



The Documentary Summit - London

Stay on the right side of the law:

Issues you will face as a doc film maker and how to overcome them

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18 May, 2013

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Introduction

Introduction

- What do you want to do with your documentary?
- **Exploit** it
- You will have to undergo a process called **Clearance**



Clearance

Clearance - General

Getting necessary permissions from each contributor to your documentary

- The relevant rights/content must be cleared to ensure that the production and subsequent exploitation of the film will not infringe third-party rights

- Clearance

- Clearance of **direct contributors'** rights
- Clearance of **third parties'** rights



Clearance - Direct Contributors

Clearance

Who are the Direct Contributors?

- Actors/Performers
- Script Writers
- Composer/Musicians
- Crew
- Locations
- Others (Video, Music, Photographs)



Clearance - Actors/Performers

Clearance - Actors/Performers

- Identify them
 - Term 'performer' not defined under the CDPA
 - E.g. Narrator
- What rights to they have?
 - Copyright
 - Performance rights
 - Moral rights



Copyright

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Copyright Overview

Actors/Performers - Copyright

- Act: Copyright, Designs and Patents Act 1988 (CDPA)
- Copyright subsists in certain **types** of work:
 - Literary, dramatic, musical, artistic works
 - Sound recordings
 - Films
 - Broadcasts
- 2 requirements for copyright:
 - **Fixed** - the work is fixed or recorded in some permanent form
 - **Original** - Literary, dramatic, musical, artistic works must be original

Copyright Overview

Actors/Performers - Copyright

- **Originality**

- The author of the work must use his own **skill and effort** to create the work

- **How long does copyright last?**

Type of work	Duration of ©
Literary, dramatic, musical or artistic work	70 years from the end of the year in which the author dies
Sound recording	50 years from the end of the year in which it is made; or released
Film	70 years from the end of the year in which the death occurs

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Copyright Overview

Actors/Performers - Copyright

- Who is the **owner** of the copyright?
 - The first owner of a work is generally its **author**

Type of work	Author
Literary, dramatic, musical or artistic work	Creator of the work
Sound recording	Producer
Film	Producer and Principal Director

- Exception - Works made **in the course of employment**

Copyright Overview

What is Copyright?

- Property right
- Bundle of rights
 - **Copy** the work
 - **Issue copies** of work to the public
 - **Rent** or **lend** the work to the public
 - **Perform, show or play** the work in public
 - **Communicate** the work to the public
 - Make an **adaptation** of the work

Clearance - Narrator

Do **Actors/Performers** in a documentary have copyright in particular works?

- **Yes** - most likely
 - E.g. Narrator - spoken words would be protected under copyright as a **literary** work
 - Must be reduced to writing in order for copyright to subsist
- How do you get clearance?

Clearance - Narrator

Clearance generally takes the form of:

- **Assignment** of the rights from the rights-owner to the producer, usually incorporated into a waiver; or
- **Licence** from the rights-owner to the producer to use the rights for permitted purposes

Clearance - Narrator

Assignment	Licence
Transfer of title (ownership)	No transfer of title
<u>Formalities</u> (s.90(3) CDPA) For an effective assignment: 1. Needs to be in writing 2. Signed by (or on behalf of) the assignor	Types of Licence: 1. Exclusive 2. Sole 3. Non-exclusive
	<u>Formalities</u> None But, for an exclusive licence (s.92(1) CDPA): 1. Needs to be in writing 2. Signed by (or on behalf of) the copyright owner

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Clearance - Narrator

What happens if you do not clear the copyright?

- **Infringement!**
- Remedies for infringement?
 - Account of profits
 - Damages
 - Delivery up of infringing articles
 - Search order
 - Injunction
 - Seizure of infringing copies
 - Destruction



Performance Rights

Performance Rights Overview

Actors/Performers - Performance Rights

- Rights in performances are dealt with under Part II of the CDPA
- “Performers”
 - No definition of performers. Would include actors, dancers, musicians/singers
 - In documentary, narrative = performer
- Qualifying Performance
 - A performance is protected if it is a **qualifying performance**

Performance Rights Overview

Actors/Performers - Performance rights

- Performance takes place in a **qualifying country**; or
- Performance is given by a **qualifying individual**

- How long do performance rights last?
 - 50 years from the end of the year in which the performance takes place; or
 - 50 years from the end of the year in which a recording of the performance is released

Performance Rights Overview

Actors/Performers - Performance rights

- How might you infringe one's performance rights?
 - Broadcasting the performance live
 - Recording the live performance or live broadcast
 - In relation to a recording, copying/issuing copies/renting/lending/making available to the public 'Property Rights'

Clearance - Narrator

- How do you clear performance rights?
 - Re 'Property Rights' - take ownership
 - How?
 - Assignment or licence
 - Formalities?
 - Re 'Non-Property Rights'
 - Obtain consents and waivers to record and exploit the performance
 - Formalities?
 - None

Clearance - Narrator



Best practice: **Written** consent covering the scope of the intended exploitation. Ideal to get a **wide** form of consent

Practical tips: '**Extras**' – ask each extra to sign a consent form granting all rights in his contribution to the producer

When **filming in a public area**, put a prominent sign up stating that by walking through the area, each person grants consent to be filmed



Moral Rights

Moral Rights Overview

Actors/Performers - Moral Rights

- Under the CDPA, authors, directors and performers have moral rights
- **Paternity right** - the right to be identified as the performer
- **Integrity right** - the right to object to derogatory treatment of a work

Moral Rights Overview

Actors/Performers - Moral Rights

Paternity right	Integrity right
Meaning: Right to be identified in a manner that is brought to the notice of the public	Meaning: Right to object to any distortion, mutilation or other modification that is prejudicial to the performer's reputation
To infringe this, the right would have had to be asserted by the performer	Does not need to be asserted

Clearance - Narrator

- The paternity right and integrity right last as long as copyright subsists in the work
- How to clear moral rights?
 - Performers' moral rights can be **waived** - s.205J CDPA
 - Waiver must be signed by the performer



Practical tip: For a well drafted waiver, you would want to include a provision where the performer **will not assert** his or her moral rights



Equitable Remuneration

Equitable Remuneration Overview

Actors/Performers - Equitable Remuneration

- What is equitable remuneration?
 - A performer is entitled to equitable remuneration (even if all the rights have been cleared) **when the rental right is transferred**
 - Rental right - the **right to control the rental copies of the performance**
 - Transfer of **rental right** to a producer of a sound recording/film

Equitable Remuneration Overview

Q	A
Assignable?	No - Cannot be assigned
Who pays?	The person who is entitled to the rental right (the person to whom the right is transferred)
Amount?	Negotiable

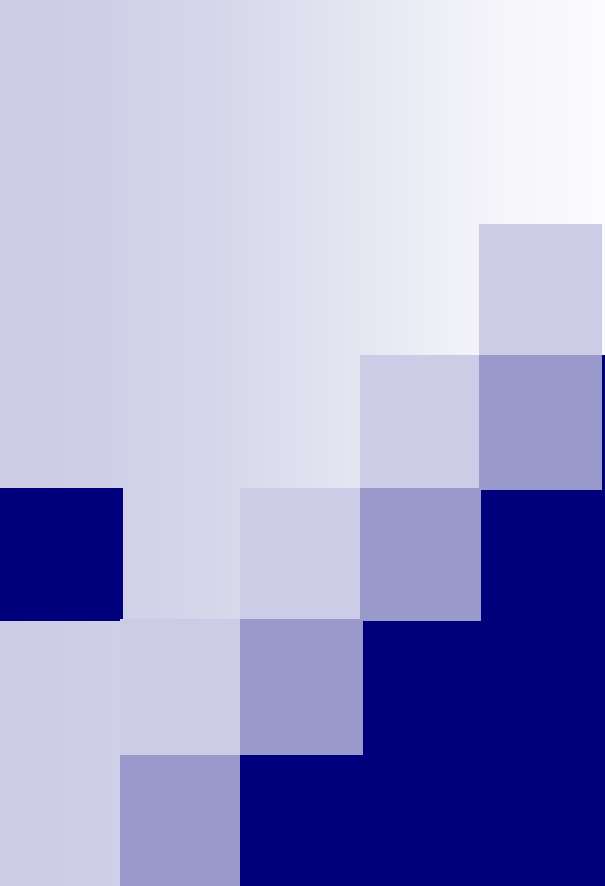


Best practice: Usual for any contractual clause relating to fees/royalties to be payable to the performer **inclusive** of equitable remuneration

Recap

Clearance for actors/performers e.g. **Narrator**

Rights to clear	<ul style="list-style-type: none">• Copyright• Performance Rights• Moral Rights
Copyright	Assignment or licence of copyright in literary work
Performance Rights	Assignment and consents/waivers N.B Equitable rights in performances
Moral rights	Waiver



Clearance - Script Writer

Clearance - Script Writer

Rights to clear: Copyright

- Identify them (e.g. someone writing script for narrator)
- In which works will copyright subsist?
 - Literary
 - dramatic, musical, artistic works
 - Sound recordings
 - Films
 - Broadcasts
- How to clear the copyright?
 - Assignment or Licence

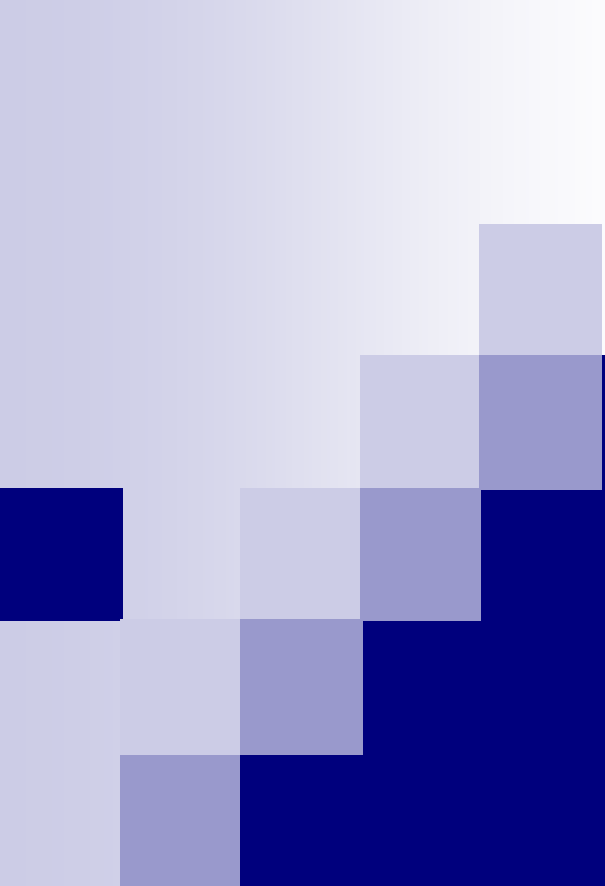
Clearance - Script Writer

Rights to clear: Moral Rights

- Script writer as author of literary work is entitled to moral rights:
 - Paternity Rights
 - Integrity Rights
- How to clear the moral rights?
 - Waiver



Practical tip: Try not to commit to any **credit**



Clearance - Others (Videos)

Clearance - Videos

- Incorporating video clips or film footage into your documentary
- Rights to clear:
 - Copyright
 - Moral Rights

Clearance - Videos

Copyright

Who is owner?

- First owner – the producer and director of the footage
- Rights would have been assigned to the producer or commissioner (e.g. the original broadcaster of the footage)

What amounts to copyright infringement?

Using the clips in the new film

Action to take?

Assignment or licence of the footage from the current rights-owner

Clearance - Videos

Moral Rights	
Who has moral rights?	<ul style="list-style-type: none">The original authors of the footage (producer and director)
What amounts to infringement?	Incorporating the clips in the new film
Action to take?	Obtain the necessary waivers, or at the least, the benefit of the waivers granted to the current rights-owner (broadcaster)



Best Practice: Obtain a **warranty** from the current rights-owner that it obtained the rights from the original producer and director as well as an **indemnity**

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Clearance - Others (Music)

Clearance - Music

- Incorporating music into your documentary
- Rights to clear:
 - Copyright
 - Rights in Performances
 - Moral Rights

Clearance - Music

Copyright	
What kind of work is this?	<ul style="list-style-type: none">• Sound recording
Who is owner?	<ul style="list-style-type: none">• First owner – the author (the person by whom the arrangements necessary for making the sound recording are undertaken)• Usually will be the artist's record label/publisher
What amounts to copyright infringement?	Using the music in your documentary without consent
Action to take?	Assignment or licence of the music from the record company/publisher

Clearance - Music

Rights in Performances	
Who has the rights?	<ul style="list-style-type: none">The musician(s), vocalist(s) performing on the sound recording has rights in the recorded performance
What amounts to copyright infringement?	Using the music in your documentary without consent
Action to take?	Consent from the performer to record and exploit the performance

Clearance - Music

Moral Rights

Who has moral rights?	Each musical performer
What amounts to infringement of paternity right ?	Where the performer has asserted his or her right, this right will be infringed if the performer is not identified as the author when the work is published commercially, copies of the sound recording are issued to the public, or it is contained within a film's soundtrack and this film is shown to the public or copies of the film are issued to the public



Best Practice: Obtain a [waiver](#) (or benefit of waiver) from the record company/publisher

- Production/Library Music (aka Stock music)
 - Non-commissioned music for films



Clearance - Third Party Contributors

Clearance

Who are the **Third Party** Contributors?



Clearance - Third Party Contributors

To consider:

- Defamation
- Offensive material
- Contempt of court
- Breach of confidence (privacy and image rights)
- Trade marks
- Passing-off
- Advertising and sponsorship



Clearance - Defences

Defences

2 main **exceptions** where clearance is not required:

- **Public-domain**
 - Never attracted copyright
 - Out of copyright
- **Defence to infringement (copyright and performance rights)**
 - Fair Dealing
 - Incidental Inclusion

Defences

■ Fair Dealing

- Producer does not need an owner's permission to use extracts of a copyright work in a film where the work is used for the purposes of **criticism, review or news reporting** - s.30 CDPA

Criticism or review s.30(1)

Work used must be:

- A published work; and
- Accompanied by 'sufficient acknowledgement' of the source

The acknowledgement should identify the work as well as the author (*Sillitoe v McGraw-Hill*)

Question: Is the **extent of copying fair** in the circumstances to support/illustrate the criticism/review?

- Extent of copying is not defined in CDPA
- Court looks at the work as a whole (i.e. quantitative and qualitative)

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Defences

- Fair Dealing

Reporting current events s.30(2)

Fair dealing with a work for the purpose of reporting current events does not infringe copyright in the work (other than photographs)

The dealing must be accompanied by a sufficient acknowledgement (unless impracticable e.g. reporting by means of a sound recording)

Defence is concerned with reporting matters that are of current interest

Conclusion

Further Information

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