Caveat Scriptor

Don't Get Burned by Boilerplate Releases

By Peter L. Skolnik and Matthew Savare

The Catch 22 for unpublished writers

Writers often spend years crafting and perfecting their novels, screenplays, teleplays and stage plays. When their masterpieces are complete, they exult in a sense of euphoria, eager to shop their property to agents, studios and production companies. However, writers—particularly first-time writers—generally find it difficult to attract significant attention to their work. In the unlikely event an unpublished writer does find someone in the industry to read his or her material, the writer is oftentimes faced with a Hobsian choice: to either sign a non-negotiable release that is so favorable to the other party that it makes it extremely risky and costly for the writer to sue for copyright infringement or to decline to submit the property and pass on perhaps the only opportunity the writer may have to sell the work.

Although no universal advice can solve this vexing dilemma, there are specific precautions that writers can take to avoid getting burned by boilerplate releases.

The realities of the market and the need for releases

Studios, production companies and other entertainment entities engage in extensive efforts to develop, create and acquire literary material. These companies are inundated with perhaps thousands of unsolicited works every year, forcing them to make their own difficult choice: to either read the materials and potentially expose themselves to claims of idea theft, copyright infringement, or breach of an implied contract, or to destroy or send back the material without ever reading it. Most companies elect the latter option, thus reducing their exposure to liability. Those relatively few entities or individuals who do read unsolicited work inevitably and understandably will require the writer to sign some type of release before evaluating the work.

Typical terms in a release

Although releases vary widely among companies, several provisions appear in virtually all of them. *First*, the release will disclaim the existence of any express or implied contract between the parties. In other words, the company is not obligating itself to purchase or produce the work. Such a disclaimer can also be relevant if the company must defend against a claim for idea theft. *Second*, the release will limit an aggrieved writer's remedies to money damages and require the writer to waive the ability to seek any type of injunctive relief. Thus, if the writer sues and wins—whether on a claim of copyright infringement or any other ground—he or she will find it extremely difficult to stop the production or distribution of the infringing work. *Third*, a writer will always be required to warrant and represent that he or she is the sole author and/or owner of the work. *Fourth*, the release will stipulate that the laws of a certain state—typically California—will govern its interpretation and enforcement. *Finally*, the release will include a merger clause, stating that it constitutes the parties' entire understanding of their agreement and supersedes all prior agreements, oral or written.

Proving copyright infringement can quickly become an exceedingly difficult and costly proposition.

Most writers find these customary provisions reasonable, execute the release, and submit their material. Unfortunately, dangerous terms lurk in some release agreements, and eager writers often overlook or turn a blind eye to these egregious provisions.

Let the writer beware

As noted, most releases, although written to favor the party receiving the unsolicited material, are fair and reasonable. Some releases, however, contain provisions that are so unfair to the writer that he or she should decline to sign unless the offending language is stricken.

For example, in a recent lawsuit in the District of New Jersey,[1] the plaintiff alleged that the blockbuster movie "*Finding Nemo*" infringed the copyright of his illustrated manuscript "*Peanut Butter the Jellyfish*." Plaintiff, an unpublished writer, submitted his copyright-registered manuscript to the Walt Disney Company. According to the plaintiff's complaint, his work is based on his "adventures as a SCUBA-diving dentist, who would collect sea creatures during his dives and bring them to his office fish tank."[2]

Before he was permitted to submit the work, Disney required the plaintiff to execute a two-page release, which contained the typical provisions mentioned above. But it also contained (i) a covenant not to sue Disney or its affiliates for "plagiarism, idea theft, infringement, confidential relationships, implied contract, unfair competition or any other theory" arising out of Disney's examination or alleged use of the work,[3] and (ii) the following clause:

> If, notwithstanding my release contained above, I should hereafter claim that you have used or misappropriated the Project, or any portion thereof, without my consent or authorization, I specifically agree and understand that I will suffer no damages in excess of Five Hundred Dollars ($500) and that such damages up to said limit shall be my sole remedy and shall be payable only in the event a court of competent jurisdiction shall find that you have

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> wrongfully appropriated the Project from me and that the Project is original with me.[4]

Notwithstanding these two atypical provisions, plaintiff signed the release and submitted his work to Disney. It was eventually forwarded to Disney's then Executive Vice-President of Television Animation who—after correspondence and several conversations with the plaintiff—decided to pass on the book, stating that it did not fit into Disney's development schedule. However, Disney recommended that the plaintiff contacted Pixar Animation Studios (Pixar). Plaintiff allegedly contact a representative at Pixar[5] and described his book, including its plot, storylines and characters in great detail. Several years later, after plaintiff viewed a trailer for "*Finding Nemo*," he filed suit against Disney, Pixar and the two individuals with whom he had corresponded, alleging, among other things, copyright infringement.

As an initial matter, proving copyright infringement can quickly become an exceedingly difficult and costly proposition—particularly when the defendant is a multi-billion dollar entertainment conglomerate. In the "*Finding Nemo*" case, plaintiff's heavy burden was exacerbated by the release provisions, which both precluded plaintiff from filing suit and limited his damages to $500 in the event a lawsuit was allowed to proceed. Thus, in his complaint, the plaintiff initially had to ask the court to declare that the release was void as against public policy, because it was "so procedurally and substantively unconscionable that it shocks the conscience of the Court."[6] Since courts typically enforce agreements entered into by consenting parties, succeeding with such a request can be even more difficult than prevailing on a copyright infringement claim.

The defendants moved to dismiss the plaintiff's complaint on procedural grounds without addressing the enforceability of the release provision. On June 16, 2005, the plaintiff voluntarily dismissed the case, but reserved the right to file suit in a different jurisdiction. So, as of the publication date of this article, the form of release Disney used ostensibly remains in effect for the company to impose upon other writers.

Although less draconian than Disney's, the standard release used by Revolution Studios Development Company (Revolution) contains several provisions that are unfavorable to writers. For example, the release contains an extremely broad cost-shifting provision under which writers are to assume all litigation costs if they sue the company unsuccessfully:

> [S]hould I be unsuccessful in any such action [for misappropriation], I assume, and agree to pay you upon demand, all of your costs and expenses entailed in defending or contesting such action, including all court costs, costs of depositions, attorneys' fees, and the fees or charges of any experts engaged by you to ascertain originality, public domain status, or any other facts or factors deemed necessary or advisable by you in the defense or contest of such action.[7]

Although the prevailing party in a copyright infringement suit *may* recover attorneys' fees and costs from the other party,[8] such recoveries are rarely as broad as the remedies Revolution gives itself in its standard release. Far from being automatically awarded in each case, prevailing party attorneys' fees are granted relatively infrequently and only at the discretion of the court.

In addition, Revolution's release purports to shorten the statute of limitations for bringing suit. Under the Copyright Act, a plaintiff alleging copyright infringement must file the claim "within three years after the claim accrued."[9] Under the Revolution release, however, "any such action shall be, and is hereby forever waived and barred, unless duly filed by me within six (6) months after your first public release or use of the Material, or thirty (30) days after you notify me in writing that you deny liability to me, whichever is earlier."[10]

Recommendations

In light of the aforementioned releases and other similar agreements that surely exist elsewhere, writers are well advised to exercise caution when submitting work for consideration. Although each case is fact specific and writers submitting material must exercise their own discretion, we recommend you advise clients to:

1. Register their copyright in the work before submitting it to anyone

Although a copyright exists from the moment at which an original work of authorship is fixed in a tangible medium of expression,[11] federal copyright registration confers significant benefits to writers. *First*, registration is generally a prerequisite for bringing an infringement suit. *Second*, registration permits writers the possibility of recovering attorneys' fees and statutory damages—which obviate the need to prove actual monetary loss. *Third*, registration provides constructive notice of the writer's copyright across the entire nation and limits the ability of infringers to reduce their damages by claiming they were unaware that the work was protected by copyright. *Finally*, a federal registration serves as prima facie evidence of the validity of the copyright.

Registering a copyright for literary works is an easy and inexpensive process, which does not even require the involvement of a lawyer. Writers should ensure that they file for registration before they submit their works to anyone.

2. Find a reputable agent or hire an industry-savvy attorney

Although unpublished writers frequently find it difficult to secure agency representation, writers should attempt to do so before submitting material on their own. Agents have personal connections with the companies that purchase literary works. These relationships increase the chances of the work being purchased and oftentimes obviate the need for a writer to sign a release.

In the event a writer cannot find a willing agent, writers are well advised to hire an attorney knowledgeable about entertainment industry transactions. Some attorneys function like agents and have similar connections with producers, development and business affairs personnel, which could both increase the likelihood of receptivity for submission of a

particular project and the possibility that it will be reviewed without the need to execute a release. In any event, attorneys familiar with the industry will stand a better chance of negotiating an acceptable release agreement if one is required.

3. Try to enter into an oral agreement with the company

It would be both impractical and unwise for a writer to ask a company willing to read his or her work to sign any type of written agreement that aims to protect the *writer's* interests, rather than the company's. No company will sign such an agreement, and the very request may be perceived as offensive, engender awkwardness and mistrust, and kill the opportunity. Although obtaining the company's assent to an oral agreement may also prove difficult if not impossible—especially if you're dealing with a studio, network or major independent production company—attempting to do so represents a more pragmatic approach.

To reach such an agreement, the writer must clearly and unambiguously inform the company that he or she is submitting the work with the understanding that if the work—or any of its ideas, characters or plot lines—are used, then the company will pay the writer reasonable compensation. Because the existence and specific terms of an oral agreement are often difficult to prove, the writer should bring a witness to any in-person meeting with the company. If the oral agreement is reached over the phone with no witness on the writer's end of the line, the writer should take contemporaneous notes, documenting the specific terms of the agreement. No matter how an oral agreement is reached, the writer should immediately follow up with a confirming letter to the company, stating his or her understanding of the specific terms that have been agreed upon.

Wags are fond of saying that an oral agreement "isn't worth the paper it's printed on." It's quite true that courts don't always enforce oral agreements—whether for lack of sufficient specificity or otherwise—and equally true that the terms of such agreements are often disputed. Nevertheless, courts do sometimes enforce oral contracts in the context of entertainment properties. All in all, writers are advised to rely on such oral agreements only when they can't find a reputable agent willing to represent them and can't afford an attorney who is in a position to submit work on their behalf.

4. Read the entire release and do not sign immediately

If all else fails, a novice writer confronted with a release should read the entire release several times, and never, under any circumstances, sign it without consulting an attorney or a layperson who is experienced in these matters and able to review the release with an informed eye. Writers should not be intimidated into signing releases or fearful that not signing immediately will jeopardize an opportunity. Entertainment companies, by and large, are simply trying to protect themselves from meritless suits and will afford writers whatever time is necessary for proper review and approval of a release. Writers should take this time and seek assistance—whether from a friend, a volunteer lawyer for the arts, or a fellow writer who has confronted similar issues.

As explained above, some releases contain provisions that are so one-sided and inequitable that the prudent writer should simply decline to sign the release unless the offending terms are removed or modified. It is far better to walk away from such an unreasonable release than risk jeopardizing the prospects for appropriate recovery in the event your work is infringed—however unlikely that may be. ❖

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Endnotes

1. *Sternberg v. The Walt Disney Co., et al.*, 05-CV-00825-SRC-TJB (D.N.J. 2005).
2. Compl., at ¶17. The complaint also claims that the work "tells of two worlds coming together—above and below the sea, with unusual sea creatures such as hatchet fish, creatures with large eyes and other exaggerated features, undersea turtles and their travels on undersea gulfstream currents, and even a character named "Nimo." *Id.* at ¶18.
3. Compl., Ex. A, at ¶4.
4. Compl., Ex. A, at ¶5.
5. According to the complaint, the person at Pixar with whom the plaintiff spoke "was credited with creating, writing and directing 'Finding Nemo.'" *Id.* at ¶38.
6. *Id.* at ¶49-50.
7. Revolution Studios Development Company, *Release*, dated "as of May 4, 2005 (on file with author).
8. 17 U.S.C. § 505.
9. 17 U.S.C. § 507(b).
10. Revolution Studios Development Company, *Release*, supra note 7.
11. For traditional literary works like plays or novels, the work is fixed from the moment that the author writes the story on paper or inputs it into a computer.