

ENTERTAINMENT LAW UPDATE

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FILMMAKER COPYRIGHT CORNER: SHOOTING ARTWORK, ARCHITECTURE, PEDESTRIANS, AND SIGNS

By: Karl Butterer and Brian Pearson

You have settled in with key members of your crew to watch the first batch of dailies from your new project, “Post Apocolyptus.” The footage looks great. No technical problems. Great angles. The actors are spot on. The editor then observes, “Maybe this is not the right time to bring this up, but I hope you realize that thing Brice Turdsen is swinging from is a pretty famous Alexander Calder sculpture. I hope that’s not a problem.” The cinematographer pipes in, “Not to mention the Merrill Lynch sign that he spray paints at the end of the first scene.” You know that you don’t want to reshoot, and think out loud, “Do you think we should call the lawyers?”

If a filmmaker is shooting a scene on a public street, does she need to be concerned with releases for public sculptures, buildings, business signs, or people walking down the sidewalk? Are there prohibitions or restrictions on depicting these items? Is permission required to film these objects/people?

Public Sculpture

It is necessary to receive permission from the owner of a piece of artwork to use that material in a film, *unless such use is incidental and*

portrayed in the background of a film. A party who has rights to a copyright can sue a filmmaker for use of a copyrighted work without permission. A copyright will typically last for the lifetime of the author, plus 70 years. A filmmaker can search for copyrighted material at www.copyright.gov.

A common defense to using copyrighted work in a documentary is through a claim of “Fair Use”, especially if such use is incidental to the shot in the documentary. Generally, there is no infringement of a copyright if the item is used for purposes such as criticism, comment, news reports, teaching, scholarship, or research. When determining the application of Fair Use, a court will consider various factors: the purpose and character of the use, especially whether it is used for a commercial nature or for nonprofit educational purposes; the amount and substantiality of the work used; and whether the nature of the work is factual or creative.

Buildings/Business Signs

The general rule is that a filmmaker can film anything that is visible to the general public, as long as such filming does not portray the signs or buildings in the background in a detrimental or

defamatory way. If the property is in the background and no reference, direct or implied, is made of the trademarked product, then permission to film is likely not needed.

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or *ordinarily visible from a public place*.

Most business signs are likely to be trademarked. As a result, the filmmaker must receive permission from the trademark owner to use the trademark in the film *if such use goes beyond mere background footage*. Registered trademarks can be found on the United States Patent and Trademark Office web site at www.uspto.gov.

If a trademark is used incidentally in a documentary, it is likely the court will find that permission is not needed. However, it should be noted that these court decisions are heavily fact-specific, with a court potentially weighing the relevant factors differently in each situation. Hence, it might not be possible to know how a court will rule prior to using the copyrighted or trademarked material without permission.

Pedestrians

Filmmakers should generally obtain a signed release from anyone who is recognizable in a film. However, if a film captures a crowd without focusing on anyone in particular, then no

permission is required. It may be beneficial to post a sign at the location of filming to make people aware that filming is taking place. An example of this type of sign:

ATTENTION!

Today (insert name of your organization) will be filming a motion picture in the areas behind these signs.

If they capture you on film, your picture may become part of a movie or a video distributed in any and all media. If you do not want your likeness and photograph to become part of the film or video, please do not enter the area bound by these signs.

If you remain in the area bounded by these signs, you are consenting to the use of your likeness for the above stated purpose.

While you finish watching the batch of dailies, you call your entertainment lawyer, who advises you to seek permission from the estate of Alexander Calder and Merrill Lynch. Just as you are ready to head out for the day's shoot, the editor says, "Hey, I thought everyone on the planet but Brice Turdson was supposed to have been killed by a virus. Isn't that an American Airlines plane flying by in the background?"

Karl can be reached directly at kbutterer@shrr.com or 616.458.9294. Brian can be reached directly at bpearson@shrr.com or 616.458.3638.

CAPITOL NEWS

The Michigan Senate Finance Committee passed amended SB1535, which proposes to limit the film tax credit/rebate package, which the legislature overwhelmingly supported this past Spring. The proposal would place a \$50 million annual ceiling on the total tax credits the State could give to qualified production companies for direct production expenditures. Senator Gilda Jacobs (D-Huntington Woods), a committee member who voted against the cap, said that even

if the bill passes the Senate, it probably won't get through the House and Governor Jennifer Granholm could likely veto it anyway.

Supporters of the bill cited the cost of the incentive package, and the need to give relief from the Michigan Business Tax, as reasons to impose the cap. For a link to the bill as introduced, please visit our website at www.shrr.com/entertainment-industry-team.

NEW FILM MAKERS' CORNER

Are You Covered?

While the media production industry relies on many types of insurance common to most commercial industries, including commercial automobile insurance, premises liability insurance, and workers' compensation insurance, it also relies on multiple types of policies specific to the media production industry. If you are making your first film, familiarize yourself with these policies.

Producer's Errors & Omissions Policies

Errors and Omissions policies protect media production companies from lawsuits involving violations of personal rights, libel, or slander based on the content of the production that might arise upon a film's release. In order to obtain such policies, insurance providers typically require production companies to obtain a written opinion from an attorney regarding the likelihood that content in the film will result in a claim being

asserted against the production company.

General Production Policies

General Production policies often provide commercial automobile insurance and workers' compensation insurance, in addition to protecting production companies against losses resulting from delays due to bad weather, equipment failure, or set damage.

Cast Insurance

Cast insurance covers the costs that arise if a production company loses a cast member, director, or another key member of the production team. In major productions, these types of claims are often the most expensive in terms of payouts by the insurance provider.

Did You Know?

Michigan Film Office Makes New Forms Available Online – If you are seeking to take advantage of Michigan's new film incentive package, check out new forms now available at the MFO website www.michigan.gov/filmoffice. The forms include revised applications for film production incentives, new forms for infrastructure tax credits, and post-production certificates of completion requests.

Smith Haughey Participates in Northern Michigan Film Forum – Smith Haughey entertainment law attorney, **Karl Butterer**, participated in a panel discussion at the Northern Michigan Film Forum in July at Black Star Farms. The focus of the event was to educate the community and businesses about effectively recruiting and working with the film and commercial production industry. Participants in the two day forum earned continuing education credits from Grand Valley State University.

Smith Haughey is proud to introduce [Red Pony Productions Company, LLC](#), as a new client. Red Pony is a Holland-based production company actively developing the motion picture "Blue Sky," a movie about endurance racing that will be shot in West Michigan.

Smith Haughey is proud to introduce [West Michigan Film & Video Alliance](#) as a new client. The WMFVA is a non-profit organization dedicated to supporting entertainment industry professionals in West Michigan, such as producers, directors, writers, actors and other personnel. WMFVA also promotes West Michigan as a destination for production companies located outside the State of Michigan.

Kirk Morgan will be attending the **Film/TV Financing Summit** in New York City on October 21. This summit brings together executives from the film, television, media, and finance industries to discuss various financing strategies, finance opportunities, and legal issues involved in financing and distributing film, television, online content, and video productions.

Smith Haughey Rice & Roegge's Entertainment Industry Team Attorneys

Karl W. Butterer, Jr., Chair
616.458.9294
kbutterer@shrr.com

Thomas F. Blackwell
616.458.8426
tblackwell@shrr.com

William L. Henn
616.458.5456
whenn@shrr.com

Kirk W. Morgan
616.458.3319
kmorgan@shrr.com

Maria T. Saez
734.913.5517
msaez@shrr.com

Jason R. Sebolt
616.458.3628
jsebolt@shrr.com

Marilyn N. Tyree
616.458.2272
mtyree@shrr.com

Melissa E. Whitman
231.486.4540
mwhitman@shrr.com

Matthew L. Wikander
616.458.8605
mwikander@shrr.com

877.833.SHRR
www.shrr.com