

Best Practices For Protection And Clearance of Works

Wednesday, April 11, 2007 --- For writers, copyrights are the intangible assets of their passions. Unlike physical goods, creative works have value that will not diminish as more people use or enjoy them. The commodities produced are creative works. While such works are generally fixed in a tangible medium, they are without question intangible assets that are infinitely reproducible with no diminishing returns.

With physical goods there exists an object that one can either sell to others or retain for personal use or enjoyment. However, once creative works are shared with others, there is a risk that they can be copied or otherwise exploited. As such, there are some simple steps that can protect these assets in order to safeguard them.

It is also important to note that we live in a world filled with creative rights. The same rights that are counted on to protect on person's works are counted on by others to protect theirs. The works of others are all around, from the graffiti on a wall, to the song being played on a street corner, to beautiful architecture.

With the works of others all around and likely to be incorporated within stories or screenplays, it is often impossible to capture any realism without including them within fictional or non-fictional works. This is precisely why script clearance has become such a key component to minimizing the risk that one person's literary work will infringe on the creative rights of others.

* Protecting The Work—Copyright *

Creative works and screenplays are protected by copyright. The Copyright Act generally gives the owner of copyright the exclusive right to reproduce the creative work, prepare derivative works based on the original creative work, and to sell or display the creative work to the public.

It is important to note that it is possible to earn some copyright protection without formally securing a registration from the Copyright Office by clearly indicating a copyright notice of the literary work (i.e. (c) 2006 Rudy Writer All Rights Reserved).

Originality and fixation are the two fundamental prerequisites for copyright protection. However, the level of creativity required is very minimal and therefore copyright protection will usually attach to a work as soon as it is created in a fixed form. This can be as simple as writing the idea on paper, setting the paint on a canvas or saving a file to a computer's hard drive. Creative work is protected the moment it is fixed in this tangible form.

While some copyright protection attaches automatically, securing a copyright registration from the U.S. Copyright Office further enhances those rights earned merely by using the copyright notice alone.

The first and most obvious benefit of securing a copyright registration is that it establishes a public record of ownership over your creative work. Additional rights and remedies available via copyright registration include the ability to sue for copyright infringement, collect statutory damages, and a possibility of an accounting for attorney's fees.

Copyright registration also allows writers to record the registration with the U.S. Customs Service for protection against the importation of infringing copies. Protection for a registered script is available in a broad number of countries based on international treaties. With an application fee of only \$45 per application, securing a copyright registration is a cost effective way to secure the broadest protection possible for the fruit of a writer's labor.

* Protecting Creative Work—Other Alternatives *

Short of securing a copyright registration, writers can establish a public record of their rights in creative works by registering the script with the Writers Guild of America or ProtectRite.

The Writers Guild of America (East and West) provides a literary work registration service. It is important to note that registering literary work with Writers Guild does not create copyright protection.

Only the United States Copyright Office can issue a formal copyright registration. However, after registering a work with the service, the Writers Guild of America can produce the registered material and confirm precisely the date of registration.

Registering creative work creates evidence to memorialize an origination date for the creative. The Writers Guild of America Registry, as a neutral third party, can then testify to that evidence. The Writers Guild of America East provides registrations that are effective for ten years at a cost of \$10 for members, \$22 for non-members, and \$17 for students.

The Writers Guild of America West provides registrations that are effective for five years at a cost of \$10 for members and \$20 for nonmembers. These WGA West registrations may be renewed for an additional 5 years at the current registration rate.

Likewise, a registration with ProtectRite provides no formal copyright protection, but establishes a completion date and identity of your creative work. ProtectRite offers a 10-year registration for \$18.95 and permanent registration for \$39.95.

* Script Clearance—What Is It? *

Once a writer has taken steps to protect the early stages of his/her creative works, it is time to start thinking about how these works may be interconnected with the rights of others. Keep in mind that a manuscript or screenplay could incorporate the creative works by simply referencing or depicting another's trademark or copyrighted materials.

Script clearance is the process of evaluating creative work for the presence of 3rd party rights incorporate therein and securing consent or a license for the use of their works. A 'cleared' script is a one that can be distributed, performed, copied and otherwise exploited without infringing or violating another's rights in their creative works or other intellectual property.

Without proper clearance, a script is typically not distributable in view of the risk associated with potential claims of infringement. Failing to properly clear a script can lead to never being able to fully realize the potential profit from the work.

A script clearance report is a detailed analysis of the script to identify all possible legal conflicts to include character names, business names, locations, artworks, music, copyrighted materials, trademarks, product placements, libel, defamation and historical inaccuracies. This report allows writers to prioritize potential conflicts and provides possible resolutions. The report is not a legal opinion and should be reviewed by the writer's attorney who will then likely draft a clearance opinion.

* Script Clearance—Why Do Writers Need It? *

Several years ago, it was easier to determine what was protected and what was in the public domain. If the work did not have a copyright notice on it, it was in the public domain.

However, the law as it stands today gives automatic copyright protection to any creative work fixed in a tangible form. Writers not only have to figure out what is protected, but they also need to locate that rights holder if no notice is present on the work. This minefield of creative rights is difficult to navigate to say the least.

Prior to working with any writer, a distributor will typically require a script clearance report and availability opinion to avoid personal liability related to content of the film or story. The filmmaker will need an errors and omissions insurance policy to shield the distributor from liability. The E&O insurer is predictably risk adverse and will require a clearance report to analyze the level of risk stemming from the film.

In view of the complexities involved, it is suggested that the writer not attempt to prepare his/her own clearance report. The insurer will require a professionally generated report to make certain it has a reliable picture of the risk associated with distributing the particular work. Professional script clearance companies are readily available throughout the U.S. and have

database information that is generally not publicly available.

The sooner the clearance process starts, the better. However, it is critical that clearance process begins prior to filming a storyline. Most script clearance companies charge a single fee and will review revisions at no additional cost. In the event the revisions include new characters, locations or music, additional fees may be charged. Most reputable clearance companies can generate a script clearance report in about 5 business days.

* The Script Is Cleared And Registered, Now What?

Collaboration Agreements (Co-writes):

Regardless of contribution, the authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary. If a writer is collaborating with another author, whether formally or informally, they should have an agreement in place that specifically outlines the parties' respective ownership interests in the creative work.

The agreement should memorialize the parties' ownership interest in the work even before work on the project has commenced. Other issues to be sorted out in a collaboration agreements include which author can license the exclusive rights to the work, how any royalties from the work should be divided, what happens if one of parties quits before the work is finished and even how the authors names will be depicted in connection with the film or story.

Regardless of how long or well the co-authors know each other; the best practice is to establish the ground rules early on. Publishers will likewise insist on a collaboration agreement between co-authors, so it is best to have the agreement completed early in the process.

Confidentiality agreements:

When a writer approaches a studio or publishing house to pitch a script or any other time he/she divulges creative work in connection with a proposed business venture, a confidentiality agreement should be put in place.

A confidentiality agreement is a legal document in which one party, usually the prospective studio, publisher or investor, pledges to keep strictly confidential, and return on request, any and all information provided by the artist or writer seeking to pitch the script.

Admittedly, since movie studios and publishers, as the power brokers in the industry, have the upper hand in negotiations with junior writers, they are likely to refuse an agreement and force the writer to assume some risk in disclosing the idea. Large studios and publishers are subject to countless script submissions.

If confidentiality agreements were entered into for each submission, studios and publishers would never be able to develop an idea without exposing themselves to any number of borderline or frivolous lawsuits from authors

with works that in some minimal way resemble the idea being developed.

Nevertheless, it is the best practice to get as many people as possible to sign a confidentiality agreement minimizing the risks to the writer of having the creative work unfairly exploited.

Following the best practices of securing copyright protection, registering manuscripts with the Writer Guild of America and ensuring that the works are free from potential infringement on the rights of others will ensure that creative works can be freely marketed to the maximum benefit.

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