Rights Clearance

A guide for independent filmmakers

WIPO

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A guide for independent filmmakers

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1 Introduction

Working with talents, choosing shooting locations, developing scripts. Professionals in the audiovisual industry certainly enjoy exciting activities, at least for those outside the industry. Still, nobody imagines the large amount of legal matters involved in the process and how important they are for the production. Almost everything that a producer does has legal consequences. Many of the legal issues are either directly related to or part of a process called "rights clearance."

In the audiovisual industry, rights clearance is an essential process to ensure that an audiovisual project is legally viable and that the legal risks derived from exploiting the final content are maintained at an acceptable level. As will be explained in this guide, clearance should start as early as possible and be incorporated in the planning and budget. The first objective is that anything that appears in front of the camera is already "cleared" and approved.

Among the different rights that need to be cleared, intellectual property (IP) is one of the most important. Personality or image rights are another. Those two sets of rights are the main pillars that fulfill requirements related to rights clearance.

Rights clearance is a required step under some financing agreements and before the content reached international distribution, sales agents work on distribution it abroad or even before a streaming platform accepts to license it . It is also specifically examined when obtaining errors and omissions (E&O) insurance. A more detailed explanation about those agreements, the audiovisual sector and IP is available in other WIPO publications.[1]

How to read this guide

This guide will help filmmakers to understand and incorporate rights clearance in their concepts, development planning and productions with special attention to IP rights.

This guide is divided into two section and annexes. The first section answers the main questions related to rights clearance and provides practical steps on how to implement best practices during audiovisual projects, including and especially in small projects with limited budget.

The second section gives more details about the clearance process according to the different type of rights and materials used in audiovisual projects.

The annexes provide practical examples and guidance for those working in audiovisual projects.

1 WIPO, *From Script to Screen: Copyright for Audiovisual Industry Professionals. A Training Tool*. Available at: https://www.wipo.int/edocs/pubdocs/en/wipo-pub-cr-film-script-to-screen-en-from-script-to-screen.pdf.

2 Rights Clearance: from idea to distribution

Understanding rights clearance

What is rights clearance?

Audiovisual productions incorporate, adapt and use vast quantities of preexisting material that is protected by various categories of rights. In most cases, the producer must obtain permission before using those rights. A right is “cleared” when an object or a person that integrates the project (a music, a painting, a product, a magazine, the photograph of someone, etc.) is identified, evaluated according to the circumstances of the use and the rights required for a lawful use also identified.

The audiovisual producer, ultimately as the entity or person responsible for assuming the risks of the production, takes the decision if an authorization is needed.

The clearing process ends with either using the content with the conclusion that no license is needed, the content is used in accordance with the license obtained, substituting it with other content or removing it altogether.

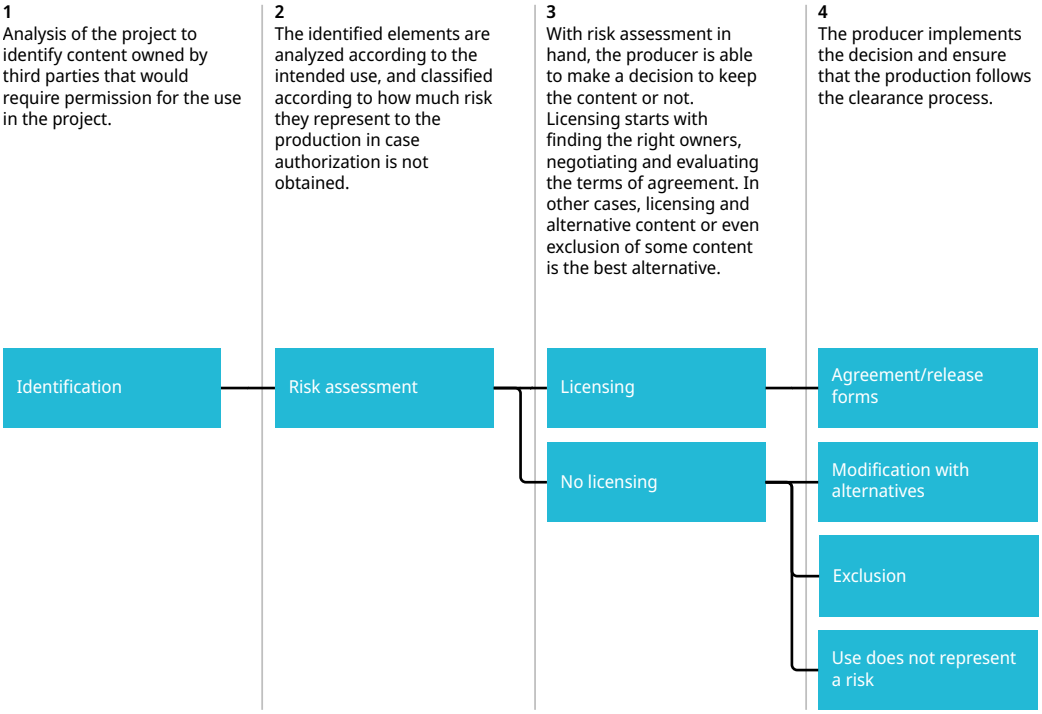
In summary, rights clearance is undertaken with two main objectives:

- Reduce the legal risks involved in the production and the final content, including for the obtaining of insurances; and
- Ensure the chain-of-title of the content.

Chain-of-title is the unbroken record of ownership of the copyright and other legal rights in the film property. The chain-of-title is a condition for the circulation of the film in the market and the producer is required by all those involved in the exploitation of the content to expressly assert it for distributors, sales agents and so on.

The rights clearance process for an audiovisual project can be summarized as shown in figure 1.

Figure 1 Rights clearance for an audiovisual project



Why is rights clearance important?

Rights clearance aims to mitigate risks for the producer and all those that will be involved in the exploitation of the content such as distributors, financiers and so on. The main risk that a producer needs to avoid is that the result of all the time, money and collaborative effort is not allowed to reach the audiences, either temporarily or permanently. Or that if it does, fines are imposed as a result of an infringement or even that the rights needed to distribute the film need to be licensed retroactively or be removed, with the corresponding financial consequences. Even when the infringement is considered not to be done by the producer directly but by a distributor in another country instead, the producer normally assumes the responsibility for that infringement through contractual obligations.

In the audiovisual industry, this risk is aggravated because audiovisual content is shared throughout the world (through digital platforms, cinemas, TV, etc.) and because many of the IP rights are protected in multiple territories.

IP protection is territorial in the sense that each country or territory has their own IP laws. The decision whether a film is considered to be infringing someone's rights is taken considering the laws where that right was exploited, for example when a film or series will reach the audiences (with some exceptions that are better analyzed case-by-case by an entertainment lawyer). Although national laws differ, there is an overall similarity in a number of issues specially regarding a minimum level of protection.[1] For example, audiovisual works are protected through copyright around the world and so is recorded music that requires authorization from right owners before its use in an audiovisual production.

1 For copyright, international treaties include the Berne Convention for the Protection of Literary, Artistic and Scientific Works (Berne Convention); the Agreement on Trade-Related Aspects of Intellectual Property Rights; the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention); and the WIPO Performances and Phonograms Treaty. For the protection of trademarks and industrial designs, such conventions include the Paris Convention for the Protection of Industrial Property.

Is clearance only a legal matter?

Clearance starts with a legal question with consequences for the planning, budget, distribution and even artistic choices of the project. For example, preexisting trademarks may be included on a set for artistic reasons (real-life objects add to the realism of the project) or for commercial reasons (product placement deal with a company). In other cases, a biopic about a celebrity will only be viable if certain content is part of the project, such as the songs by that celebrity, broadcast where that celebrity appears, newspaper articles and so on.

Producers must determine whether they can use IP-protected material in an audiovisual production based not only on legal considerations, but also commercial, financial and even reputational factors. Reputational considerations are particularly common in the true-crime genre.

Who is responsible for IP clearance?

An audiovisual project is a collaborative effort. The person responsible for orchestrating the various elements into a single product that will be distributed and exploited to reach the audiences is the producer. The producer owns the copyright over the finalized product: the film, documentary, TV series and so on. As the copyright holder of the audiovisual work and the person responsible for the execution of the project, the producer will also be liable for materials used in the production, guaranteeing it through the chain-of-title. Since the producer has the liability, they are also the one responsible for mitigating the risks through rights clearance.

The producer is, therefore, the one responsible for rights clearance, especially in independent productions. If two or more producers work together on a single audiovisual project, they may assign liability in a particular way, but legal systems generally require those who commit IP infringement to accept joint liability.

For **commissioned** and **non-independent works**, normal practice of the sector considers the producer as the coordinator of the rights clearance process which they must carry out in accordance with the terms set out by the financial backers (a platform, a TV channel, a studio, etc.) The contract between the producer(s) and the financier normally stipulates in a clear way the liability and rights clearance obligations.

In the specific case of **commissioned productions**, such as an original production by a channel or streaming platform, the practice is that the contract between the financing agent and the producer not only provides that rights clearance is the responsibility of the producer, it also provides policies and criteria for risk-taking decisions that are predetermined in advance for all the content financed by that company. In most cases, rights clearance is a precondition for obtaining the green light for the project. This is done with the provision of a clearance report prepared by a legal expert.

What is a clearance report?

By now, you will realize that rights clearance is not only important but fundamental for an audiovisual project. How is it actually done?

The key document that will help producers to structure their clearance process is the clearance report. This report is prepared by a legal expert identifying the objects and materials included in the project that represent a risk of infringement on third-parties rights. This report, as mentioned later in this guide, can and should be updated by the time more materials are included in the script or outside the script such as in the schedule, storyboard, the actual shooting of the scene and even in the post-production phase.

Accordingly, the clearance report covers a script analysis but also other elements such as shot-by-shot analysis. It maps a diverse array of IP rights and personality rights such as trademark analysis (real and fictional trademarks), fact-checking (for documentaries and works inspired

by real events), title reports and clearance/release submission logs. Other reports can also be attached, depending on the practices of each production company or financing agent.

In short, the clearance report will provide producers with a reference of the clearing activity of the project allowing the supervision of subsequent actions, such as the licensing of IP rights, risk-mitigation steps or the decision to assume the risk of using the material as it is, without consent. This way, the producer can undertake the necessary adaptation and measures in other areas of the project beyond the legal, such as artistic, planning, budget and so on.

How to proceed when the clearance report indicates the need for authorization

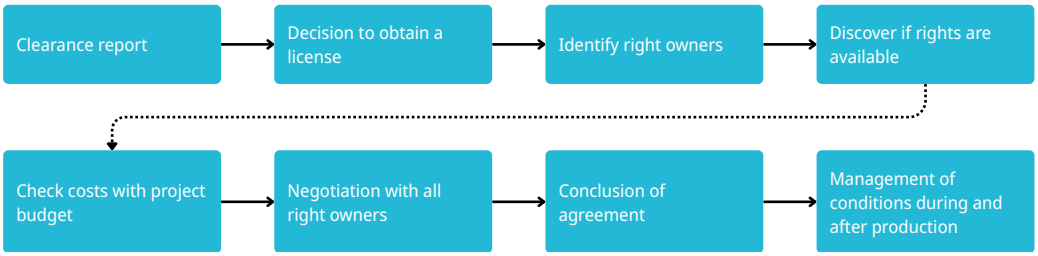
A well-structured audiovisual project considers the possible risks that could hinder the project. The definition of how much risk a project is allowed to have in terms of rights clearance will be one of the factors that producers will need to weigh once the first clearance report indicates the material that represent a risk.

At that moment, the producer will normally have a meeting with the legal expert or clearance team to understand the risks indicated in the clearance report in order to take one of the following actions:

- Initiate the process of licensing of the content.
- Substitute the element or content by a different one.
- Use the element or content in a different way.
- Keep the use as it is without licensing.

In the case where the seeking of licenses is the preferred alternative for the audiovisual project, the producer should be aware that this could unexpectedly turn into a process that lasts several weeks and, in some cases, months or even years. See figure 2 for a summary of the process of licensing from the clearance report.

Figure 2 Process of licensing from the clearance report.



What to do if it is not possible to license a right identified during clearance report

Depending on the nature of the project, certain rights may be identified as non-licensable already during the development or production phase. In this case, the earlier the producer realizes they will not be able to rely on a right the easier the adaptation of the project.

For example, a project includes a character who is in a cover band of The Beatles. The script and the story is based on the main character performing five different songs through the film, either on stage or during rehearsals. The total music time of those scenes is approximately five minutes in total. At the same time, imagine that the project's budget is USD 500,000, with the music budget 5 percent of this. In summary, the project will have USD 25,000 dollars to obtain the rights of all the music used in the project, including three songs from The Beatles. From the outset, it is clear that some adaptation will be needed in the project because the rights over the music of the project are beyond the budget planned. Adaptation should be done as early as possible and even before the project is presented to financiers.

In other cases, the risks and needs to adapt the project might be less clear at the beginning. For example, a project where a statue located in a public space is mentioned in the script. Should it

not be possible to clear (release from the creator of the statue), the producer might benefit from an exception for works permanently located in public spaces. This analysis would appear in a clearance report based on the evaluation of how the statue appears in the scene or script and the applicable legislation.

While the type of rights, risks to the production and time needed to negotiate a license depend on a number of different factors, the main advice to producers is to start the clearing process as early as possible. This could be done with an initial assessment from the producers themselves in order to better plan the audiovisual project.

What to consider when assessing the rights clearance report

As a follow-up from the identification of the need to clear a right, producers could think of the following aspects when deciding on the next steps:

- What is the level of risk derived from the use of the content?
- Can the use be configured as a limitation or exception?
- Could the way it is used be adapted in order to comply with a limitation or exception?
- How long would it take to obtain the signed license? Is it in accordance with the project plan?
- What conditions could be imposed that could limit the intended use in the project?
- How much would the license cost? Is it in accordance with the financial plan?
- Once licensed, does it make sense to use the content in other moments of the project?
- Could it be substituted? What is the alternative content and implications for the project? Who needs to be involved in this decision from an artistic point-of-view?

Do limitations and exceptions allow the content to be used without requesting permission?

Sometimes it is possible to use content in a lawful way without requesting permission. It is very important that producers understand that those circumstances are not only exceptional but that they might also represent a risk. In copyright law, those circumstances are called limitations and exceptions. They are specific regulatory provisions – generally interpreted restrictively – that allow the use of IP rights without the right holder's prior permission.

Similarly to protection, the limitations and exceptions are also dependent on the legal system of each territory or country. In the audiovisual sector, the most well-known national system of limitation and exception is from the United States of America, called the "fair use doctrine."[2] As a result, rights clearance analysis for the territory of the United States of America must consider the conditions and case law on fair use to determine whether it is possible to use a particular copyright without the right holder's prior permission.

In some countries, the legal analysis will conclude that there are no exceptions applicable to the specific intended use, resulting in a higher risk to the project. The decision regarding that risk will depend on the producer as mentioned before.

When to start clearing the rights

Rights clearance affects the projects' planning, financing and artistic choices. Experience tells us that the last moment that rights clearance should start is at preproduction where the script analysis should take place. A concern for the producer is that the production time between script analysis and the production phase might not be enough for the negotiation and licensing process. In some cases, licensing a song can take much more than eight weeks from finding the right owners, negotiating the terms of the agreement and signing the agreement.

Producers should take rights clearance into consideration as soon as they start work on a project. The more care that is taken with rights clearance before the production phase, the less adaptation and changes will be needed during it.

2 Title 17, Section 107 of the United States Code

Clearance during the development phase

Carrying out clearance at the development stage is important because development-stage material is analyzed to map out the strategic risks associated with the project from the beginning. This allows the producer to make informed decisions and take action to mitigate or reflect accordingly in the planning and budgeting of the project.

When the producer is still pitching the project to possible partners and financiers, awareness of the rights clearance process will be an important element in the evaluation of the viability of the project. At this stage, the producer's actions may involve obtaining IP rights or personality rights that are linked to the creation of the project itself. For example: life-story rights, fiction books, comic books, nonfiction materials (news articles), plays, movies in the case of remakes, concepts and even submission releases to avoid litigation risks.

At this phase, the producer might not have the resources to obtain the rights already identified as needed and sign license agreements. In those cases, producers could seek "option agreements." These agreements establish the conditions of a future license by giving the producer the option to enter into the negotiated agreement or not during a period of time. For example, literary option agreements might grant exclusive rights to a producer to adapt a fiction book into a film or a TV series. After the expiration of the option agreement, the producer is no longer allowed to adapt the book unless they enter into an extension or a new agreement with the right owner.

In other cases, a first clearance activity might indicate to the producer that the use of a content or right is not viable, and the project is already adapted from the beginning to mitigate the risk with no time and budget implications later on.

If any of the risks – identified or not – are not eliminated or mitigated by the time the script and storyboard are finalized it might actually become part of the scenes already shot. That scenes might represent a risk so important for the production that it might not be possible to use it in the final cut with the budgetary and artistic impact. The later the clearance is done, the more expensive it will be and the longer it will take to mitigate the risks.

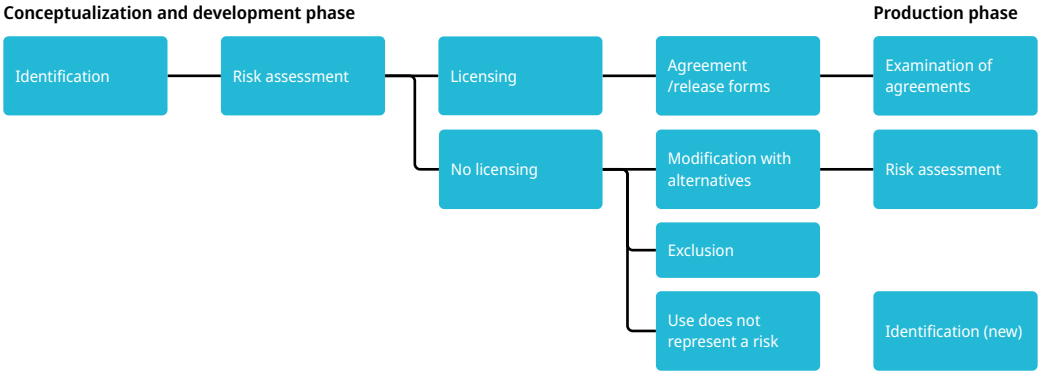
Clearance during production phase

Clearance is a continuous process (see figure 3). While the recommendation is to start as early as possible, the beginning of the preproduction is considered a limit to undertake a clearance report. This might be the last opportunity to clear materials before they are used in the production (with the respective risks and implications for the chain-of-title and insurances).

In the production phase, the main difference is that the script is finalized, a storyboard or even the screenplay are created. While the project starts to move into shooting and editing of the scenes, the clearance process could include the following:

- Examination of agreements of the content identified in the development phase
- Examination of materials that were included to substitute those identified as risks
- Examination of new materials included in new versions of the script, storyboard and screenplay
- Scene review for confirmation of the clearance measures

Figure 3 Clearance through the concept to production phases



How to keep track of rights clearance in the script

As the production advances, the script might be adapted, new scenes might be included and new ideas tested on the spot. Ideally, productions would have a legal expert available to routinely answer questions and provide information about the inclusion of materials. In reality, it doesn't happen for cost and logistic reasons. Although a legal opinion will necessarily be needed during the project, producers tend to reduce the number of consultations – and the fees due – to legal experts.

Many of the time-consuming tasks of the rights clearance could be done by the producer and their team, especially if good practices are followed. Still, legal advice will be needed at some point, even if on a "mandatory" basis for the E&O insurance provider.

One of the main challenges during the project is to keep track of "cleared" content and new content or content that is not cleared when there are new versions of the script, storyboards, screenplay and so on.

This is where annotation of the scripts can play an important role, especially to avoid high-risk content being included and only identified when it is "too late" for mitigation. Screenwriters should annotate the scripts as to document the source of their creativity when writing. Annotations ideally include:

- Source of inspiration: this doesn't apply for items that are completely fictional and a result of the writer's creativity.
- Characters, events, settings and dialogue that have a relationship with preexisting materials, content, facts, people, etc.
- Annexes or separate files with reference materials used in parts of the script with the index of page and scene.

The annotations should cover two main areas of the script:

1. Characters
   - Are they real, fictional or a composite?
   - For real people, is the person living or dead? Where was the information about that person found?
   - For composites, the name of the person that inspired the character and what aspects of the person were used.

2. Scenes: Are they related in any way with a real fact (an event that actually happened)? If they are, include the relevant details:
   - the book (non-fiction) where it is described, including the page number
   - news article: details of source, author and date
   - internet source: website, author, link and date it was accessed
   - radio, podcast, YouTube video, etc.: date it was accessed or broadcast, link, channel or station, person interviewed or speaking, any other details that could be relevant

- court proceedings: whether they were sealed or kept confidential , how the details were accessed, details of the case and parts which inspired the scene.

Rights clearance and financing models

The decision about the risk identified during the clearance process might include other stakeholders beyond the producer. This could impact how clearance is carried out and especially what risks the producer could or could not take. From the producer's perspective, it is important that the project is in line with clearance processes or instructions given in this regard. Below are the main three financing models and how the clearance is impacted.

Independent productions

Independent productions normally leave the clearance process entirely as the responsibility of the producer. The producer will decide the risk to be assumed upon the clearance report and, in most cases, the possible artistic elements in case of adaptation and changes due to the clearing process. At the same time, the producer will also have the responsibility of the declarations under the E&O insurance, the chain-of-titles obligations and any infringement that results from the content.

Commissioned and non-independent productions

If a production is financed wholly or in part by a studio, a broadcaster or a streaming platform and the copyright will be transferred to someone from the producer, the contractor, as the copyright holder, will be liable for any legal risks associated with the use of third-party IP rights in the production.

In commissioning contracts, however, the clauses typically transfer the liability for those responsible for the production. This is because the contracts usually state that the contractor can exploit the work without infringing the rights of third parties (chain-of-title) and that the producers must compensate the contractor for losses resulting from noncompliance with that guarantee.

While having the responsibility to guarantee the chain-of-title, producers might have to apply policies and processes from the financier or commissioning entity. In many instances, the clearing process of core elements (either in terms of risk or budgetary implications) might also be taken involving the entity that commissioned the production. This could also be clearly established as a requirement in contractual clauses in the Production Services Agreement (PSA) besides being a precondition for the green light or even the acceptance of the final product.

International coproductions

Projects might include more than one producer in more than one location. Rights clearance for international coproductions may be the responsibility of a single coproducer or more than one coproducer, depending on the needs and characteristics of the project. More than one jurisdiction will usually be considered during the clearance process, especially if the production is financed by one country but takes place in another.

For example, when original artistic work is licensed from one of the coproducing countries, the licensing is usually handled by the coproducer from that country, who will be able to communicate with the license holder more easily, since the local coproducer will speak the same language and have better access. If, for some reason, it is not possible to license the rights, experts in both jurisdictions will usually examine whether any copyright limitations or exceptions apply, and perhaps also whether the material is in the public domain. The experts are selected from both jurisdictions because the legal risk must be assumed by all coproducers, the only exception being when the coproduction contract assigns the risk to a single coproducer.

Clearance policies

As mentioned above, under some financing models the producer might need to follow an existing clearance policy from a broadcasting organization, streaming platform or a studio that keeps a tight control on some elements of the project (for example, age classification or accepted level of risk). Those companies will request that their policy is observed in all projects that are commissioned or that they invest in. By using predetermined policies, investors can harmonize productions in terms of rights clearance practices and facilitate the management of their catalogue in terms of legal risk and conditions that might affect the exploitation of the content.

Once the project is agreed between the producer and the commissioning entity, the producer receives a project-specific guide or report in which the rights clearance policies and criteria are presented. Their observation and specific reporting are normally also included as a contractual obligation. The main elements that could differ from one policy to another are as follows.

The use of limitations and exceptions

Different companies are open to different levels of risk. Rights clearance policies reflect a company's risk appetite. Policies might be more flexible or more restrictive in relying on situations where a written license was not obtained but the use was based on existing limitations and exceptions. These instructions provide a prior analysis of the legal risk that the producers should consider but producers will need to interpret the instructions and apply them to the specific situation while considering the laws in force where production is taking place (in comparison to the one mentioned in the policy that could reflect, for example, the law from United States of America or France).

Territorial and temporal scope

Some companies, such as global streaming platforms, tend to stipulate that the producer should license the rights with no territorial restrictions since the audiovisual works will be shown in the territories in which the platform offers its services – possibly globally or nearly.

In addition, there must be no time limits on the exploitation of works on global streaming platforms, and licenses for such platforms should not be exclusive, since works produced for one platform are increasingly being allowed to be shown on rival platforms, and even through other distribution channels such as movie theaters (theatrical release). Where instructions include such conditions, producers must observe them when licensing rights and follow the process foreseen, such as reporting and/or including the commissioning company in the negotiation.

Presentation of reports

Besides following the instructions, producers must prepare authorization reports written specifically for each channel and platform. The reports normally include information on decisions (or proposals) not to license certain IP rights and the legal basis for not doing so. Sometimes, producers will be required to submit the final decision on the licensing of certain rights to the commissioning organization, in which case they operate under the direct supervision or even negotiate directly with right owners.

Chain-of-title

For works based on real events or on preexisting works, the documents used to verify the chain-of-title of the production must include either a risk analysis or the previous instances in which the existing right was licensed must be part of the set of documents for verifying the chain-of-title for the production. This because of the importance of those documents for the project and the existence of a structural risk. In other words, producers must check that all the rights they need to exploit the content were actually transferred to them. In commissioned productions, the platform or channel reviews the chain of rights before giving the greenlight with the relevant consequences of committing rest of funds and triggering a number of contractual clauses.

Insurance

Some organizations will have strict requirements in terms of insurances to be taken by the producer. This could impact the budget of the project in a substantial manner. In terms of rights clearance and chain-of-title, the policy might require a more comprehensive E&O insurance (see explanation further above). The E&O policy requires not only a clearance report but might not accept higher risks taken by the producer.

Risk in the audiovisual project and rights clearance

Defining risks

Risk is indissociable from the audiovisual production. On a more general note, the risks listed exist in an audiovisual project:

- Business/legal risks
- External/operational
- Liquidity
- Market
- Credit

The main entity or person taking the risk is the producer. When other entities participate in the production, particularly financing it, the risk of the producer will also affect them (and their investment). Therefore, risk is normally defined by the financial backer who will try to reduce its exposure. Rights clearance is therefore centered around legal risks analysis and is the first step, as previously mentioned.

Taking risks

It would be difficult to create an audiovisual work in which all third-party IP rights or personality rights were fully licensed in writing. An audiovisual project without risk is virtually impossible. In practice, some level of risk is part of the industry.

Risks are different according to the rights affected by the project and the characteristics of the content. To determine the risks in each project, it is essential to understand the specific features of each type of production and to identify what type of audiovisual work is being produced. Each type of audiovisual work presents a different level of risk. Figure 4 shows how the level of risk varies between different types of project.

Figure 4 Levels of risk

Low Legal Risk

Fiction
Original works created by their authors based on fiction and fantasy.

Documentary
Works based on fact-checking.

"Docudrama"
Works inspired by true stories and events, possibly combining fiction and non-fiction.

"Biopic"
Works inspired by true stories and events, possibly combining fiction and non-fiction.

Inspired by real events
Works inspired by true stories and events, but with varying degrees of fictional elements.

High Legal Risk

Mitigating risks

Once the risks are identified, they should be mitigated or eliminated. The mitigation will need to be in line with the production plan, business model, budget and, of course, artistic options. Some mitigating strategies are as follows.

Documentaries

The rights clearance for documentaries are particularly important due to the purpose and connection with real people, places and stories. The legal risk can be mitigated with precise fact-checking and the public interest on information that might already be in the public knowledge. In addition, documentaries often use preexisting works that cannot yet be licensed in full because some of the authors and owners are unknown. The reality of documentaries is that they rely strongly on limitations and exceptions as well as an overall higher risk taking than other types of content.

Fictional works

Creative freedom in fictional works is nearly total. Therefore, the inclusion of material owned by a third party is the result of a choice and it is difficult to justify unauthorized use, especially without the informational aspect that could be found in documentaries. This also applies to the use of materials based on existing copyright limitations and exceptions. Nevertheless, because of the freedom given by fictional works, script and scenes could be developed and adapted to reduce risks indicated in the rights clearance process. This could lead to modification of the script, soundtrack, camera position, set dressing and many other aspects of the project.

Works inspired by real events

Audiovisual content inspired by real events is constrained by the need to use certain content or to portray certain events or real persons in the story. In many cases, that is the main attractive element of the project. They are, in a sense, bound by the preexisting events and content, which limits the creators' ability to alter the script or screenplay or set so that they do not have to clear a specific right. Works inspired by real events therefore present a higher level of risk compared to fictional ones since the portrayal of an event or person may affect rights without the possibility of mitigating the risks for the project. Furthermore, projects inspired by real events might generate risks involving personality rights such as defamation and the reputation

of those involved in the real event. In other words, the combination of reality and fiction needs to be done with care as it could affect people in a way that represents a high risk to the project.

For example, a true-crime production tells a story of a real-life person who was notorious for committing crimes while listening to certain jazz albums. For dramatic effect, some of the crimes and some of the profiles of the victims were changed in the screenplay to disassociate the characters portrayed from real people. Despite these changes, the jazz composer or recording label may believe that associating the music with real crimes will affect both the music and artist's reputation and moral right.[3]

Likewise, if the main character of a film repeatedly wears the same soccer jersey of a certain team or brand while committing crimes, the producer may struggle to obtain the license for the trademark since its inclusion would harm the brand's commercial value and marketing.

3 Article 6 bis (1) of the Berne Convention states the following: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right … to object to any distortion, mutilation or other modification thereof, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

3 Rights assessed during clearance

Filmmakers could undertake several acts themselves and through the production team to ensure that rights clearance is undertaken during the project. While this will not substitute the need to consult with legal experts, the production team could undertake a lot of the groundwork themselves. This section will explain in detail the rationale behind the rights clearance process according to the type of rights that would be needed to be cleared.

This section also provides practical steps that the producer could follow to minimize the risks of the project related to the rights and objects shown in figure 5.

Figure 5 Steps to minimize risk

The explanation in this section of the guide on how the assessment and clearance of rights is done will be divided into the following categories: copyright; trademarks and designs; personality rights; and the implications of the use of artificial intelligence tools.

Copyright

Music

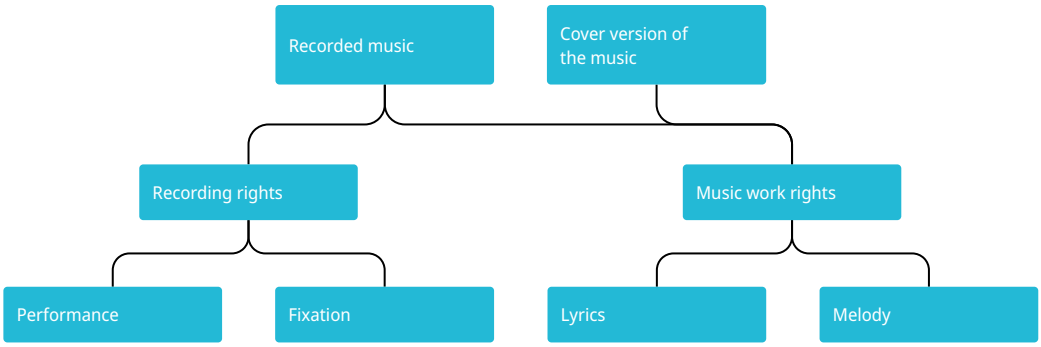
The music industry has very well established rights and licensing processes. If you would like to better understand the music industry visit goclip.org, an initiative from WIPO to provide an easy-to-understand guide to the music sector.

One of the most important rights to be cleared for audiovisual projects relates to music. While projects assign a significant percentage of the budget to cover the costs with music (more or less 5 percent), there are two categories of music to be cleared: music created/composed for the project or the use of preexisting music and recordings.

In both instances, it is important to understand the rights involved in using music content as they impact both commissioned and preexisting music. The first stage is to understand what content (and rights) will be used in the project.

Recorded music actually includes four set of rights and different right owners protected by copyright and related rights as shown in figure 6.

Figure 6 Recorded music rights



For the use of recorded music, a filmmaker normally must contact two groups of rightsholders to "clear" the recorded music:

- Record label – they will own the rights over the recording
- Publisher – they will own the rights or represent the authors of the music (both lyrics and composition)

It is important that the producer first assesses if the project is using recorded music, the music (composition) or only the lyrics or composition separately. This will be important for the licensing and the type of right you need for your project.

While the record labels and publishers are normally the usual channel to obtain the rights for recorded music, producers have also managed to obtain clearance through other stakeholders. One alternative is to contact collecting management organizations. Those organizations might help to give you information about right owners but in some instances they also have the legal right to authorize use.

In some cases, the producers also contacted authors directly to explain the particular use of the material in the project and obtain authorization. Sometimes the authors are no longer able to provide authorization themselves due to contractual arrangements with publishers.

What rights do you need?

The first step is to know how the project will use the music. Based on how you are planning to use the music in your project, a legal expert will be able to translate those uses to the respective

rights needed from the right owner. There are three types of uses and rights that producers might need from right owners:

1. Reproduction rights – these are also referred to as synchronization rights, mainly because the recorded music is copied in the soundtrack that is synchronized with the visual images. Authorization is needed as right owners (authors and the record label or phonogram producer) are entitled to control the reproduction of their music and recording.
2. Public performance rights – this is a very broad right that will need to be detailed in the agreement according to the specific use intended in the project. Right owners have the right to control (with some exceptions) when their music is communicated to the public through different ways.
3. Adaptation rights – if the music needs to be modified in any way, this modification also needs to be cleared. The right owner has the right to control adaptations and modifications of the music including, for example, translations.

Synchronization licenses specify which audiovisual works and scenes will include the lyric, composition or phonogram. The audiovisual producer preferably seeks a license that is broad in scope, with no restrictions on where, when or in which distribution windows the audiovisual work can be exploited not to limit the exploitation of the audiovisual work. Sometimes, those licenses are referred to as "master use" licenses. However, rightsholders may sometimes want to negotiate restrictions if the audiovisual producer cannot afford the price stipulated for the license.

Some countries' laws also state that this public performance right gives rise to equitable, nonwaivable remuneration to some or all of the right owners (authors, performers and producers). This is normally paid for by a distributor to a local collective management organization in each country it distributes. In order for that to happen, the producer is fundamental in providing information about the music included in the audiovisual content. This is done through the preparation of a document called a cue sheet. See more information below about the cue sheet.

How are licenses negotiated?

Negotiating music synchronization licenses is one of the most important steps in the rights clearance process. It starts with the identification of which music is used and how. See the figure 7 for an overview of the process.

Figure 7 Overview of license negotiations

Ideally, a song would have only one single right owner who would accumulate multiple rights needed from author, composer and producer. Unfortunately for the producer, that is very rare. More commonly, lyrics have multiple authors and each coauthor might even have a different music publisher. Authorization from one of the coauthors does not allow the use of the lyric, music or recording. This is an all-or-nothing situation. Licenses very often contain clauses stating that all coauthors of a work must be paid the same amount. In addition, record labels usually charge the same amount the publisher or author is paid.

Even if you do not negotiate directly with the authors of the music, record labels and publishers usually ask authors and performers to approve the synchronization license since they may object to their music appearing in certain works or being used in certain ways. Producers should be aware of that because the number of authorizations needed usually means longer periods of time, discussion on how the music is used in the project and, eventually, even how to adapt due to negative answers to the request to use the music.

The license fee charged by publishers and record labels is dependent not only on how significant or successful the music is and who the authors and performers are. Other factors affecting the fee might include:

- How intensively it is used in the project (e.g., the total duration)
- How the music appears in the content
- Where and in which distribution windows the audiovisual work will circulate
- Whether the music will be used in promotion and marketing content.

Licenses granted by publishers and record labels usually stipulate that certain obligations must be met in terms of the credits. Specifically, the licenses state how the song must be credited in the audiovisual work and require the production company to include the details of the licensed song in the music cue sheet (as explained above).

What are the different types of use?

Right owners will ask how much of the music is used and under what circumstances it appears. Producers should be ready to provide that information at the outset of the request for a license. The types of uses are typically classified as follows:

- Opening theme: music that plays during the title graphic
- Closing theme: music that plays during the end credits
- Character theme: music that plays when a certain character is on screen
- Performance: a live performance of the musical work
- Background music: music accompanying a scene in the background

When requesting a synchronization license, producers must inform the description of the scene where the music will be synchronized; the distribution windows and territories in which the work will be presented; whether the music will be used only in the audiovisual work (in context) or also separately and for advertising purposes (out of context).

They must also provide information regarding whether other rights, such as distribution of the phonogram through audio streaming platforms, are requested (for example the film soundtrack playlist). If they are, the type of use and the duration of the license needs to be specified.

How to start negotiations

The first step to request a license is to identify who own the rights to grant a license to the audiovisual producer. The quickest way to find that information is through collective management organizations. Those have access to global databases that use processes and identifiers to manage the global music catalogue. The focus of most organizations is to manage the right of public performance so they might not be able to grant licenses (while some will have the authorization to license). Due to their tasks, collective management organizations usually have the most up-to-date information on rightsholders. The search usually starts with collective management organizations in the country in which the work is being produced, in the country of the author's nationality and, for phonograms, in the country in which the record label or the performer is based.

What is a cue sheet and why is it important?

A cue sheet is a document listing all the music used in the production. It is a technical data sheet that will function as a reference in the music licensing for the public performance right when the film is distributed. Some distributing agents, such as broadcasting organizations, necessarily request this information in order to distribute the audiovisual work. When a music license is granted, the conditions of the agreement will also include obligations related to credit and inclusion of the music in the cue sheet.

In case of original music composed for the audiovisual production, the producer could appear as a music publisher and, in some cases, also as a music producer (record label). In those cases, the producer should undertake the measures taken by those rightsholders such as registration of the music with the collective management organization in order to obtain identifiers that will be included in the cue sheets.

A cue sheet should include:

- identifying information of the produced content (film, episode, etc.),
- the title of the music performed,
- the duration of the performance in the audiovisual content,
- how the music was used, for example: background instrumental, background vocal, visual instrumental, visual vocal, main title theme, end title theme or logo,
- entitled parties (songwriters, composers and publishers), and their respective ownership shares for the cue (song used): this information is normally provided in the licensing agreement, and
- the name and contact information for the production company.

Cue sheet format

While the cue sheet is normally submitted to the collective management organization in the country of the production who will facilitate its own form, there are ongoing efforts to standardize cue sheets around the world. For an adopted global standard that producers could use during the production to keep record of the music that integrate the project, the collective organization CISAC (the International Confederation of Societies of Authors and Composers) offers at its website a sample format, explanation and even an example for producers to better understand how to fill up the cue sheet: https://members.cisac.org/CisacPortal/consulterDocument.do?id=32286.

Cue sheets, and collective management organizations in general, rely on international standards on several elements such as music works (ISWC), recordings (ISRC), natural persons or companies (IPI) and so on.

If you would like to understand more about music identifiers, visit the CLIP (Creators Learn Intellectual Property) website for more information: https://goclip.org/en/music/getting-credited-and-paid/identifiers.

Practical steps – music

Identify: Select the music content of your project. Decide if they will be created for the project and for the pre-existing music if you will use a recorded version or only the lyrics or/and the composition.

Plan: Reflect the musical needs of the project in the planning and budget.

Find the rights owners: Ensure you have all the rights owners needed (for example, all the co-authors).

Negotiate: Understand the terms and conditions of the license offered: What you can do with the music, for how long and in which territories.

Sign written licenses: Keep the documentation for clearances checking and manage the conditions for future reference of the distribution of the film.

Cue sheet and credit: Prepare the cue sheet as the music is included in the audiovisual content and include it in the credits.

Clips and audiovisual content

News and stock footage, film clips, television clips might be included in audiovisual productions, either synchronizing that content or in an incidental way, for example in the background or

in a television in the set and so on. Any use of clips will need to be cleared for its use in the project. It is therefore very important that when the camera is on, there are no televisions or screens playing films, sport events, series that had not been previously cleared. If the script or storyboard already indicate that audiovisual content will be used, the producer should foresee the need that the content is cleared. As in the case of music, the producer can commission or license a preexisting content.

For example, the script describes a group of characters cheering for a football match on a TV. Images of a football match could be commissioned and played on the set or be digitally included in postproduction. If the characters are cheering for a specific sport event and the camera will zoom on the content, then actual footage and narration of the match might be cleared following artistic decisions on how the television will be shown.

For news clips, media companies can license specific footage that is needed. In cases where there are people (such as interviewees and reporters) in the clip, the license normally does not include the personality rights of those appearing and a separate authorization will be needed for those rights. There might be a case where the person appearing is a public figure in a situation where the use is tolerated without the need to obtain authorization of the use of his or her personality rights, but this would need careful assessment by a legal expert.

Similarly, content that appears in the clip will need to be licensed in the same way it would in the case where the project incorporated them directly. For example, if a clip includes an advertisement showing a product, the clearance of the brand will need to be assessed from a rights clearance perspective.

For other films or television clips, the cost of the license normally depends on how the producer plans to use it and for how long. One key consideration is how that clip will relate to the film. In many instances, studios might not want to license or license for a very limited timeframe excluding any promotional material or editing of the clip. If the project is commissioned by a large media company it might be worth discussing if there is any agreement or practice that could help the producer to license the content. As a general rule, the negotiations are very limited and the producer is not able to choose the conditions of the license.

Practical aspects – clips

Identify

- Ensure all audiovisual clips are licensed.
- Clearance of the personality rights of people appearing in news and TV images will need to be undertaken separately

Plan ahead

- Identify the presence of TVs and screens in scripts and storyboards and think what will be shown in case those TVs are switched on. Make sure the producing team and director knows the TV should be turned off on set in case that is the intention.
- If the screen should be showing a specific content, commission the creation of a content that will fulfill the requirements of the scene.

License

- In case of audiovisual content incorporated in your project, ensure to understand the terms and conditions applicable. In many instances, the conditions imposed on the use of the clip is not possible to negotiate.

Manage

- Ensure to reflect the terms and conditions applied to the license and the use of the content in the project. For example, if music is played in a clip used in your project, ensure it is covered by the license and include it in the cue sheet.

Scenery (including visual art, statues, photographs, posters, etc.)

Internal and external shootings might include photographs, posters, drawings, paintings, statutes, maps, CD/Vinyl covers and other types of artworks. If they are specifically created for the film, the clearance process will focus on obtaining the documentation around the commissioning of those materials and that either the ownership is transferred to the producer or a license is given for the use in the project.

If the materials were not created specifically for the project, an analysis of the protection over those materials start with the copyright status of those materials. Materials portraying people (such as photographs) will lead to an analysis of the rights of those persons for their personality rights (see below). Similarly, a photograph showing another artwork could lead to the need to also clear the objects included in the image.

While the script might already include a description of the materials to be included, they might be precise enough to start the clearance process. The annotation in storyboards and script might provide a better idea of what might represent a clearance risk before the actual shooting of the scene.

For those materials analyzed for copyright, older materials might be in the public domain (where the economic rights of authors have lapsed and therefore the use without authorization is allowed). Sometimes, finding both the authors and the time when the work was created are both challenging and time-consuming. Contacting collective management organizations (visual arts or reprographic organizations) could be a first step. Registration logs at the local authority responsible for registration of visual works could also give useful information about authorship and ownership.

In cases where the risk of use is elevated and the clearing process seems complex, producers will need to either assume the risk or substitute the object in the scene. For external shootings, the use of artwork, statues or posters also need to cleared. The main difference in external scenes is that: the producer might not be able to control the placement of those objects and alternative solutions might need to be found (postproduction effects, camera position, etc.); the existence of materials in public might entail that the use is covered by limitations and exceptions to the copyright applicable to works permanently located in public.

As in other cases, early planning and mapping of the potential risks through clearance is important to avoid production delays or unnecessary risks. Due to last-minute additions or improvisation in the shooting of scenes, it is important that the producing team is aware that the additional of products, objects and other elements in front of the camera could impact the rights clearance process.

Online image banks

Some companies in the photo licensing market have vast catalogues of photographs and images that can be licensed for use in audiovisual works. These catalogues are known as image banks.

Many platforms, including those that produce content for streaming, have contracts in place with these image banks with pre-negotiated terms and conditions. When commissioning audiovisual productions, TV channels and platforms inform producers of the availability of those image banks.

Image banks generally license the copyright of the photographs they hold, but they do not license the actual content of photographs of protected artworks such as sculptures, paintings and illustrations. The same is true for photographs of people. A producer must therefore clarify with the image bank whether it is possible to license the actual content shown in a photograph in addition to the photographic work itself.

This situation is also very common for photographs from press image banks. Such photographs were usually produced to portray real events and are not commissioned photographic essays that can be used for more than one purpose.

Practical steps – images

Identify

- Clear the largest amount of materials as early as possible. Clearance report on storyboard might avoid shooting of scenes with materials that represent a legal risk.

Coordinate

- Keep the production team informed to have the materials intended to use as soon as possible and avoid last-minute in place additions.
- Anything added after the clearance should also be cleared and have a written reference (in the storyboard). This can provide important support to avoid surprises.

Clear the copyright

- Evaluate if the work in public domain or if limitations and exceptions apply. Ensure you have all the right owners needed.
- For materials created for the production, ensure you have obtained the ownership or an appropriate license to use in the project.

Clear the image rights

- For those materials depicting people, authorization for the use of personality rights of those people will also be needed.

Sign written licenses/releases

- Keep the documentation for clearances checking and manage the conditions for future reference of the distribution of the film.

Manage

- Don't forget to manage the information and maintain a record-keeping process for the final clearance report and for future reference. This also includes materials from online image banks.

Newspapers, magazines and other publications

The use of printed materials could be incidental in the background of a scene, have a prominent use being manipulated by one of the characters or actively shown on screen. The latter is common in documentaries and true-crime films, for example. In many countries, printed newspapers, magazines and other publications are protected as a collective work and this protection is independent to the content of those publications.

While publications appearing in incidental background set dressing might not represent a risk in a specific case, more active uses of printed materials might lead to the need for written authorization, especially if the character interacts with them such as quoting, reading or with close-ups.

It is important to note that the protection of publications is different to the information contained in a newspaper or magazine. The information – also referred to as news of the day – is not protected by copyright but the articles, columns, drawings and the periodical publications as a whole are. A rights clearance will assess what is being integrated into the project and if the authorization from the rightsowner is needed.

Practical steps – printed materials

Identify

- Map the uses that are incidental in the background as a set prepping and the ones that are identifiable and part of the scene.
- If a character quotes, reads or refer to headlines or articles, clarify if those are real or not.

Clear rights

- For the uses that represent a risk, ensure that you obtain the written authorization.
- In case of documentaries or content based on real events, some materials could have already been licensed for the script. Manage those authorizations and check in case you are already authorized to use them as intended.
- In case of content that will be translated for local audiences, ensure the license cover those uses.
- For older content, check if the content is not in public domain. Ensure you have legal advice as this normally involves previous versions of the copyright law.

Manage the information

- Ensure record-keeping for the future and avoid last minute surprises in front of the camera and in post-production for materials not cleared.

Overview of materials protected by copyright

Copyright protection does not depend on the form or type of material. Copyright, as an intellectual right, is owned and transferred independently from the material object it is fixed (recorded, stamped, engraved, written, etc.) on. For example, you might buy a painting, the physical object, but that does not transfer the copyright of that painting. You might also acquire the copyright over that painting but that is independent from the physical object.

In order to identify that something is protected by copyright, having a better understanding is the most prudent strategy to avoid legal risks. Consulting legal experts is another one. In general, objects to be protected by copyright (usually referred to as “works”) require originality and that is independent of the form, shape or quality of the work. Originality (or creativity) is usually understood as a low threshold for a work to fulfill in order to receive copyright protection. The initial presumption that an object might qualify for copyright protection is probably the safest way to approach clearance of copyrights in audiovisual productions.

Copyright protection is not unlimited. First, there is a time limit. When the term of protection has lapsed, a work is said to have entered into the public domain. Second, there are limits to what is protectable by copyright. For example, ideas are not protectable by copyright. Third, there are some circumstances where even when a material is protected, copyright laws allow the use without needing authorization from right owners. Those circumstances are called limitations and exceptions. See below for a more detailed explanation of these aspects.

Public domain

Before the licensing process, clearance experts assess whether the copyright term of protection has lapsed for work. This would mean that the work is in the public domain. The fact that a work is in the public domain does not mean the producer could use it in any context or circumstances. Public domain refers to the end of the term of protection of the economic rights.

Copyright is divided into two categories of rights: economic rights – the rights that the producer needs to license such as reproduction, public performance, adaptations, etc. – and moral rights. As a general rule, moral rights are not licensed nor expire with time (in most countries). They refer to the rights of authors to be identified as such and to oppose the use of their works in circumstances or ways that are detrimental or against their honor.

When the time of protection over the economic rights lapses, the work enters into the public domain. To consider whether a work is in the public domain, two elements are to be considered:

1. How to count the term of protection: according to the type of material, you might consider the year following the death of the author or, in some instances, when it was created. In the case of a book with two coauthors, the book will enter into the public domain counted from the subsequent year of the death of the author that died last.
2. Term of protection: overall, the time of protection is equal or superior to 50 years with many countries recognizing at least 70 or even 100 years. It is important to have in mind the countries you would like to consider in the clearance process in order to assess their term of protection.

There are some instances where the rules to count the term of protection are specific. For circumstances that are fairly complex, the advice is to rely on legal experts for advice or to approve the clearance. See below for examples of some of those circumstances:

- Anonymous works: sometimes it is not possible to identify the author of the work and the work will be considered anonymous. Copyright laws normally prescribe a term of protection counted from publication date (or creation if never published) instead of the death of the author.
- Orphan works: works where the rightsholders cannot be found could be classified as orphan works. Procedures covering orphan works (such as limitations and exceptions) do not exist in most countries with the particular example of detailed rules for the use of those materials in the European Union.
- Translations and adapted works: if a work protected by copyright is in public domain, it does not mean that the translation is also in the public domain. This is because the translated version should be assessed as an independent work protected by copyright also for the purposes of the term of protection. For example, you might want to use the book *The Little Prince* by the author Antoine de Sain-Exupéry. *The Little Prince* is in the public domain in those countries that have a term of protection of 70 years since the author died in 1944. While the original book was in French, if the producer uses a translated version, the criteria to count the term of protection will be the date of the death of the authors of the translation and not the original book.

Limitations, exceptions and fair use

A producer might think or hear that they don't need to ask for authorization because of an exception to copyright law, or because of fair use. It is important to understand that once a material is protected by copyright, commercial uses (for example, in an audiovisual production) is likely to trigger the need for authorization from rightsowner. In particular and special cases, this authorization might be exempted in the copyright laws. The provisions allowing those uses are called limitations and exceptions.

What are limitations and exceptions?

Limitations and exceptions are provisions in the copyright law that allow the use of protected content under very specific cases and requirements. One of the most well-known examples is the quotation of works made available to the public.

On a practical level, the use of limitations and exceptions involves a level of risk as courts or right owners might disagree of the interpretation that a certain use is in accordance with existing limitations and exceptions. Additionally, the freedom given by limitations and exceptions are normally interpreted in a restrictive way and not the other way around.

What is fair use?

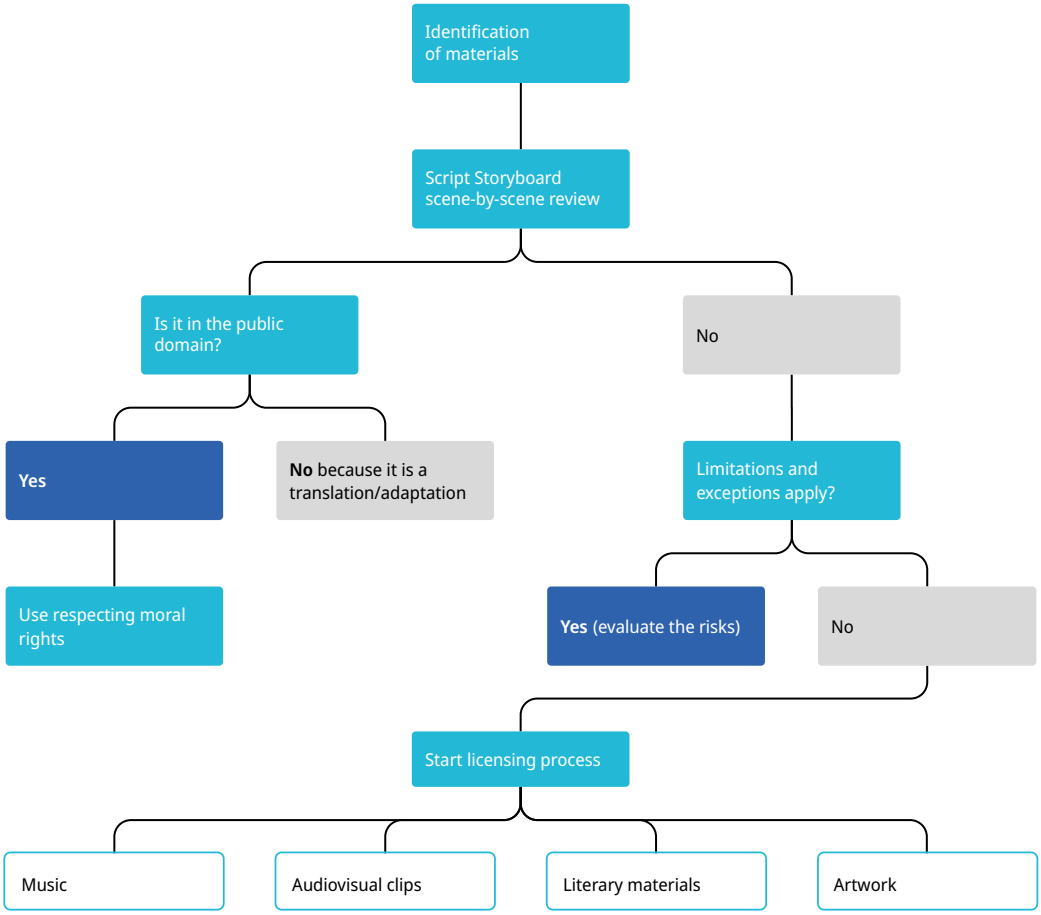
Limitations and exceptions depend on the legislation of each country, as does the protection of copyright and related rights. In the United States of America, the limitation and exception system is known as "fair-use" doctrine. It is the combination of a provision in the US copyright statute together with guidance from jurisprudence. It involves consideration of four factors: purpose of the use, nature of the use, amount of work used and market impact on the original work.

Fair use is not universally applied. Similar provisions exist in other countries, such as "fair dealing" in United Kingdom, Canada and Australia.

In the vast majority of countries, copyright legislation does not apply fair-use doctrine nor a general provision of limitation and exception but rather specific conditions where uses without the authorization of the right owner is allowed.

Filmmakers would need to assess if the use they intend falls under the existing limitation and exception system. In most cases, the commercial purposes of the production might not allow the production to benefit from the exception. The possibility to rely on limitations and exceptions is normally more frequent in the case of documentaries, where the purposes and circumstances on how materials are depicted in the production might allow the use to qualify as in accordance to a limitation or exception.

Figure 8 Assessing limitations and exceptions



Trademarks and designs

Trademarks

From a purely legal point of view, trademarks are symbols (images and/or text) that are registered to identify a group of products or services. In a broader sense, they are an important element for the public to distinguish between different offerings. For companies and businesses, trademarks are an important way to communicate, attract and maintain consumers. Trademarks also are an important tool in preventing unfair competition between companies competing in the market. Producers should be reminded of the different aspects to better understand how the use of trademarks and designs in the project could impact third-party rights and why a rightsholder might oppose their use.

The protection of trademarks is territorial and depends on registration (with very few exceptions). In other words, legal protection is a result of a registration, which is done on a territory-by-territory basis.

Generally, trademarks are protected against confusion that other signs could generate in the consumer of that product or service. It is also protected against genericization and tarnishing (especially famous trademarks) where any form of use or depiction that could be detrimental would not be allowed. Trademarks also represent an asset that receives considerable investment from companies on the trademark likeness (or even the "aura" of the trademark), in particular luxury brands. Right owners normally try to exercise control over the use of their trademarks. In some cases, it might be understood that the use could be beneficial and they might even be willing to pay for the exposure (the best example of this is product placement deals). In other cases, the context of the use in the audiovisual project might lead to tarnishing or even the association of the brand with other products or services.

Many financing agents, such as television channels and streaming platforms, have established policies on the use of trademarks (including product placement). Those policies, usually communicated to the producer beforehand, deal with precautions in including a trademark in the project, because trademarks are aimed at a defined group of consumers of the product or service identified by the mark. The expectations of the film are normally broader than the consumers of that trademark so there is a need to ensure that the trademark is used in the normal and expected way the product or service is consumed. For example, a brand of office tools to be used in an office environment and not to hurt a character of the film.

The decision to obtain a license will be taken depending on the trademark, product and services and the use in the project. Any use without written authorization should be done in an appropriate context that is relevant to the product or service that it represents and where the use is minimized and does not take a central role in the scene (story point). Guidance on the use of real trademarks normally states that the products or services should be shown as originally designed and no comments are made endorsing or referring to the quality or characteristics of the trademark. For this reason, when producers need to show alcoholic beverages and tobacco products, they often decide to create fictional brands and props to avoid showing real brands.

For documentaries and works inspired by real events that are directly related to a brand, producers determine whether they need to obtain permission to use a brand on a case-by-case basis, according to how the brand will be portrayed and in what context.

As an alternative to clearing process of real trademarks, many producers prefer to create fictional trademarks to eliminate any risk whatsoever. Before they do so, they are advised to investigate whether the fictional trademark has already been registered in the country of production or in a selected number of countries,5[1] and whether the trademark is used for any other product or service. This is because if a fictional trademark is created but it happens to be confusingly similar to a preexisting trademark, it might still represent an infringement of third-party rights.

Designs

Industrial design is a type of IP that protects ornamental or aesthetic aspects. This could be three-dimensional features, such as a shape, or two-dimensional features, such as patterns or combinations of shapes and colors. A number of objects could have their appearance protected by industrial designs: electronic equipment, armchair, high-end lamps, watches, fashion items and so on.

For the purposes of audiovisual clearance, filmmakers should be aware that products could be protected by a design and that right owners might enforce their rights in case they oppose the use of the product in the project. The precautions taken for the use of trademarks could also be adopted in relation to design rights. Products that are well-known for their aesthetics might require a license from the right owner, especially if they are shown with prominence in the scene or the characters refer to them as luxurious or expensive items, for example.

1 5The WIPO Global Brand Database is often used to carry out this investigation (Global Brand Database): https://www.wipo.int/reference/en/branddb.

Scenes that show a mobile phone close up should be carefully evaluated as the application or interface might also be protected by design and/or copyright. The initial consideration is that the use in the scene should be relevant and appropriate within the context of the scene and, as a famous brand mentions in its guidelines, the "product is shown only in the best light."[2]

For example, an appropriate context would be a character receiving a message and reading. A different situation, from the clearance perspective, is a villain character using a recognizable mobile phone to detonate a bomb remotely.

Organizations and official symbols

Some countries have specific rules on governing the use of official symbols of public bodies such as ministries, police and firefighters. Additionally, some official governmental bodies have registered their logos as trademarks. Producers are therefore advised to license all items they use from a governmental institution (shields, uniforms, badges, etc.) or to create original designs for the production.

In cases where the project is telling a real story, the use of such symbols could be justified on the grounds that it is depicting real events where the institution was involved and that disclosing the information and story is in the public interest.

The use of symbols does not preempt the fact that the clearance of personality rights of officers and employees will need to be considered independently from the authorization to use official symbols (see the observation about public figures above).

Practical steps

Producers considering the use of trademarks, design and organizations' names and logos should consider the following guidelines:

Real uses: Without modification and faitfully to the way ot exists (shapes, colors, formats, etc.).

Terms of use: The characters or story do not imply the use that would not be in line with terms and conditions for the products identified by the trademarks protected by the design, etc,

Context: The circumstances in the project are not derogatory nor assocaite the products and services or ogranization with negative contexts, etc.

Centrality: The products, services or institution do not play a central role in the scene, story or in a character's profile.

Real facts: In case of documentaries and real stories, the use could be tolerated depending in the circumstances above,

Personality rights

Personality rights are the rights of a person over their image, voice, appearance, likeness and recognizable aspects of their persona. The depiction of a real person should be undertaken with care as it could not only generate legal issues for the production but also bring undesired impact on the lives of those mentioned or portrayed in the film, series, documentaries and so on. The circumstances in which those people appear and how they appear are important, even in cases where authorization or releases were already signed to the production. The considerations will vary on the degree of reality of the project and how faithfully to reality the persons are portrayed.

2 Guidelines for Using Apple Trademarks and Copyrights, available at: https://www.apple.com/legal/intellectual-property/guidelinesfor3rdparties.html.

As a general rule, a person has the right to authorize or oppose the use of his or her personality rights. A person also has a right to privacy which is mentioned further below. In the case of notorious people and celebrities, the expectation of privacy is considered reduced due to their position in the eye of the public (and legal doctrines such as freedom of speech, public interest, etc.). Still, even in the case of celebrities, the commercial exploitation of his or her image and its likeness could require authorization.

In other cases, the decision whether the personality rights would be infringed or not will depend on the jurisdiction considered. In some countries, there is no infringement of personality rights of deceased people (such as in the United States of America). At the same time, even biographies of famous people are considered an infringement to personality rights (such as in Brazil). This is to say, there is no straightforward rule on the clearance of personality rights. Considerations should be taken with the particularities of each project. See below some considerations.

Works of fiction

For the purposes of clearance (and infringement of third-party rights), works of fiction presume that the story and the elements to tell that story were intentionally chosen. In practice, this means that anyone who appears in front of the screen must have authorized it. This is true for actors, extras, people passing by the street during an external shooting and so on.

Personality rights go beyond a person's physical appearance. The biggest risks linked with affecting personality rights are emotional damages and defamation. Intent to cause harm or defamation is not a requirement for an infringement to take place. Therefore, even if it was not the intention to use or harm a person's image, infringement could still be considered to take place. This is slightly different in the case of public figures, where the intention to cause harm or the lack of care might need to be proved by the person to successfully bring a case of defamation or invasion of privacy. This is not applicable to all people but only to celebrities and public figures, where the public interest somehow hinders their expectation of privacy.

For that reason, one of the few acceptable uses without written consent in works of fiction is mentioning public figures in a way that is justifiable and within the context of that public figure. For example, a character might mention a president, a singer of a song or a famous actress within a context in which they would normally be mentioned. It would be different if they were mentioned in a scene or context in which it could be understood that there is a commercial exploitation of the name and image of the person or, alternatively, in a way that is derogatory, malicious or out of context.

Works based on real events

Works of fiction sometimes draw inspiration from real events rather than portraying them. This is normally done to present universal themes from a concrete angle or with true elements, engaging audiences that would like to know about the "real story." In such cases, the scriptwriters can take a universal theme and disassociate the story from the real people and events that were the inspiration behind it. In doing so, they can reduce or almost entirely eliminate the risk of violating third-party personality rights as long as they are not recognizable to the public. If the person is recognizable, you can be liable even without naming a person. On the other side, if they are not recognizable, the personality traits and themes are not protected by copyright and hence can be exploited in a production.

The situation is a little more complex when filmmakers combine real events with fictional scenes for the purpose of the film or series without changing the names of the individuals involved. Indirectly, this will involve the real people involved in the story and attribute them dialogues and acts that did not exist. At the same time, the audiences are not able to dissociate real events from the ones that are fictional, directly harming the image, likeness, honor or even violating the privacy of those people.

Imagine a work based on real events that used a character with the same name and appearance as one of the people involved in the fact. At some point in the story and for the purpose of

engaging the audience, this character commits a crime that did not happen in the real case. The audience will not be able to know if that person did or did not commit that crime and the filmmakers would be attributing to that person a crime he or she did not commit. This could constitute defamation or an offense against the person's honor. Even if the person signed an authorization or release, it is important that filmmakers ensure that the authorization covers such "artistic" freedoms.

A relevant part of the analysis of the risk involving personality rights will be the circumstances where the audience will be able to make a connection with real-life events. In that analysis, the connection with the source of inspiration or adaptation for the script will play a relevant role for fact-checking purposes. See below for details of some aspects of this.

Life-story rights

When preparing the project, bible, script or even concept, producers might base their work on real-life events. It is true that information and facts are not protected by copyright and are free to use. A more challenging task is to identify the legitimate use of personality rights and, when developing the project, what was the result of knowledge and mere information and what is, in fact, a copy or adaptation of an author's expression of originality when telling a story or information in a newspaper, for example. The uncertainty from this analysis frequently results in the recommendation for producers to license at least one source of information that contains the real events referred to in the project. This could also be a requirement in the admission of the E&O insurance.

You want to tell a story and it so happens that it is one person's (or more) life story. You might purchase life-story rights for different reasons. A strategic one is to protect your project from legal risks resulting from defamation, invasion of privacy and personality rights. You might also strategically include in the agreement access to confidential information, interviews, photographs and diaries and other materials that could serve as an inspiration for the script or project as a whole.

Filmmakers should shape the life-story rights according to the needs of the project. One agreement on life-story rights could be very different from another. It is important to know that only those signing will be bound by that agreement. If the producer would like other family members and friends to give testimonies or to refrain from taking legal action, they would need to also sign agreements.

One key element in agreements is the possibility to fictionalize, dramatize or adapt the story as needed or desired by the producer while, at the same time, being protected from legal action. Many people will want to exercise control over how they are portrayed but producers do not want to be subject to script approval. Alternatives such as technical position in the project (i.e., consultant) or to limit the period of time of the facts, participate in the selection of the writer or even expressly exclude a fact (such as a car accident, an affair, prison, etc.)

Documentaries

Documentaries are the genre in which works based on real events are most prominent. Documentaries not only draw heavily on preexisting intellectual works, but they also refer to real events and people. This leads to three particularities of the legal clearance of documentaries: first, they tend to use a vast amount of preexisting content (clips, news articles, photographs); second, it might impact a large amount of people (and their personality rights); third, documentaries tend to rely more intensively on limitations and exceptions or uses that are tolerated and exempted from authorization from right owners.

While documentaries might involve a higher risk when compared to other projects, the need to identify and map those risks continues to exist. Only after mapping and assessing the risks will filmmakers decide on which rights it will pursue a license and which ones represent a negligible risk.

There are situations in which it is not possible to license the rights used in the project. A documentary investigating a political issue, for example, might include numerous interviews

with political figures and might portray public protests in various countries. The legal analysis for such a documentary must consider that it is impossible to license the image rights of those attending street protests because they cannot be identified. It is also impossible to license the image rights of many of the political figures portrayed. Using such images is therefore a risk, and this risk must be analyzed based on the laws in the place where the documentary is being produced.

Although a person being interviewed for a documentary tacitly consents to their image being used, the use in an audiovisual production is not the same as broadcasting in a TV channel which was agreed by the interviewee. For that reason, the producer should obtain prior written consent whenever possible to ensure that no claims are made at a later date, especially given that the legal effects of such tacit consent may vary from one country to another.

The producer's legal team must then assess the local case law and conduct a legal risk analysis to determine whether they should make the documentary without the consent of most of the people portrayed. The team will be required to provide a legal opinion on the risk of portraying people whose consent cannot be obtained so that E&O insurance can be taken out and the work can be marketed.

Privacy

Privacy is somebody's right to be left without undesirable attention or publicity. The rights are balanced with the public interest, for example in the case of journalism or news reporting. A key element on privacy and personal data is that once it is revealed, a person cannot recover from the invasion of privacy. Privacy is also a fundamental right protected in many constitutions around the world.

The invasion of privacy could be found in different circumstances, such as:

- Intrusion: an intrusion through surveillance could be offensive. For example, long-shot cameras directed at the windows of somebody's house.
- Disclosure: facts about somebody's life, particularly those that are not newsworthy and of embarrassing nature, could constitute an invasion of privacy. This could also include in the context where the person is identified or personal data from that person and his or her properties (home address, car plates, etc.)
- Appropriation: the use of somebody's personality rights without authorization could generate emotional distress or compensation for the commercial value of his or her image rights that was exploited.
- Negative portrayal: in cases where portrayal is offensive, with or without damage to the reputation of the person, that could be considered as an invasion of privacy. This is particularly true if the person is linked to events, declarations or acts that he or she did not participate in.

Projects involving minors

Actors who are minors must be hired in compliance with all laws, regulations and other legal requirements in the countries where the work is filmed. In some countries, the filming of minors must be authorized by the courts and specific laws govern the employment of minors. The purpose of such regulations is to ensure that minors are not harmed by the work, whether through loss of school time or because of the subject or context to which they are exposed during filming.

Producers must also obtain the appropriate licenses in writing for the use of the related rights of minors in the work, and they must follow local laws in force in the place where the contracts are signed when determining whether the contracts should be entered into by the minors themselves and/or by one or both parents.

Furthermore, whenever minors are exposed to sensitive topics or scenes, such as those containing violence, alcohol, narcotics or sexual content, producers are advised to pay careful attention to ensure that they are not held liable for any physical or moral harm to the minors.

Some companies even stipulate that psychologists, qualified instructors and/or social workers must be hired to accompany minors during filming and that the environment must be made suitable for the minors (such as provision of a recreational room in the set, for example).

Other aspects of rights clearance

Projects involving animals

When filming with animals, two topics require special attention. First, local animal protection laws may include specific requirements on how animals must be handled and cared for during filming, with administrative or criminal penalties potentially imposed for noncompliance. Second, there may also be specific rules on handling and gaining access to species that are protected for environmental reasons or to protect wildlife (a parrot, for example).

Producers should determine with whom to conclude the contract: the owner of a domestic animal (trained dogs, horses and other domestic animals),7[3] with zookeepers or specific companies who train animals for the cinema.

Second, producers need to consider their reputation, since there is growing concern for animal welfare and the prevention of cruelty to animals.

Producers are generally advised to bear these two areas in mind during the scene setup stage, whether on set or on location. Although it can be argued that using animals in a scene is protected by freedom of expression, the producer still has a duty of care toward the animals.

Native and indigenous people and their territories

In general, any filming of indigenous people (such as interviews with members of a certain community) must comply with the specific laws and regulations of the country. If filming takes place at indigenous territories or indigenous land, the producer must comply with the requirements determined by the national body responsible for that area before entering into it and especially before undertaking a commercial enterprise (audiovisual production). In some countries, both government authorization and indigenous people leadership are required.

In many cases, the negotiation will also include how to remunerate the indigenous community members. This is particularly true in communities where payment in currency could affect the lifestyle of the tribe and alternative forms of compensation would be discussed and approved by the governmental authority responsible.

Sensitive issues and duty of care

The level of legal risk in audiovisual works that deal with sensitive issues such as suicide, violence, discrimination and illegal activities should be analyzed on a case-by-case basis.

Some platforms issue instructions with policies on how certain scenes should be portrayed. They refer to this as “duty of care.” Such instructions might, for instance, require the producer of a true-crime documentary to offer interviewees (victims, family members, etc.) access to professional psychological support on set. The producer of a biographical film made without the consent of the subject of the film might be required to have a contingency budget for any new authorizations or agreements with the family portrayed. And the producer of a work that is loosely based on controversial, real-life events might have a team in place before the launch to address any reputational crises as quickly as possible.

Sensitive content can prevent the audiovisual work from being fully broadcast: some content changes the restrictions attached to the exploitation visa (PG 13/17; Under 16s, 18s in some countries) and therefore influences the circulation, broadcast and profitability of the work. The producer must take all of this into account and the characteristics of the project when deciding to include this kind of scene in the work.

3 A lot of animals can be considered domestic depending on the local law. For example, in France, the Order of August 11, 2006, consider 179 animals as domestic.

Nudity and sexual content

Where scenes contain sexual content or nudity, it is essential to check whether the platform or channel on which the work will be made available provides any specific recommendations for the shooting of such scenes.

If any of the cast members' private parts will be exposed during production, it is common to negotiate a "nudity rider" with them. In practice, a nudity rider is a consent agreement, or a specific clause in the contract between an actor and the production company for participation in the work. The purpose of the agreement is to establish the conditions for filming nudity or intimacy or for representing sex organs.

Producers are advised to avoid shooting such scenes with minors (in places where local laws require authorization by the courts or government bodies for such scenes, the scenes might not be approved) and to hire a professional to discuss such scenes with the cast, prepare the professionals involved in the scenes and provide guidance on the maximum number of professionals who may be present.

Promotional material

The fact that a material or a right is cleared to integrate the project does not necessarily mean it could be used in promotional or marketing materials. This is generally understood as a different exploitation of the rights and the presumption should be that it is not cleared. The licenses or agreements should clearly establish that this use is also allowed. In the case of personality rights and materials that were included relying on a limitation or an exception (or fair use), the use in promotional materials might lead to an infringement to the commercial exploitation nature of the content instead of, for example, telling a real story.

In short, the materials included in promotional materials should be analyzed and cleared for those purposes even if they already appear in the movie, series and so on.

Audiovisual insurance

Insurance is a financial product used for audiovisual productions. It is usually contracted to protect the filmmaker (legal entity or natural person), the participants in the production and the financial agent backing the project against risks such as accidents, damage to equipment and financial losses due to canceled shooting days and additional programming fees.

Recently, however, insurance has increasingly been used to ensure that producers and financial backers receive compensation for any damages resulting from their failure to comply with their legal obligations, that is, damages resulting from rights clearance work.

A wide range of insurance products are available on the market, but two are particularly common for independent audiovisual productions:

- A film package is an insurance package for the filming of the work. It covers a range of risks (such as equipment, props, extraordinary costs and absences) and civil liability (such as compensation for unintentional damage, defense costs and compensation for damage to property).
- E&O insurance is focused on professional civil liability, that is, liability for damages arising from any errors or omissions made by the producer in the fulfillment of their legal obligations (specifically, IP rights and personality rights).

Artificial intelligence

The use of artificial intelligence (AI) tools in the audiovisual market is not predominant all over the world but it is becoming a growing trend with the improvement of Generative AI (GenAI) tools. The legal and regulatory framework is still evolving without a clear guidance to audiovisual producers on how to incorporate or control the use in their productions.

While the use is growing, many established studios and filmmakers are looking into how to incorporate AI tools in their future productions. The main concern for producers relating to rights clearance and GenAI could be summarized as follows:

Non-declared uses

- The producer might not be aware that some creative collaborators are using GenAI tools in the project. In this case, the producer will not be able to take precautions around that use.

Creative uses

- Some of the creative materials integrated in the project might have been generated with the assistance of GenAI tools (deliberately or inadvertently). For example, someone might have asked a GenAI platform to generate a dialogue based on parts of the script. This script might be later modified, adapted and the legal implications around the GenAI output might implicate the project as a whole.

Infringements

- The use of outputs obtained from GenAI could lead to infringement of third-party rights, including copyright and even personality rights. This is very much linked to uncertainty about training data of those processes. The producer will have no control over that liability and impact after its use.

Prompt (input)

- When using GenAI – even when the output is not included in the project – a collaborator might use content from the project as input (prompt). The result is that the use as input (for example, a clip or a script) could imply that a license over that content is granted to the platform as per the terms and conditions of the service and the producer will no longer be able to control exclusive rights.

Contractual obligations

- The main contractual obligation will be linked to the chain-of-title and how that could be impacted by the use of GenAI services terms and conditions.
- Large players such as streaming platforms and broadcasting organizations already have in place an AI policy that will be communicated to the producer. The compliance with that policy will become a contractual obligation on the producer's side and it will have to transpose into the different areas of the project.

Registration

- The number of regulations and requirements around the use of AI in the creation of works is on the rise. The lack of knowledge about the use or clearance from a producer over the use of GenAI in the project could lead to false declarations, for example, when registering the script or the audiovisual work upon a copyright registration office that requires the disclosure of the use of AI.

Collective agreements

- While the SAG-AFTRA union agreement from the United States of America pioneered rules on the use of GenAI in audiovisual productions, other unions around the world might include tailored rules on the use of GenAi in audiovisual productions.

Filmmakers should know the areas of concern whenever using AI tools in their project. Understanding the impact of the legal conditions when using those tools is the main concern for the purpose of rights clearance.

Practical steps – AI

Adopt a strategy

- Think about what your position is regarding the use of GenAI in the project based on the tools, conditions and existing obligations you might have (for example, from a financier that might have an AI policy).

Reflect existing obligations

- Ensure that your strategy and choice is in line with current and future obligations related to the use of AI, in particular transparency, disclosure, licensing and chain-of-title.

Clear GenAI uses

- In case there is a use of GenAI tools in the production, ensure that you understand and are in accordance with the terms and conditions of the service used.

Inform the production team

- Communicate your policy or position on the use of AI tools clearly and in advance, specially to the creative and legal areas of your production team.

Annex I: Music clearance report

This sample clearance report could be used by audiovisual producers to manage the use of musical content in their projects, and the development of licensing agreements in line with clearance practices.

Project title:

Producer:

	Ref. 1	**Ref. 2**	**Ref. 3**
Photogram/frame			
Description			
Episode			
Time code [start]			
Time code [end]			
Duration			
Format			
Source/license/owner			
Status			
Fee			
License			
Rights granted			
Credit obligations			
Limitations on advertisements/promotion			

Annex II: Checklist

This list could be used by producers to control and remind them of the minimum paperwork needed to obtain E&O insurance at the end of the production.

1. Authors of the screenplay
2. Authors of underlying works (books, news articles adapted or included)
3. Music:
    i. Lyrics
    ii. Music (composition)
    iii. Recording
    iv. Performances (singers, musicians)
    v. Soundtracks
    vi. Background music incidentally included

4. Film clips
    i. Owners/licensing entities
    ii. Copyright owners
    iii. Music included in the film:
        1. Lyrics
        2. Music
        3. Recorded songs
        4. Performances (singers, musicians)
        5. Soundtracks
    iv. Background music incidentally included
    v. Writers and authors (scriptwriters, etc.)

5. Performances from actors
6. Extras and people appearing in the film
7. Persons whose name or personality rights are used
8. Subtitles/captioning licenses
9. Directors' authorization for final cut
10. Copyright registration of the work and screenpla

Rights Clearance: A guide for independent filmmakers provides a "how-to" for small- and medium-sized audiovisual producers to adopt best practices regarding legal permissions related to intellectual property and personality rights in audiovisual productions.

The guide provides practical steps to follow while explaining the risk-taking involved in any audiovisual production and how to adopt measures to avoid costly legal issues and distribution problems.

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