

THE BASICS OF PROGRAM PRODUCTION AND LICENSE AGREEMENTS

by

Paula A. Jameson

Radio and television program producers want to create exciting and compelling programs that will attract audiences. The thought of having to negotiate the particulars of a production or distribution contract has little appeal. Nonetheless, all producers have to turn their attention — hopefully early in the production process — to the legal documents that will assure funding, production, and distribution of the program they have worked so hard to create.

Unless the producer has the capability of producing the program using only its employees, written production and other agreements are essential, particularly in today's media environment where so many means of program distribution and use (and revenue streams) are possible. Establishing the legal framework before production begins assures all parties of the level playing field apt to give the fairest result in negotiations because once production is underway the stakes — and negotiating leverage — begin to shift. Most importantly, agreement on the division of production responsibilities and distribution rights assures all parties of their roles and sets the course for the development of the program.

The issues that must be addressed and resolved in any program agreement will differ from deal to deal. This article is intended to provide only a checklist of issues — often posed as questions — that should be kept in mind and answered before an agreement is reached. The exercise of having to think through the issues also serves to help formulate the production and distribution plan for the program before production begins.

Productions Using Only Employees. If a producer simply uses its own non-union employees to produce a program and does not engage any outside assistance, an agreement may not be necessary since any work created by its employees would be considered a “work made for

Paula Jameson is a partner in the Washington office of Arter & Hadden. She is the former Senior Vice President, General Counsel & Secretary of the Public Broadcasting Service and former House Counsel and Director, Legal Department of Dow Jones & Co., Inc.

hire” under U. S. copyright law. The copyright in that case resides with the employer, not the employee, absent any agreement to the contrary. It is good practice nonetheless to disclose to employees in materials provided when they are hired that all works created by them within the scope of their employment will be owned by the employer. Some companies require that employees sign a writing to that effect.

The development of new technologies brought with it lawsuits by employee-creators claiming a right to additional compensation for exploitation of their work in media not contemplated or existing when the work was created. Different courts have ruled in favor of differing parties depending on the language of the agreement and the intent of the parties at the time. To stave off claims, disclosures to employees or employee agreements should also make it clear that the employer’s rights also extend to use of the work in any media or using any technology or device now or hereafter known.

Other Productions. Producers often hire outside assistance for specific assignments relating to the program. For example, you may want an experienced announcer or known talent, writer, musician, or director. While in some cases, the person hired will simply be asked to perform services — act a role, play music — it is difficult to predict how production will progress or what contributions each person will make to the program. In any event, your first priority is to produce the best program possible, so you will want to adapt the program to incorporate the best ideas offered by those working on the program.

If you are the producer, you will want each person or company whose services you want to use to agree in writing that the work or contributions they make to the production will be “works made for hire” and that the copyright and all other rights to the program will be owned by the producer. As extra assurance, the contract should also assign all copyrights and other rights to the producer just in case the work or contribution is later determined for legal reasons not to be a work made for hire. While including both provisions is a bit of “belt and suspenders,” it is highly recommended to avoid any question about who owns the copyright to the program.

Because copyright vests in the author or creator at the moment the work is created, it is particularly important that agreements be reached and signed prior to the commencement of production.

Think about how negotiating leverage might be affected if the parties delay signing the contract until after the script is written. Without a written agreement, copyright vests in the author upon creation. While the parties may still enter into a “work made for hire” arrangement after the script is written and production is underway, incentives to persuade the creator and owner of those rights to sign the agreement may have to be increased. A work made for hire agreement is still more important when financing arrangements for production require the producer to warrant that he or she owns or has obtained certain rights to the program or program elements as a condition of the financing. Producers cannot so warrant until the contract has been signed. By agreeing in writing beforehand, these potential pitfalls are avoided.

If you have identified a funder or investor willing to assist in financing the production of the a program, you may need an agreement delineating your respective rights and responsibilities. Co-produced programs require co-production agreements, which can be very complicated because distribution rights, including media, territories, and net revenues, are usually divided between the co-producers.

Issues Common to Most Agreements. There are a number of issues that are common to most agreements to produce, finance or distribute radio or television programs.

- **Purpose.** At the beginning of every agreement, it helps to set the context by describing the intent of the parties, that is, what you intend to accomplish under the agreement. Anyone later asked to interpret the agreement will have some direction from the agreement itself about the parties intent.

- **Production Responsibilities.** What rights and responsibilities are to be assigned to each of the parties?

- > **Production Budget.** Who will prepare the production budget? How much will it cost to produce the program? How will those costs be allocated among participants in production of the program? What are the projected costs for each stage of production, i.e., pre-production planning, program development, production (shooting, recording, editing, facilities, locations), post-production, distribution, promotion and advertising? Who will be responsible for preparing a line item production budget? What accounting or financial reporting should be required? At what intervals? What are the expected cash flow needs for each stage of production? What happens if the program

runs over-budget? Do you want the right to terminate the agreement? In that case, who owns what rights to the audio recorded or footage shot through the date of termination?

> **Production Schedule.** What is the anticipated production schedule? How many rehearsal days and recording/shooting days will there be? What are the projected dates and locations for those activities? What delivery dates do you want to establish for scripts, selected recordings/footage, rough cuts, fine cuts, the finished program? It is not uncommon in co-production or financing agreements to withhold “greenlighting” — final agreement to proceed with production — until the production budget, cash flow and production schedule are agreed to.

> **Program Specifications.** In which format will the program be produced? What technical specifications must the completed program satisfy? What production and post-production techniques will be used in the program? Will dubbing of the program in other languages be necessary? Who will have the right to edit the program after completion for other uses, *e.g.*, as excerpts, to meet the program clock of distributors in other countries, or in other programs? What limitations or restrictions, if any, will be placed on editorial changes to the program? Will prior approval of the edited programs be required?

> **Personnel and Facilities.** Who is responsible for production of the program? What specifically are those responsibilities? Who will hire the cast and production personnel? What positions (director, line producer, actors, musicians, composers, narrators, animators, cinematographers, camera operators, etc.) will be hired? What facilities and equipment are needed? Who will furnish production facilities and equipment? Are prior approvals or notifications of the hiring of key production personnel required? Will key man insurance be required for any person hired to work on the production? In agreements with talent, you should also secure waivers of any moral rights from members of the production team, which they arguably might have in the program in countries that accord moral rights, particularly if the program will be distributed outside the United States.

- Who will administer the payments of all costs and expenses incurred in the production of the program? Who will make arrangements to obtain any licenses or permits that may be required during production of the program?

> **Rights Clearance.** A critical function in the production process is obtaining and clearing all underlying rights for materials included in the program for all media and territories in

which the program is intended to be used. That includes rights to the script, underlying literary material, still photos used in the program, music, stock footage, and any other element of the program. It may even include the rights to use certain props for background in the program.

- **Ownership of Rights.** One of the most important issues to be addressed in any programming contract is copyright ownership of the program. Copyright owners by law have the broadest rights and protection. Will the copyright be owned by one party or jointly by two or more parties? Under U.S. copyright law, a copyright in the program may be owned jointly, in which event each owner has all the rights of a copyright owner, unless those rights are otherwise restricted by contract. While ownership of the copyright may not be split into unequal shares, the joint copyright owners may agree by contract on a division of distribution rights, uses, revenues and profits in any manner they wish. The agreement should also specify the copyright notice to be included on the program and assign responsibility for registering copyright with the U.S. Copyright Office and enforcing copyrights in the program.

- **Fees, Revenues, Profits.** If payment of money between parties is involved, as in funding agreements or co-production agreements, what are the milestones or deliverables that will trigger payments? How much will be paid upon delivery of production budgets, production schedules, scripts, rough cuts, fine cuts, finished programs (including residual summaries, music cue sheets and music synchronization licenses)? Will revenues or profits received from distribution be split? Will certain expenses be recoupable before revenues are shared? If more than one program is involved, will costs incurred be cross-collateralized against revenues received from other programs? Will only net revenues be shared? How is net to be defined? Adequate financial reporting is essential to assure profits are shared or royalties are paid according to contract. Although it is not without cost, make sure you get the right to audit the books of the party responsible for collecting revenues to be shared with you.

- **Credits, Residuals, Music Cue Sheets.** What on-screen or on-air credits will be accorded the parties involved in the production of the program? Distributors of the program will want assurance that they can rely legally on the credits included in the program provided by the producer. Who will be responsible for the payment of any residuals or participations due to actors,

musicians, directors, music publishers or others as a result of revenues received from exploitation of the program in other media?

- **Distribution Rights.** How will distribution rights and territories be divided?

Among the rights that should be considered are theatrical rights, terrestrial broadcast (including cable and satellite retransmission of those signals), direct broadcast satellite, basic cable, pay-cable, pay-per-view, video-on-demand, home audio or video (including cassette, CD, videodisc, DVD), online rights, interactive media (CD-ROM, videogames), book publishing, merchandising, and, again, all other distribution rights or uses in any media or using any technology now known or later devised.

Geographical territories can be divided to meet the needs of the parties. Be aware that distribution in some countries will require adherence to the laws and regulations of those countries.

- **Publicity And Promotion.** It is important to secure the right to advertise, promote and publicize the program and to use excerpts of the program for such purposes. You may also want the agreement of talent to make appearances to promote the program.

- **Insurance.** Contracts may call for production insurance, comprehensive liability insurance and insurance omission to cover any liability or loss incurred during production of the program and to cover other expenses. Insurance also protects the producers' considerable investment in the program.

- **Representations, Warranties, and Indemnification.** Producers or licensors of programs are expected to make certain representations and warranties about the program and its content. Issues covered usually include privacy, copyright, defamation, program rights, the authority to enter into the agreement, tax liability, rights to musical compositions, payments of residuals, outstanding liens or encumbrances. The agreement should also include provisions whereby the parties indemnify each other against breaches by the other.

- **Term.** What will the term of the agreement be? If a program is being licensed, will the term of the agreement coincide with the term of rights to the program? How many uses of the program are licensed during the term of the agreement? Is an option to renew desirable?

- **Termination.** Understandably, parties negotiating a deal are not usually as interested in thinking through what might happen in the event of termination. While events may sometime dictate what will happen when an agreement is terminated, it is critical that the parties try to

anticipate what they would prefer. Sometimes the remedy you want can be fairly straightforward. If a program is being licensed for distribution and the distributor breaches the agreement, the license can simply terminate. The situation is more complex in a production contract. What happens to the materials produced to the date of termination? Will the non-breaching party be given the right to complete production of the program? In that event, will the breaching party be entitled to any share of net revenues that come from the program thereafter? Does copyright ownership vest in the non-breaching party?

- **Miscellaneous Provisions.** There are a number of so-called “boilerplate” provisions that should be included in any agreement. These include provisions that address the severability of the provisions of the contract, notices to be given under the contract, the need to execute additional documents to effectuate the terms of the contract, governing law, dispute provisions (choice of courts, arbitration, mediation), the rights of parties to assign their rights and obligations under the contract, relationship of the parties (i.e., independent contractors), and the survival of certain provisions of the contract even after termination or expiration of the agreement.

Conclusion. This overview is intended to remind producers of the some of issues that should be addressed when producing a program. Each deal is different and requires an agreement suited to the deal. If we can be of assistance to you in crafting such agreements in your future activities, please do not hesitate to call us.

**PROGRAM PRODUCTION
AND LICENSE AGREEMENTS
CHECKLIST**

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**Paula A. Jameson
Arter & Hadden LLP**

I. Productions Using Only Employees.

- A. In non-union setting, work made for hire.
- B. Written disclosure to employees; cover media and technologies known and later developed
- C. Union agreements

II. Productions Involving Others.

A. Kinds of Agreements

- 1. Talent
- 2. Financing/Investing/Funding
- 3. Co-production

B. Common Issues

- 1. Purpose: what do you want to accomplish
- 2. Production Responsibilities
 - **Production Budget**
 - a) Costs
 - Program development
 - Production
 - Post-production
 - Distribution
 - Promotion and advertising
 - b) Cost allocation between parties
 - c) Accounting or financial reports; frequency
 - d) Cash flow needs for each stage of production
 - e) Budget overruns

- **Production Schedule**
 - f) Rehearsal days
 - g) Recording/shooting days; on location, studio
 - h) Delivery dates: scripts, selected recordings/footage, rough cuts, fine cuts, finished program

- **Program Specifications**
 - a) Format/s
 - b) Technical specifications
 - c) Production and post-production techniques
 - d) Dubbing in other languages
 - e) Editing rights: limitations or restrictions

- **Personnel and Facilities.**
 - a) Hiring
 - Director, line producer, actors, musicians, composers, narrators, animators, cinematographers, camera operators
 - b) Facilities and equipment
 - c) Key man insurance
 - d) Production insurance
 - e) Moral rights waivers
 - f) Administration of production budget

- **Rights Clearance**

Script, underlying literary material, still photos used in the program, music, stock footage, props

- **Ownership of Rights.**
 - a) Copyright
 - b) Distribution rights
 - c) Copyright notice

- **Fees, Revenues, Profits**
 - a) Milestones or deliverables that will trigger payments
 - b) Revenues or profits split
 - c) Recoupment of expenses
 - d) Net profit definition
 - e) Cross-collateralization between programs
 - f) Financial reports and audit rights

- **Credits, Residuals, Music Cue Sheets**
- **Distribution Rights**

- a) Theatrical rights
 - b) Terrestrial broadcast, direct broadcast satellite
 - c) Basic cable, pay-cable, pay-per-view, video-on-demand
 - d) Home audio or video
 - e) Online rights, interactive media (CD-ROM, videogames)
 - f) Book publishing
 - g) Merchandising
 - h) Territories
 - i) All other
- **Publicity And Promotion**
 - **Insurance**
 - **Representations, Warranties, and Indemnification.**
 - a) Privacy, copyright, defamation, program rights, contractual authority, taxes, musical compositions, residual payments, outstanding liens or encumbrances
 - b) Indemnification against breach
- **Term**
 - Term of agreement; program use frequency; option to renew
- **Termination**
 - a) Events of termination
 - b) Refunds
 - c) Termination of agreement
 - d) Termination of program rights
 - e) Right to program
 - f) Effect on copyright ownership
 - g) Revenue distribution after termination
- **Miscellaneous Provisions**
 - Severability of contract provisions, notices, additional documents, governing law, dispute provisions, assignment, survival of certain provisions

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