

A LEGAL CHECK LIST OF BASIC CLEARANCE PROCEDURES

The clearance procedures contained on most E&O insurance applications can be extremely useful. They provide a legal checklist of what steps you must take to produce your project safely and to minimize the risk of an E&O claim.

Anyone producing a film, television program or series, a multimedia work, publishing a book or an Internet site, or preparing any other type of creative property at some point will need to purchase an errors & omission or media perils insurance policy (for general info on E&O insurance, see "Counseling Content Providers in the Digital Age" published by the New York State Bar Association). In order to obtain the insurance for your project, you will be required to complete an application (see "Cracking the Code on Your E&O Insurance Application"). Attached to the application will be the clearance procedures that you are required to review; you also must warrant that you have followed the procedures.

What follows here is a compilation of clearance procedures from the applications of several different E&O carriers. It is a fair representation of what you are likely to find on any application.

GENERAL: You and your attorney should monitor the production or other work to be insured at all stages, from inception through final cut or edit, with a view to eliminating all material that could give rise to a claim. Prior to any public exhibition of the work, it must be previewed to assure that the clearance procedures have been followed.

All necessary rights must be obtained that cover domestic and foreign territories, including any extensions and renewals for all literary material (other than original or unpublished material) contained in the insured production. The origin of all works on which the production is based must be traced and cleared in order to ascertain that you have all the required rights.

Consideration should be given to the likelihood of any claim or litigation. Is there a potential claimant portrayed in the work who has sued before and is likely to sue again? Does the subject matter require difficult and extensive discovery in the event you have to defend it? Are the sources reliable? Is there a close copyright or other legal issue? If full copyright is not obtained, any limitations and/or reservations must be explained to the E&O carrier.

As soon as you become aware of any rights problems related to material included in the production, the carrier must be informed and you must seek advice from your attorneys.

COPYRIGHT REPORT: You must obtain a copyright report that covers domestic and foreign copyright, as well as all extensions and renewals, for all

literary material (other than original and unpublished) contained in the work. If you are acquiring a completed work (such as a pick-up of a motion picture), you must also obtain a copyright report covering the completed work. In the case of an unpublished original work, the origin of the work has to be traced in order to ascertain that you have all the required rights.

SUBMISSIONS: The origins of the work should be ascertained, including the basic idea, sequence of events, and characters. Be sure that you (or your partners, directors, officers, or agents) have not received any unsolicited submissions of any literary or dramatic material, program ideas, formats, or storylines from any third parties that are similar in content or style to the insured production. If so, the circumstances as to why the submitting party may not claim theft or infringement should be described in detail. If it is likely this person may assert a claim, then steps should be taken to secure that person's rights. You must have a process for dealing with them, and quitclaims should be obtained where appropriate.

WRITTEN AGREEMENTS REQUIRED: You have to have written agreements between you and the creators, authors, writers, and owners of all material. This includes getting authorization for quotations from copyrighted works that are used in the work. All contracts and releases must give you the right to market the insured production in all media and all markets (e.g., DVD, video cassette, digital format, internet, etc.). In particular, any gaps in respect to underlying rights must be explained.

FACTUAL WORKS/ DOCUDRAMAS: If the work is in any way based on actual facts, you must make certain that the source material is primary (e.g. direct interview, court records) and not secondary (e.g., another copyrighted work). Use of secondary sources may be permissible, but full details must be examined by an experienced clearance or media attorney to evaluate whether they are adequate.

DOCUMENTARY: If the production is a documentary and there is no script, you should provide counsel with a detailed synopsis of the project in advance of production. (If it is a documentary series, your lawyer should receive a detailed synopsis of each episode.) If the production will involve negative statements about people or businesses, provide counsel with full details about the allegations and their merit. During filming, you should consult with counsel about anything questionable (e.g., filming identifiable copyrighted items or performances, trademarks, persons who have not specifically consented to be filmed, or minors.) Relevant laws differ from place to place: some jurisdictions have very restrictive rules about filming persons, signs, buildings, public art, etc. Also be careful to avoid narration or editing that accidentally implies negative things about the people, products, or businesses pictured in the work.

IDENTIFIABLE INDIVIDUALS: Obtain written releases from all persons who are recognizable or who might reasonably claim to be identifiable in the work, or whose name, image, or likeness is used. Releases are not necessary if the recognizable person is part of a crowd or background shot and his image is not shown for more than a few seconds or given special emphasis. In the case of minors, the minor's consent must be legally binding. If the recognizable or identifiable person is deceased, you have to obtain releases from the personal representative of such person. Releases of these types may not be required in certain instances, but full details must be provided to a qualified media or clearance attorney who can evaluate the situation.

Releases must give you the rights to edit, modify, or juxtapose any part of the film with any other film, change the sequence of events or of any questions posed and/or answers given, fictionalize persons or events, and make any other changes in the film that you deem appropriate.

DEFAMATION/PRIVACY: It must be determined that the work does not contain any material that constitutes defamation, invasion of privacy, violation of the right of publicity, or of any other right of any person, firm, or corporation. You and your lawyer must read the script, manuscript, or other content to eliminate anything that can be construed as defamatory, invades privacy, or is otherwise actionable.

SCRIPT RESEARCH REPORT: Where the work is fictional in whole or in part, the names of all characters have to be fictional. It is important that a "fact research" report be obtained to determine whether names, locations, and other matters contained in the work are truly fictional or may unintentionally infringe on the rights of individuals or entities. In certain limited instances, particular names need not be fictional, but a qualified media or clearance attorney must review full details.

BUSINESS, PERSONAL PROPERTY, & PRODUCTS: Where scenes are filmed depicting or referring to distinctive businesses, personal property, or products identifiable with any person, firm, or corporation, or depicting or referring to distinctive real property of any person, firm, or corporation, you have to obtain written releases that grant you the right to film or depict and use such property in the work. In certain instances releases may not be required, but a qualified media or clearance attorney must review full details. Releases are not necessary if property is non-distinctive background only.

MUSIC: Synchronization and performance licenses must be obtained from the composer or copyright owner of all music used in the work. Licenses are unnecessary if the music (and its arrangement) is in the public domain. Licenses must also be obtained for the use of previously recorded music.

FILM CLIPS: If the production contains any film clips, you must obtain authorization to use the film clip from the owner of the clip who has the right to grant such authorization, as well as obtaining authorization from the appropriate persons for "secondary use" of all material contained in the film clip, e.g. underlying literary and musical rights, performances of actors and musicians.

TITLE REPORT: This report covering the title of the work should be obtained from a recognized source, setting forth prior uses of the same or similar titles. The title of the production must be changed if there is the possibility of any conflict.

BONUS MATERIAL: Any bonus material, interviews, or outtakes included on a DVD or any other media version of the production must go through the same clearance procedures as the insured productions.

DISCLAIMER: The foregoing clearance procedures should not be construed as exhaustive; given the great variety of works, they do not cover all situations that may arise, Rather, you and your counsel must continually monitor the work at all stages, and in light of any special circumstances, to make certain that the work contains no material that could give rise to a claim.