

CRYPT CLUB PRODUCTIONS INC.

FILM RIGHTS & CLEARANCE GUIDELINES

The rights clearance process is an integral part of commercial filmmaking. These guidelines are presented as general information for Screenwriters and Filmmakers before submitting material to Crypt Club Productions Inc. (“CCPI”). We hope this information helps you in your future efforts.

These guidelines cannot cover every situation you may encounter. As always, you should consult your own lawyer. You assume all risk and responsibility in connection with use of the following information.

If you sign a written agreement with CCPI, you are fully responsible and obligated to obtain all necessary releases, licenses, and agreements in accordance with the terms of the agreement between you and CCPI. The fact that CCPI has provided these guidelines in no way shifts that responsibility to CCPI. CCPI cannot and does not represent you in legal matters.

WHY BOTHER WITH RIGHTS & CLEARANCES?

Like other production/distribution companies, CCPI requires that you make warranties regarding the clearance of the rights to be granted to CCPI for any submitted material, and to provide supporting documentation.

A “cleared” film is one that can be copied, distributed, exhibited, and otherwise exploited by the Filmmaker (or its licensees/distributors) without infringing on or violating the rights of an individual or entity. Without proper clearances, a film is generally not distributable. And film clearance begins with the Screenwriter and the screenplay rights.

If your project has any commercial potential then doing some research, getting good advice (including competent legal counsel), and taking preventive steps will save you time, money, and a lot of stress down the road.

Yes there is work involved here. It’s easy to go filming “guerilla-style” and worry about the consequences later. But rights and clearances is one area where it is infinitely better to ask for permission in advance than seek forgiveness later. Consider what can happen if you’re hit with an injunction preventing the use or sale of your film, or if you’re forced to pay substantial damages after the fact. Where does that leave you, your film, and everyone who supported your now wasted efforts?

The steps to getting rights and clearances are part of responsible commercial filmmaking. They protect everything that you do, providing an ounce of prevention rather than a ton of cure.

IN GENERAL

Know Your Rights:

From initial concept to first draft to final cut, you should be aware of the elements that may give rise to a legal claim against your project – and either settle or eliminate those elements.

Ignorance of the law is no excuse, and denial is a dangerous option. It’s easy to inform yourself of basic copyright, trademark, and other intellectual property laws. And, as a creator, those laws serve to protect you too. You can start at the US Copyright Office website (www.copyright.gov), or the Canadian Intellectual Property Office (CIPO) http://strategis.ic.gc.ca/sc_mrksv/cipo, or your own government’s intellectual property office and go from there. Be aware that copyright laws and terms vary from country to country.

Then, find and consult competent legal counsel experienced in entertainment and intellectual property matters. The fact that you’ve learned the basics will save you time and legal fees. However, don’t avoid consulting your lawyer for a qualified opinion.

Determine & Get The Correct Rights:

Knowing early how and where you plan to exploit your project will help you determine which rights you should obtain. Many rights can be negotiated depending on their intended final use. For example, if you

only plan to screen the film at festivals you might obtain a limited “festival” license that is less expensive than the full-use rights to the music. But what happens if you get a distribution or broadcast offer after a festival screening? You may have to turn the offer down if your newly expanded music license will cost more than the buyer’s license fee. So, you should know which rights you need to obtain and what the remaining rights (if any) may cost you should circumstances dictate you need them later. Wherever possible, try negotiating the price of those additional rights into the initial agreement to avoid being held for ransom later.

If you enter into guild or union agreements you should be aware of the rights you are granted as well as your obligations, because they likely affect each other. And those agreements may contain provisions that bind potential distributors, making the film more or less attractive to them. This knowledge may alter your project’s plans, but it’s best to know before your ship sets sail.

Here are some elements that define the scope of any specific right granted.

Territory specifies the country or geographic region throughout which the granted rights may be exploited. For example, in North American deals there are usually only two territories: Domestic (includes USA and Canada) and Foreign (the rest of the world).

Term specifies the duration of the rights granted. This is usually expressed in years, starting from a specified date or a particular action (e.g.: signing date, date of first broadcast, etc.)

Consideration determines the compensation (usually monetary) due for the granted rights.

Media specifies the means of exploitation, or the commercial field/market for the granted rights (e.g.: theatrical, television, home video, internet, etc.).

Get every agreement in writing and as specific as possible. Generally, if a right or clearance is not expressly stated it is not granted. (Remember the “festival” music license?) Oral and spoken agreements are hard to prove and defend even if tape-recorded. Get your agreements in writing and specify the details to save yourself the hassle of a “he said/she said” scenario.

Determining and getting the correct rights and clearances starts with your agreement regarding the story material and continues through your agreements with creative decision makers, the cast, crew, suppliers, and so on. Ultimately, all of these gathered rights will grant you the authority to legally produce and exploit your project in the way that you intended.

Avoid Litigation:

When evaluating rights and clearance issues you should consider the likelihood of a claim or litigation in order to avoid it. Does the project portray a potential claimant (an individual or entity) who has sued before or is likely sue again? If you are forced to defend the project in court, will it require difficult and extensive (read: expensive) legal discovery to make your case? Is there a nebulous copyright, trademark, or other legal issue lingering? Before using material under a claim of “fair use”, “fair dealing”, or “public domain” be sure that your information sources are reliable. When in doubt, err on the side of caution and get competent legal advice in advance to avoid paying big-time later.

DURING DEVELOPMENT

Screenplay Clearance:

The intended (final) shooting screenplay and storyboards should be meticulously reviewed to identify potential clearance and legal issues. You should avoid mention of specific individuals and entities that may take exception to, and legal action against, being portrayed in the work.

Before going into production, you should submit the screenplay to a reliable screenplay clearance company that can review the work and generate a detailed report identifying issues for your consideration. It is then your choice to ignore, delete, modify per suggestion, or obtain clearance/rights for each issue.

In many cases, the clearance company can provide contact information for a referenced product or business so you can pursue a clearance.

Depending on the screenplay, many of a clearance company's notes will be about language (particularly swearing), violence, nudity, sex, and adult situations. If your film's audience rating is critical, pay attention to these notes now and throughout filming and post-production. A distributor's interest may depend on your film's final audience rating. Are those extra curse words vital? Can you record an alternate dialogue version on set, or ADR it in post? Can you film a love scene once with, and again without, nudity so you can offer a "US TV" and a "European" edit?

If the screenplay is fiction, it's a good idea to interview the Screenwriter(s) to note if there are identifiable incidents or characters (regardless of their screenplay names) taken from real life experiences that should be cleared.

If the screenplay is based on or features real events or individuals, the Screenwriter(s) should provide a copy of all source materials and references consulted along with the fully annotated screenplay, citing sources for characters, dialogue, and events as a starting point for obtaining clearances.

If the screenplay is based on any other material(s), you should determine the status of that material with a copyright report that lists domestic/foreign copyrights and renewal rights.

Even if the screenplay is a completely "original" work (not based on any other material), it's still a good idea to check all the facts, characters, names, and events. You'd be surprised how few completely "original" screenplays exist. The key is to make sure that it is original enough to avoid the potential of a legal claim.

In addition to all the scrutiny of the screenplay itself, it's a good idea to track the screenplay's influences and development, from conception through to the final draft. You should also determine if/when similar materials or ideas were submitted to anyone involved in the project. The purpose is to establish a chain of influence, events, and circumstances to help avoid and/or disprove any legal claims.

Before you lock the screenplay and design logos, title treatments, and screen-print crew shirts with the project's title you should also get a title clearance report to make sure your proposed title is clear for use. While you cannot copyright a title, using a title that is identical, or similar, to an established property may result in an infringement claim under trademark or unfair competition laws.

Finally, have your lawyer review all the screenplay reports and materials and make recommendations. If you choose to ignore a raised clearance issue at this stage then you have wasted your money and put your project at unnecessary risk.

Screenplay Registration:

An idea cannot be copyrighted, but its written expression can be. In countries adhering to international copyright laws, a literary work's copyright begins when it is put into a fixed form. As the screenplay goes from concept to treatment and subsequent drafts, you should consider registering it to help establish your claim of ownership and copyright.

You do not have to register your copyright to have protection, but when you register with a copyright office (see earlier references) you receive a certificate that can be used to your advantage in the event that your work is infringed. A certificate of registration is evidence that your work is protected by copyright and that you, the person registered, are the owner. In the event of a legal dispute, you do not have to prove ownership; the onus is on your opponent to disprove it.

However, registration is no guarantee against infringement. You have to take legal action on your own if you believe your rights have been violated. Also, registration is no guarantee that your claim of ownership will eventually be recognized as legitimate. The copyright office does not check to ensure that your work is indeed original, as you claim. Verification of your claim can only be done through a court of law.

The Writers Guild of America (www.wga.org), and the Writers Guild of Canada (www.wgc.ca) also offer screenplay (not copyright) registration services. As the WGA puts it, “registration provides a dated record of the writer's claim to authorship of a particular literary material.”

DURING PRE-PRODUCTION & PRODUCTION

Releases & Agreements:

If you have commercial hopes for your film, be aware that, in addition to obtaining all the rights and clearances to *create* your film, you'll need to secure the rights to copy, manufacture, market, license, assign, transfer, sell, etc. all of those acquired rights to a third party (e.g.: a distributor).

Your lawyer should help you draft the agreements and releases that you need based on your intentions for the project. Be wary of borrowing “boilerplate” agreements from other productions as their specific terms and provisions may not be in your interest. Contracts and terms drafted in another jurisdiction may not be relevant or valid in yours. Above all, know the meaning of the terms and provisions in your agreements, as well as your rights and obligations under those agreements. The wording should be as clear and easy to understand as possible.

It's best to obtain all agreements in writing and in advance. **If you cannot secure a written agreement or release for one of the items listed below, do not use it in connection with your film.** There are many substitutes available. If your film is not cleared, your chances of it being picked up for distribution are practically non-existent.

Screenplay:

Despite the clearances process, you must still secure rights to the screenplay itself. Typically, this is done through an option agreement or an outright purchase of the screenplay. Screenwriters' union or guild contracts have specific provisions and payment schedules as part of their contracts. Even if you work outside a union or guild situation, it's good to be familiar with their terms and provisions. If the rights to the screenplay are not completely secured, the rest of your work will be in vain.

Changes to the screenplay during production are inevitable. Any variations should be noted and checked to ensure clearance. And this clearance checking process should continue throughout production until the final film is locked.

People:

You need written agreements and/or releases from all performers, crew, suppliers, and other contributors that provide materials or an on-screen service to the project. If their work is part of the finished film or part of the film's related elements (e.g.: publicity or marketing materials), then you'll need a signed release or agreement from them allowing you to use their work, and in some cases their likeness, voice, etc. Releases should include an express waiver of moral rights, and of defamation, publicity, and privacy claims.

A release may not be required if a person is part of a large crowd scene or shown in a fleeting background. However, you should make sure that no names, faces, likenesses, or other identifying marks of any recognizable living persons are used or depicted unless written releases have been obtained.

The term “living persons” includes thinly disguised versions of living persons or living persons who are readily identifiable because of the identity of other characters or because of the factual, historical, or geographic setting. Aside from living persons, even dead persons (through their personal representatives or heirs) may have a “right of publicity” claim under certain circumstances (particularly involving commercial exploitation outside of the film itself). Furthermore, the family and/or successors of deceased persons may under the laws of certain jurisdictions have the right to bring actions akin to defamation. Clearances should be obtained for the right to portray deceased persons unless your lawyer has concluded that the law clearly does not require such releases.

Another provision that you should include when securing the rights to a person's life story is the right to alter the material: to embellish, fictionalize, dramatize, and adapt the life story. This is often a key sticking point in negotiations.

In the case of a minor, you'll need the permission of a parent or guardian who is legally empowered to negotiate for the minor. Court review or approval of the contract may be advisable in some places.

Places:

You should secure written releases if you film (or plan to film) distinctive locations, buildings, businesses, or personal property. This is not necessary if you only make non-distinctive background use of real property, provided the filming is done from a publicly owned area or an area on which you have the right to be. Even so, some buildings and properties are trademarked, and may file an infringement claim. Consult your local film commission or a reputable film location manager for help in this area.

Beyond the risk of an infringement claim, the main reason for securing a location release deals with your liability for personal injury and property damage while working on or near the site. A distributor won't touch your film if you're in court for liability issues related to it.

Things:

Again, you should secure written releases for the names, products, logos, and other identifying marks of business and other entities. Check the Internet, directory listings, and other information sources to identify if any actual business or individual has the same name as a fictional business or individual in the film. If so, you'll want to obtain a release or change the name in the screenplay. Then check the new name.

You might consider a product placement agreement or a contra deal with a product supplier. Just be aware that some distributors avoid films with overt product placement because of the chance for conflicting broadcast sponsors. As a general practice, your prop master should "Greek" a hand prop's logo or identifying mark so it is unidentifiable on screen.

Be aware of the props and set dressing appearing in your film, no matter how inconsequential. There are many items such as (but not limited to) artwork, art objects, photographs, articles, book covers, magazines, newspapers, and even carpet and wallpaper designs that may be protected by copyright or other intellectual property laws. Often, prop rental houses check their stock to avoid these items.

You should also be aware that the permission of the *owner* of an object is not enough. So, for example, getting a release to film in a house is not enough to cover the use of any artwork that may be present. You would also need the permission of the *copyright owner* of that artwork. Sometimes a defense may apply, but you should never rely on defenses without consulting an experienced lawyer.

Music:

Obtaining music rights and clearance is complicated and can be a lengthy process. It is best to secure music licenses as early as possible in the production, and definitely have them before you incorporate any music into the film.

If you have music in your film, you must secure all necessary synchronization and public performance licenses from the copyright holder of music and/or lyrics. And if you use pre-recorded music (i.e.: existing music not created for your film, such as a pop song) you must also obtain licenses from the owner of the master recording as well as from the copyright holder of the music and/or lyrics. These rights are often owned or controlled by different entities (i.e. a publishing company and a record company).

A license to incorporate a musical composition into a film is known as a "synchronization" or "sync" license. A license to use a particular sound recording is known as a "master use" license. A license to a composition does not include a license to a recording of it, and vice versa.

Be aware that music from even mildly successful musicians can be prohibitively expensive. You should have a back up plan if the music you want is not the music you can get or afford.

Audio & Video Clips:

Film and audio clips are dangerous unless licenses and authorizations for the second use are obtained from not only the owner of the clip or party authorized to license the same, but also from all persons rendering services on, or supplying material contained in, the film clip; e.g., underlying literary rights, performances of actors or musicians. Special attention should be paid to music rights as publishers are taking the position that new synchronization and performance licenses are required when clips are used. In addition, use of clips often implicates re-use and residual payment obligations to guilds and unions.

Your lawyer should review all license agreements to ensure you obtain the proper rights.

AFTER PRODUCTION

Copyright Registration:

You should register the film with a copyright office (see earlier references).

Chain of Title Record:

You should record with the copyright office any documents evidencing any change in the film's ownership from the original author of the film to the finished film. This may seem needless, but it is typically required for any television or theatrical distribution.

For example, assume Bob wrote the script and the film was produced by a partnership made up of Bob and Mary. Chain of title in the film would be shown by:

- a) a certificate of authorship signed by Bob indicating that the screenplay is original, written by Bob, and that no rights have previously been granted,
- b) a copyright certificate in Bob's name for the screenplay,
- c) an assignment or other written transfer of the right to make a film based on the screenplay from Bob to the partnership, and
- d) a copyright certificate for the film registered in the name of the partnership.

Insurance:

You should seriously consider obtaining E&O insurance since you will remain liable for any claims that arise, even in the event that your distributor is sued. E&O insurance is meant to protect the insured (i.e. the filmmaker) from third party claims that arise in connection with the film, such as violations of copyright or publicity/privacy rights.

MORE INFORMATION

In addition to the information above and advice from your lawyer, here are some helpful books:

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

Dealmaking in the Film and Television Industry by Mark Litwak (Silman-James Press)

Getting Permission: How to License and Clear Copyrighted Materials Online & Off by Richard Stim (Nolo Press).

The internet also has lots of information available. Just remember to confirm that the information you get from the internet is accurate, as well as relevant to your situation and jurisdiction.

We wish you the best of luck with all your projects.