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Clearance Procedures Guidelines

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Clearance for a motion picture production requires a thorough evaluation of the screenplay, the film footage, all contracts, set dressing, wardrobe, and more. The following list of clearance procedures should be followed prior to final cut or first exhibition of a motion picture. This list should not be considered exhaustive as it may not cover all situations which may arise since every production presents its own unique issues. Filmmakers and attorneys should always review the following points carefully with one another and work together to continually monitor the production at all stages to make certain that the motion picture contains no material which could give rise to a claim. There are three main reasons why the producer must be aware of clearance issues: avoidance of liability, eligibility for E&O insurance coverage, and assurance that the film will satisfy the distributors' legal delivery requirements.

1. Pre-Production Review For Possible Actionable Script Content: Prior to the start of production, the screenplay should be read for the purposes of identifying and eliminating material that is defamatory, violates rights of privacy and publicity, or is otherwise potentially actionable.
2. Obtain A Clearance Report: A Clearance Report of the final shooting script should be obtained by a professional clearance research company. These companies perform a variety of tasks, such as, researching all story character names and places against the commonality of the names, street addresses, and business names in the general population. This will help the producer avoid possible invasion of privacy and similar type claims from people whom the film may have unwittingly portrayed. The clearance report will also identify the proper contact from which to obtain product placement clearances for any products, copyrights, or trademarks that are referenced in the screenplay.
3. Document Origins Of "Original" Unpublished Works: If the screenplay is an unpublished original, the producer should inquire into and document the origins of the work, such as the stimulus for the creation of the basic idea, sequence of events, and characters.

4. Document & Distinguish Similar Works In Producers' Hands: The producer should determine if any similar screenplay written by a different screenwriter has ever been submitted to the production company. If so, document the wholly independent manner in which the later screenplay came to the production company. Document and evaluate the circumstances as to why the owner of the earlier submission would not claim theft or infringement.

5. Evaluate "Chain of Title" & Potential Encumbrances: The producer must document the origin of the work and each transaction that transferred the rights in the work up to and including the transfer to the producer; this is called "the chain of title". Did the screenwriter's engagement qualify as a *bona fide* "work for hire"? If not, is there an effective option or transfer of rights? Identify any potential rights-holders (particularly those who may raise a claim from earlier expired options, but whose contributions to rewrites may extend beyond the expired option). Did anyone contribute anything to the content of the script from whom a release was not obtained? Obtain "quitclaims" from any individual that may have an encumbrance to a clean chain of title.

6. Require the Writer To Provide An "Annotation Guide": An annotation guide identifies every character, place, and event and states whether the item is purely fictional, real, or a composite of real and fictitious items. This will pin down whether and for what additional releases may have to be obtained.

7. Document Sources For "True Life" Stories: If the motion picture depicts actual events, it should be determined whether the screenwriter's sources are independent and primary sources (contemporaneous newspaper reports, court transcripts, public records, etc.) and not secondary sources (another author's copyrighted work, autobiographies, copyrighted magazine articles, etc.). If secondary sources were relied on, then the producers will most likely have to obtain a release from those sources.

8. Obtain Releases From Living & Deceased Individuals Depicted As Characters In The Script: Whether the motion picture is factual or fictional, it should be certain that no names, faces, likenesses of any recognizable living persons or deceased persons or locations are used unless written releases have been obtained. The term "living persons" includes thinly disguised versions of living persons or individuals who are readily identifiable because of identity of other characters or because of the factual, historical, or geographic setting. Releases from all recognizable or identifiable deceased persons in the screenplay should be obtained from the personal representative or heirs of such person. Insurance companies issuing "Errors & Omissions" insurance will insist on such releases unless the production company can demonstrate, to the insurance company's satisfaction, specific reasons in writing as to why such releases are unnecessary.

9. Obtain Releases From All Performers & Recognizable Extras: Releases from living persons should contain language which gives the production company not only the right to use the person's image and name, but also the right to edit, delete material, juxtapose any part of the film with any other film, change the sequence of events, fictionalize persons or events, and to make any other changes in the film that the production company

desires in its sole discretion. If the person is a minor, consent must be legally binding. In California, a minor's contract of employment should be ratified by the court to ensure validity.

10. Obtain Releases From All Behind The Scenes Contributors: Written agreements must exist between the production company and all creators, writers, performers, and any other persons providing or owning material (including quotations from copyrighted works) or on-screen services. Likeness releases should be standard language in all contracts, even in the contracts for off-camera crew. You never know when a crew member may become an extra or captured in "behind the scenes" footage.

11. Obtain Location Releases: If distinctive locations, buildings, businesses, and/or personal real property are filmed, written releases should be secured. This is usually not necessary if non-distinctive background use is made of real property.

12. Obtain Prop & Product Clearance: Obtain releases for all props, set dressings, and wardrobe items bearing distinctive logos if such items are to be featured. Remember, it is often difficult to anticipate the prominence of a prop in a final cut, thus it is best to apply an abundance of caution in attempting to clear these items. Caution: Do not assume that items coming from prop houses or that have been used in other films have been properly cleared. Also, be especially cautious of major league sports apparel and other trademark names.

13. Obtain Releases and Clearance For All Artwork: Extreme caution is necessary when dealing with artwork. Abundance of caution demands that all artwork, even those items not featured or in focus be cleared. Do not rely on production designer's representations without some form of documentation to support the representations. Find out who was the artist. Is the artist alive or dead? When did he or she die? When was the artwork first published? Most importantly, who holds the copyright? A qualified art director will be trained in how to avoid clearance problems and should be able to provide props and set dressing that are pre-cleared.

14. Be Extra Careful with Photos & Posters: A multitude of ownership issues arise in clearing photos and posters. Obtain releases from the photographer, any person in the photograph, and the copyright holder of the photograph or poster.

15. Obtain Music Licenses: If music is used, the production company must obtain all necessary synchronization and master use licenses. The composer of the score must have entered into a composer agreement that releases the rights of the score to the production company.

16. Obtain and Verify Clearance For "Stock Footage" & "Film Clips": If the production contains any film clips, the production company must obtain clearances for the second use which are to be obtained from the owner of the clip or those who have the right to grant such authorization who are supplying on-screen services or supplying material. Make sure that there is an indemnification clause binding the stock house or supplier of

the clip. *Note: Special attention should be paid to music that is contained in such clips, as rights holders (record companies or publishers) may assert that a new synchronization or master use license is required.*

17. Use All Encompassing Releases For All Technologies: If the motion picture is intended for video tape, discs, DVD, Internet or other new technology, rights to manufacture, distribute, and release the motion picture in such media should be obtained from all writers, directors, actors, musicians, composers, etc.

18. Obtain a Copyright Report: Obtain a copyright report. A copyright report is always required by the distributors and will verify that there are no problems with the chain of title. Check both domestic and foreign copyrights and renewal rights. The party acquiring a completed film should perform a similar review of copyright and renewals on any underlying property.

19. Obtain a Title Report: Obtain a title report prior to final title selection. The report should set forth prior uses of the same or similar titles, and if there is a conflict, the title should be changed. For an additional fee the title report company will provide a legal opinion to the production company about whether the title is clear. The distributors will require a title report.

20. Beware of Evolving Law Of “Right Of Publicity”: Aside from living persons, even dead persons (through their personal representatives or heirs) have a “right of publicity” especially where there is considerable fictionalization. Clearances should be obtained where necessary.

21. Check & Recheck Before Public Exhibition: Prior to any public exhibition of the motion picture, the production’s attorney should preview the film to assure that the above-listed clearance procedures have been followed.

22. Perform a Separate Analysis For Trailers & Commercial Tie-Ins: Make sure that all clearance licenses and releases extend to using the item or person in advertising and publicity.

The following are examples of recent legal disputes over Clearance issues which demonstrate the volatile situations that may arise from this area.

2002: The owners of the building at 2 Times Square filed a lawsuit in Manhattan federal court alleging that in the film *Spider-Man*, Columbia Pictures digitally replaced a Samsung advertisement on the side of their building with an advertisement for USA Today which appears three times in the film. *See Spider-Man Caught in Legal Web, available at* <http://apnews1.iwon.com/article/20020411/D7IR0NN03.html> (April 11, 2002).

2001: USA Films paid an undisclosed sum to a private school in Ohio for the unauthorized use of the school’s name in the motion picture *Traffic* and agreed

not to use the school's name in any re-release of the film. No lawsuit was filed. See Makers of Hit Movie 'Traffic' Pay Out to School, *available at* <http://news.findlaw.com/entertainment/s/20010427/filmtrafficdc.html> (May 2, 2001).

2000: The Warner Brothers film *Batman Forever* depicted sculptural designs which were part of a building in downtown Los Angeles utilized as the fictional Gotham Bank. The sculptor sued Warner Brothers, however, the Court held the artwork was part of the architecture and thus copyright protection was eliminated by a 1990 amendment to the Architectural Works Copyright Protection Act. See *Leicester v. Warner Brothers*, 2000 Daily Journal D.A.R. 12637 (9th Cir. 2000).

2000: The granddaughter of silent film comic Harold Lloyd filed a \$50 million lawsuit for violation of federal copyright law against Walt Disney, alleging that its 1998 Adam Sandler film *The Waterboy* was a copy of Lloyd's 1924 film *The Freshman*. See Janet Shprintz, 'Freshman' Fracas, *VARIETY* 7 (October 31, 2000).

1999: A man named Michael Costanza unsuccessfully sued the producers of the television show *Seinfeld* for invasion of privacy, false light publicity, and defamation, claiming that the character George Costanza was based upon him. See *Costanza v. Seinfeld*, 27 Med. L. Rptr 2177 (NY 1999).

1998: 10 copyrighted photographs appeared in the film *Seven* for a total of 35.6 seconds. The court found the *de minimus* use had not been surpassed because the photographs were out of focus and unidentifiable. See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).

1997: Warner Brothers was sued by a sculptor and the Protestant Episcopal Cathedral Foundation of the District of Columbia on copyright, Lanham Act, anti-dilution, and federal moral rights grounds over a religious sculpture, *Ex Nihilo*, a copy of which appeared in the film *The Devil's Advocate*. See *Fredrick Hart and The Protestant Episcopal Cathedral Foundation of the District of Columbia v. Warner Brothers, Inc. and Time Warner, Inc.*, Civ. No. 97-1956-A (D.C. E.D., Va. 1997).

1997: A copyrighted poster of the "Church Picnic Story Quilt" could be seen in an episode of the television series *ROC* for a total of 26.75 seconds. Although the poster was never in perfect focus, the court concluded that the *de minimus* use had been surpassed because the poster was "plainly observable." Established use of *de minimus* defense as a separate issue that must be considered before, and separately, from the fair-use defense of Section 107 of the Copyright Act. See *Ringgold v. B.E.T. Inc.*, 126 F.3d 70 (2d Cir. 1997).

1996: The artist, Lebbeus Woods, obtained an injunction against a motion picture for infringing his copyrighted drawing "Neomechanical Tower (Upper)

Chamber," in the Universal film *12 Monkeys*. In the opening scenes of the film, the main character is brought into a room and seated in a chair attached to a vertical rail, which bears striking resemblance to Woods' drawing. Terry Gilliam, the director of *12 Monkeys*, admitted he had seen a copy of Wood's drawing and had discussed it with the film's production designer. *See Woods v. Universal City Studios*, 920 F. Supp. 62 (NY 1996).

Remember: Failure to follow the proper clearance procedures may (1) prevent the production company from obtaining errors and omissions insurance; (2) deter a distributor from acquiring the film; and/or (3) expose both the production company and the distributor to liability to third parties.