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MEDIA DEALS BOUTIQUE

Closing a Talent Release in One Move &
Getting the Grant of Rights Just Right

A Transactional Boutique Session

Alexia Bedat, Klaris Law
Raphael Winnick, Disney

Part I – Closing a Talent Release in One Move

1. Typical talent lawyer requests and production counsel considerations in evaluating such requests:

   a. Scope of rights granted – consider:

      i. "Must haves" vs "nice to haves" – e.g. for use in derivatives: does business affairs/legal affairs prefer to reach back out for approvals down the road rather than go out with a wide grant of rights that will invite pushback?

      ii. For episodic content: do you have the rights required to use in/promote the episode, podcast and project as a whole? (how far does "in and in connection with the episode" language get you?)

> "The 2019 Appearance Releases grant to RGP (the "Producer") the right to use the film footage of Carole and Howard Baskin (the "Grantors"),
>
> > in and in connection with the production, exploitation, and/or distribution of the documentary motion picture currently entitled "Big Cats" (the "Project"), with the right to edit, distribute, exhibit, broadcast, exploit, promote, and advertise the Project, including excerpts therefrom, in any and all manner and media ....
>
> The plaintiffs argue that there is a substantial likelihood that they will prevail on their claim that the Appearance Releases do not authorize the defendants to use

footage of them in Tiger King 2 (Doc. 4, pp. 8–21). They assert several arguments in support of this contention, but the most obvious, and most persuasive, is that the plain language of the Appearance Releases granted rights to use the footage in one documentary. See Eternity Global Master Fund Ltd. V. Morgan Guarantee Trust Go. Of New York, 375 F.3d 168, 177 (2d Cir. 2004) ("Typically, the best evidence of intent [of the parties] is the contract itself; if an agreement is 'complete, clear and unambiguous on its face, [i]t must be enforced according to the plain meaning of its terms.' ").

Thus, the 2019 Appearance Release defines RGP's right to use footage of the Baskins "in connection with ... the documentary motion picture currently entitled "Big Cats" (the "Project") (Doc. 24-1, p. 5; Doc. 24-2, p. 4) (emphasis added). As the plaintiffs argue (Doc. 4, pp. 10, 14), "the" is singular; it means one. See Battery Associates, Inc. v. J & B Battery Supply, Inc., 944 F. Supp. 171, 176 (E.D.N.Y. 1996) (citation omitted) ("Words and phrases ... are given their plain meaning."). Therefore, it means one documentary, which, in this case, is Tiger King 1. This conclusion is underscored by the absence of any reference to "sequel rights," or any plural references from which it is reasonable to infer the scope of the contract extends to other projects.

[….]

Therefore, at this juncture, it does appear that the plaintiffs have stated a cognizable claim for breach of contract. However, the impairment of free speech pending resolution of this case, as well as the other preliminary injunction factors, weigh greatly in favor of denying the requested preliminary injunction."

Baskin v. Royal Goode Prods. LLC, No. 8:21-CV-2558-VMC-TGW, 2021 WL 6125612, at *8 (M.D. Fla. Nov. 19, 2021)

b. Addition of "lender" – consider:

i. catch-all language covering relationship between Lender and Artist:

⇒ "Notwithstanding the fact that the terms of this Release are drafted in the form of an agreement between Production Company and Lender, it is understood and agreed that Lender, as your employer, is furnishing your services to Production Company hereunder in accordance with the terms and conditions set forth herein. Throughout this Release, if and to the extent applicable, any reference to you shall also be inclusive of Lender."

ii. inducement language + signature by talent:

⇒ "By signing this Release, you confirm that you have read this Release and agree to its terms. You acknowledge: (i) Lender has an exclusive employment agreement with you and has the right to lend your services as described in this Release; (ii) you will render services in connection with and appear in the Podcast directly for Production Company in the event Lender is unable or unwilling to provide same; and (iii) you will look solely to Lender for any and all compensation in connection with the Podcast (if any)."

c. Approval over interview/use recordings – consider:

i. Business affairs considerations – are creative executives OK to grant approval?

ii. Editorial integrity/independence

"We reject Berlinger's contention. Given all the circumstances of the making of the film, as reasonably found by the district court, particularly the fact that Berlinger's making of the film was solicited by the plaintiffs in the Lago Agrio litigation *for the purpose of telling their story*, and that changes to the film were made at their instance, Berlinger failed to carry his burden of showing that he collected information for the purpose of *independent* reporting and commentary. Accordingly, we cannot say it was error for the district court to conclude that petitioners had successfully overcome Berlinger's claim of privilege."

Chevron Corp. v. Berlinger, 629 F.3d 297, 299 (2d Cir. 2011)

d. Approval over name/voice/likeness (NVL)/ in promo – consider:

i. Addition of no use of NVL in commercial tie-ins, merchandising or endorsements without approval but

⇒ Is there a timeline/ are there guardrails around approval? By when is approved deemed given? e.g.

"You must exercise your approval rights granted in the paragraph above within X business days of Production Company's submission to you of the applicable request in writing (email sufficing) (reducible to Y business days from the date Production Company notifies you of an exigency),provided that if the request is for marketing or promotion of the Episode and/or the Podcast("Promotional Materials"), such approval rights must be exercised within X hours of Production Company's submission to you of the applicable request, reducible to Y hours from the time Production Company notifies you of an exigency. Failure to disapprove any of the foregoing within such time

period(s) will be deemed approval of the submitted material solely for the purposes set out as part of the rights granted herein."

⇒ Is it clear use of the N/V/L and/or in the context of promoting the availability of the projects on the applicable distributors' and/or publishers' platforms/products ≠ endorsement?

⇒ Is it clear that the Production Company can freely use name/professional credits and include name to identify talent as a participant in the Podcast, in any press materials and/or in the Podcast's creative notes and/or metadata, and/or in connection with the rights granted without seeking approval?

⇒ Is it clear that once N/V/L is approved for the submitted proposed marketing copy, the same content in the Podcast, N/V/L can be used for related marketing without going back for approval?

⇒ Are N/V/L restrictions clearly limited to the project vs on the Production Company generally?

e. Indemnification of talent by production company – consider:

i. Inclusion of indemnification language by talent in first place – when is it really required? Consider the pros/cons of edits that require the addition of signature by the Production Company.

ii. If indemnification by the production company is included,

⇒ Is scope qualified? E.g.

"Except to the extent arising from a breach of your representations and/or warranties, Production Company agrees to indemnify and hold Lender and you harmless from and against any claims, liabilities, costs and expenses (including reasonable outside attorneys' fees and expenses) arising in connection with the development, production, distribution and exploitation of the Recordings, Episode and/or Podcast as well as any breach by Production Company of this release,"

⇒ are there guardrails around indemnification obligation? E.g.

"provided that:(i) prompt notice is given to Production Company of any such claims or suits;(ii) Production Company shall have the option to undertake and conduct the defense and/or settlement of any such claims or suits and that you cooperate with Production Company in the defense of any such claims or suits; (iii) no admission shall be made or other action taken which may prejudice the ability of Production Company to defend or prosecute any

claims without the prior consent of Production Company; (iv) no settlement of any such claims or suits is made without the prior written consent of Production Company; and (v) in no event shall Production Company be liable for any consequential damages or loss of profits you may suffer arising out of any breach by Production Company of its representations and/or warranties hereunder."

⇒ What is your company's policies around adding talent to insurance? Consider difference between "added as additional insured" vs "covered as additional insured subject to the terms and conditions of the policy".

Part II – Getting the Grant of Rights Just Right

Drafting Grant of Rights Clauses For Media & IP Agreements

1. Caselaw Context

(a) IP Agreements.

- Caselaw varies on how to interpret Grants of Rights.
- There is a long history of cases, covering over 100 years, interpreting Grants of Rights for Media and IP agreements in the context of ambiguous language as well as new technologies or unexpected uses
- There is no reliable, uniform rule on how an ambiguous Grant of Rights clause will be interpreted.
- In IP cases, different Circuits have different approaches.
    - Second Circuit: Boosey & Hawkes v. Disney Co., 145 F.3d 481 (2d Cir. 1998)
    - First Circuit: Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993)
    - Ninth Circuit: Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Circ. 1988)

(b) General Contract Law. More broadly, in contract cases, New York and California have different approaches on what is relevant to interpret contracts:

- California contract law can be more willing to accept extrinsic evidence, and the course of dealings between the parties. Winet v. Price, 4 Cal.App.4th 1159, 1165 (1992)
- New York can be stricter about looking only to the four corners of the actual contract language. Kass v. Kass, 91 N.Y.2d 554, 566 (1998)
- Regardless, it is always preferable to avoid ambiguity in the drafting process.
- As the duration of the Agreement and the potential use of the property becomes longer, the issue becomes more likely to become important.

2. Broad Grants

(a) Sample Clause – Very Broad

- " . . . Producer grants Licensee the rights to exploit the Content throughout the Territory and during the Term in all products, services, means, media or methods of distribution now known or developed in the future . . ."

- From the Pulp Fiction Agreement:

> "Producer hereby grants to Miramax for the "Territory" and "Term" all rights (including all copyrights and trademarks) in and to the Film (and all elements thereof in all stages of development and production) now or hereafter known including without limitation the right to distribute the Film in all media now or hereafter known (theatrical. non-theatrical, all forms of television, home video, etc,)"

(b) Under this language, all future uses and developments will generally be construed in favor of the Licensee.

(c) This broad language avoids having to specifically negotiate the scope of the License.

3. A Narrow Grant

(a) List of Specific Rights

- Grant only a specific list of particular IP rights, or potential uses and technologies

- Example:

> " . . . IP Owner grants Licensee the rights to record, fix, transmit, distribute and publicly perform the Content, throughout the Territory and during the Term, solely as incorporated within feature-length motion pictures for distribution in media that is in commercial use as of the Effective Date. . ."

- If the rights are primarily copyrighted works, consider using the statutory terms in Sec. 106 (E.g., the rights to Reproduce, Distribute Copies, Publicly Perform, Publicly Display or Prepare Derivative Works).

(b) Reservation of Rights

- Including a Reservation of Rights in favor of the IP Owner can further narrow the rights, and provide a rule of interpretation that will apply in any disputes. Sample language:

"Reservation of Rights & Non-Exclusivity.

(a) All rights that are not specifically granted to Licensee by this Agreement relating to the Content remain with and are reserved to IP Owner. Other than as expressly granted to Licensee in this Agreement, Licensee shall not distribute, exploit or otherwise utilize any Content without the prior written consent of IP Owner.

(b) The rights granted to Licensee are entirely non-exclusive, and IP Owner is not restricted in any way from exploiting any Content, Marks, or any other product or service in any manner whatsoever at any time."

4. A Broad Grant, With A Carve-Out

- This can be a potential compromise solution.
    - Gives broad rights to the Licensee, and allows the IP Owner to preserve some specific rights
- Pulp Fiction Example:

"Producer hereby grants to Miramax for the "Territory" and "Term" {both defined below) all rights (including all copyrights and trademarks) in and to the Film (and all elements thereof in all stages of development and production) now or hereafter known including without limitation the right to distribute the Film in all media now or hereafter known (theatrical. non-theatrical, all forms of television, home video, etc,), but excluding only the following rights ("Reserved Rights") which are reserved to Tarantino; soundtrack album, music publishing, live performance, print publication (including without limitation screenplay publication, "making of' books, comic books and novelization, in audio and electronic formats as well, as applicable), interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights. Exercise of certain of the Reserved Rights is subject to restrictions set forth elsewhere in this agreement. Tarantino shall have the right to use the title of the Film in connection with the exploitation of the Reserved Rights. For the purpose of this agreement, "interactive media" means any interactive device or mechanism, such as a computer game based on the Film, which may include literary or character elements used in the Film but shall not be a

substantial replication or viewing of the Film. Interactive media rights, if not hereafter acquired by Miramax, shall he subject to a holdback to be negotiated in good faith, with a particular view to avoiding competition with home video. Miramax may publish for promotional purposes excerpts up to 7500 words from the screenplay on a not-for-sale basis."

- Any ambiguities may take a long time to arise. In this case, it took nearly 30 years.
    - The 2021 Lawsuit involved NFTs of Tarantino's Original Script for Pulp Fiction.
    - Tarantino sold the first NFTs for $1.1 Million.

5. Including a List As A Potential Solution

(a) Exclusive Lists vs. Illustrative Lists

- Illustrative Lists:

  ". . . Including, without limitation, . . . " or ". . . Including, for the sake of illustration and not limitation. . . "

- An example of both an Exclusive List, and an Illustrative List, from the same paragraph of the Pulp Fiction Agreement:

  "but excluding only the following rights ("Reserved Rights") which are reserved to Tarantino; soundtrack album, music publishing, live performance, print publication (including without limitation screenplay publication, "making of' books, comic books and novelization, in audio and electronic formats as well, as applicable), interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights. Exercise of certain of the Reserved Rights is subject to restrictions set forth elsewhere in this agreement"

- The difference between "i.e." vs. "e.g."

(b) Including An Exhibit Or Sample Of What The Parties Intended

- A drafting solution that can be used if the Parties want to lock themselves into the current Status Quo

  American Movie Classics vs. Time Warner Cable case (2005 N.Y. Slip Op. 52081)