Cracking the Code
on Your E&O Insurance Application

by Ted Gerdes

For more than twenty years, I have represented various insurance carriers that sell errors and omission insurance for many different forms of media, including film and television productions, web sites, music catalogs, etc. One of my functions has been to review the application for E&O insurance submitted to the carrier by the prospective insured, i.e., filmmaker, television producer, etc., and advise them of their risks. I have also written applications for companies. If you want to understand more about E&O insurance in general, please see "Errors and Omissions" in "Counseling Content Providers in the Digital Age" published by the New York State Bar Association. My purpose here is to help you streamline the application process. This article reviews the typical questions found on most E&O applications and provides an explanation of the questions, in some instances why a particular question is there and what information is being requested.

E&O applications contain a series of questions about the project or other risks the applicant wants to insure. The processing of the application can sometimes take as long as 2-3 weeks from the time it is submitted, so you need to allow adequate time for processing. In addition to completing the application, you may be required to provide the carrier with supplemental information for certain questions. I have found that delays are frequently caused by the following primary errors:

- Applicants not understanding each question carefully and completely.
- Questions with multiple parts, with one or more part left unanswered.
- Answers not responsive to the question.
- Answers that raise doubts about the Applicant's understanding of the risks.
- Questions not answered at all.

I recommend that you read through this entire article first, but if your immediate concern is about a particular question or a certain section of an application, you can scan the article quickly to find the information you need.

THE APPLICATION

Each carrier has its own application. The formats of each are different and the questions may be worded differently, but the basic information requested is essentially the same.

They all contain various notices, which you should read. Some of the notices provide basic information about the type of insurance you are applying for and coverage

restrictions. Other notices are required by a particular state, relating to restrictions or requirements within that particular state. Some require you to submit documents with the application, such as resumes of the principals involved in the project, copies of certain contracts, a DVD or script, a budget, and advertising samples.

The questions fall into several general categories that request information about: the applicant, the scope or requirements of the insurance requested, the subject matter to be insured (film, television production, company's production activities, a library), the claims history of the applicant, and the clearance or vetting procedures used.

GENERAL INFORMATION

The Applicant.

The first section of every E&O application requests information about the applicant, including name, address, type of business entity (i.e. a corporation, LLC, or partnership), its history, and the principal officers or partners. This is basic information. It is important to know who will be the policyholder. The history of the company and the experience of the individuals can help an underwriter evaluate the overall risk. The longer a company has been in business and the greater the experience of the principals, the less chance there is of making a mistake or failing to secure the proper rights or contracts.

In the film and television business, it is common for a new entity to be set up specifically for a production. This is done for a variety of reasons, one of which is to keep separate any liability resulting from a particular project. It also keeps the accounting and tax issues separate and the film can easily be sold merely by selling the entity, rather than having to transfer all of the rights and contracts individually. For example, with a motion picture, a sale would require transferring the film, the script, all of the actor contracts, bank loans, guild guarantees, and numerous other things.

If the applicant is such an entity, it often has only been in existence for a few months. Normally this short history would be of concern to an underwriter, which is why he or she will look closely at the principals of the organization to judge their experience level and therefore the risk.

Additional Insured.

An "additional insured" is a company or individual added to the coverage of the policy. This coverage of an additional insured is limited to claims asserted against the additional insured rising out of the activities of the Named Insured. Other claims filed against an additional insured are not covered. Distributors are typically added as additional insured. For example, a claim of copyright infringement against an insured film would be covered and distribution would be defended as part of the suit, whereas a claim of trademark infringement against the distributor for its logo would not.

WHAT IS TO BE INSURED

The information in this section of the application is often most crucial in helping the underwriter separate low risk from moderate or high risk. Is this fiction or non-fiction? Is it a film or television program? Is it original or based upon another work? These answers can also affect the premium charged.

The subject of the Insurance.

The "who" information discussed above is normally followed by questions about the subject matter to be insured, the "what." Is this policy to cover a motion picture or television production, a book, an Internet site, a music or film library, etc.? It will also request the title as well as the name of the author, the producers, executive producers, the director, and perhaps others. Much of this is self-explanatory and straightforward.

Underlying works.

One of the most crucial questions in this area is whether the production is based upon another work. You will need to list the work and its author as well as other relevant information. It may be a script based upon a novel or a short story. It may be a sequel or a remake of a preexisting film. This legal history or "chain of title" can be simple or quite complex. For that reason, it is important that you have an attorney experienced in copyright chain of title analysis. Be as explicit as possible and be prepared to provide the carrier with additional information. You may be asked to provide copies of relevant documents and the carrier's attorney may also want to question your attorney about what was done to properly secure the necessary rights in the underlying work.

Fiction/Non Fiction.

All of the carriers have a question that essentially asks about the production. Is it:

- Entirely fictional
- Entirely fictional but inspired by specific events or occurrences
- A portrayal of actual facts, which includes significant fictionalization
- A true portrayal of actual facts
- or other?

The answer is simple, right? Not at all. This is one of the questions that applicants and their attorneys agonize over. It's usually obvious when a work is "Entirely Fictional." This box is meant to be checked when the applicant has an original film that is purely fictional. Most problems arise with the next two descriptions. If your project falls into one of these classifications, it is good to include additional information and explanation as to how and why your project falls into one of these two categories:

1. "Entirely fictional, but inspired by specific events."

This is meant for a work that is more fiction than non-fiction. For example, a film that uses the Watts riots as the background for a fictional story may contain references to

public figures of the time period and use actual Los Angeles locations. Sometimes producers check this box when a fictional film may contain events that are loosely based upon events in a writer's life.

2. "A portrayal of actual facts which includes significant fictionalization."

This is a description of the traditional docudrama, a story based upon facts or actual events in which events and characters have been created for dramatic and other effects. The biopic fits into this category.

The last category—"A true portrayal of actual events or happenings"—is for news or documentaries.

Summary of the story and time frame.

There is usually very little room for a description. If you can accurately describe the story as it would appear in a television listing, do so. Otherwise, put "see attached" and attach a more detailed description of the content to the application. For works that are pure fiction or pure non-fiction, a simple log line may be enough. For the hybrid (fact/fiction) works, it is better to provide a longer explanation to head off questions. It should also include an explanation as to what is fact and what is fiction, and whether releases have been obtained from individuals depicted, or if not, why not.

In the case of a docudrama, you may need to submit more detailed information. This can include the script, the factual basis for the script, and life story rights agreements and other documents that help provide the carrier and the attorney with a more complete picture so the risk can be properly evaluated.

The time frame of the story is self-explanatory. In the case of a fact/fiction work, the time frame can reduce questions. For example, if the events and people portrayed are real but the story took place during the Civil War, many legal issues arising out of true stories, such as defamation, can be eliminated.

SCOPE OF THE INSURANCE

There will be several questions about the insurance you are requesting, such as limits and term. It may also request a budget and expected revenue as well as whether you discussed this insurance with another carrier and whether another carrier has refused you insurance.

Limits.

Third parties, such as distributors or broadcasters, often dictate the limits of insurance. If you don't have a distribution contract or broadcast deal, consult with your broker or your attorney. The per claim limit refers to the maximum amount the carrier will pay for claim expenses and defense costs for an individual claim. The aggregate is the total amount it will provide during, either a 12-month period, or the entire policy

period. For example, if you have an aggregate of $3,000,000 and you have two claims, one for $1,000,000 and one for $2,000,000, you have exhausted your policy coverage.

Term.

The term required is often dictated by the contract for distribution or broadcast. Three years is typical, although the trend is to increase this to five years. The primary reason for this is that , it typically takes 1-2 years to complete a project before release and the statute of limitations for most claims is three years or less. Also, history shows that from the release date of a production, most of the claims are asserted within three years, with year one and two being the most likely. For ongoing risks, such as web sites or film libraries, or ongoing businesses, such as commercial production houses, the risk of claims does not diminish and an ongoing policy may be necessary.

The effective date may also be determined by a contract. Film distributors often require coverage prior to the start of principal photography. Some broadcasters only need coverage just prior to the air date. It depends upon the risk of a claim. Keep in mind that if a claim is asserted before you obtain your policy, *it will not be covered.* Absent a contractual requirement, it is a decision based on balancing risk vs. financial concerns.

The application will often contain a question asking whether or not insurance was discussed with another carrier. They want to know if you have shopped the policy. The typical follow-up question regarding whether you have been refused coverage is to determine if another carrier thought the risk was too great to offer coverage.

The budget and revenue information help to assess the scope of the risk. Larger budget and higher revenue projects have a higher incidence of claims. This is not usually a question of carelessness or negligence on the part of the producers, but the economic fact that the higher grossing and higher profile projects attract more attention from claimants. Often these are nuisance or frivolous claims, but because they have a greater potential payday, it is easy enough for the claimant to find an attorney who will take the case on a contingency fee.

CLEARANCE OR RISK MANAGEMENT QUESTIONS

Title.

The title report is a research report. It searches various databases, including the United States Trademark office records, state trademark records, industry trade magazines, the Internet, and others. The purpose is to provide all pertinent information about the current and past use of a particular word or phrase as a title. This report will be reviewed to determine whether the title is clear to use. The research companies most commonly preferred are Thomson CompuMark, CT Coresearch, and Dennis Angel.

Copyright Report and Chain of Title.

The copyright report is a search of the records of the Copyright Office and other databases to determine the economic and legal history on the "chain of title" of the particular work being used. If it is a recently written script based upon original material, the report will be short. Sometimes a carrier will waive the requirement for this report in such a situation.

These reports and the follow-up questions are more important when the new work is based upon a pre-existing work, typically a book or a prior film. Applicants sometimes are confused by the request for confirmation that there are no gaps in the "chain of title," thinking this refers to the Title Report discussed above, which includes any information found in the U.S. Copyright Office as well as the document history of the work upon which the project is based.

The history of this underlying work must be checked to make sure the necessary rights to make this new work are available and that they are properly acquired. For example, if the underlying work is a novel, the copyright report will provide information about the copyright registration and renewal of the book as well as any documents recorded in the copyright office that affect ownership of the work. If a prior producer optioned the book for a film, this information would probably be listed in the report and it would be necessary to make sure that that prior option has expired. It is also necessary to verify that the publisher of the book did not acquire any motion picture rights.

The circumstances vary from work to work. The older a work, the more complex this process is as the legal history is longer and often complex. Traditionally, carriers rely upon the attorney for the producer to perform this work; more recently, carriers are requiring that their own attorney be provided access to this information so he or she can corroborate the opinion of the applicant's attorney.

Formats.

The rise in popularity of reality programming and the spike in litigation over ownership of formats have generated a response from E&O carriers. They have added questions about formats: Is your show based on an original format? Are you aware of any similar program? There are often follow-up questions.

Formats have become valuable. The owners of a successful reality series can license the format to producers in a variety of territories. They have become very protective of these rights. The difficulty with this is that under U.S. Copyright laws, ideas are not protected. While the execution and creative expression in a reality show may be protected, the basic elements cannot be copyrighted. Courts have declared program elements to be basic ideas that are not protectable.

Even though series formats are difficult to protect, that does not mean that they can't be. It also does not mean that litigation can ensue over perceived rights. Keep in mind that E&O carriers are highly sensitive to the potential for litigation, as one of the primary

benefits of an E&O policy is defense costs. Even if a defense is successful, it can still cost the carrier six and seven figures to reach that result.

Pre-1978 Works.

This question asking about pre-1978 works was inserted into applications in the mid-1990s after the U.S. Supreme Court decided the case of *Stewart v. Abend.* That case arose out of the underlying rights of the Alfred Hitchcock film "Rear Window," starring James Stewart as a man confined to a wheelchair who sees suspicious events in the apartments across the courtyard. The film, released in 1954, was based upon a short story, "It Had To Be Murder" by Cornell Woolrich, written in 1942. The Copyright Act of 1901, which governed this film and the story, had a two-term system of copyright protection: an initial term and a renewal term, both originally 28 years in duration. The copyright subsisted for the initial 28-year term unless the author or his or her representative filed a renewal application during the last year of copyright protection. If done properly, the work's protection was extended for the renewal term of 28 years.

Woolrich died in 1968 two years prior to the start of the renewal term and his heirs renewed the copyright of his story. They eventually sold their rights to Sheldon Abend, who sued Universal, the owner of "Rear Window," claiming that the Copyright Act provided that if the original author dies prior to the renewal term, all rights in his work revert to his heirs upon renewal. The U.S. Supreme Court agreed with this interpretation, which means that owners of a derivative work such as "Rear Window" may not continue to distribute their film without consent of the owner of the renewal rights. They must go to the renewal rights owner and reacquire those rights. In essence, they are required to buy the same rights they purchased earlier but this time from a different party.

This case is the reason this question was inserted into E&O applications in the United States. It prompted carriers to obtain additional information in order to better evaluate this risk. In large part, the *Stewart v Abend* risk has been limited because of changes made by the Copyright Act of 1976 that became effective in 1978. The term of copyright is now based upon the life of the author plus a period of years (currently 70) after his or her death. Presently, all works are either governed by the 1976 Act or are in their renewal term of protection under the 1909 Copyright Act. Although *Stewart v Abend* may not affect new licenses, it still can complicate a copyright chain of title.

Name and Likeness.

Is the name or likeness of any living individual used or is a living person portrayed in the production? If yes, have clearances been obtained?

The intent of this question is to understand whether any "real" individuals are referred to or portrayed in the work to be insured. I have seen applicants wrongly answer "yes" for a strictly fictional project, apparently referring to the actors. While the actors are real people, they are not playing real people in a fiction work. This question only applies to the actual use of real living persons in the production.

If the production is a documentary, then real living people are shown in the film and permission to show them is necessary, except when it is not. For example, if a documentary is the biography of a film star, one may use his or her image to tell the story of his or her life without permission.

Similar to the question about living people, there is usually a question that asks about the use or portrayal of deceased individuals that relates to the "right of publicity" issues surrounding deceased individuals. Right of publicity was traditionally not descendible, but this has changed over time. States have passed laws that allow the heirs of famous people to control the commercial use of their predecessor's likeness.

When using or portraying real individuals, whether living or dead, it is important to understand when releases are necessary and when they are not. In completing the questions, it may be necessary to provide additional information explaining who these people are, how they are portrayed, and whether or not you have a release. If you don't have a release, you need to explain why. If you are not sure, consult with a lawyer before completing the question. An informative answer may obviate the need for follow-up questions from the underwriter or the carrier's attorney.

Fact Research Report.

A fact research report, sometimes called a script clearance report, is a necessity for most fiction and some non-fiction projects. A researcher reviews the script, checking factual elements to make sure they do not accidentally represent any real person or company. They also check for use of real business names, logos, and a number of other things that can get you in trouble. An attorney should review this report to determine if the changes recommended by a researcher are necessary. If changes are needed, the script clearance company normally will assist you by providing alternative suggestions. For example, if the name of the main character in the film, set in a small but real town, is identical to a real individual living in that town, the character name should be changed to avoid any accidental connection between the character and the real individual. This is especially important if the character in the script is, for example, a killer or adulterer.

Film Clips.

If the production contains third party film, television, or Internet clips, they must be properly licensed. In addition to obtaining permission from the copyright owner of the clip, the producer must also obtain permission from the writer of the underlying material contained in the clip, for any music score in the clip, and from actors or others appearing in the clip. There can be exceptions. For example, if the music is not used or if it is a news clip and the use is for a documentary, permission from the individuals may not be required. If you are not sure, have an attorney evaluate your particular situation.

Photographs.

This refers to photographs used in the production. The copyright owner of the photo must provide a license to the production company and permission must be obtained from all individuals or businesses depicted in the photo. If this is a non-fiction work, such as a documentary, some of these permissions may not be required.

Music.

For any third party music used, whether it is an original score or a commercial recording, all rights must be obtained for all intended uses of the production. The synchronization license is a grant that allows the composition or sound recording to be "synced" to the film. Performing rights licenses are also necessary in most cases.

A music cue sheet is a listing of every piece of music contained in the production, whether it is ten seconds or five minutes in length. This allows the royalty collection agencies to properly list the music and to be able to pay the composers and publishers when the film is shown in theaters or on television.

If you hire a composer to prepare a sound track, the insurance carrier wants to know that your contract with him or her contains a provision that the composer will indemnify you in the event he or she has used any music of others.

A separately released sound track is a risk outside the distribution of your film, television production, or other work. This is a separate risk that must be evaluated on its own terms and often requires the completion of an application for this work. An additional premium may be charged.

Failed Negotiations.

The point of this question is to determine whether or not someone tried to negotiate rights that may or may not be necessary for this production and was turned down. For example, the music supervisor wanted to use a popular song in the film but the artist did not grant permission. If the explanation is "we were turned down but we will not use the music," the answer is satisfactory. This sometimes comes up in a life story project where someone approaches an individual portrayed in the film for a life story release but is refused. If the person is not depicted, then this is not an issue, but if he or she is depicted, it may be a problem. This must be evaluated by an attorney to determine if the First Amendment permits portrayal of that person without a release.

Unsolicited Submissions.

Some applications contain questions about the company's policy with regard to unsolicited submissions. These refer to ideas, concepts, scripts, or music that may be provided to one of the employees or principals of the company in the hope of selling their work or obtaining a job. In certain cases, these types of submissions can create an implied contract between the person presenting the material and the person viewing it.

The potential for a person to later claim that he or she submitted a script or idea to someone involved in the production and is entitled to be paid can result in expensive litigation. To combat this, companies set up internal policies and procedures where employees are instructed not to accept any such submission. Larger companies that receive submissions through the mail sometimes have a logging system where the submission is logged in and returned to the sender unopened, with a letter explaining that they will not read, view, or listen to any unsolicited submission.

Another way to minimize the risk of unintentionally creating a contract is to provide the person offering the material a written contract that is called a "submission agreement." This essentially explains that the company will review the material but will be under no obligation to the person submitting the material for any compensation. These agreements have held up in court.

Claims History

You must list all claims asserted against the company and anyone who is part of the company or any related companies.

You must list any current or threatened claims against the project that is being insured. Keep in mind that pre-existing claims will not be covered, so concealing them will not help you. If your concealment is considered material, it could void the policy.

Are you or anyone else aware of any facts or circumstances that could give rise to a claim?

This is a tricky question. You must list any event that has occurred to date that could possibly give rise to a claim. For example, during production someone calls and says that the writer stole parts of his script from the caller's book. After investigation, the producers determine this was impossible as the screenplay was written ten years before the book was published and the screenwriter has never read it. Even if you think it is not a problem, this must be disclosed. If the book author later sues, and the carrier finds out you knew of his concern, the claim may be disallowed and not covered.

CLEARANCE ATTORNEY

The name and experience of the attorney is critical. The carrier is relying on this individual to insure that all necessary licenses and other contracts are obtained. If you have an attorney with little experience in the entertainment business, the underwriter will look it at as an additional risk.

The carrier wants to be reassured that the non-lawyers working on the project have been properly apprised of the rights to be obtained and other things that must be done in order to reduce the risk of a claim against the production.

WARRANTIES

Most applications have a series of warranties and warnings. It is important that you read them and understand what it is you are agreeing to sign. Some applications require that certain warranties are initialed separately to confirm that they were read and understood.

Fraud.

One is a list of legal consequences for providing false or intentionally misleading information on the application. It should be common sense that in applying for a policy any material information relevant to the risk of a claim should be provided to the carrier. In addition, many applications require that you warrant that all the information you have provided the carrier is true and you have not left out anything important.

Clearance Procedure and Licenses.

You warrant that you have complied with the clearance procedures attached to the application and, if you find out something material after the application is submitted, you will disclose it. For example, you will disclose if the phone call from the book author who asserted that his book was ripped off by the screenwriter (as discussed above) comes in after the application has been submitted but before a policy has been issued.

You will obtain warranties from third parties from whom you obtain material that they have the right to license it to you and, if there is a claim, you will be indemnified by them. For example, the photo you licensed turns out to be owned by someone other than your licensor. It is the licensor who should bear the cost of any litigation or pay any claim.

You have made an effort to determine that all material used in the production has been properly licensed or it will be licensed before the production is completed. This accounts for the practical reality that at the time the application is submitted not all of the permissions necessary have been obtained, and allows the carrier to issue a policy without having to wait for all the necessary documents to be finalized. Some carriers accomplish the same thing with temporary exclusions for items such as music. These are removed once you provide confirmation that all necessary rights have been obtained. This is often necessary when coverage is required at the start of principal photography, when many things are still undecided.

Understanding the Insurance Policy

Other warranties explain that the application will become part of the policy, so any statement made or information missing could affect coverage under the policy. Just because you sign the application does not guarantee that insurance will be offered. Any exclusion in the policy applies regardless of the statements made in the application. You understand that the financial limits on the policy include defense costs as well as any settlement or judgment, which is a reminder that attorneys' fees could exhaust the policy

limits before any judgment is rendered. Any costs or expenses in excess of these limits are your responsibility.

Attorney Warranties.

Some carriers require the attorney to sign the application in addition to the applicant. The attorney must warrant that he or she is familiar with the clearance procedures, that he or she has reviewed these procedures with the applicant, and that the statements made on the application are true and correct.

If you have any further questions regarding your application, please contact me at:
And good luck with your project!