BY SUSAN RABIN AND CHRISTOPHER Q. PHAM

Authorship Issues in Entertainment Contracts

MOST ENTERTAINMENT COMPANIES operate through agreements, whether formal or informal. A clearly written contract makes the rights and duties of the parties easier to understand and enforce and avoids struggles about the facts of the agreement. Some creative types, however, rely on a handshake and are loath to engage in written contracts. Even more troubling is their reluctance to seek legal counsel prior to sealing a deal. After seemingly casual conversations between writers and producers at parties or over lunch regarding story ideas and concepts, many creative people get into difficulties.

In the absence of a written agreement, courts may recognize the existence of an implied contract. As one court has observed, "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact."[1] Protection of the ideas and concepts pitched may be sought under contract theories and in equitable doctrines of unjust enrichment (in which a duty to pay compensation is imposed when a benefit has been conferred with a reasonable basis of compensation) and quantum meruit (in which an implied promise to pay the reasonable worth of services performed is found). If a writer took some action in reliance on the existence of an agreement, and the producer was aware of the writer's reliance, an agreement may be inferred.

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If the pitch goes beyond the conversation stage and involves a writing, even in the form of a short treatment or synopsis, but no offer is made by the producer, an eventual production by the producer's company that resembles the writer's concept may be challenged.[2] The claims are not necessarily dependent on copyright theories if the facts are sufficient to prove contractual promises.[3]

When a producer offers to buy the property, the terms offered will be influenced by a number of factors, including the size of the company, the budget available, and the stature of the writer. Independent film production has created its own style of negotiations and contract terms. A small budget film may only promise screen credit to the writer, with a promise of future earnings if the film gets distribution and makes a profit.

Contracts that are exploitative and not based on legitimate business factors may be challenged as contracts of adhesion. A producer accused of offering a contract of adhesion may be able to justify the offer as reasonable and consistent with small productions and industry practices, and that the contract terms are necessary for the production company to survive.

Entertainment projects are generally collaborative endeavors with separate contributions merging into a unified whole. Writers put their properties in the hands of directors, designers, and actors, among others. Confusion and conflicts arise as to copyright ownership and entitlement to credit and compensation. Under U.S. copyright law, a joint work results from the merging of contributions when the "authors" intend such a result.[4] If a writer does not consider his or her work to be a shared creation, a claim of joint authorship may be defeated.[5] At the same time, the standard practice is to engage creative participants on a work-made-for-hire basis, whether on an employment or specially commissioned basis rendering the employer the author and copyright owner.[6] Credit, compensation, and other benefits are then contractually negotiated.

The traditional deal to acquire a writer's property necessitates that the writer transfer and assign all rights under copyright, but negotiations may result in the writer's retaining certain rights (for example, the right to dramatize for the stage). Writers who are shopping scripts are well advised to register their properties with the U.S. Copyright Office and not solely with the Writers Guild. The benefits of registration, including statutory damages under 17 U.S.C. Section 504 and attorney's fees under 17 U.S.C. Section 505, are not minor considerations in the event of a copyright dispute.

The Copyright Act also provides that a valid transfer of copyright requires a writing. The interpretations of "a writing" have given rise to numerous legal skirmishes. As one court has noted, "The writing in question 'doesn't have to be the Magna Carta; a one-line pro forma statement will do.'"[7]

Creative clients should be encouraged to seek written agreements at the start of a creative endeavor before the deadlines are tight and memories clash. Memorializing intentions and expectations in writing will go a long way in preventing disputes, strained budgets, and spoiled relationships. ■

[1] Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 611 (1981).
[2] Desny v. Wilder, 46 Cal. 2d 715 (1956).
[3] *Id.* at 722.
[4] 17 U.S.C. §101.
[5] Childress v. Taylor, 945 F. 2d 500, 507 (2d Cir. 1991).
[6] 17 U.S.C. §101.
[7] Lyrick Studios, Inc. v. Big Idea Prods., Inc. 420 F. 3d 388 (5th Cir. 2005) (citing Effecrs Assocs., Inc. v. Cohen, 908 F. 2d 555, 557 (9th Cir. 1990)). *See also* Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F. 3d 922, 927 (9th Cir. 1999); Graham v. Scissor-Tail, 28 Cal. 3d 807 (1981); CIV. CODE §1670.5.

Christopher Q. Pham is a partner at the law firm of Sayegh & Pham, where Susan Rabin is a special counsel. They specialize in business and entertainment law litigation.