



Clearance: Start Early and Avoid the Clutter

Sandra P. Thompson, PhD

The film and television industries have expanded beyond traditional studios and locations. Independent and documentary filmmakers swell the ranks of those making large screen feature films and documentaries, while the growing number of channels and the popularity of reality television shows increase the offerings on the small screen. In addition, there is a rapidly expanding content base of entertainment that is exclusively for online consumption, such as original episodic offerings by Netflix and content found on youtube.com.

This additional content means an increase in the probability of improper use of intellectual property. Regardless of whether you are in the entertainment industry, have intellectual property interests, or both, it is important to understand how the use and presentation of intellectual property in a film, television production or online video production can affect the filming process and project costs.

The process of clearing a film or television episode/production involves reviewing the production components, determining whether there is any potentially actionable intellectual property in the production, categorizing the instances, developing a strategy as to how to address each instance and then executing that strategy. Clearance considerations should be addressed early in the process, in order to determine whether potentially actionable instances can be removed or minimized.

Two key intellectual property interests to consider for clearance purposes are trademark and copyright interests. A trademark is designed to identify the source of the goods or services in the minds of a consumer. Therefore, as long as the product or service is being fairly represented in the film or television show, that use cannot be limited.

Two modern films that have been newsworthy in this regard are the feature film *Flight* with Denzel Washington

and the documentary *Super Size Me* with Morgan Spurlock. In *Flight*, the main character is an alcoholic who is shown drinking Budweiser beer while driving. Anheuser-Busch asked the filmmakers to blur or hide the label, but they could not legally compel the filmmakers to do so, since the beer was being represented fairly. While McDonald's trademarks were utilized throughout *Super Size Me*, McDonald's food and restaurants were not being misrepresented, but instead were integral to the documentary.

The logical question is why products or logos are blurred in some productions. In many instances, trademarks and logos are blurred or hidden, in order to keep from providing free advertising to the products or services or to keep another sponsor satisfied. If product placement is an issue in a current project, it may be wise to contact the trademark owner to discuss the use in and potential product placement revenue generated from the production.

Another consideration is copyright infringement. A copyright protects the expression of an idea and is designed to give the creator of an artistic work the right to produce/publish and reproduce the work. Copyrights protect artistic works, literary works, music, films, scripts, video productions and other creative works. While the creator of the script and film or television production can protect those works by copyright, there is often music, video clips from news programs or sporting events, scripts, literary works used as the basis for the script or production and other forms of expression that must be cleared as part of the review of the film or production.

One of the key considerations is whether the use of the copyright protected material is a fair use of the material. The Copyright Act of 1976 established a four-part test to determine fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of



the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work (17 USCA §107). As with many multi-part tests, there is room for different interpretations. Yoko Ono sued to get 15 seconds of the song “Imagine” removed from a film project, because she did not agree with the premise of the film, but was unable to do so under the Fair Use Doctrine. There are some other exceptions for the use of copyright protected work, such as private, noncommercial use or educational use, but these are specific exceptions and must be reviewed in context.

Clearance of intellectual property issues is a key step to begin early in the process of making a feature film, a documentary or a television program. The filmmaker and production team should understand that the failure to involve a clearance attorney during the review of the script, first cuts and subsequent editing can result in delays, budget overages, reshoots and/or reediting, and possibly litigation. A coordinated clearance strategy can result in a final product that has few, if any, significant intellectual property risks, while at the same time ensuring that proper licenses, permissions and documentation are in place prior to release and distribution.



Dr. Sandra Thompson is a Shareholder in the firm’s Corporate and Intellectual Property Practice Groups. She can be reached at 949.224.6282 or sthompson@buchalter.com.