writer should, as an initial matter, ensure that he is regarded as a freelancer rather than a writer preparing a work for hire. Courts assessing whether or not a creator is a freelancer will look to issues such as whether or not he created the work on his own time, with his own tools, at his own location, setting his own work hours, and whether or not the party commissioning his work withheld Social Security or payroll taxes.[17]

Pro-Publisher*:* This is the type of clause a publisher might want in negotiating for a work for hire agreement; the author, in general, should resist this and strive to retain ownership of the copyright:

> The parties acknowledge and agree that the Works shall constitute a work made for hire within the meaning of the copyright laws of the United States or any similar or analogous law or statute of any other jurisdiction and, accordingly, Assignee shall be the sole and exclusive owner for all purposes of the copyrights and all other rights in the Works.
>
> Should it ever be determined that the Works do not constitute a work made for hire, Author hereby irrevocably assigns to Assignee and agrees that Assignee, effective as of the date of creation of such Works, shall be the sole and exclusive owner of, all right, title and interest in and to the Works, including the copyrights and all proprietary rights of any kind, that Author owns at any time that may be secured under the laws now or hereinafter in effect in the United States or any other country and any and all claims, demands and causes of action arising out of or related to infringements of the copyrights or other proprietary rights in the Works that have already occurred or that may occur at any time. Author hereby waives any moral rights that it might have in the Works. No rights are reserved by Author.

Whatever publishing rights the author grants in the agreement, it is advisable that, rather than including a work for hire clause, the agreement include language affirmatively retaining the copyright in the author's name:

> ***Pro-Author***: The Publisher hereby acknowledges that the Author owns all proprietary rights, including without limitation all copyrights, in and to the work, and the Publisher shall have no right to exploit the work, other than the rights specifically granted herein. All rights not specifically granted herein are reserved to the Author. Without limiting the foregoing, the

[16] 17 U.S.C. §101.
[17] *Cmty. for Non-Violence*, 490 U.S. at 752.

Author retains all subsidiary rights in the work, including without limitation all rights in abridgements, excerpts, serializations and all rights to reproduce and store the work by electronic or other mechanical means.

3 CHAPTER II: AN AUTHOR'S USE OF A THIRD PARTY CONTENT

Creators including journalists, photographers, and filmmakers often wish to incorporate third party material into their works. Such use of third party content raises a number of issues: Is the use protected by the copyright laws as a fair use? Does the creator need permission from one or more persons to use their names, images and likenesses in the creator's work? And, for photographers especially, does their use involve photographing buildings in which architects might hold copyrights?

Fair Use

What is Fair Use? Technically, **Fair Use** is a lawfully permissible use of a third party's content, without that third party's consent, which is limited to specific purposes and conditions. This doctrine constitutes a defense to what would otherwise be an infringement of a third party's copyrights. Fair use may be an important doctrine, particularly to a journalist or filmmaker who wishes to use selective, discrete portions of another's content in his article, blog, film footage or other work. Writers and filmmakers should be aware of risks they assume when incorporating third party content into their articles, blogs and other works. They should know how to mitigate those risks by using third party material only in such a way as should be shielded by the fair use doctrine

The fair use doctrine is designed to foster educational and newsworthy purposes as well as to encourage creativity. The provision in the Copyright Act recognizing fair use states that use of a third party's copyrighted work for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[18] The U.S. Copyright Office also explains: "Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances."[19]

> *Example 1: Use of exact copy of political candidate's headshot fair use where headshot was part of blog post expressing criticism of candidate's political viewpoint.*[20]

> *Example 2: Uses of photographs or video footage in criticism — for instance, to criticize the leadership in Apartheid South Africa — may further favor a finding of fair use.*[21]

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[18] 17 U.S.C. § 107.
[19] https://www.copyright.gov/fair-use/more-info.html
[20] *Dhillon v. Does 1-10*, No. 12–22211–CIV, 2014 WL 722592, at *4-*5 (N.D. Cal. Feb. 25, 2014).
[21] *Katz v. Chevaldina*, No. 12–22211–CIV, 2014 WL 2815496, *6-*7 (S.D. Fla. June 17, 2014) (finding use of unflattering, copyrighted photograph of business owner was fair when made in conjunction with critical commentary).

The Four Fair Use Factors: Four separate factors generally determine whether or not the use of another's work is a fair use. These are the factors that a court would consider, for example, were a copyright owner to challenge a journalist's unauthorized use of part of the copyright owner's work. The factors consist of:

- The purpose of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work (*i.e.*, whether it is highly original or more factual in type);
- The amount of the work used by the defendant; and
- The effect upon the market for the copyright owner's work caused by the defendant's use.

Examining each factor more closely, we find:

The Purpose of the Fair Use Doctrine: The preamble to fair use provision in the Copyright Act lists certain purposes that are "most appropriate" for a finding of fair use.[22] These purposes are commentary, criticism, news reporting, teaching, scholarship and research. Parody and satire are also generally within the realm of fair use. In one of the most well-known and amusing fair use cases, the U.S. Supreme Court held that parody may constitute fair use. *Campbell v. Acuff-Rose Music, Inc.*[23] In that case, Acuff Rose Music, Inc., sued members of the rap music group 2 Live Crew and their record company, claiming that 2 Live Crew's song, "Pretty Woman," infringed Acuff Rose's copyright in Roy Orbison's rock song, "Oh Pretty Woman." 2 Live Crew's clever lyrics particularly, the second verse bear repeating here:

> Ha haaa, walkin' down the street
> [Pretty woman] Girl, girl, you look so sweet
> [Pretty woman] You, you bring me down to the knees
> [Pretty woman] You make me want to beg please
> [O-o-o-o-oh, pretty woman]
>
> You need to shave that stuff
> [Big hairy woman] You know, I bet it's tough
> [Big hairy woman] All that hair, it ain't legi-i-it
> ['Cause you look like Cousin I-I-I-I-It]
> [Big hairy woman]
>
> Girl, your hair won't grow
> [Ball-headed woman] You got a teeny-weeny afro
> [Ball-headed woman] You know, your hair could look nice

[22] *TCA TV Corp. v. McCollum*, 839 F.3d 168, 179 (2d Cir. 2016) (citation omitted). *See also* 17 U.S.C. § 107.
[23] 510 U.S. 569, 579 (1994).

[Ball-headed woman] First you got to roll it with rice
[Ball-headed woman]
(spoken) Here, lemme get this hunk o' beans for ya,
ya know what I'm sayin'? Ha ha! This better than Rice-a-Roni!
Ha ha ha ha ha!…

The Supreme Court found that 2 Live Crew's song might be a parody that qualified as a fair use.[24]



Of particular note, many cases also focus on whether a "**Transformative Use**" qualifies as a fair use. The transformative inquiry has been described by the U.S. Supreme Court as the "central" inquiry under this first factor, namely, the purpose of the use.[25] The transformative use inquiry asks "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[26] This new expression, meaning, or message may involve commentary on the original work and the social and cultural themes that the work allegedly implicates.[27]

Example: You are covering a Presidential general election speech by Green Party candidate Howie Hawkins. You obtain a printed copy of the speech and select a paragraph from it on Hawkins' visions for a Green New Deal. You write a story on this speech, interspersing the story with lines from the speech, followed by criticism of those lines. This is a transformative use of portions of the speech that should constitute a "fair use."

a. *The Nature of the Copyrighted Work*: This factor focuses on the relative creativity inherent in the third party work you wish to integrate in your work. That is to say, the more creative a work is, the more protection it should be afforded from copying. On the other hand, the more informational, factual or merely functional the plaintiff's work, the broader should be the scope of the fair use defense. Indeed, the courts have recognized that there is a "greater license" to use portions of "a work more of diligence than of originality or inventiveness" such as a catalog, index or other compilation, under the doctrine of fair use than would be the case "if a creative work had

[24] *Campbell*, 510 U.S. at 594.
[25] *Id.* at 579.
[26] *Id.* (internal quotation marks and citations omitted).
[27] *Id*. at 582-583.

been involved."[28] And, mere recitations of facts without a modicum of originality are not subject to copyright protection at all. For example, in a leading case, *Feist Publications, Inc., v. Rural Telephone Service Co.*,[29] the U.S. Supreme Court held that the mere listings in the white pages of a telephone directory deserve no copyright protection.

> *Example 1: For a veterinarian's magazine circulated in Maryland, you produce a list of the characteristics that various breeds of cats exhibit similar to a version of this list initially published by another magazine in Kentucky. Your purely factual list, even if similar or identical to the Kentucky list, should be covered by the fair use doctrine.*
>
> *Example 2: A third party publishes an article in a food section of his local newspaper, listing ingredients for various chocolate chip recipes. You then write a magazine story about teaching children to bake, discussing various chocolate chip cookie recipes and simply listing the ingredients of each, which mirror the list in the newspaper article. Your magazine story should nonetheless be shielded by the fair use defense.*
>
> *Example 3: You write an article on the same subject (teaching children to bake), but this time you copy verbatim a third party's expressive description of how various types of cookies look, taste, and smell after they come out of the oven. This piece copies expressive elements of someone else's copyrighted work and is likely not covered by the fair use defense.*

b. *The Amount of the Work Used by the Writer*: Not surprisingly, if a writer, filmmaker -- or even photographer -- copies an entire work of a third party without permission, this may weigh against a finding of fair use. That said, this tends to be the least important of the fair use factors.

Additionally, there are exceptions to this principle. For example, in *Belmore v. City Pages, Inc*.,[30] the court found that the defendant's wholesale copying and publication of the plaintiff's story that first appeared in a police federation's monthly newspaper was fair use; the defendant copied the entire story to illustrate its belief that the story was racist and to criticize that story. The court stated "[i]n considering the amount copied under this factor, courts do not focus solely on the quantum of material copied; instead, courts must determine whether the amount copied is "reasonable in relation to the purpose of the copying." There, court held: "[A]lthough wholesale copying militates against a finding of fair use, this factor does not have significant weight when applied to the unique facts presented in this case", which were criticism, commentary and news reporting.[31]

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[28] *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977) (finding defendant's indexing of personal names appearing in *The New York Times* newspaper to be a fair use).
[29] 499 U.S. 340 (1991)
[30] 880 F. Supp. 673, 678-679 (D. Minn. 1995)
[31] *Id*. at 678-79.

c. *The Effect on the Market Caused by the Writer's Use*: As one authority explains, this factor requires balancing the benefit to the public if the copying is allowed against the personal gain to the copyright owner if such copying is not permitted.[32] The analysis often turns on whether the use supplants the market for the original work, or will be seen as a substitute for that work.[33] Merely showing that an unauthorized use causes some harm to the copyright owner, is not enough; the copyright owner must show that, if everybody engaged in the same unauthorized use as the accused infringer, the impact on the potential market would be substantial.[34] The type of copyrighted work and the manner in which the copyright owner makes it available for purchase are also relevant. As the courts have acknowledged, "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture" because the potential market for copies of news broadcasts is not as great as that for copies of movies.[35] Also, if the defendant's use of the copyrighted work is transformative, this may minimize the effect on the potential market for the plaintiff's work.[36] On the other hand, if the owner of the copied work makes its work available for license, that tends to increase the likelihood that the allegedly infringing use will be found negatively to impact the potential market for the work.[37]

Some case law regards the effect on the market as the most important of the fair use factors. The U.S. Supreme Court has even stated this. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*[38] This case presents a prime example of the potential harm to the plaintiff's copyrighted work. In the *Nation* case, former President Ford contracted with publishers Harper & Row and the Reader's Digest to publish his memoirs, giving them exclusive rights to license prepublication excerpts. The publishers sold exclusive first serial rights to *Time* magazine. Prior to *Time*'s release of the article, an editor of *The Nation* magazine obtained a copy of President Ford's manuscript, and wrote a news story of facts, quotes, and paraphrases drawn exclusively from the manuscript, including 300 words quoted directly out of President Ford's memoirs. *Time* thereupon canceled its piece and exercised its contractual right not to pay the remaining amount to the publishers with which it had contracted. The Court held that the magazine's unauthorized publication of verbatim quotes was intended to supplant the copyright holders' commercially valuable right of first publication, and significantly damaged the marketability of the first serialization rights, of the memoirs and thus was not a fair use.

Best Practices When Using Third Party Content

❖ Use third party content in news reporting or other factual material.

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[32] 4 Nimmer on Copyright § 13.05[A][4].
[33] *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1275 (11th Cir. 2014).
[34] *Id.*
[35] *Sony Corp. of Am. v. Universal City Studios, Inc* ., 464 U.S. 417, 455 n. 40 (1984)
[36] *See Campbell.,* 510 U.S. at 591 (band 2 Live Crew's parody of song "Oh Pretty Woman" was transformative and thus "market substitution is at least less certain, and market harm may not be so readily inferred.").
[37] *See Cambridge Univ. Press*, 769 F.3d at 1276-82.
[38] 471 U.S. 539, 566 (1985). *See also Robinson v. Random House, Inc*., 877 F. Supp. 830 (S.D.N.Y. 1995) ("most important of the four enumerated factors of the fair use analysis").

- ❖ Use third party facts, not unique expression of those facts.
- ❖ Paraphrase third party content, rather than using the exact words. This is particularly important if you choose to use more than just a few words of a third party's content. Remember, while the expression of an idea is copyrightable, the idea itself is not, and you may lawfully summarize it in a different manner.
- ❖ If you must use third party material, take as little as possible and attribute that material and any quotes to the original source
- ❖ Especially avoid using material that you know is being licensed to others by its creator.

Right of Publicity: *Using the Name, Image or Likeness of a Third Party*

The Right of Publicity is the exclusive right of an individual to control the commercial use of his or her name, image or likeness. In general, this right is an offshoot of the right of privacy.[39] This right is not just for Elvis, Marilyn, Beyoncé, or Tom Cruise. In other words, it is not limited to famous people. Joe or Joanna Q Public also have this right; they may consent to -- or withhold -- the ability of a photographer or journalist to use their names, images, and likenesses. This right may even extend to the use of a person's voice, particularly if distinctive, as Ford Motor Company discovered when it used a "sound-alike" of Bette Midler to advertise a car without the "Divine Miss M's" consent.[40]

For U.S. matters, whether or not this right exists is determined by U.S. state law. To date, more than half of the states recognize this right in some form.[41] Specifically, the right might exist by statute, as it does in New York[42], by both statute and "common law", meaning by cases that have established the right, without the state passing a particular law on the books, as in California[43], or simply by common law, as is the case in Texas.[44]

Why is the right of publicity important in the journalism and filmmaking industries? In particular, the subjects of photographs and film footage may assert this right to prohibit a journalist's use of their image, name, likeness or even voice without the subject's permission. The journalist who does not seek and obtain consent in this situation could be subject to an injunction to stop or recall use of the photograph and liable for money damages.

Best Practices When Using A Third Party's Name, Image or Likeness:

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[39] *See* 1 Nimmer on Copyright § 1.17.
[40] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988)
[41] Listing states that recognize the right of publicity (or "personality right") and the form of recognition.
[42] N.Y. Civ. Rights L. §§ 50, 51.
[43] Cal. Civ. Code §§ 3344 (for living persons) and 3344.1 (post mortem); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (common law right for television celebrity Vanna White was not restricted to appropriation of identity by means of only name or likeness).
[44] *See, e.g.*, *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999).

It is always best to obtain written consent (usually referred to as a "release") from the individual whom you wish to photograph or film, specifying how you may use that photograph or film. The most useful release contains broad language to use the subject of the photograph or film footage "in perpetuity" (forever), worldwide, in any media (this would include digital, print) and for any purpose. Attached as Appendix B is a template Release.

❖ *Architectural Works Exception*

What is this exception? A separate provision of the Copyright Act[45] permits photographers to photograph and display a building if the building is visible from a public place. So, a photographer standing across the street from a building may photograph the building (or draw from a photograph of the building) and use (including by licensing and selling) that photographer without permission of the architect of that building.

C. *Works Licensed From Third Parties*

While our discussion focuses on works that journalists, photographers and filmmakers create, they might on occasion incorporate third party material in their work by obtaining a **license** to use that material (rather than relying, say, on a fair use defense). A thorough license should protect the licensee by specifying:

- Content: Exactly what material the licensor is licensing for use.
- Duration: It is best from the licensee's standpoint to make the license perpetual
- Exclusivity: An exclusive license is preferable but might be unrealistic to obtain
- Territory: Preferably worldwide, so that the license can make use on the Internet
- Royalties: Plainly, a royalty-free license is preferable, if available. Alternatively, a lump sum payment is attractive because it avoids the uncertainty of a license dependent on a portion of gross or net sales.
- "Quality Control": According to U.S. law, the licensor must exercise some control over the qualities of the products or services sold under the licensed mark. This might involve approving samples of the licensee's initial work. In the context of a journalist of filmmaker as licensee, a recitation that the licensor is familiar with the licensee's high quality work, and that the licensee will adhere to this high quality, might be sufficient.

[45] 17 U.S.C. § 120

To obtain a license for use of specific images, a well-known, reliable photo gallery would be your best bet. It should have reasonable, established prices for the licensing of images, which might depend on how often and for what purpose the licensee uses the image. Such reliable licensors include Getty Images, see https://www.gettyimages.com/, which is the largest and now provides many of its images free for use for certain purposes, and Adobe Photoshop at adobe.com.

Works in the Public Domain

It is useful for journalists, photographers and filmmakers alike to recognize that some works are in the public domain and free for all to use without risk of infringement. These works generally fall into three categories: works created by the federal government; works that are sufficiently old so that they have fallen into the public domain name; and works that creators have dedicated to the public domain.

Under the Copyright Act, copyright protection "is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment."[46] Thus, for example, a report by the General Accounting Office is available for copying, but a scientific study on climate change created by an independent contractor and assigned to the government is not free for all to use.

The rules governing when certain categories of works fall into the public domain are quite complex and confound even copyright lawyers such as us! Suffice it to say that at present, works created prior to 1925 should be in the public domain.[47]

Finally, creators in some instances choose to dedicate their works to the public domain for use by all. Perhaps the most common vehicle for doing this is through a "Creative Commons" license, which allows creators to share their work with the public on prescribed conditions. An Attribution 4.0 license allows the public to use the material (even commercially) as long as the user attributes the work to the creator and follows certain attribution requirements. *See* https://creativecommons.org/licenses/by/4.0/legalcode. Creative Commons offers a varieties of licenses that are beyond the scope of this discussion, but that a journalist or filmmaker can review at https://creativecommons.org.

4 CHAPTER III: COPYRIGHT FORMALITIES (NOTICE & REGISTRATION)

Notice

Notice of copyright may take these forms: "©", the word "Copyright", or the abbreviation "Copr.", the year in which the work was first published, and the name of the

[46] 17 U.S.C. § 105(a).
[47] This general rule will change annually and might also be subject to change if the rules governing the duration of copyright ownership change. *See* 17 U.S.C. Chapter 3, "Duration of Copyright."

copyright owner.[48] While notice is not absolutely necessary, it is advisable as it informs the public of the copyright owner's claim in the work.

Registration

Likewise, registration of the copyright with the Copyright Office is not necessary to obtain copyright protection, but is a good idea. Among other things, registration offers a public record as to the owner of the copyright, which could facilitate third parties in locating the owner and obtaining licenses to use the owner's work.

Registration also provides added protection for copyright owners. Under U.S. law, to bring suit against an infringer, the U.S. Supreme Court has held that a copyright owner must hold a registration.[49]

Moreover, if a copyright owner registers within three months of publication of the work, or prior to the infringement of the work, statutory damages and attorneys' fees are available to the copyright owner in the event of an infringement lawsuit. Statutory damages typically range from $750 to $30,000 per infringed work (though they can be as high as $150,000 per infringed work for willful infringement, or as low as $200 where the infringer was not aware and had no reason to believe the use was infringing.) Registration also allows you to request reimbursement of your attorneys' fees and costs of filing the lawsuit. If you do not register your work prior to the infringement or within three months of publication, your remedy in an infringement action is limited to the actual damages that you suffered as a result of the infringement, which might be difficult to prove.

CHAPTER IV: PROTECTING AN AUTHOR'S TRADEMARK RIGHTS

A **trademark** "includes any word, name, symbol, or device, or any combination thereof—…used by a person…to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Federal Trademark Act, 15 U.S.C. §1127. Examples of actual trademarks used by authors include:

> ***Example 1: "Random House" (owned and registered to Penguin Random House LLC publishers for books and services including Internet publishing and children's books, respectively)***
>
> *Example 2: RICHARD SCARRY (name of children's author) owned and registered to Richard Scarry Corporation for children's books, clothing and toys.*

While relatively few authors likely have developed their own trademarks or logos, for those who have, they should be aware of these important principles. First, rights in a

[48] 17 U.S..C. §401(a).
[49] *Fourth Estate Public Benefit Corp. v. Wallstreet.com, LLC* (2019) (also holding that damages recovered may date back to infringement occurring prior to suit); 17 U.S.C. 411(a).

trademark come from using it in commerce, but are enhanced by registration with the **U.S. Patent and Trademark Office (PTO)**; among other things, registration creates a legal presumption that the registrant owns exclusive nationwide rights in the trademark for the products or services for which it is registered.

The test for trademark infringement is "likelihood of confusion," *i.e.*, whether the public is likely to be confused between two parties use of their trademarks into thinking their products or services are from the same source or are affiliated. This test depends on factors such as the similarities between the products or services, the similarities between the marks, and the target audiences for the products or services.[50]

Best Practices for Trademark Use: In developing a trademark, an author should always conduct a search of the PTO records to determine whether there is an obvious risk to use of that trademark because it might conflict with a pre-existing trademark. An author can use this link on the PTO website to search: http://tmsearch.uspto.gov/bin/gate.exe?f=searchss&state=4806:z2yle6.1.1. Do not make any representations and warranties in a publishing agreement that you have not infringed any trademark or trade name without, at the very least, doing this search or consulting with an attorney about doing a trademark search.

CHAPTER V: COMPENSATION TO FREELANCERS

How should an author best protect his or her right to receive compensation for the work created? Although there are no specific guidelines, common sense is a good rule. The publishing agreement should specify the exact amount of payment to avoid any risk of vagueness. The agreement should also include a schedule specifying when and how the author receives compensation. Ideally, the publisher will pay the author immediately upon accepting the work for publication -- when the author *creates* the work, not when it is *published*. Thus, the agreement should state expressly that the publisher shall make payment upon signing.

The publishing agreement should also specify who is responsible for any expenses incurred in drafting article and other works, such as research, database expenses and photocopying, travel expenses and lodging (particularly important to photojournalists). Consider specifying that the author may incur a maximum specified amount of expenses to be reimbursed by the publisher without the publisher's permission; any amounts exceeding that would be subject to the publisher's written approval.

Another safeguard for the author is known as a "kill fee." The publishing agreement should specify that the author receives a "kill fee" if he or she complete the agreed-upon work but the publisher does *not* publish it. This ensures that the author still gets paid whether or not the publisher decides to use the work. Relatedly, one authority suggests that making a license grant revocable helps to ensure that the author gets paid.[51]

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[50] *See* 4 McCarthy on Trademarks and Unfair Competition § 23:19 (5th ed. 2020).

[51] Art Neill and Erika Lee, "The First Thing You Need to Know About Freelance Contributor Agreements" https://www.forbes.com/sites/artneill/2018/11/14/the-first-thing-you-need-to-know-about-freelance-contributor-agreements/#1b)f81af4435.

The notion is that, if the publisher breaches the agreement, the author can revoke the publisher's license, requiring the publisher to refrain from publishing the content or to remove the content.

Finally, what amount of payment is customary? Freelance journalists are often paid based on the length of their contribution. According to a 2020 report surveying leading online and print publications, outlets typically pay between 50 cents to nearly $3 per word.[52] The survey highlights significant discrepancies in compensation structures across different outlets. Anecdotally, print magazine outlets tend to offer a more generous compensation per word structure to freelance journalists than do other online outlets.[53]

Other data we obtained annualize a journalist's salary in various cities with a dramatic difference geographically. Payscale.com reports an average journalist's salary of $40,591 in Washington, DC.[54] According to this same source, this is 45% higher than the national average.in New York City, journalist are paid 25% greater than the national average. Reportedly, other cities in which journalists receive more than the national average are: San Francisco (23%); Los Angeles (16%); and Boston (11%). Surprisingly, journalists in Chicago reportedly are paid 8% below the national average, and those in Miami receive 12% less that the national average.[55] In a comparison of specific occupations, video editors make the most (averaging $42,182), with technical writers making the least ($39,546).[56]

CHAPTER VI: REPRESENTATIONS, WARRANTIES AND INDEMNITIES

Representations and Warranties

The parties to a publishing agreement should expect to make some **Representations and Warranties** to each other. Generally speaking, "representations" are declarations that specific facts as to the parties are true and "warranties" are guarantees that the representations are true during the life of the agreement. Drawing an analogy to a household appliance such as a refrigerator is a good illustration: The new refrigerator come with "representations" as to its features, such as a working icemaker and "warranties" that those features such as the icemaker will not break.

Representations and warranties may be critical to a publishing agreement. They can govern the parties' expectations. Breaches of the parties' promises in this regard may have significant consequences, including possible monetary damages.

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[52] Diana Kelly Levey, "Here's How Much Freelance Writers Are Getting Paid," https://www.dianakelly.com/heres-how-much-freelance-writers-are-getting-paid-in-2018/.
[53] *Id.*; Michael Rosenwald, "Print is dead. Long live print.," https://www.cjr.org/special_report/print_analog_comeback.php.
[54] https:///www.payscal.com/research/US/Job=Journalist/Salary
[55] *Id.*
[56] *Id.*

These are among the customary representations and warranties in a publishing contract to which a journalist or filmmaker should expect, and those to which they should agree:

❖ Typical by Both Parties: Each party has due authority to enter into a valid binding agreement

❖ Typical by the Publisher:

1. That its publication, as a whole, will not infringe or otherwise violate the copyrights, trademarks, trade names, trade secrets, or other rights of any third party.

2. That its publication will not contain any content that is libelous, defames any individual or corporation, slanders an individual, or constitutes an invasion of privacy or publicity rights of any individual.[57]

❖ Typical by Author (the author should not volunteer these but be prepared to address them if the publisher demands them):

1. That the author's work is original and was independently created. This is typical and generally acceptable because the author should have control over, and knowledge of, these matters.

2. That the author is the sole creator of the work. That the work does not contain any third party content or, if it does, that the author has the right to use, and to let others including the publisher use, that third party content in the manner contemplated in the publishing agreement.

a. Here, the author must perform due diligence before making this representation and warranty. If he or she knows that third party content is included in the work, he or she must receive a license or other permission (best in writing) that he or she "may use and authorize others to use" the third party work in question

3. That, *to the best of the author's knowledge and belief*, the author's work will not infringe or otherwise violate the copyrights, trademarks, trade names, trade secrets, or other rights of any third party.

4. That, *to the best of the author's knowledge and belief*, the author's work will not contain any content that is libelous, defames any individual or corporation, slanders an individual, or constitutes an invasion of privacy or publicity rights of any individual.

[57] Defamation is a false statement that injures the reputation of another person. "Libel" is defamation that is contained in a writing or visual depiction, while "slander" is defamation that is made orally. Truth, nonactionable opinion, and fair report are a few of the many defenses and privileges to these claims. When a public figure brings a defamation lawsuit, in order to prevail he or she must prove that the speaker acted with actual malice when making the statement; by contrast, when a private person brings a defamation lawsuit, in order to prevail he or she must prove that the speaker acted negligently when making the statement. *See, e.g.*, Sack on Defamation: Libel, Slander, and Related Problems (Fifth Edition).

Best Practices for Making Representations and Warranties to a Publisher:

- ❖ Understand that the consequence might be significant. The author's promises are generally not temporal; he or she is pledging not to violate anyone's rights not only in the present but *also* in the future. And he or she is pledging not to violate those rights in any jurisdiction, not simply where the author is domiciled.

- ❖ Any representations that the author makes must contain the knowledge qualifier included in this section, in the italicized and underscored language, that is, the author is only making the representations and warranties "to his or her knowledge and belief." Resist giving a blanket representation and warranty -- or even one stating to the **best** of an author's knowledge or belief.

- ❖ Adding that the representation and warranty is restricted to the countr(ies) in which the work will be distributed is advisable.

- ❖ In general, an author should resist including any representation or warranty that the work includes only factual content, particularly because the work may be revised by editors who change or remove content.

Indemnification

An **Indemnification** is, in general, a pledge that a contracting party assumes to make good on any loss, damage or liability that the opposing, "indemnified" party suffers, including by compensating the "indemnified" party monetarily. This is effectively a shifting of liability.

In a publishing context, the principal legal risks that the parties -- publishers and authors alike -- face are claims for **defamation**, **libel, slander** (as well as copyright infringement). To guard against these claims, journalists and filmmakers should be able to recognize their characteristics. "Defamation" is a statement that harms a third party's reputation. It includes both libel (written statements) and slander (spoken statements). To prove defamation, one generally has to show: (1) a false statement purporting to be fact; (2) publication or communication of that statement to someone else; (3) fault in making the statement; and (4) damages, or some harm to the person who is "defamed."[58] A famous Supreme Court case, *New York Times Co. v. Sullivan*,[59] limited the rights of persons suing for defamation, finding that given free speech protections, public officials had to prove that supposedly defamatory statements were made with "malice" to prevail. Truth is an absolute defense to a defamation claim.[60] Likewise, a statement is protected so long as it merely a statement of opinion, and not a statement of fact.[61]

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[58] *See* https://www.law.cornell.edu/wex/defamation
[59] 376 U.S. 254 (1964)
[60] *See, e.g.*, The affirmative defense of truth—Truth and the common law, Defamation: A Lawyer's Guide § 2:4.
[61] *See, e.g.*, Hon. Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems, Chapter Four (5th ed. 2020).

Although traditionally, publishers have usually indemnified authors against these risks, the tide is unfortunately turning, and publishers are more recently seeking to shift indemnity obligations to authors, whether or not the authors can actually shoulder the obligations of paying for any suits and resultant damages. Thus, authors should be alert to any proposed contractual provision that requires them to indemnify the publisher against all liabilities arising from any claims relating to any violations of a third party's rights as a result of publication of the work.

Journalists should carefully read and understand the scope of any provisions requiring indemnification of the publisher. The precise language of the indemnity provision matters. For example, some indemnity provisions require that one party simply "indemnify" the other, which essentially shifts the responsibility to pay for liability. A broader form of indemnity provision, however, might require that one party "indemnify, hold harmless, and defend" the other party. The author should especially resist this broad indemnification language. This provision would not only shift the responsibility to pay for any liability, but would *also* shift the responsibility to pay for legal and other costs associated with defending against a lawsuit, regardless of the outcome. In sum, such a clause would prevent the indemnitor from claiming that the indemnitee was at fault for any liability, irrespective of financial responsibility, and would require the payment of legal fees regardless of the outcome of a suit.

Specifically, the author should be on the lookout for, and withstand adopting, pro-publisher clauses such as the following:

> Author agrees to indemnify Publisher, and each subsidiary, affiliate, successor, agent, officer, employee, and assign of each of the foregoing (each, an "Indemnitee"), with respect to, and hold each of them harmless from and against, any and all claims, demands, suits, proceedings, liabilities, judgments, awards, losses, damages, settlements, payments, costs, expenses including without limitation, reasonable attorneys' fees and costs (collectively, the "Losses") incurred by any such Indemnitee resulting from, arising out of, or relating to the use of the author's work, including without limitation any claims, demands, suits or proceedings alleging that such use infringes, dilutes, or misappropriates any trademark, trade dress, copyright, patent, trade secret, or other intellectual property right of any kind, nature, or description whatsoever of any person or entity, or constitutes defamation, libel, slander or invasion of privacy.

Best Practices for Negotiating Indemnifications in a Publishing Agreement:

- ❖ The goal in negotiating an appropriate, even-handed indemnification is to reject any one-sided clauses placing liability for all third party claims upon the author. The author should insist upon a balanced provision that places liability (absence gross negligence) on the parties equally by, for example, making each party responsible for indemnifying the other against claims arising from the indemnifying parties' breach of any of its representations and warranties.

Accordingly, where a journalist is unable to avoid an adverse indemnity provision altogether, she should consider seeking to limit the provision's scope. Possible ways to limit the scope of an indemnity include:

1. Removing the indemnity clause entirely (which would likely be unacceptable to the publisher)

2. Cap the monetary amount that the author must pay for any defense costs and liability

3. Limit the author's indemnity obligation to pay for defense costs and any other losses *only* if liability is established and all appeals have been exhausted to eliminate the author's need to pay for frivolous claims

4. Invalidate the indemnity obligation if the loss is incurred as a result of the publisher's gross negligence or willful acts

CHAPTER VII INSURANCE REQUIREMENTS

Publication agreements sometimes require journalists or contributors to carry insurance for liability potentially arising out of the licensed work. This might be tied to provisions requiring the author to indemnify the publisher to ensure that, if liability arises, the author will have insurance to cover any indemnity obligations he or she incurs.

Even apart from any requirements contained in publishing agreements, many authors simply choose to carry insurance to protect against liabilities arising from their work. Indeed, insurance can also protect the author in the event of a lawsuit against the author *personally*, rather than against the publisher. While less common than suits against publishers, public figures occasionally bring defamation or similar types of suits against individual journalists for the purpose of intimidation.

Obtaining the appropriate *type* of insurance policy is important. Some general liability insurance policies may not cover certain types of defamation or infringement claims and so journalists may, instead, choose to obtain specialized "media liability insurance" policies which provide coverage for these types of liabilities. According to the Digital Media Law Project, freelance journalists tend either to[62] (a) obtain media liability insurance through a group or association, like The Authors Guild; or (b) purchase a policy through a carrier--several national insurance carriers, including Chubb, ACE USA, and AIG offer these policies through a licensed agent or broker.[63]

Best Practices: Where possible, journalists should attempt to require the publisher, or their insurance, to cover liability arising from the published work. Publishers, especially

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[62] *See* Authorsguild.org. The Authors Guild is this country's oldest and largest professional organization for writers.

[63] Digital Media Law Project, "Media Liability Insurance," http://www.dmlp.org/legal-guide/media-liability-insurance#:~:text=Media%20liability%20policies%20typically%20have,but%20typically%20begin%20at%20%242%2C500.

large publishers, likely already have insurance and my be willing to do so *pro forma*. If a publisher is unwilling to accept the insurance obligation, or to the extent there is a risk of litigation against the journalist personally, the journalist should obtain a suitable media insurance policy. When in the market for media liability insurance, keep apprised of whether your policy includes coverage for punitive damages, whether the policy will require you to make a non-refundable retention fee if you ever need any attorney, or whether the policy covers acts committed outside the United States.

CHAPTER VIII SPECIAL CONSIDERATIONS GOVERNING FILMS AND PODCASTS

• Films

Business Entities for Filmmakers

In general, a business entity is a legal construct that enables an individual or individuals to operate a business without incurring personal liability for any legal claims arising in connection with the business. This benefit is known as "limited liability, "and virtually every jurisdiction allows businesses to form entities in order to obtain limited liability. Informally, business entities are often referred to as "corporations." In truth, however, there are different types of corporations, and other types of business entities which are not corporations, all of which afford different benefits and detriments to their owners. It is important for filmmakers, like all businesspeople, to understand not only the importance of operating under a business entity, but also the different types of entities available, and how to form and maintain an entity.

Why business entities are important. While it is possible for a business to operate without a legal entity—this is often known as a "sole proprietorship"—doing so is generally not advisable. This is particularly true in the case of businesses, such as film production companies, that will likely need to incur debts, hire employees or contractors, and enter into complex agreements. In addition to the risk of unlimited personal liability to the business owner, a sole proprietorship may also experience difficulty raising capital or obtaining lines of credit on account of the added risk of liability. Sole proprietorships can also give rise to significant tax disadvantages for their owners. By contrast, operating a business through the use of an appropriate legal entity generally protects the owner from personal liability and lowers the business's overall risk profile. Certain business entities are entitled to more favorable tax treatment.

Types of business entities. While there are variations in the available business entities from one jurisdiction to the next, this section will discuss the three most common business entities which are available in most if not all states: the **C Corp.**, the **S Corp.**, and the LLC. As explained below, for most small businesses, including independent filmmakers, the proper entity will generally be either the S Corp. or the LLC, with perhaps a modest preference for the LLC. Choosing the best entity for a particular situation, however, can be highly fact- and jurisdiction-dependent. Accordingly, consulting an attorney regarding the appropriate entity for a particular business is always recommended.

As an initial matter, the C Corp. and the S Corp. are two different types of corporations. Both afford the owners, who are known as "shareholders," the benefit of limited liability. The primary differences between C and S corporations are taxation and ownership. When a C Corp. receives income, that income is taxed twice: first, the C Corp. is required to pay corporate taxes based on its income; second, after the C Corp. distributes its income to shareholders (this is called a "dividend"), the income is considered taxable for purposes of the shareholders' personal income taxes. The S Corp., however, is only taxed once; its income is not subject to corporate taxation in the first instance and is taxed only as income to the individual shareholders. Most S Corp. shareholders are able to deduct certain business expenses and business losses on their personal tax returns, which provides additional benefits. In exchange for the S Corp.'s tax advantages, however, the U.S. tax laws impose limitations on ownership: unlike a C Corp., an S Corp. must be a U.S. domestic corporation, may have no more than 100 shareholders, and its shareholders must generally be U.S. citizens.[64]

The other common type of business entity is the **Limited Liability Company** or "**LLC**." In most jurisdictions, an LLC is similar to an S Corp. in that it receives the benefit of both limited liability and passthrough taxation. The LLC, however, can provide additional flexibility not available to an S Corp. In most jurisdictions, there are no limits on the number of owners (called "members") of an LLC, and there is no requirement that members of the LLC be U.S. citizens. Most jurisdictions also allow LLCs greater flexibility in allocating income and losses, as well as managerial control, amongst the members through the LLC's operating agreement. The drawback to the LLC relative to the S Corp. is generally the way in which the IRS assesses self-employment taxes.[65] S Corp. shareholders pay self-employment taxes only on the salaries they receive, if any, from the S Corp.; LLC members, however, are generally responsible for paying self-employment taxes on the full amount of the LLC's income.

Forming and maintaining business entities. Different states have different requirements for how a business entity must be formed and maintained. In general, however, most states tend to require payment of fees and filing of certain paperwork. These requirements and any additional instructions can ordinarily be found on the web. For example, the New York Department of State has a web page providing the requirements and instructions for forming an LLC in New York.[66] Under New York law, an LLC may be formed by a filing of the LLC's "articles of organization" and payment of a $200 fee; the LLC must then file its operating agreement within 90 days of the filing of the articles of organization. Similarly, New York LLCs are required to file a statement every two years certifying their address for receiving service of process.[67]

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[64] Certain other limitations may generally apply to S Corporations, including that shareholders may generally only be individuals, estates, and certain types of trusts. S Corporations may generally only have one class of stock. *See* Internal Revenue Service, *S Corporations* (Feb. 23, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations.

[65] *See generally*, Internal Revenue Service, *Topic No. 554 SelfEmployment Tax* (Sept. 20, 2020), https://www.irs.gov/taxtopics/tc554.

[66] New York State Department of State, Division of Corporations, State Records & UCC, *Forming a Limited Liability Company in New York*, https://www.dos.ny.gov/corps/llcguide.html.

[67] New York State Department of State, Division of Corporations, State Records & UCC, *FAC-Biennial Statements*, https://www.dos.ny.gov/corps/bus_llc_faq_statements.asp.

Best Practices:

- ❖ Film producers should form a business entity to obtain the benefits of limited liability and should do so before beginning production, hiring employees, entering into contracts, or engaging in other business. An S Corp. or LLC is the preferred entity to form for a small film company.

- ❖ Film producers should take care to do business in their entity's name, rather than their own name. Any contracts, for example, should be signed on behalf of the business entity, by an authorized representative of the business entity.

Financing Agreements for Filmmakers

Obtaining financing is often a critical step in independent filmmaking, as the costs of producing a film may otherwise be prohibitive to a small production company. In general, financing arrangements for filmmakers fall into two categories: debt financing and equity financing.

Debt financing involves a lender, such as a bank, providing a loan to the production company that must be repaid within an agreed-upon time period.[68] Similar to a loan for starting a business or purchasing property, the borrower must show that he or she is creditworthy, able to repay the loan, and has sufficient collateral to cover the amount borrowed. In film financing, where the borrower often lacks sufficient tangible assets to serve as collateral, he or she might seek to offer the rights to the story, script, or screenplay (if the producer has those rights). Depending on the film's likelihood of success, the right to future distribution proceeds from the film could also serve as collateral. These are sometimes known as "pre-sale rights."

> *Example 1: A film producer approaches a commercial bank about obtaining $50,000 in debt financing to produce a film. Before agreeing to finance the film, the bank requires that the producer demonstrate that he has secured a script for the film, obtained binding commitments from key personnel (directors, performers, etc.), prepared a viable production budget, and obtained commitments from distributors. The producer lacks sufficient tangible assets to offer as collateral, and instead permits the bank to take a security interest in the future distribution proceeds from the film up to the full amount of the loan. The bank agrees because the producer has previously made successful films and the bank believes this next film will be a hit.*
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> *Example 2: The film producer in the example above produces the film using debt financing. The film is successful and generates $1 million in distribution proceeds. The bank is only entitled to repayment of the original $50,000 plus any interest accrued.*

[68] *See* Investopedia, *Debt Financing* (Mar. 9, 2020), https://www.investopedia.com/terms/d/debtfinancing.asp.

Example 3: The same film producer takes the debt financing, but produces an unsuccessful film, and generates only $10,000 in distribution proceeds. If the producer fails to repay the loan, the bank can enforce its security interest for the full $10,000 in distribution proceeds, and any future proceeds, up to the full amount of the loan.

Equity financing involves one or more investors providing funds in exchange for a share of ownership.[69] In the filmmaking context, equity financing can involve granting of interests in either the production company, the distribution or other rights to the film. The filmmaker is not required to repay the funds; rather, the investors simply receive the income to which they are entitled based on their equity interest.

Example 1: In exchange for $50,000 in financing, producer Max Bialystock[70] grants the investor a 50% interest in the distribution rights to the film. The film is successful and distribution generates $1 million in income. Bialystock does not need to repay the original $50,000 investment; however, because the investor holds a 50% interest in the distribution, she will receive $500,000, or half of the distribution proceeds.

Example 1A: Suppose Bialystock instead produces a flop, generating $0 in distribution proceeds. Bialystock will still not be required to repay the initial $50,000 investment. Instead, the investor will be entitled to 50% of the distribution proceeds, a full $0.

Example 2: Now suppose that in exchange for the $50,000, Bialystock grants a 50% interest in his production company, Bialystock & Bloom LLC ("B&B"). B&B holds the distribution rights to the film. The film generates $100,000 in distribution proceeds, but B&B also incurs $50,000 in debt. Assuming the LLC evenly distributes profits and liabilities among its members, the investor would recoup $25,000 (50% of the revenue minus liabilities).

Importantly, equity financing arrangements may be subject to disclosure and registration requirements under federal law and regulations set forth by the U.S. Securities and Exchange Commission (the "SEC"). Generally speaking, whether federal securities regulations apply turns on whether an offering is being made to retail or passive investors (a "securities offering"), as opposed to "active" or "accredited" investors (a "non-securities offering" or a "Regulation D offering").[71] Because the federal securities

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[69] *See* Investopedia, *Equity Financing* (Jul. 1, 2020), https://www.investopedia.com/terms/e/equityfinancing.asp.

[70] To those of you who do not frequent the theater, "Max Bialystock" is one of the lead characters in producer Mel Brooks' Broadway hit *The Producers*. The musical comedy tells the story of Biaylstock, who teams up with timid accountant Leo Bloom in a get rich quick scheme to stage one of the world's worst plays ever, "Springtime for Hitler," an intentionally offensive show intended to bomb instantly. *See* https://www.imdb.com/title/tt0395251/.

[71] *See* U.S. Securities and Exchange Commission, *Fast Answers Regulation D Offerings* (Nov. 27, 2017), https://www.sec.gov/fast-answers/answers-regdhtm.html.

laws and regulations can be quite complicated, however, consultation with legal counsel is recommended for filmmakers considering the use of equity financing.

Best Practices for Seeking Financing:

- ❖ Producers seeking financing of any kind should be prepared with a detailed business plan that will make the best possible pitch for why the film will be successful and lucrative. Securing in advance the participation of key personnel, such as a director or performers for example, may help demonstrate to potential creditors that the producer can transform his or her creative vision into an actual film.

- ❖ Producers should be realistic about their financing needs. Data collected at the 2014 Sundance Film Festival showed that the budget for an average independent film was approximately $750,000.[72] Too little financing can cause the obvious problem of running low on cash while the film is in production and having either to seek additional funds or sacrifice aspects of the film in order to finish on-time and on-budget. Too much financing can simply result in over-encumbering the production company with excessive debt or other payment obligations.

- ❖ Where an investor seeks an equity interest in the film's distribution rights, producers should consider whether to negotiate for limitations on that interest. Such limitations could include geographic scope (*e.g.*, "U.S. distribution rights"), temporal scope (*e.g.*, "distribution rights for the first three years after release"); or format or media (*e.g.*, "rights in online streaming distribution only").

Joint Authorship

Where more than one person contributes to the creation of an artistic work, the U.S. Copyright Act affords each person (called an "author") joint ownership in the copyrights to the work. 17 U.S.C. § 201(a).[73] In the absence of an agreement among co-authors, each co-author is presumed to own an equal, undivided share of the work.[74] As explained in the House Report on the Copyright Act of 1976, the default relationship between co-owners of a copyright is a tenancy in common. Each joint or co-owner has an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners. [75] A co-owner has independent standing to sue for infringement and need not join the other co-owners.[76]

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[72] Renee, V., *Sundance Infographic Reveals Some Promising and Not So Promising Numbers in Independent Film*, No Film School (Jan. 12, 2014), https://nofilmschool.com/2014/01/sundance-infographic-numbers-in-independent-film.

[73] *See also* 17 U.S.C. § 101 (defining "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable and interdependent parts of a unitary whole.").

[74] *See* 1 Nimmer on Copyright § 6.03.

[75] H.R. REP. 94-1476, 121, 1976 U.S.C.C.A.N. 5659, 5736.

[76] *See, e.g.*, *Davis v. Blige*, 505 F.3d 90, 99 (2d Cir. 2007) ("An owner may also convey his interest in prosecuting accrued causes of action for infringement.").

Joint Authorship Disputes. While seemingly sensical and well intentioned, the Copyright Act's joint authorship rule and equal-undivided-share presumption can in practice give rise to disputes where two or more co-collaborators disagree as to their respective roles in creating a work. While the law imposes some minimum requirements on whether a person's contributions to a joint work give rise to a claim of authorship,[77] the threshold is relatively low.[78] Accordingly, a common problem in collaborative works, such as films, can arise when one collaborator believes his contribution was enough to make him a joint author entitled to a share of copyright ownership, while the other collaborator—who may have done more, or even most, of the work on the project—disagrees and believes she is the sole author with sole ownership of the copyrights. Because co-collaborators may be hesitant to discuss ownership rights at the outset of a project, joint authorship disputes often do not arise until *after* the project is completed, has become successful, and is generating income.

Contracts. Joint authorship disputes can typically be avoided by entering into contracts as early as possible at the outset of the project. One type of contract for doing this is a "work-for-hire" or "work-made-for-hire" agreement, which is used to ensure that copyrights in a creative work are owned by the creator's employer with whom the work-for-hire agreement was made, rather than the creator herself. *See* discussion at *supra* page 10.

But a work-for-hire agreement would *not* cover the situation where two or more co-collaborators *want* to be co-authors and individually retain ownership shares, but want to set the terms of their joint-author relationship. The type of agreement for this situation would be a "joint authorship agreement." A joint authorship agreement allows joint authors to agree on, among other things, what contributions each author will make to the project and the shares of the copyrights that each author will own.

A third type of agreement that may be helpful in avoiding joint-authorship disputes is an assignment. An assignment essentially allows one party to transfer his or her property, rights, or some share of those property or rights, to someone else, in exchange for payment or other benefits. An assignment may be useful where, for example, authors want to transfer creative control over a project from one collaborator to another, or in situations where one or more collaborators want to "buy out" a third collaborator's ownership stake. A template for a copyright assignment is attached as Appendix C.

[77] *Brownstein v. Lindsay*, 742 F.3d 55, 65 (3d Cir. 2014) ("For two or more people to become co-authors, each author must contribute some non-trivial amount of creative, original, or intellectual expression to the work and both must intend that their contributions be combined.").

[78] *See Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (holding that a contributor's giving a description of a character, which was then later drawn by a different contributor, was enough to confer joint authorship rights in the character, because the description had "expressive content without which [the character] wouldn't have been a character at all, but merely a drawing.").

Example 1: Joel and Ethan[79] want to make a film for which Ethan will write the script, but Joel will be the producer and director. Before beginning production, Joel and Ethan enter into a joint authorship agreement providing that Ethan will own 100% of the copyrights in the script, but one third of the copyrights in the film itself, the remaining two thirds of which will be owned by Joel.

Example 2: Halfway through production, Joel decides he does not like the direction the film is taking and no longer wants to be involved. Ethan still wants the film to made, however, and offers to take over directing and producing and buy out Joel's interest in the film in exchange for 5% of the film's profits in the first year. Joel agrees and the brothers execute an assignment agreement. This way, if the film becomes successful, Ethan will have most of the rights, and Joel will only have a limited claim to the profits.

Best Practices:

- ❖ Filmmakers working together on a project should discuss early on who will fill what roles and each collaborator's expectations regarding ownership. These discussions should culminate in an appropriate written agreement. Where the parties intend to be joint authors, they should agree on who will hold the copyrights in specific content and in what percentages. Where contributors are intended only to be employees, the producer(s) should insist that the contributors sign work-for-hire agreements.

- ❖ Co-authors should be cautious about changes in responsibility that may take place during production. If new or different roles in the production are not reflected in a joint authorship agreement, and the parties do not make appropriate assignments of rights to reflect the changes, a collaborator who takes on a greater share of responsibility for the project may not be entitled to a commensurate share of the copyrights.

B. *Employment Agreements*

Making a film almost always involves employing cast and crew members. This section discusses some common issues and terms arising in employment contracts for films. We note that the matter of attribution, while technically a component of employment agreements, is a more complex subject and thus is treated in its own dedicated section below. *See infra* § G.

Above-The-Line Employees versus Below-The-Line Employees. For employment purposes, production companies often distinguish between employees that are "above" or "below" the line. In the film context, above-the-line employees are those with creative input in film, such as directors, producers, and most cast members.

[79] Of the "Coen Brothers" fame. Joel and Ethan Coen write, direct and produce films and have won Academy Awards for *Fargo* and *No Country for Old Men*. Among others, they also executive produced the ever-popular *Bad Santa* movie. *See* https://en.wikipedia.org/wiki/Coen_brothers_filmography.

Below-the-line employees are essentially everyone else: camera operators, lighting operators, sound technicians, set designers, costume makers, best boys, et cetera. A "Best Boy", a phrase seemingly unique to the entertainment world, refers to members of a film crew that are best boy electric (assistant to the department head for electricals, the Gaffer) and the Key Grip (lighting and rigging). Contracts for above-the-line employees are generally more complicated and involve greater reservation of rights to the employee. Below-the-line employees, by contrast, are often employed with more standard-form contracts.

Unions. In the entertainment industry, a significant number of employees, both above- and below-the-line, belong to labor unions which set many of the terms under which their members may be employed—including minimum rates of pay. For example, directors, assistant directors, and unit production managers, must often be employed subject to terms set by the **Directors Guild of America** ("DGA").[80] The same is true for performers, who are often members of the **Screen Actors Guild** ("SAG").[81] The union contracts often link the employees' rates of pay to the film's budget.

> *Example 1: A producer is making a film with a budget of $300,000. For purposes of hiring performers, SAG would classify the film as an "Ultra Low Budget" film, because it has a maximum budget of $300,000.*[82] *The employment terms of SAG-member performers would be subject to the SAG "Ultra Low Budget Project Agreement," which is available online.*[83]
>
> *Example 2: The same producer wants to hire a director who is a member of the DGA. According to the most recent rates schedule from the DGA, the film would be classified as a "Level 1" production and accordingly the director's "initial compensation, daily rate, and preparation time "will be subject to negotiation between the Employer and the Director."*[84]

Filmmakers interested in hiring unionized cast or crew members should carefully review and understand the relevant union agreements and comply with any requirements set forth by the unions. For example, SAG has a process for becoming a signatory to the relevant agreements for hiring its members and recommends beginning the signatory process at least 3-6 weeks before shooting the film.[85] SAG also provides general information for independent filmmakers.[86] Quite plainly, entertainment labor agreements

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[80] Directors Guild of America, *Basic Agreement*, https://www.dga.org/Contracts/~/link.aspx?_id=CC4363E3-BC29-443C-9E34-88F7A534F982&_z=z.
[81] SAG-AFTRA, *Theatrical*, https://www.sagaftra.org/production-center/contract/818/agreement/document.
[82] *See* SAG-AFTRA *Ultra Low Budget Project*, https://www.sagaftra.org/production-center/contract/819/getting-started ("Ultra Low Budget Project Agreement" applies to films with a "maximum budget of $300,000").
[83] *See* https://www.sagaftra.org/files/UPA2020s.pdf,
[84] DGA, *Minimum Salary Schedule Effective 7/1/19 - 6/30/20*, https://www.dga.org//-/media/Files/Contracts/Rate-Cards-2019-thru-2020/DGA200118Rates2019thru2020.pdf at 17.
[85] *See* SAG INDIE, *Become a Signatory*, https://www.sagindie.org/signatory/.
[86] *See* SAG INDIE, *Frequently Asked Questions*, https://www.sagindie.org/about/faq/.

can be complicated and, as such, it may be necessary to seek assistance from an attorney specializing in entertainment law or other professional familiar with these agreements to determine what terms and conditions govern a given situation.

Some important terms. When hiring cast or crew, certain terms—in addition to pay rates—should be given special attention by the filmmaker. These terms may be standard in certain union contracts and non-union contracts alike. The following is a non-exhaustive list of such terms (some of them, terms of art).

- **Stipends/Per Diem Allowances**: Union contracts may require production companies to cover the costs of employees' travel, accommodations, food, and incidentals during production.

- **Benefits Contributions**: Union contracts may also require production companies to make certain contributions to health and benefit plans as a condition of employing their members.

- **Accommodations While Filming**: Production companies are often required by union contracts to provide facilities such as dressing rooms, restrooms, and trailers in the case of on-location shooting or where permanent facilities are unavailable. Where the producer is required to provide food, beverages, or catering services to cast or crew members, it will likely also be required to provide sufficient dining facilities with tables, chairs, dinnerware, serving areas, etc.

- **Special Considerations for Certain Types of Scenes or Performers**: Certain types of scenes or performers may be subject to additional requirements under union contracts, such as scenes involving animals, "stunts," nudity, or filming under hazardous conditions such as smoke. Similarly, union contracts set forth special requirements for certain categories of performers, such as body doubles, stunt doubles, stunt coordinators, singers, dancers, or airline pilots. Employment of a performer who is a minor will also involve special contractual considerations.

- **Promotion, Publicity, and Merchandising**: Union agreements, particularly for performers, may give the employee certain rights of approval over publicity photos and other materials (including without limitation those materials bearing the employee's image and likeness) that can be used to promote a film.

- **Profit-Sharing**: It may be necessary for the producer to enter into an agreement to share a percentage of the profits of a film with key employees, such as a director, in the event the film is particularly successful at the box office.

- **Uniqueness/Injunctive Relief**: A common term in entertainment contracts for key talent will often state that the employee's services are unique and not readily replaceable. These terms can be used to permit the producer to seek injunctive relief in the event the employee breaches the contract to prevent the employee from working on a competing project within a certain time period. Note that injunctive-relief provisions have been found unenforceable by courts in certain

jurisdictions, and, as such, these provisions might, by certain courts, be modified so as to be reasonable in terms of time and scope.

- **Final Cutting Authority**: Who will get to make the final decision as to which scenes are included in the film and which scenes are cut? Production companies may want this authority for themselves, however, ceding this authority to key employees, such as a director or producer, may be useful or necessary in securing their participation in the project.

- **Right of First Refusal**: In certain contracts for writers, directors, or leading performers, it may be necessary to agree to a "right of first refusal" that allows the employee the right to choose whether or not to participate in a sequel or prequel to the film before another director/performer/etc. may be hired.

- ***Deal Memoranda***. *For below-the-line employees, producers will often provide a "deal memorandum," in addition to or in lieu of a formal contract, which sets forth the material terms of the agreement, including term and rates of pay. Deal memoranda are helpful for bookkeeping purposes and assist with efficient tracking of below-the-line costs. Deal memoranda also save time because, as a practical matter, the contractual terms for most or all below-the-line crew members will be identical and the memoranda can simply leave blank spaces to write in the employee's position, rate of pay, and other key terms, while keeping all of the standard contractual language otherwise consistent for all below-the-line crew members.*[87]

Best Practices:

- Filmmakers should carefully plan out their staffing needs as early as possible. For many films, producers should do this before even seeking financing, as staffing can account for some of the film's most significant expenditures and will be necessary in determining the budget needed for the film.

- Filmmakers should consider whether they intend to hire unionized employees and ensure such employees meet all necessary requirements for doing so well in advance of shooting. Unions have a hand in multiple aspects of the production process, including directing, performing, support services, and post-production services. Accordingly, filmmakers should think independently about each employee or category of employees needed for a project, and consider whether compliance with any union requirements will be necessary.

- Filmmakers should also consider the nature of the film and its particular needs, and how to prepare those needs from an employment and budgeting standpoint.

[87] A number of deal memoranda are on the web. *See, e.g.*, St. Louis Volunteer Lawyers and Accountants for the Arts, *Crewmember Deal Memo*, https://vlaa.org/wp-content/uploads/2015/05/Sample-Crew-Member-Deal-Memo.pdf; Studiobinder, *Mastering the Crew Deal Memo (With FREE Template)*, (Oct. 24, 2019), https://www.studiobinder.com/blog/mastering-the-crew-deal-memo-with-free-template/#general-information.

For example, if filming will need to be done in a remote location, the producer should be aware that she may need to arrange for travel, transportation, and accommodation for some of the cast and crew members.

- For films requiring the services of certain specific individuals, such as a director or leading performer, the producer should approach these individuals (or their talent agents, managers, etc.) early on, and potentially in advance of seeking financing, both to secure their participation and to determine any additional costs or concessions needed in connection with these key crew or cast members. For example, a director who is in high demand will likely require compensation greater than the minimum union scale.

- Filmmakers should consider using a deal memorandum for employing below-the-line employees, both for efficiency and clarity, but also to ensure that consistent contractual terms apply to all crew members.

Locations and Permitting

Apart from the script, cast, and crew, securing the proper locations in which to shoot a film can be key to its success. Accordingly, filmmakers should be prepared to obtain permission either from private property owners and/or any public authorities who are in charge of any areas in which they wish to film.

Private Property Location Agreements: Filming on someone else's private property requires the consent of the landowner. While it may be possible to obtain this consent informally, it will almost always be preferable to have a written location agreement in place. Some landowners will require an agreement to protect themselves or their property, or to ensure they receive payment in exchange for their permission. While the terms of a location agreement may need to be adjusted to address both the needs of the filmmaker and the concerns of the property owner, the following material terms should typically be addressed:

- **Description of the Location**: The location agreement should state the address, if any, of the property and should specify the areas in which filming will take place.

- **Grant of Access**: The location agreement should state that the property owner grants to the producer access to the location and any specifically described areas, that these areas will be accessible to all personnel within the film crew, and that the film crew may bring all necessary equipment, props, tools, and other effects onto the premises. If applicable, the agreement may also need to grant access to additional personnel for receiving of deliveries, catering of food, etc.

- **Modification of the Property**: If possible, the location agreement should set forth any modifications the film crew will need to make to the property (*e.g.*, digging a hole, removing a fence, re-arranging of furniture, etc.). If it is not clear what modifications will be needed, the provision should allow for the production company, or its authorized representative, to request permission from the owner if modifications become necessary.

- **Payment**: The location agreement should set forth any fees to be paid to the owner in exchange for the use of the property; how, if at all, these fees will be calculated (flat, hourly, daily, etc.); and the timing at which payment will be made.

- **Reservation of Rights**: The location agreement should provide that the filmmaker shall have the exclusive rights to any and all images and sounds recorded during filming on the property.

- **Portrayal**: The location agreement should provide that the filmmaker may portray the property in any way that the producer wishes in the film and is not agreeing to any particular depiction of the property, nor even to depict the property at all.

- **Releases**: Location agreements often include releases applicable both to the property owner and the filmmaker. The filmmaker should ensure that the property owner releases all third party past, present and future claims for libel, defamation, invasion or privacy, or publicity against the property owner arising from the filming done on the property . Similarly, the property owner will likely want the filmmaker to release any claims against him or her for personal injuries or damage to equipment while on the property.

- **Indemnity and Insurance**: The property owner may also want the filmmaker to agree to indemnify him or her in the event of any claims by third parties arising from the filmmaker's use of the property and to represent that the filmmaker has an insurance policy that will cover any such claims.

- **Authority**: The filmmaker and property owner should both certify that they have the authority to enter into the agreement. The property owner should represent that he or she does, in fact, own the property *and* has all necessary rights and authorization to enter into the agreement.

Public Property and Permitting. Filming on public property will often require a permit from the municipality in which the property is located. Indeed, some jurisdictions, including the City of Los Angeles, require a permit to film even on private property.[88] Jurisdictions also have different exceptions for when filming may be conducted without a permit. New York City, for example, does not require a permit for filming productions using hand-held or tripod cameras and only hand-held props and equipment.[89] While most jurisdictions charge a fee for film permits, these fees also differ widely from one jurisdiction to the next.[90] While filmmakers should always carefully research the

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[88] *See* City of L.A. Admin. Code § 22.350; *see also* Film LA, *Area Requirements, City of Los Angeles*, https://www.filmla.com/for-filmmakers/requirements/#los-angeles-city (click on "Special Requirements").
[89] *See* NYC Mayor's Office of Media and Entertainment, *When a Permit is Required?*, https://www1.nyc.gov/site/mome/permits/when-permit-required.page.
[90] *Compare* FilmLA, *Area Requirements, City of Los Angeles*, https://www.filmla.com/for-filmmakers/requirements/#los-angeles-city (City of LA charges $699 application fee per permit and allows up to 10 locations per permit over a 2-week period) *with* City of Chicago, *Chicago Film Office Permits for Filming*,

applicable permitting requirements in the jurisdictions where they intend to film, we provide some common considerations for filmmakers seeking to obtain film permits:

- **Insurance**: Many jurisdictions require that filmmakers purchase insurance policies to cover any damages that arise in connection with filming at the designated location. Filmmakers should identify what types of insurance will be needed, any required policy limits, and who must be listed as insured parties. These requirements may differ depending not only on the jurisdiction, but also how the location is being used. For example, filming a scene involving automobiles, heavy machinery, weapons, or pyrotechnics might understandably require a more extensive insurance policy with a higher limit.

- **Police or other Monitoring**: For certain filming activities, jurisdictions might require on-site monitoring by police or other designated officials. There may also be additional charges billed to the filmmaker to cover the costs of providing the required supervision.[91]

- **Closures of Public Areas**: Filmmakers may be required to obtain additional approvals from municipal authorities if filming will require closures of streets or sidewalks, or posting of no parking signs.[92]

- **Public Hearings**: In some jurisdictions, a film permit applicant may need to attend a hearing before one or more public agencies to answer questions regarding the proposed project before the permit may be issued.[93] Other jurisdictions may require the applicant to contact affected residents or businesses in the designated location to solicit individual concerns. [94]

- **Community Notification**: Many jurisdictions also require that the filmmaker give certain notice to the members of the community in which filming will take place as a condition of issuing the permit. Some provide electronic services for

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https://www.chicago.gov/city/en/depts/dca/supp_info/permits.html (City of Chicago charges $250 per day/per location, but offers a discounted rate of $25 per day/per location for student or independent films).

[91] *See, e.g.*, Houston Film Commission, *Production FAQ*, http://www.houstonfilmcommission.com/production-and-resources/production-faq/ (City of Houston requires city police to be present for shoots involving traffic or pedestrian control or roadblocks and requires a fire marshal to be present where filming will involve use of squibs or pyrotechnics).

[92] *See, e.g.*, Chicago Film Office, *City Services Request Form for Phase 4* (Jul. 1, 2020), https://www.chicago.gov/content/dam/city/depts/dca/Film%20Office/cityservicesform.pdf (applicant must state whether street closure is needed, exact locations that will need to be designated as "no parking" zones, and whether and when police and/or tow truck services are requested).

[93] *See, e.g.*, City of New Orleans, *Guide to Film Production in New Orleans*, https://www.nola.gov/nola/media/One-Stop-Shop/Office%20of%20Cultural%20Economy/City-Of-New-Orleans-Film-Policies-and-Procedures.pdf at 2 (various types of film products "may" be required to participate in a City Hall production meeting).

[94] *See, e.g.*, FilmLA *Filming Surveys*, https://www.filmla.com/communities/filming-surveys/.

giving notice,[95] while others may require distribution or posting of signs or leaflets in advance of production.[96]

- **Deadlines**: Permit applications may be subject to strict filing deadlines that must be met to obtain the permit in time for production. Some jurisdictions even impose penalties or additional charges for late-filed applications.[97]

Best Practices for Filmmakers:

- Filmmakers should identify the precise location where each scene will be shot and determine whether those locations are on public or private property.

- Filmmakers should consider and be able to explain in detail the key logistical considerations for filming at each location for which permission will need to be obtained. Approximately how many cast/crew members will be present in total? What types of equipment will be used? If a public area, will a dedicated space be needed? What types of disruptions—such as loud noises, road blocks, or fire hazards—might arise?

- Filmmakers should identify the appropriate individuals, companies, or public offices from which they must seek permission before filming. For privately-owned land, they might have to conduct title searches or other research to determine the property owner. And for private or public lands, it may be necessary to obtain more than one level of permission. For example, both a city and a county may have their own separate permitting requirements.

- Private location agreements should clearly describe locations to be used and the manner and amount of time for which it will be used, reserve the filmmaker's rights to the film and to footage from the location, and set forth all expectations as to liability releases, indemnities, and insurance.

- Filmmakers should carefully review the applicable permitting requirements, paying careful attention to jurisdiction-specific requirements regarding insurance coverage, official supervision, and deadlines. They should start the permit application process well in advance of production, so as to ensure sufficient time both to obtain the permit and to address any concerns of local residents or public officials.

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[95] *See, e.g.*, FilmLA, *E-Notification Service*, https://www.filmla.com/communities/notification/.
[96] *See, e.g.*, City of Chicago, *Step 4 (of 4) Community Notification Leaflet*, https://www.chicago.gov/city/en/depts/dca/supp_info/permits.html#step4.
[97] *See, e.g.*, Philadelphia Parks & Recreation, *Media Permit* (Jan. 24, 2020), https://www.phila.gov/media/20200124144336/Media-permit-application.pdf (City of Philadelphia Parks Department requires permit application to be filed at least 10 business days before first day of shooting and imposes increasing penalty charges for applications filed less than 10 days before shooting and less than 3 days before shooting).

Music Licensing[98]

Filmmakers must also obtain appropriate permission to use music in films. The requirements for doing so arise from both the U.S. copyright laws and from contractual licensing agreements. This section discusses the different types of rights and licenses applicable to filmmaking as well as instances when licenses are not required, such as fair use and public domain music.

Copyrights in Music: To understand the licenses needed to use music in a film, it is helpful to understand the different rights, as an initial matter, that exist in music. Under the copyright laws, separate rights exist in both the **Sound Recording of a Song** and the underlying **Musical Composition**. The owners of both may not be the same; nor are they necessarily the original composers or performers of a song, as these rights are often sold to record companies or music publishing companies.

> *Example: Jimi Hendrix performed and recorded a cover version of "All Along the Watchtower," a song originally composed by Bob Dylan. Jimi Hendrix (or his record company) would own the copyrights in the recording of the song. Bob Dylan (or his publishing company) would own the copyrights in the underlying composition.*

Types of Music Licenses for Filmmaking: Different types of licenses may be needed depending on how a piece of music is used in the film.

A "Master Use License" grants the right to use a particular version or recording of the song (*i.e.*, a "master track"). This license must be obtained from the owner of the copyrights in the particular sound recording, often a record company. The owner is under no obligation to license the track, and the rates are negotiable.

A "Synchronization License" grants the right to use a musical track in conjunction with visual media, such as a motion picture, television, or animation. The synchronization license must ordinarily be obtained from the owner of the musical composition, often a publishing company. The owner is not required to grant a synchronization license and the rates are negotiable. Synchronization rights holders may also seek to dictate how their music may be used or portrayed in films. For example, the company which controls Jimi Hendrix's estate, which includes the copyrights to his music, refuses to license Jimi Hendrix music for films or other projects depicting alcohol or drug use, among other things.[99]

Sometimes a production of a film may require reproduction of a song rather than use of the original version. This situation would necessitate a "Mechanical License," which permits the reproduction and distribution of a copyrighted work. This license must

[98] It bears repeating that filmmakers should be ever-conscious about mitigating the risk of potential defamation, right of publicity, trademark, and copyright claims arising from their films. This warning is equally applicable to podcasters, as discussed later in the manual).

[99] *See* Experience Hendrix, L.L.C., *Company*, https://www.jimihendrix.com/experience-hendrix-llc/ (Under the heading "Quick-Link License Request Downloads," click the "download" button to the right to "Sync License" to download the synchronization license request form).

ordinarily be obtained from the owner of the published music. Certain mechanical licenses may be considered "Compulsory Licenses" that the owner is required to grant under the Copyright Act.[100] A copyright owner may not refuse to grant a compulsory license and the fees are ordinarily set by federal regulations.

Some examples are helpful to illustrate the differences between the types of licenses and when each is required.

> *Example 1: The movie "Fight Club" plays the original 1988 version of "Where is My Mind?" by the Pixies during the final scene. The filmmakers would have needed both a Master Use License to use the 1988 Pixies version of the song and a Synchronization License because the song is being used in conjunction with a motion picture.*
>
> *Example 2: The movie "Scott Pilgrim Versus the World" uses the song "Black Sheep" which was written by Metric, but did not use Metric's version of the song. Rather, the film's performers, who played the members of a band, The Clash at Demonhead, recorded their own rendition of "Black Sheep" which was then used in the film. Here, the master use license would not be required because the Metric sound recording was not used. Synchronization and Mechanical Licenses, however, would be required, because the song is being both reproduced and used in conjunction with a motion picture.*
>
> *Example 3: In the movie "A Clockwork Orange," the characters sing a few lines from the song "Singing in the Rain" during one of the scenes. This would not require a master use license to the original track, but would require a Synchronization License because the song is being used in conjunction with a motion picture. Here, again, the master use agreement would not be needed. The synchronization license is required because the song is set to the film. The Mechanical License is also required because the composition is being reproduced in the film, even if just a few lines.*

Blanket licenses: Blanket Licenses are essentially services provided by companies, such as BMI, ASCAP, and SESAC, that hold the copyrights to a large number of musical compositions. In effect, holding one company's blanket license permits the licensee to use any of the music in the licensor's catalog. Blanket licenses may be subject to different terms, such as the length of time covered or how much music may be used. For production companies that use a significant amount of music, blanket licenses can save time and be more cost effective.

Public domain music: The general rule under the U.S. Copyright Act is that copyrights exist for the life of the creator plus 70 years.[101] Some works, however, may be subject to different lifespans, depending on when they were created and whether their

[100] *See* 17 U.S.C. § 115.
[101] 17 U.S.C. § 302.

copyrights were ever renewed, among other factors.[102] But at a certain point, all music eventually becomes "public domain," meaning that it is no longer covered by copyright and may be freely used by the public without need of a license. Certain private web services permit users to run searches for individual works to determine whether their copyrights have expired.[103] Note, however, that just because a particular song may be in the public domain, certain versions or renditions of the song may still be under copyright.

> *Example 1: A scene in a film will involve one of the characters singing the song "Amazing Grace." The song is hundreds of years old and has long been in the public domain. No licensing will be required to use the song.*
>
> *Example 2: Instead of having one of the characters sing "Amazing Grace," the filmmaker wants to plan Alan Jackson's 2013 rendition of "Amazing Grace." Jackson is still alive, however, and as such the song is under copyright and will be for quite some time. The filmmaker would need to obtain appropriate licensing to use the song.*

Fair Use: Filmmakers may be able to use music without obtaining licenses under certain circumstances qualifying as "fair use." This matter is discussed in detail in Chapter II.[104] We note generally, however, for purposes of this section that often times obtaining a license will be the safest option for use of music in a film, regardless of the merits of a potential fair use claim. Litigating or otherwise resolving a dispute with a copyright holder regarding whether fair use applies in a particular case—even if the filmmaker is ultimately successful—can involve substantial inconvenience and costs that far outweigh the cost of simply obtaining the license in the first instance.

Best Practices for Music Licensing in Films:

- ❖ Filmmakers should determine what music they will need and determine whether that music is under copyright or within the public domain.
- ❖ For music under copyright, filmmakers should identify how each song will be used: Will the original track be used? Will a cover version of the song be used? Will a cover version be created for the film specifically? The answers to these questions will dictate what types of licenses will need to be procured. If in doubt, consult with a lawyer specializing in music or entertainment law. Filmmakers should determine who owns the rights to each song and ensure that they are obtaining licenses from all of the relevant owners. Many major music publishers, such as ASCAP or BMI, provide searchable databases that can help to identify all rights owners and their contact information.
- ❖ If using a blanket license, filmmakers should take care to ensure that all songs they seek to use are in fact covered by the blanket license.

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[102] 17 U.S.C. § 304.
[103] *See* Durationator, *For artists, filmmakers, musicians, scholars, and others*, https://www.durationator.com/for-the-artist-in-all-of-us.
[104] *See supra* at page 12.

C. *Attribution*

"**Attribution Rights**", which some countries recognize broadly, in effect provide that no matter who is performing a copyrighted work, say, under license, the author of the work has a right to be named as the author or creator. Yet, in effect, U.S. law, and ultimately U.S. courts are unlikely to recognize attribution rights of filmmakers under the Copyright Act.[105] [106]

Accordingly, attribution rights for contributions to a motion picture are almost always creatures of contract. In other words, because these rights are not created under the law, they generally come into existence because both parties agree on who will receive credit. Attribution rights may be the subject of union contracts for directors, performers, or crew members. The **Screen Actors Guild Basic Agreement**, for example, requires that the cast of characters be listed at the end of the motion picture, naming the performer and the role played.[107] The names generally must be listed in the same size and style, and be readily readable.[108] The producer generally has control over the arrangement, order, and formatting of the credits, as well as the selection of who will receive credit; however, the Basic Agreement requires that motion pictures with a cast of fifty or less give credit to all performers and that motion pictures with more than fifty performers give credit to no less than 50 performers.[109] The Basic Agreement also permits the producer to negotiate individualized crediting arrangements with particular cast members, as to size, description, and placement of credit.[110] Producers should ensure, however, that any individual agreements as to credit do not come into conflict.

> *Example 1: A producer wants to hire a particular performer for a leading role in a film. As a condition of agreeing to act in the film, the performer requires that the producer agree to give a "Single Card Credit" at the end of the film, where the performer's name is listed on the screen by itself and before the rolling of the credits for the full cast. The producer wants this particular performer for the film, and is willing to accept this condition.*
>
> *Example 2: A producer agrees to give the director of the film a "single card" credit at the end of the film, but also agrees that the director's single card credit will be shown first, and before any other credits appear. Because the producer has agreed to show the director's credit first, he may*

[105] *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82-83 (2d Cir. 1995) (The Berne Convention's "provisions are not enforceable through any action brought pursuant to the Convention itself, and neither adherence to the Convention nor the implementation legislation expands or reduces any rights under federal, state, or common law to claim authorship of a work").
[106] It is also unlikely that any additional attribution requirements could be created under state law and without an amendment to the federal Copyright Act. In general, state governments' attempts to enact laws supplementing the rights created under the Copyright Act are barred by the Copyright Act's preemption provision. *See* 17 U.S.C. § 301.
[107] SAG-AFTRA, *Basic Agreement* (2014) § 25(A), https://www.sagaftra.org/files/2014_sag-aftra_cba_1.pdf.
[108] *Id.*
[109] *Id.* §§ 25(A)-(B).
[110] *Id.* § 25(C).

not enter into an agreement with another crew or cast member for the same film to give first credit at the end of the film.

Best Practices for Attribution in a Film:

- ❖ Filmmakers should determine their own preferences for the giving of credit in the film, including who will receive credit and the way in which credits will be displayed. At the same time, filmmakers should determine whether these preferences are affected, if at all, by requirements under any applicable union agreements for cast or crew members.

- ❖ Attribution is a common area for negotiation. Accordingly, filmmakers should be prepared to discuss individualized credit arrangements with key cast and crew members and should take care to ensure that all of these agreements can be honored.

- ❖ Producers should also address, to the extent possible, attribution for other individuals or organizations aside from members of the cast and crew. For example, if an individual gave permission for filming on his or her property or provided special items for use in making the film, that individual may also wish to receive credit for his or her contribution. The type and manner of such credit should be carefully spelled out in the applicable written agreement with this individual. It may be sufficient to just list the individual's name at the end of the credits as part of a list of people receiving a "special thanks." On the other hand, the person might be expecting a more personalized credit that indicates his or her contribution (*e.g.*, "on-set locations provided by …"). These expectations should be discussed and negotiated from the outset of engaging the individual's contribution to the film.

D. *Distribution*

For most films, exercise of **Distribution Rights** are the primary vehicles for gaining access to audiences and generating revenue. And because independent filmmakers generally lack the resources to conduct mass distribution of their work, they usually seek to enter into distribution agreements with distribution companies. By contrast, major production companies (*e.g.*, Warner, Universal, Disney, Fox) typically have their own distribution departments and thus will not need to engage a third-party distributor. But many of these companies have and will enter into distribution agreements for films made by smaller or independent production companies.

In addition to distributing the film, distribution companies will also generally be involved in marketing, which can be an extensive undertaking for some films. Marketing might include production of commercials and trailers, coordinating promotional events, entering into partnerships or other ventures, creating and distributing posters, and developing the cover and packaging for home videos.

Distribution agreements. Because distributors play such an integral role in the life cycle of a film, the terms of the agreement between the distributor and the production

company are of particular importance to filmmakers. While there are a variety of terms that can be included in these agreements, we discuss some of the more common and consequential terms of which filmmakers should be aware:

- Territory: In what locations will the distributor be responsible for distributing and marketing the film? Many distributors will seek the right to distribute the film "throughout the world." But some distributors may only seek to do so in certain countries.

- Media: In what forms of media will the film be distributed? These might include distribution to movie theaters, home video (DVD, Blue Ray, etc.), network television, paid television (*e.g.*, HBO or Showtime), or Internet streaming.

- Exclusivity: Is the distributor seeking "exclusive rights" to distribute and/or market the film? If the producer grants these rights he or she will not be permitted to engage other distributors. A distributor may seek exclusive rights to distribute in certain media or in certain territories, but would be advised to agree to non-exclusive distribution rights in others.

- Term: How long will the distributor have the right to distribute the film? The agreement will generally have just one term for all types of distribution in all areas, but a distributor might be willing to agree to different terms for different territories or media, or different terms during which it will have exclusive and non-exclusive distribution rights.

- Fees: Distributors will likely charge distribution fees equal to some percentage of revenues. Filmmakers should be aware that the percentages may differ depending on the media and the territory. Similarly, filmmakers should be aware of the difference in granting a percentage of gross revenues as compared to revenues less expenses. Of course, the distribution fee will be greater—potentially much greater—if it is a percentage of revenues before deduction of expenses.

- Recoupment of expenses: Does the agreement permit the distributor to take an additional share of the film's revenues to cover marketing and other expenses? This term may be important, particularly where the distributor is also charging significant fees. Because recoupment of expenses out of the film's revenues would not be a fixed percentage of revenues, inclusion of this term may result in there being no proceeds left for the production company, depending on the film's revenues and the amount of the marketing costs.

- Consultation: Filmmakers will sometimes be able to retain a right to consult with the distributor regarding the marketing and distribution strategy for the film. The extent of these rights will depend on how the term is drafted; however, ordinarily they do not extend beyond mere consultation, and the distributor will have the final say on marketing and distribution decisions.

Best Practices for Distribution Agreements:

- ❖ While it may be difficult for independent filmmakers to negotiate with distribution companies, the filmmaker should seek expressly to reserve any rights not being sought by the distributor. For example, distributors may have no interest in the distribution rights to a soundtrack of original music in the film, dramatic on-stage performances of the film, sales of merchandise or video games based on the film. Companies engaged in distribution over the Internet may have no need for the rights to distribute home videos. Where possible, the filmmaker should expressly reserve these rights in the distribution agreement.

- ❖ Filmmakers should try to retain the rights to future creative works based on the film, such as sequels, prequels, remakes, or television series.

- ❖ Filmmakers should clarify that any rights granted to the distributor will revert back to the filmmaker after the expiration of any agreed-upon term.

- ❖ If possible, filmmakers should try to negotiate limits, to the best extent possible, on distribution fees and recoupment of costs. For example, allowing recoupment of costs only up to a certain amount, will help to ensure that cost recoupment does not cut too significantly into the share of revenue to which the filmmaker is entitled to receive.

- ❖ Similarly, filmmakers should try to obtain some guaranteed percentage of revenues in the distribution agreement.

- ❖ Filmmakers should also be mindful of any pre- or post-production agreements into which they may have entered with respect to distribution rights. For example, as discussed above, some films are financed through the sale of future distribution rights. If this is the case, and depending on the terms of the financing agreement, the filmmaker may need to cede authority to the investor to shop the film to prospective distributors, select which distributor to engage with, and/or negotiate the terms of the distribution agreement.

Promotion and Screening

Filmmakers will often enter into short-term or one-off arrangements with individuals or organizations to allow pre-distribution screening of a new film. This is often done before the filmmaker has secured a distribution deal and when he or she is seeking to generate interest in the film. The purpose of these types of screenings is usually not to obtain revenue, but instead to promote the film and, hopefully, solicit positive reviews and feedback. Still, filmmakers must take caution when entering into these arrangements, even where they involve little or no payment.

Screening agreements. Screening agreements should provide only a very narrow and carefully specified license to the film and should take precautions to ensure the film will not be lost, transferred, or "leaked." We discuss some key provisions for screening agreements below.

- ❖ Reservation of rights: Filmmakers should ensure that the agreement expressly reserves all rights in the film. The screening agreement grants only a *license*—not any rights—and screening agreements, which may need to be drafted by the filmmaker, should not confuse these terms.

- ❖ Description of the license: How and under what circumstances will the filmmaker permit screening of the film? A screening agreement for a theater may, for example, limit screening to only 5 exhibitions within one week for an audience of no more than 50 people per exhibition at only the designated theater location. Or, perhaps, the filmmaker has been invited as a guest on a radio or television show to talk about the new film and would like to offer a screening copy to the host of the show or other individuals conducting the interview. In that case, the screening agreement may allow unlimited exhibitions, but allow only viewing in the licensee's home and with members of the licensee's immediate family.

- ❖ Non-transferability: The filmmaker should ensure that the licensee expressly agrees in writing not to transfer or sublicense the license granted under the agreement. The licensee should expressly agree not to copy, televise, stream, "burn," "rip," or otherwise electronically duplicate or transmit the film. Similarly, the licensee should expressly agree not to sell, loan, donate, gift, or otherwise transfer the physical copy of the film provided for screening. The filmmaker may even want to require the licensee to return the physical copy either in-person or by mail after the screening is concluded.

- ❖ Additional precautions: The filmmaker may also seek to require the licensee to "use best efforts" or "take all necessary steps" to prohibit use of any recording or photographic devices during screenings of the film. If these provisions are included, it may also make sense to require the licensee to give prompt notice to the filmmaker if he or she learns of any unauthorized copying, recording, or other forms of duplication of the film.

- ❖ Costs/fees/attorneys fees: If a screening copy of a film is compromised, resulting in unauthorized distribution of the film, there will likely be legal recourse available to the filmmaker, such as to bring a claim against any infringers for copyright infringement, or potentially even theft. Because legal action can be expensive, the filmmaker may consider trying to shift these costs to the licensee, if the licensee is willing to agree.

Festival agreements. Agreements to exhibit a new film at a film festival will likely contain roughly terms similar to those listed above. However, the film festival may simply have the greater leverage than, for example, an ordinary movie theater. Accordingly, film festival screening agreements may be drafted in the first instance by the festival's promoters, contain terms more favorable to the promoters, and may not be subject to negotiation by the filmmaker. Filmmakers should nonetheless carefully review festival screening agreements to ensure they are comfortable with the terms and are not bargaining away more than necessary to show their film at a festival.

Best Practices:

- ❖ Filmmakers should ensure that, at a minimum, screening agreements grant only a license—and not any rights to the film—and make clear that the license is limited to screening purposes only. Ideally, a screening agreement will carefully limit the screening of the film as needed under the circumstances.

- ❖ Filmmakers should take all possible precautions to ensure that no unauthorized distribution will arise from a screening arrangement. Ideally, filmmakers should seek to include provisions, as discussed above, that provide additional protections against piracy. However, and regardless of the contractual language, filmmakers should carefully research any prospective screening licensees to determine whether they are reputable and responsible.

Where unauthorized copying or distribution occurs, the filmmaker should try to determine how this happened and who is responsible. The filmmaker should also consult with counsel to evaluate whether it makes sense to take legal action, either to enjoin ongoing infringement, to seek money damages, or both.

- *Podcasts*

The Nature of a Podcast

To the uninitiated a podcast is like a fancy talk radio program. As one source explains: "[A podcast] is a series of spoken word, audio episodes, all focused on a particular topic or theme, like cycling or startups. You can subscribe to the show with an app on your phone and listen to episodes whenever you like on your headphones, in the car or through speakers."[111] Although most podcasts are audio only, there may be video podcasts as well. Podcasts implicate some of the same considerations as films,[112] but also present their own unique concerns because they entail advertisements and endorsements.

Advertisements and Endorsements

Many podcasters rely exclusively on advertisements to generate revenue and new listeners. Often, advertisements are presented at several points during a single podcast episode, and they are frequently woven seamlessly into the content of the program. Podcasters should be aware that the Federal Trade Commission ("FTC" or "Commission"), a federal agency that focuses on consumer protection and prevention of deceptive and unfair business practices, has significant enforcement powers over

[111] https://www.thepodcasthost.com/listening/what-is-a-podcast/

[112] Because podcasts may be downloaded and re-played on demand at any time, securing permission to use music in a podcast episode implicates many of the same issues associated with obtaining permission to use music in films, including the right to reproduce and distribute that music. Likewise, the fair use principles and best practices in this manual concerning films apply with equal force to podcasts. Podcasters looking to play any form of music on a program might consult this comprehensive discussion by David Oxenford,. *See* Amplifi Media, Why Can't Music Be Played in Podcasts? (May 25, 2017), https://www.amplifimedia.com/blogstein/2017/5/24/why-cant-music-be-played-in-podcasts?mc_cid=05e8a614b9&mc_eid=aac5713446.

wrongdoers, including the levying of, fines and other civil penalties.[113] This power applies to advertisements on television, radio, and, yes, advertisements presented on podcasts.

What does this mean for podcasters? Hosts, producers, and all those responsible for the content of any given podcast have a duty to screen advertisements for deceptive or misleading material. The FTC has issued a series of practical and helpful tips to spot fraudulent advertising, including screening advertisements that include frequent "buzz words" (among them, "Get rich quick!", "Anybody can do it!", and "You Purchase at Wholesale, Then Resell at a Huge Profit!"). The Commission also warns those involved in making podcasts happen to exercise caution when an advertiser refuses to answer questions or declines to make changes to a given advertisement in response to the podcaster's concerns or instinctive feelings about the advertisement.[114]

Likewise, the FTC enforces misleading *sponsorships*. Often, an advertiser will pay the podcast host to endorse a given product on the air. So long as the podcast host makes clear that he, she, or it has been paid to endorse the product, the host's endorsement of that product should be acceptable. Hosts run into trouble, however, when making an endorsement that is dishonest or misleading. For example, the FTC cautions that "if there's a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed."[115] Likewise, if the host has received compensation to endorse a product, or if the host is endorsing a product owned by a family member, the host should clearly state these facts and disclose any such pertinent relationships in the context of making an endorsement. All of these rules are intended to benefit consumers; after all, wouldn't we all want to know whether, when a friend recommends that we use a particular product, the friend was paid to make that endorsement by the company that manufactures the product?

By taking the FTC's guidance seriously, podcasters can protect their customers, their reputation, and avoid potential scrutiny from a federal agency that has the authority to punish podcasters for deceptive or misleading advertisements and endorsements.

Podcasts Are Forever

Unlike a traditional radio program or a segment on the evening news, podcasts are immediately downloadable and are preserved on the Internet forever. This distinction means less in the current digital landscape, where entire news broadcasts and other segments are often archived and available for streaming subsequently. However obvious this guidance may be, podcasters should not take for granted the fact that their programs

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[113] Federal Trade Commission, Enforcement, https://www.ftc.gov/enforcement.
[114] Federal Trade Commission, Screening Advertisements: A Guide for the Media, https://www.ftc.gov/tips-advice/business-center/guidance/screening-advertisements-guide-media#Introduction.
[115] Federal Trade Commission, The FTC's Endorsement Guides: What People Are Asking, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#ftcactapply.

can be downloaded and streamed on a variety of devices around the world at any time. Once released, a podcast is preserved forever; indeed, even if the podcaster pulls a given episode such that it cannot be downloaded on a going-forward basis, it may be impossible to guarantee that the episode has vanished completely from the digital world. Accordingly, the guidance in this manual designed to mitigate the risk of potential defamation, right of publicity, trademark, and copyright claims applies with full force to podcasts.

CHAPTER IX STANDARD PROVISIONS IN COMMERCIAL CONTRACTS

Parties to a publishing agreement, an agreement in the filmmaking industry, or even an agreement between a podcast producer and host should be familiar with basic provisions are common to most commercial contracts. This chapter discusses some of the most important of these.

Dispute Resolution

It is advisable for the parties to agree on the form that resolution of any contractual dispute they have should take. For example, some commercial contracts are subject to binding arbitration. A typical arbitration provision might contemplate that a party objecting to the opposite party's conduct first serve notice upon the opposite party; that the two parties might in good faith to try to resolve their differences; and that binding arbitration occur only if the parties are unable to resolve their differences. The arbitration clause might read as follows:

> In the absence of a resolution, either party may request in writing that the controversy or claim shall be settled by binding arbitration before a single arbitrator [or a panel of three arbitrators, one selected by each party and the third agreed upon by both parties] in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The parties must agree on the selection of an arbitrator [or arbitrators] within ten (10) days of the request for arbitration or accept a selection by the AAA based on their selection process. No payment of any award or posting of any bond of any kind whatsoever is required to be made or posted until such controversy or claim is finally determined.

The parties should agree upon the location for the arbitration. Generally, each side will pay its own costs although the arbitrator may determine that the losing party pays the costs and attorneys' fees of the prevailing party.

As an alternative to binding arbitration, an agreement may be silent on forms of dispute resolution, or may state that either party might pursue injunctive relief against the other.

Independent Contractor Status

Given that the journalist, filmmaker or other author generally wants to maintain ownership rights in his or her work, it is important to maintain a legal separation between the contracting parties. Hence, most agreements contain this type of boilerplate clause:

> Independent Contractor. The relationship of the parties is that of independent contracting parties, and nothing in this Agreement, or in the relationship contemplated by this Agreement, shall be deemed to make the parties in an employment relationship or to make either party an agent, joint venturer or partner of or for the other party.

Force Majeure

The purpose of a Force Majeure provision is to excuse or postpone the arties' performance of the agreement because of some extraordinary event, such as a war, strike or epidemic. It is interpreted according to the law of the contract (the governing law provision). A typical Force Majeure provision might read:

> The performance of this Agreement by either party is subject to acts of God, war, government regulation or advisory, disasters, fire, accidents or other casualty, strikes or threat of strikes, civil disorder, acts and/or threats of terrorism, or curtailment of transportation services or facilities, or similar cause beyond the control of either party making it illegal, impossible or impracticable to fulfill their mutual obligations under this Agreement. Either party may suspend its obligations under this Agreement with no liability or obligation to the other party if such obligations are delayed or prevented by any of the above events to the extent such events are beyond the reasonable control of the party whose reasonable performance is prevented and for the period that such performance is prevented.

Of course, in light of the present pandemic, it would be wise to add a specific mention to COVID-19 into any Force Majeure clause.

Other Provisions

Although not all-inclusive, this is a list of other standard provisions that appear in most commercial contracts, and that the author would expect to see:

- Governing Law and Venue: The contracts should specify the law of the state that governs its terms. Because many journalists and filmmakers work internationally, it might also be wise to provide that U.S. law governs. "Venue" refers to the place in which a lawsuit may be brought. If the author has a strong desire to litigate in a certain place (and absent an arbitration clause), the contract might specify that the parties consent to litigation in the courts of {X} state.

- ❖ Modification: The contract should specify that it may not be modified except in a writing executed by both parties.

- ❖ Severability: The idea behind severability is that, if one clause to an agreement is invalid, it will not adversely affect or nullify the other clauses. For example, this clause might read: "Any provision of this Agreement that is found to be prohibited or unenforceable in any jurisdiction shall be severed and the remainder of the Agreement shall remain in full force and effect."

- ❖ Survivability: A survivability clause ensures that certain enumerated provisions remain in effect after an agreement is terminated. Typically, representations, warranties and indemnities survive.

- ❖ Binding Effect: This basic provision states that the terms of the agreement are binding upon the parties "successors and assigns."

- ❖ Integration: This is often the final clause in an agreement. It states that the agreement represents the complete agreement of the parties and supersedes any of their prior understandings.

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APPENDIX A

PUBLISHING AGREEMENT

This agreement ("Agreement"), effective as of the date of the last party to sign (the "Effective Date"), is between [Name of Publisher] ("Publisher"), located at [street address] and [Name] ("Author"), located at [street address].

WHEREAS, Author has agreed to prepare [an article/series of articles/blog/[other manuscript] for publication by Publisher; and

WHEREAS, the parties have agreed that Publisher is willing to publish that article/series of articles/blog/[other manuscript] on the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the foregoing and in further consideration of the premises as hereinafter set forth, the parties agree to the following terms and conditions:

ARTICLE I GRANT OF PUBLISHING RIGHTS

I.1 Author agrees to prepare [an article/series of articles/blog/[other manuscript] about [describe subject matter of article/blog] (the "Work"), which Work shall be between _____ and _____ words in length.

I.2 Author grants to Publisher the non-exclusive right and license to print, publish, market, and sell (including the right to permit others to sell) the Work or any portion thereof in all languages worldwide, in all manner and media, in all forms now existing or hereinafter created.

I.3 This license grant shall be for the period of [one (1) year] from the Effective Date recited above (the "Term").

ARTICLE II PAYMENT TO AUTHOR

Publisher shall pay to Author [amount of payment] (the "Payment") in consideration of Author's research and preparation of the Work. Subject to Article III herein, Publisher shall make this payment within ten (10) business days of the Delivery Date. Publisher shall pay Author by check made payable to [Author's name], sent to Author at the address recited in the preamble.

ARTICLE IIIDELIVERY and PREPARATION OF THE WORK

III.1 Author shall deliver the Work to Publisher on or before **[**date**]** (the "Delivery Date"). In the event that Author fails to provide the Work to Publisher by the Delivery Date, Publisher may either extend the Delivery Date to a new date set by mutual

agreement of the parties or Publisher may terminate this Agreement. If Publisher elects to terminate this Agreement, Author shall refund to Publisher any compensation that Author has received from Publisher as an advance within thirty (30) days of the termination of the Agreement.

III.2 Publisher agrees to return a copy of the edited Work to Author for Author's review. Author shall provide comments and corrections on the edited Work, if any, within ten (10) business days of receipt of same, and Publisher shall incorporate any such changes into the Work. If Author does not return proofs within this period, Publisher shall be free to proceed with publication of the Work, and any expenses that Publisher incurs for errors in the Work shall be deducted from payments made to Author or refunded by Author to Publisher from such payments.

III.3 Publisher shall be responsible, at its own expense, for correcting any errors made by Publisher or by others involved in the preparation of the page proofs.

ARTICLE IV COPYRIGHT IN THE WORK

IV.1 Publisher hereby acknowledges that Author owns all proprietary rights, including without limitation all copyrights, in and to the Work, and Publisher shall have no right to exploit the Work, other than the rights specifically granted herein. All rights not specifically granted herein are reserved to Author.

IV.2 [Publisher may, but has no obligation to, apply for copyright registration of the Work in Author's name in the United States (unless otherwise stipulated in writing), and in other countries, as may be deemed necessary or desirable by Publisher, at Publisher's sole expense. Author shall cooperate in securing and preserving any U.S. copyright registration for the Work that Publisher seeks.] [Alternative: Author may, but has no obligation to, apply for copyright registration of the Work in Author's name in the United States (unless otherwise stipulated in writing), and in other countries, as may be deemed necessary or desirable by Author, at Author's sole expense. Publisher shall cooperate in securing and preserving any U.S. copyright registration for the Work that Author seeks.]

IV.3 [Publisher/Author] may, but has no obligation to, print or cause to be printed or displayed on the Work the following copyright notice: © [year of publication] [Name of Author].

ARTICLE V REPRESENTATIONS AND WARRANTIES

V.1 Each of the parties represents and warrants that it has full power and authority to enter into this Agreement and to grant the rights granted herein.

V.2 Author represents and warrants that, to [his/her] knowledge, the Work is original with Author and not in the public domain.

V.3 Author represents and warrants that [he/she] is the sole owner of the Work or has obtained the necessary permissions, rights, licenses, releases, or consents to any

portion of the Work not owned by it, along with the right and license to authorize Publisher to use, and to allow others to use, the Work as provided herein.

V.4 Author represents and warrants that, the best of [his/her] knowledge and belief, the Work does not infringe upon or otherwise violate any copyright, trademark, trade name, trade secret, patent, or any proprietary right of any person, firm or corporation, and that the Work contains nothing slanderous, libelous or defamatory, nothing that invades any person's right of privacy, and nothing that is otherwise unlawful.

V.5 Publisher represents and warrants that, the best of its knowledge and belief, its publication as a whole in which the Work will be incorporated will not infringe upon or otherwise violate any copyright, trademark, trade name, trade secret, patent, or any proprietary right of any person, firm or corporation, and that such publication will not contain slanderous, libelous or defamatory content or any content that invades any person's right of privacy, and nothing that is otherwise unlawful.

V.6 Any rights in the Work not granted to Publisher hereunder are reserved to Author.

V.7 The parties' representations and warranties as set forth in this Article V shall survive the termination or expiration of this Agreement.

ARTICLE VI INDEMNIFICATION

VI.1 Author shall indemnify and hold harmless Publisher, its officers, employees and agents from and against any and all losses, costs, claims, actions, suits, proceedings, damages, liabilities and expenses (including reasonable attorneys' fees), judgments, settlement payments and fines (collectively, "Losses") sustained, incurred, paid or required to be paid, directly or indirectly caused by or arising out of (a) the inaccuracy or breach by Author of any representation or warranty contained in Article V herein; and (b) the breach by Author of any obligation to be performed by [him/her] contained in this Agreement.

VI.2 Publisher shall indemnify and hold harmless Author from and against any and all Losses sustained, incurred, paid or required to be paid, directly or indirectly caused by or arising out of (a) the inaccuracy or breach by Publisher of any representation or warranty contained in Article V herein; and (b) the breach by Publisher of any obligation to be performed by it contained in this Agreement.

VI.3 The indemnifying party ("Indemnitor"), at [his/her/its] sole expense, shall assume the defense of the indemnified party ("Indemniteee") against any Losses incurred by the Indemnitee. Notwithstanding the assumption by Indemnitor of the defense thereof, the Indemnitee may participate in any such defense with counsel of [his/her/its] own choosing at the Imdemnitee's expense. Author shall have the right, upon receipt of the Publisher's written consent, to settle any matter for which a claim for indemnification is made in any actions brought by any third party.

ARTICLE VII ATERM AND TERMINATION

VII.1 Author may terminate this Agreement in the event that:

a) Publisher permanently discontinues its publishing operations with no intent to resume those operations as a resolution of Publisher's bankruptcy or dissolution, upon which event all rights in the Work shall revert to Author;

b) in Author's opinion the publication which the Work will appear violates the right of privacy of any person or contains defamation, libel, slander, or any other matter that Publisher deems may be subject it to any claims from any third party; or

c) Publisher breaches any of the representations and warranties set forth in Article V.

VII.2 Publisher may terminate this Agreement in the event that:

a) Author does not provide the completed Work to Publisher within the Delivery Date as required by Section 3.1 herein;

b) in Publisher's opinion the Work violates the right of privacy of any person or contains defamation, libel, slander, or any other matter that Publisher deems may be subject it to any claims from any third party; or

c) Author breaches any of the representations and warranties set forth in Article V.

ARTICLE VIII BINDING EFFECT; ASSIGNMENT

This Agreement shall inure to the benefit of and be binding upon the parties and their successors, heirs, administrators, and assigns. Neither Publisher nor Author shall assign his, her, or its rights pursuant to this Agreement without prior written consent of the other party.

ARTICLE IX ENTIRETY CLAUSE, MODIFICATIONS, AND AMENDMENTS

This Agreement constitutes the entire agreement by and between the parties regarding the subject matter herein. Statements or representations not included in this document shall not be binding upon the parties. No modifications or amendments of any of the terms or conditions of this Agreement shall be valid or binding unless made in writing and signed by both parties.

ARTICLE X NOTICES OR OTHER COMMUNICATIONS

All notices or other communications pursuant to or in connection with this Agreement shall be in writing and shall be deemed given upon delivery, with return receipt acknowledged by electronic mail as follows:

If to Publisher:

Attention: [Name/Street address/Email address]

If to Author:

Attention: [Name/Street address/Email address]

ARTICLE XI SEVERABILITY

In the event that any provision hereof shall be deemed in violation of any law or held to be invalid by any court in which this Agreement shall be interpreted, the violation or invalidity of any particular provision shall not be deemed to affect any other provision hereof, but this Agreement shall be thereafter interpreted as though the particular provision so held to be in violation or invalid were not contained herein.

ARTICLE XII ENFORCEABILITY

The failure of either party to enforce any provision of this Agreement or to exercise any remedy available under this Agreement or in accordance with law upon the other party's breach of the terms, covenants and conditions of this Agreement or the failure to demand the prompt performance of any obligation under this Agreement shall not be construed as a waiver or limitation of such right or remedy, or the party's right subsequently to enforce and compel strict compliance with every provision of this Agreement.

ARTICLE XIII ARTICLE XIII APPLICABLE LAW

This Agreement shall be governed by and construed in accordance with the laws of [specify jurisdiction], without regard to conflicts of law principles. Proper venue for any legal proceeding regarding this Agreement shall be in[specify jurisdiction].

ARTICLE XIV HEADINGS

The headings and marginal numbers in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

[PUBLISHER'S NAME]

By: _____
[Type Author's Name]
Date: _____

By: _____
Title: _____
Date: _____

APPENDIX C

ASSIGNMENT

WHEREAS, _____, a resident of [address] ("Author"), at the expense and direction of_____, which has its principal place of business at [address] ("Assignee"), has developed the work entitled _____ for Assignee's use (the "Work"); and

WHEREAS, the parties wish to verify that Assignee owns all rights, including all copyrights, in the Work.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged:

1. Author hereby represents and warrants that it created the Work independently, and that, to the best of Author's knowledge and belief, the Work does not and will not infringe any copyright rights, trademark rights, rights of publicity, or any other rights of any third party, and shall not contain any material that is slanderous, libelous or defamatory.

2. Author hereby irrevocably assigns to Assignee, and agrees that Assignee shall be the sole and exclusive owner of, all right, title and interest in and to the Work, including the copyrights and all other rights of any kind that Author owns at anytime, that may be secured under the laws now or hereinafter in effect in the United States or any other country, and any and all claims, demands and causes of action arising out of or related to infringements of the copyrights or other proprietary rights in the Work that have already occurred or that may occur at any time. No rights are reserved by the Author.

4. Author hereby waives any moral rights that it might have in the Work. No rights are reserved by Author.

5. Author shall execute any documents necessary to manifest this agreement.

_____
Name

_____
Title

_____
Date

APPENDIX B

Release

[Date]

1. I hereby give permission to [Name of Person/Company], its employees and agents to use (including without limitation to reproduce, distribute, display and perform) and to adapt video footage and photographs containing my image, voice, likeness, biography (as supplied by me), name and statements for any purpose, in any and all manner and media (including without limitation print, video, television, radio and electronic media) and in all forms throughout the world, whether now known or hereafter existing. I grant this right in perpetuity on a nonexclusive basis. I have not granted to anyone else rights inconsistent with the rights that I grant to [Name of Person/Company] in this Release.

2. I hereby release [Name of Person/Company], [his/her/its] agents, officers, directors, employees and assigns from and against any and all demands, liabilities, claims, costs and expenses which I have or may have arising in connection with the use of my image, voice, likeness, biography, name and/or statements, including but not limited to claims for invasion of privacy, defamation, libel, slander, or any other cause of action.

3. The rights I am granting are granted for good and valuable consideration, receipt of which is hereby acknowledged.

4. This permission constitutes the entire understanding between [Name of Person/Company] and myself with respect to the subjects discussed in this Release, and may not be amended except by a writing signed by both [Name of Person/Company] and myself.

By: _____

_____

Print Name

_____

Date

[*If a minor is issuing release, parent or guardian must sign*]

APPENDIX D

DISTRIBUTION AGREEMENT

[Date]

This agreement ("**Agreement**"), effective as of the date of the last part to sign (the "**Effective Date**"), is between [Name of Distributor] ("**Distributor**"), located at [Street Address] and [Production Company] ("**Licensor**").

WHEREAS, **Licensor** has produced the motion picture entitled [Title of Film] (the "Picture"); and

WHEREAS, **Distributor** is willing to distribute and promote the **Picture** pursuant to the terms and conditions set forth below.

NOW, THERFORE, in consideration of the foregoing and in further consideration of the premises as hereinafter set forth, the parties agree to the following terms and conditions.

ARTICLE I LICENSE

I.1 **Licensor** irrevocably grants **Distributor** the [non-exclusive] [exclusive] license to distribute the **Picture**, including, without limitation: the right under to authorize, license, and sublicense others to exhibit, distribute, transmit, reproduce, manufacture, publicly display, project, advertise, promote and otherwise exploit the **Picture** in the "**Licensed Media**" (as defined herein), throughout the "**Licensed Territory**" (as defined herein) for a period of time equal to the "**License Period**" (as defined herein) (collectively, the "**Granted Rights**").

I.2 The "**Licensed Media**" shall mean: theatrical and non-theatrical exhibition; ancillary exhibition (e.g., airlines, ships, and military bases); all forms of home video (including for-sale and rental videocassettes, DVDs, "Blue Ray", and CD-ROMs); all forms of televised exhibition (including but not limited to free television, basic and pay cable, pay per view, and all forms of on-demand media); all means of digital exhibition (including broadband, mobile, internet streaming, and on-line transmission and delivery.

2..1 The "**Licensed Media**" shall not include: stage performance, radio transmission, sound recordings of the film soundtrack.

2..2 The "**Licensed Media**" shall not include any sequels, prequels, "spin-offs," episodic series, television series, miniseries in connection with the **Picture**.

I.3 The "**Licensed Territory**" shall mean: The world.

I.4 The "**License Period**" shall mean the period of time to commence on the date of the **Effective Date** and continuing for seven (7) years therefrom.

ARTICLE II PARTICIPATION IN NET RECEIPTS

II.1 **Distributor** agrees to pay to **Licensor** one hundred percent (100%) of "**Net Receipts**" as defined herein.

II.2 "**Net Receipts**" shall mean: **Gross Receipts** (as defined herein) after deduction of (i) payment to **Distributor** of the **Distribution Fee** (as defined herein); and (ii) **Reimbursable Costs and Expenses** (as defined herein) incurred by the **Distributor**.

II.3 "**Gross Receipts**" shall mean: One-hundred percent (100%) of all non-refundable amounts actually received by or credited to **Distributor** from the exercise of the **Granted Rights** after deduction for all refunds, credits, discounts, allowances, rebates, set-offs, and returns.

3..1 If the **Picture** is licensed for distribution as part of a package or library including other programming where proceeds are not received for individual titles or programs contained therein, the **Distributor** shall allocate a share of gross receipts derived therefrom based on the **Distributor**'s good faith judgment as to the fair market value or usage of the **Picture**, as the case may be. The share of gross receipts defined in the foregoing sentence shall be included in **Gross Receipts** for purposes of this agreement.

II.4 "**Distribution Fee**" shall mean an amount equal to:

a. ___[35%]__ of gross receipts from the exercise of **Granted Rights** with respect to distribution in the form of theatrical and non-theatrical exhibitions; plus

b. ___[35%]__ of gross receipts from the exercise of **Granted Rights** with respect to distribution in the form of home video media; plus

c. ___[35%]__ of gross receipts from the exercise of **Granted Rights** with respect to distribution in the form of digital media; plus

d. ___[35%]__ of gross receipts from the exercise of **Granted Rights** with respect to distribution in the form of television media; plus

e. ___[35%]__ of gross receipts from the exercise of **Granted Rights** with respect to distribution in the form of ancillary exhibitions.

II.5 "**Reimbursable Costs and Expenses**" shall mean the lesser of either:

a. The total amount of all costs and expenses incurred by the **Distributor** in connection with the promotion, distribution, and exploitation of the **Picture** (the **"Total Costs and Expenses**")

OR

b. An amount equal to ___[15%]__ of gross receipts from the exercise of **Granted Rights.**

ARTICLE III PAYMENT AND ACCOUNTING

III.1 Commencing on the first day of the first calendar quarter following the first calendar quarter in which **Gross Receipts** are received by **Distributor**, and continuing on the first day of each subsequent quarter thereafter for a period of two (2) years, **Distributor** shall furnish **Licensor** with a reasonably detailed statement showing the amount of **Gross Receipts** received in the preceding quarter and a calculation of the **Distribution Fee**, **Reimbursable Costs and Expenses**, and the **Net Receipts** for the preceding quarter (each, a "**Quarterly Accounting Statement**").

III.2 After the conclusion of the two (2) year period described in the foregoing section 3.1, **Distributor** shall, on the first day of the first and third quarters of each calendar year furnish **Licensor** with a reasonably detailed statement showing the amount of **Gross Receipts** received in the preceding two (2) quarters and a calculation of the **Distribution Fee**, **Reimbursable Costs and Expenses**, and the **Net Receipts** for the preceding two (2) quarters (each, a "**Biannual Accounting Statement**").

III.3 The **Quarterly Accounting Statement** or **Biannual Accounting Statement** as defined herein shall be accompanied by payment of any amounts due to **Licensor** in U.S. Dollars by check or money order, subject to all laws and regulations requiring deduction or withholding of payments for income or other taxes payable by or assessable against **Licensor** (each, "**Payment**").

III.4 A **Quarterly Accounting Statement, Biannual Accounting Statement**, and/or a **Payment** as required under this **Agreement** shall be mailed or shipped to the **Licensor**'s address as set forth under the introductory paragraph of this **Agreement**.

III.5 A **Quarterly Accounting Statement**, **Biannual Accounting Statement**, or a **Payment** accompanying either a **Quarterly Accounting Statement** or a **Biannual Accounting Statement** shall be deemed true, accurate, and binding upon the **Licensor** if not objected to in writing by the **Licensor** within eighteen (18) months after the delivery of such statement, and if formal legal action is not commenced within one year after such written objection. If such a legal action is commenced by **Licensor**, all statements to which such claim pertains shall not be deemed biding upon **Licensor** until such claim is resolved. A formal legal action commenced by **Licensor** does not terminate Distributor's continuing obligation to furnish **Quarterly Accounting Statement**(s), **Biannual Accounting Statement**(s), or **Payment**(s) as required herein.

III.6 **Licensor** shall have the right, at its own expense, on at least thirty (30) days prior written notice to **Distributor**, to have a certified public accountant examine the books of account with regard to the distribution and exploitation of the **Picture** at the **Distributor**'s principal place of business or another location at which such books of

account are maintained. **Licensor**'s right under this section shall be limited solely to the examination of portions of books and records pertaining to the **Picture** (and no information related to allocations of revenues or expenses shall be redacted from such books and records). **Licensor**'s right under this section may not be exercised more that once per calendar year for the first three years after the date on which the first **Quarterly Accounting Statement** is furnished to **Licensor** as required under this **Agreement**.

ARTICLE IV DISTRIBUTION AND MARKETING

IV.1 **Distributor** shall have complete discretion and control over the time, manner, places, and terms of any distribution, exhibition, licensing, exploitation, promotion, advertising, or marketing of the **Picture**. **Distributor**'s discretion pursuant to this section shall include, without limitation, the decision of (i) the date of the initial theatrical release of the **Picture**, if any; (ii) when to make the **Picture** available for video-on-demand exhibition; (iii) when to make the **Picture** available in home video media; and (iv) when to make the **Picture** available through internet streaming.

IV.2 **Distributor** and/or its designees shall consult with **Licensor** and/or **Licensor**'s designees regarding the marketing strategy for the **Picture**, it being understood and agreed, however, that **Distributor**'s decisions shall be controlling as to any such matter on which consultation may be had.

IV.3 **Distributor** makes no guarantees, representations or warranties as to the amount of **Gross Receipts** or **Net Receipts** that may be derived from the **Picture**, nor as to the amount of any **Distribution Fee** or of any **Reimbursable Costs and Expenses** in connection with the **Picture**.

ARTICLE V CREDIT

V.1 **Distributor** shall have the right, at its own expense, to include its names, insignia, logos, emblems, or trademarks (or those of its affiliates, licensees, or sublicensees) as is customary in the motion picture industry (including a presentation credit), on all copies of the **Picture** and on all advertising, promotional, publicity, and marketing materials for the **Picture**, together will all appropriate text, to be determined in **Distributor**'s sole discretion, indicating that the **Picture** is being distributed by **Distributor**.

V.2 In the exercise of its rights under the immediately preceding section, **Distributor** shall adhere to any and all obligations of **Licensor** regarding credit and paid advertising for the **Picture**, provided that **Distributor** receives timely written notice of such obligations and that such obligations are reasonable and customary in the motion picture industry.

V.3 **Distributor** shall use best efforts to notify any and all of its affiliates, licensees, or sub-licensees with respect to the **Picture** of any obligations of the **Licensor** regarding credit and paid advertising for the **Picture**. Distributor shall use best efforts to

obtain agreements from any such affiliates, licensees, or sub-licensees to adhere to any and all obligations of **Licensor** regarding credit and paid advertising for the **Picture**.

V.4 The casual or inadvertent failure by **Distributor** or of any third party to comply with **Licensor**'s obligations regarding credit and/or paid advertising shall not constitute a breach of this **Agreement**. **Distributor** agrees, however, to take all economically reasonable steps to cure such failure prospectively with respect to copies of the **Picture** not yet made and/or advertising, promotional, or marketing, or other materials under the control of **Distributor** which have not yet been placed or issued.

ARTICLE VI COPYRIGHT

VI.1 All copyrights in the **Picture** will be held by **Licensor**.

VI.2 **Licensor** shall register, renew, extend, and protect all copyrights in the **Picture** for the maximum period of time allowed by law. **Licensor** shall furnish **Distributor** with copies of all such registrations and renewed registrations. If **Licensor** fails to register or renew registration for any copyrights in the **Picture**, **Distributor** shall have the right to register or renew the registration of the copyright in the **Licensor's** name with the United States Copyright Office, the cost of which shall be included among **Total Costs and Expenses** incurred by **Distributor** for the quarter(s) in which such costs were incurred.

VI.3 **Licensor** hereby authorizes **Distributor** to institute such suits and/or legal proceedings as **Distributor** may deem necessary or advisable to protect any copyrights in the **Picture** and/or to prevent any infringement upon the **Granted Rights**.

6.3.1 **Distributor**'s authority under this section shall be subject to consultation with **Licensor** prior to instituting any such suit or proceeding.

6.3.2 **Distributor**'s costs and attorneys fees incurred in bringing any suits or legal proceedings pursuant to this section shall be included among **Total Costs and Expenses** incurred by **Distributor** for the quarter(s) in which such costs or fees were incurred.

6.3.3 The total amount of any recovery by **Distributor** in and suit or legal proceeding described under this section shall be included in **Gross Receipts** for the quarter(s) in which such recovery is had.

6.3.4 **Licensor** shall have the right, but not the obligation, to participate in any legal proceedings described under this section at **Licensor**'s own expense and represented by counsel of **Licensor**'s choice.

6.3.5 In connection with any suit or legal proceeding brought pursuant to this section, **Licensor** hereby grants **Distributor** an irrevocable power of attorney with the power to execute any and all documents as may reasonably be needed for such suit(s) or proceeding(s) on **Licensor**'s behalf consistent with the terms of this **Agreement**. The power of attorney granted under this subsection shall terminate on the expiration of the

License Period. **Distributor** shall provide Licensor as promptly as practicable with copies of any and all documents signed pursuant to the power-of-attorney granted under this subsection.

ARTICLE VII DELIVERY

VII.1 The **Picture** shall be an original motion picture containing visual media and sound, photographed in color use ___35mm__ with an aspect ratio of ___2:35:1__. The **Picture** shall be in ___English__, have an approximate running time of ___120__minutes.

VII.2 The **Picture** shall not differ in any material respects from the version that was screened at __[Name of festival or other screening, if desired]____.

VII.3 The **Picture** shall have been directed by _____[Director]_____, written by _____[Writer]_____, produced by _____[Producer]_____ _____, and starring _____[Performers]_____.

VII.4 **Licensor** agrees that time is of the essence and that **Delivery** (as defined herein) shall occur no later than _____ ____. 20___ (the "**Delivery Date")**.

VII.5 "**Delivery**" shall mean:

a. **Licensor**'s delivery of or granting of access to the **Picture** in a technical quality acceptable to Distributor; and

b. **Licensor**'s delivery of or granting of access to the items and materials listed under the **Delivery Schedule** (attached hereto as Exhibit 1).

VII.6 **Distributor** shall be responsible for reimbursing **Licensor** for all reasonable costs incurred in making **Delivery** and in preparing and/or procuring items listed under the **Delivery Schedule**. **Licensor** agrees that, within a reasonable time in advance of the **Delivery Date**, **Licensor** shall furnish to **Distributor** a price list that reasonably sets forth prices applicable to each item or material listed on the **Delivery Schedule**; **Distributor** shall have the right to pre-approve any expenses set forth on the price list prior to those costs being incurred by **Licensor**.

VII.7 If **Distributor** notifies **Licensor** of any **Delivery** deficiencies, then **Licensor** shall have ten (10) business days within which to cure all such delivery deficiencies. If **Licensor** fails to timely make **Delivery** or fails to cure any deficiencies in **Delivery** within the aforesaid time period, then **Distributor** shall have the option to (i) permit additional time in which **Licensor** shall be permitted to cure any of the aforesaid failures; (ii) secure acceptable replacements for the deficient **Delivery Materials** at **Licensor**'s expense; or (iii) terminate this **Agreement** upon written notice to **Licensor**, in which event any advances paid to **Licensor** by **Distributor** shall be repaid to **Distributor**

in full. **Licensor** is not relieved of its obligation to make **Delivery** as required by this **Agreement** unless **Distributor** elects to terminate the **Agreement** and **Licensor** receives the written notice of termination as required under this section. **Distributor** does not waive its right to receive **Delivery** unless it elects to terminate this **Agreement** and sends to **Licensor** the notice required under this section. Acceptance of less than all of the **Delivery Materials** and/or release of the **Picture** and/or the exercise of any **Granted Rights** under this **Agreement** shall not relieve **Licensor** of its obligations to make **Delivery**.

VII.8 Upon expiration of the **License Period**, and in accordance with the **Licensor**'s written instructions and at **Licensor**'s sole costs and expense, **Distributor** shall return to **Licensor** or destroy the **Delivery Materials** provided by **Licensor** pursuant to this **Agreement** and any materials created in connection with the **Picture** by **Distributor** (other internal recordkeeping or archival materials for use in the ordinary course of **Distributor**'s business).

ARTICLE VIII EDITING AND MODIFICATIONS

VIII.1 **Distributor** shall have the right to cut, edit, delete from, dub, and subtitle the **Picture** as is determined to be necessary in **Distributor**'s sole discretion: (i) as may be necessary for exploitation of the **Picture**; (ii) to comply with any requirements imposed under law or to avoid incurring liability; (iii) to conform to local or national broadcast standards, censorship requirements, or obscenity laws; (iv) to insert promotional, advertising, or commercial materials (including without limitation, such promotional, advertising, or commercial materials which may run concurrently with the end credits); (v) to compress or shrink the credits in a manner consistent with customary practice in the motion picture and television industries; (vi) to create promotional materials; and/or (vii) to create and license clips from the Picture in a manner consistent with customary practice in the motion picture and television industries (including, without limitation authorizing third parties to create such clips). Any editing or modifications made to the **Picture** pursuant to the foregoing clauses (ii) or (iii), and/or any editing or modifications not described under this section, shall be subject to the written approval of the **Licensor**, provided that if **Licensor** fails to respond to **Distributor** within 5 business days after receipt of **Distributor**'s notice requesting to make such edits or modifications, such editing or modification shall be deemed to be approved by **Licensor**.

ARTICLE IX DEFERRED FEES AND RESIDUALS

IX.1 **Licensor** shall be solely responsible for the calculation and payment of any and all deferred fees and/or residuals and/or third-party participations. The **Picture** is not subject to the jurisdiction of any union or guild and **Distributor** shall have no residual or other obligations to any union or guild.

ARTICLE X REPRESENTATIONS, WARRANTIES, AND INDEMNITIES

X.1 **Licensor** hereby represents and warrants that: (i) it has the full rights, powers, and authority to enter into this **Agreement** and to grant the rights herein granted; (ii) it owns or controls all rights in and to the **Picture** and in and to all the literary, dramatic, and musical material included therein and required for **Distributor** to exercise the **Granted Rights**, free of any lien, claim, or encumbrance thereon, (iii) all musical compositions and/or performance of musical compositions contained in the **Picture** have been licensed for use in the **Picture** and for use in advertising, publicity, and promotion of the **Picture**; (iv) no part of the **Picture**, nor the exhibition, distribution, exploitation, promotion or any other use thereof by **Distributor** or its licensees will violate or infringe upon any rights of any third party; (v) the services provided under this **Agreement** are not subject to the jurisdiction of any union, guild, or collective bargaining agreement; and (vi) there is no action, suit, claim, or legal or arbitral proceeding pending, affecting or threatened against the **Picture**, its producers, **Licensor**, or any distributor of the **Picture**.

X.2 **Licensor** shall [indemnify] [hold harmless] [and] [defend] **Distributor** and its officers, agents, employees, affiliates, licensees, and assigns from and against any and all claims, damages, liabilities, costs, and expenses, [including reasonable outside attorneys' fees and disbursements], arising out of any breach of representation or warranty made by Licensor herein.

X.3 **Licensor** shall purchase and maintain at its own expense and in full force and effect for a period of three (3) years from Delivery, a liability insurance policy that covers liability in connection with any breach of warranty under this **Agreement**. The insurance policy required under this section shall name the **Distributor** , its parent affiliates, subsidiaries, assigns, and licenses with respect to the **Picture** as additional insured parties. The insurance policy required under this section shall have a deductible of no more than $10,000, with minimum limits of $1,000,000 for a claim arising out of a single occurrence, and $3,000,000 in the aggregate.

ARTICLE XI ASSIGNMENT

XI.1 **Distributor** shall have the right to assign its rights and obligations under this **Agreement** to any third party and shall be relieved of its obligations to the extent they are assumed in writing by (i) any purchaser of all or substantially all of **Distributor**'s stock or assets; (ii) any entity into which **Distributor** is merged, consolidated, or combined; (iii) any major or minor studio; or (iv) any affiliate of **Distributor**. **Distributor** shall have the right to assign its rights and obligations hereunder to any third party not listed under clauses (i) through (iv) of this section, however, in such case **Distributor** will remain primarily liable to **Licensor** for its obligations under this **Agreement,** unless the **Licensor** approves of such assignment in writing.

XI.2 **Licensor** may not assign this **Agreement** or any rights hereunder, other than its rights to receive money, without prior approval of **Distributor** (although **Distributor** agrees not to unreasonably withhold approval under this section).

ARTICLE XII GOVERNING LAW

XII.1 This agreement shall be governed by and construed in accordance with the laws of the State of [State] applicable to contracts and wholly performed therein without regarding to choice-of-law principals.

ARTICLE XIII DAMAGES

XIII.1 **Licensor** and **Distributor** agree that, in addition to any remedies expressly set forth under this **Agreement**, the only remedy available in the event of a breach of this **Agreement** is recovery of money damages. Neither **Licensor** nor **Distributor** may seek t remedy such breach through injunctive or other equitable relief, except to the extent **Distributor** exceeds the scope of the **Granted Rights**.

ARTICLE XIV NOTICES

XIV.1 All notices or documents from either party as required under this **Agreement** shall be given in writing by international courier, messenger, fax, or personal delivery, addressed to the parties as set forth above. The earliest of the (i) actual receipt; (ii) five days after the date of the receipt from and international courier; and (iii) the date of messengering; or (iv) personal delivery shall be deemed to be the date of service for purposes under this Agreement.

ARTICLE XV AMENDMENT, WAIVER, AND MERGER

XV.1 This **Agreement** may not be amended nor any provision waived except by written agreement signed by all parties hereto.

XV.2 This **Agreement** contains the full understanding of the parties. This **Agreement** supersedes any and all previous agreements between the parties.

ARTICLE XVI MISCELLANEOUS

XVI.1 This agreement is comprised of this document as well as Exhibit A attached hereto.

FOR THE LICENSOR:

[Production Company]

By: _____

Name

Title

Date_____

FOR THE DISTRIBUTOR:

[Distributor]

By: _____

Name

Title

Date_____

EXHIBIT A

Delivery Materials

[Delivery materials should be tailored to specific needs of the distributor and the film. Some examples of categories of delivery materials are contained below]

1. PICTURE ELEMENTS AND NEGATIVES
2. SOUND ELEMENTS
3. VIDEOTAPE MASTERS
4. PUBLICITY MATERIALS
5. MUSIC DOCUMENTS AND LICENSES
6. REGISTRATION AND TITLE DOCUMENTS
7. PERSONAL SERVICE CONTRACTS
8. THE FILM CREDITS
9. CUTS, OUTTAKES, SCREEN TESTS, AND CUTOUTS
10. COPIES OF THE ORIGINAL SCRIPT
11. CONTANT/ELEMENTS FOR TRAILER
12. VARIOUS FORMATS OF THE PICTURE