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Copyright Ownership and Licensing in Film and Television: What Happens When the Deal Isn't Papered

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Introduction

At its core, film and television production is collaborative. A single project might involve dozens of independent creative contributors: a songwriter hired to compose an original score, a choreographer engaged to create a dance sequence, a screenwriter brought in to punch up a particular scene, a visual effects artist contracted to design and render a signature sequence, or a graphic artist commissioned to create artwork that appears on screen.

The work created by these contributors (musical compositions, choreography, scripts, visual effects, artwork, etc.) often constitutes copyrightable subject matter. Under U.S. copyright law, copyright ownership initially vests in the author.[1] This means that, absent an exception, the songwriter owns the copyright in the score, the choreographer owns the copyright in the choreography, the screenwriter owns the copyright in the script, and the visual effects artist owns the copyright in the elements they added to the footage.

In practice, however, those rights are often transferred, assigned, or licensed to the studio or production company. A common mechanism for allocating ownership is a work-for-hire agreement. When properly memorialized in writing, a work made for hire deems the commissioning party the author from the outset. Absent a valid work-for-hire arrangement or an assignment of rights, the production company owns only those rights the creator grants, whether expressly or implicitly, which may be far more limited than the company assumes.

Entertainment production is fast-paced. Deals are struck quickly, projects move forward on momentum, and paperwork (including copyright clearance) sometimes falls behind. A songwriter delivers a finished score before the agreement is signed. A choreographer teaches the cast the routine before anyone has paused to execute the contract. A visual effects team delivers footage under a handshake understanding that the paperwork will come later. But sometimes “later” never comes. The project is released. And it is only when a dispute arises over compensation, credit, or ownership of the work that the absence of a signed agreement becomes a serious problem.

This article examines what happens when copyright clearance falls through the cracks in film and television production. It addresses: (1) the general rules governing copyright ownership and licensing in the entertainment context; (2) the potential damages the production company might owe the creative professional; (3) key cases in which courts have analyzed these issues and the outcomes they produced; and (4) practical guidance for licensing practitioners working to ensure that copyright clearance is properly addressed before a project is released.

Copyright Ownership in Film and Television: The Default Rules and

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the Work-for-Hire Doctrine

The starting point is the default rule that generally, the person who creates a work is its copyright owner.[2] For a production company that has engaged an independent contractor to contribute creative work to a project, this default rule is particularly important. It means that, absent some affirmative act (*i.e.*, a properly executed agreement), the copyright in any work created by the contractor belongs to the contractor, not the company.

The primary mechanism for overcoming the default rule is the work-for-hire doctrine. Under 17 U.S.C. § 101, a work made for hire is defined in two ways. First, a work prepared by an employee within the scope of their employment is automatically a work made for hire, with copyright vesting in the employer.[3] Second, for independent contractors, a work can qualify as a work made for hire only if two conditions are met: (1) the work falls within one of nine specifically enumerated categories under the statute (such as a work specially ordered or commissioned for use as a part of a motion picture or other audiovisual work); and (2) the parties have expressly agreed in a written, signed instrument that the work shall be considered a work made for hire.[4]

The second requirement (the written, signed agreement) is not a mere formality. It is a substantive legal requirement codified in 17 U.S.C. § 101 and § 204(a), which mandates that any transfer of copyright ownership (including work-for-hire agreements) must be executed in writing. A verbal agreement, an email exchange, an invoice, or a course of conduct, however clear, does not satisfy the requirement. As the Ninth Circuit observed in *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990):

> [C]ommon sense tells us that agreements should routinely be put in writing. This simple practice prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one.

Even when a work-for-hire agreement is not in place, the production company can still acquire the right to use the work through a license. But the statute is clear that any transfer of copyright ownership (including through an exclusive license) must be made in a signed writing.[5] Courts have consistently rejected attempts to substitute industry custom, payment, or mutual understanding for the writing requirement.

The practical consequence for entertainment production is significant. A production company that releases a film or television project without first obtaining a signed work-for-hire agreement or copyright license from a contributor may not own the copyrights in those contributions. While the company may have an implied license to use the work (a concept discussed further below), the lack of a written agreement means the company does not have an exclusive license or full ownership. This distinction can become critical if a dispute arises over the use of the work.

What's at Stake: The Damages Landscape

When a project is released without a signed work-for-hire agreement or a signed license agreement, the independent contractor who created the work may bring multiple claims simultaneously. The exposure is not limited to a single theory of recovery. A sophisticated plaintiff's attorney will plead every available claim and let the facts determine which ones survive.

Understanding the damages landscape across each type of claim is essential context for anyone advising clients in this space, whether representing the production company seeking to minimize exposure, or the creative professional

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seeking to understand the full scope of their potential recovery.

Breach of Implied Contract

Even where no written or verbal agreement exists, California law recognizes that a contract can be formed by conduct.[6] These are called "implied contracts." Implied contracts must satisfy the same elements as express contracts (mutual assent, consideration, and the like), but they arise from the parties' conduct rather than their words. In the entertainment context, an implied contract claim typically arises when a creative professional submits or delivers work under circumstances that reasonably imply an expectation of compensation.

The damages available on an implied contract claim are governed by ordinary contract principles. In many cases, this may be measured by the reasonable value of the services rendered. But where the terms of the implied agreement can be established, the creative professional may seek expectation damages reflecting the benefit of the bargain.

Punitive damages are not available on a contract claim under California law, and injunctive relief is typically not available either. For that reason, implied contract claims, while significant, represent the lower end of the damages spectrum; though for a creative professional who was never compensated at all, the reasonable value of their services may still represent a meaningful recovery.

Copyright Infringement

Copyright infringement is where the stakes escalate dramatically. A production company found liable for copyright infringement may face the following:

Compensatory damages. The plaintiff is entitled to recover their actual damages, which is often measured by the fair market value of a license for the infringing use.

Disgorgement of profits. The plaintiff may also recover any profits of the infringer that are attributable to the infringement and are not taken into account in computing actual damages.[7] In the film and television context, where a successful project can generate tens or hundreds of millions of dollars in revenue, this exposure can be enormous. The production company bears the burden of proving which portion of its profits is attributable to factors other than the infringement (a difficult and expensive exercise).

Statutory damages. In lieu of actual damages and profits, a plaintiff who has timely registered the copyright may elect statutory damages of between $750 and $30,000 per work infringed, as the court considers just.[8] If the infringement is found to be willful, statutory damages may be enhanced to up to $150,000 per work.[9] Willfulness does not require proof of malicious intent. A court may find willfulness where the infringer knew or acted with reckless disregard for, or willful blindness to, the possibility that its conduct constituted infringement.

Attorneys' fees. A prevailing party in a copyright infringement action may recover its reasonable attorneys' fees and full costs.[10] In complex entertainment litigation, attorneys' fees awards can run into the millions of dollars.

Injunctive relief. Perhaps most significantly, a court may grant injunctive relief, including an order requiring the production company to stop distributing, exhibiting, or otherwise exploiting the project.[11] For a studio that has spent years and tens of millions of dollars developing, producing, and marketing a film or television series, an injunction halting distribution is potentially catastrophic.

Fraud

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Where the creative professional can establish that the production company made a promise it did not intend to perform at the time it was made, a fraud claim becomes available. For example, a creative professional might allege fraud if a production company promised additional compensation upon the project's commercial release, but the creative alleges the company never intended to make that payment.

The significance of fraud is that it opens the door to punitive damages. Under California law, punitive damages are intended to punish and deter, and a jury has significant latitude in determining the amount. Punitive damages are not tied to a fixed formula, but courts and juries often assess them in relation to the amount of compensatory damages, subject to constitutional due process limits. The U.S. Supreme Court has indicated that, in most cases, single-digit ratios between punitive and compensatory damages are more likely to comport with due process.[12]

In high-stakes entertainment litigation, where actual damages themselves may be substantial, the punitive damages exposure can be extraordinary. To illustrate the magnitude: there could be cases in the entertainment industry where a jury awards tens of millions of dollars in compensatory damages, with punitive damages potentially pushing the total exposure into nine figures, leading parties to settle for amounts that reflect the full range of possible outcomes at trial.

Employment Misclassification

Finally, a creative professional who was engaged as an independent contractor may argue that they were in fact an employee under California's expansive employment classification standards, including the ABC test codified in California Labor Code § 2775, *et seq*. If successful, this theory exposes the production company to liability for unpaid wages, overtime, meal and rest period premiums, unreimbursed business expenses, employee benefits, payroll taxes, interest, penalties, and attorneys' fees. These amounts compound quickly, particularly where the relationship extended over a significant period of time, and statutory penalties under the Private Attorneys General Act (PAGA) can add a further layer of exposure.

How Courts Analyze Implied Contract Claims: The Desny Doctrine

The foundational California case on implied contracts in the entertainment industry is *Desny v. Wilder*, 46 Cal. 2d 715 (1956), decided by the California Supreme Court nearly seventy years ago and still good law today. The facts of *Desny* are straightforward: a writer submitted an idea for a film to Paramount Pictures, telling Paramount that he expected to be compensated if they used it. Paramount released a film that the writer believed was based on his idea, without paying him. Paramount argued that the case should be dismissed because the writer's idea was not sufficiently original to constitute a copyright.

The California Supreme Court agreed that the idea lacked copyright protection, but held that the writer might nevertheless have a viable claim for breach of implied contract. The court reasoned that where a person submits an idea to another under circumstances that reasonably imply an expectation of compensation if the idea is used, and the recipient uses the idea without paying for it, the law may imply a promise to pay. The absence of copyright protection for the underlying idea was irrelevant to the contract analysis.

The significance of this holding cuts in both directions. For production companies, it means implied contract liability may arise even from the use of material that is not itself protected by copyright (including an unoriginal idea, a concept, a treatment, or a pitch). For creative professionals, it is an important source of protection: even where a work lacks sufficient originality to sustain a copyright infringement claim, the *Desny* doctrine may still provide a path to recovery. The claim requires only that the submission was made under circumstances implying an expectation of payment.

The Ninth Circuit elaborated on the elements of a *Desny* claim in *Grosso v. Miramax Film Corp*., 383 F.3d 965 (9th

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Cir. 2004). In *Grosso*, a writer alleged he had submitted a screenplay to Miramax and that Miramax subsequently released a film (*Rounders*) that was based on his idea. The court explained that to state a *Desny* claim, the plaintiff must show: (1) the plaintiff prepared the work; (2) the plaintiff disclosed the work to the defendant for sale; and (3) the plaintiff did so under circumstances from which it could be concluded that the defendant voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.[13]

The court in *Grosso* dismissed the copyright infringement claim, finding the two works insufficiently similar to support an infringement theory. But it allowed the implied contract claim to proceed to a jury. This is perhaps the most important practical lesson for production companies: dismissing a copyright infringement claim at summary judgment does not necessarily end the litigation. The implied contract claim may survive, and litigating a case through a jury trial can cost millions of dollars more than resolving it at the summary judgment stage.

The implied contract theory, therefore, creates significant litigation exposure for production companies even in cases where the copyright infringement theory fails. And it creates meaningful leverage for creative professionals who find themselves in that position.

How Courts Analyze Copyright Infringement Claims: The Implied Nonexclusive License

The leading Ninth Circuit case on copyright infringement claims in the entertainment production context is *Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990). In that case, Larry Cohen, the writer-director of a low-budget horror film called *The Stuff*, engaged a small special effects company to create footage for several scenes in the film, including a sequence in which a yogurt factory explodes. The parties verbally agreed that Cohen would pay the special effects company for its work, but they never discussed who would own the copyright in the footage, and no written agreement was executed.

Cohen was dissatisfied with the footage and paid the special effects company only half of the agreed amount. He nonetheless used the footage in the film and released it. The special effects company sued for copyright infringement.

Cohen argued that the written agreement requirement of 17 U.S.C. § 204(a) should not apply to moviemakers because they are too busy making movies to worry about contracts. The Ninth Circuit flatly rejected such argument and offered its now-famous observation: “It doesn’t have to be the Magna Charta; a one-line pro forma statement will do.” [14]

The court nonetheless dismissed the copyright infringement claim on a different theory. The court held that although exclusive copyright licenses require a signed writing, a creative professional can implicitly grant a nonexclusive license under certain circumstances—namely, by creating the work at the request of another party and delivering it with the intent that the requesting party will copy and distribute it—though courts apply this doctrine narrowly and examine the specific facts of each case carefully.[15] On the specific facts before it (including that Cohen had paid some amount for the footage), the court found an implied nonexclusive license existed, such that Cohen’s use of the footage did not constitute infringement.

But the court’s ruling came at a cost to Cohen in at least one respect. Because the license was *nonexclusive* the special effects company retained all of its remaining rights in the footage. It could license the footage to other filmmakers, sell it for use in music videos, or distribute it in any other way it chose. Cohen, the court noted, “will have no basis for complaining. And that’s an important lesson that licensees of more versatile film properties may want to take to heart.” [16]

The implied nonexclusive license protected Cohen from a copyright infringement finding, but it did not provide him

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with exclusive rights to the footage. As a result, the special effects company retained its ability to license the footage to others, potentially undermining Cohen's project by allowing competitors to use the same footage in other contexts (*e.g.*, music videos, other films).

This case underscores the importance of securing clear ownership rights through written contracts, especially for key creative assets. It also reminds creative professionals that delivering work without a signed agreement may significantly limit their ability to control how that work is used going forward.

The Ninth Circuit addressed related issues in *Ahanchian v. Xenon Pictures*, 403 Fed. Appx. 166 (9th Cir. 2010), a case involving a parody film called *National Lampoon's TV: The Movie* . The plaintiff, a writer, alleged that the defendants had used several comedic sketches he authored without his permission and without payment. The defendants moved for summary judgment, arguing that the plaintiff had co-authored the sketches and that, as co-authors, they could not be liable for copyright infringement.

The district court granted summary judgment for the defendants, but the Ninth Circuit reversed. The Ninth Circuit's reversal hinged on a disputed factual issue of joint authorship (*i.e.*, whether the defendants had made independently copyrightable contributions to the sketches). For joint authorship under copyright law, each author must make a distinct, copyrightable contribution to the work. If the defendants were co-authors, they could not be held liable for infringement because co-authors cannot infringe on their own work. The court sent the case back for trial, as the factual dispute required resolution before determining authorship.[17]

The practical significance of *Ahanchian* is clear: when a copyright infringement claim survives to trial, it substantially increases litigation exposure for the defendant. Legal fees can accumulate rapidly, and the prospect of a jury trial increases the uncertainty surrounding authorship, which can lead to unpredictable outcomes. In addition, the potential for an award of attorneys' fees under 17 U.S.C. § 505 for the prevailing party can create significant settlement pressure.

Practical Guidance for Licensing Practitioners

The case law discussed above leads to a set of clear, actionable recommendations for licensing practitioners advising creative professionals, studios, production companies, and others engaged in film and television production.

Negotiate and execute work-for-hire agreements before work begins (or at minimum, before the project is released).

The single most important step one can take is to ensure that written, signed work-for-hire agreements are in place before the work is used (and ideally before it is created). This is beneficial to all parties involved because it sets expectations at the outset, when everyone is excited to create together. The Ninth Circuit noted in *Cohen* that when it comes to written agreements, a one-line pro forma statement will do. But the parties should clarify everything at the outset. For example: What are the deliverables? When are they due? When are payments due? Who owns the deliverables? What credits, if any, are being granted?

Production companies could consider establishing intake procedures that require executed agreements as a condition of beginning work. Where the fast-paced nature of production makes it impractical to execute a long-form agreement before work starts, a short-form letter agreement or deal memo that includes the work-for-hire language and the contractor's signature should be obtained immediately.

Counsel for creative professionals: consider withholding deliverables until an agreement is signed.

The implied nonexclusive license doctrine of *Cohen* cuts both ways. While it may save a production company from a copyright infringement judgment, it simultaneously limits the creative professional's leverage. A creative who delivers finished work before an agreement is executed might inadvertently grant the production company an implied nonexclusive license to use that work, even if no agreement is ever signed. Counsel representing creative professionals should consider advising their clients not to deliver work until a signed agreement is in place. Retaining the finished work is one of the creative professional's most important points of leverage in ensuring the deal is properly papered.

Consider conducting a copyright clearance audit before release.

Before a film or television project is released, production companies should consider conducting a systematic review of all creative contributions to confirm that signed agreements are in place for each one. This audit could be a standard part of a pre-release checklist, with the same priority as clearances for music, locations, and third-party intellectual property.

Conclusion

The cases discussed in this article (*Desny*, *Grosso*, *Cohen*, and *Ahanchian*) span more than six decades of entertainment industry litigation. They share a common origin: a project moved forward without the parties pausing to execute the agreements that would have clarified ownership and avoided the dispute. A creative professional and production company may both operate in good faith, and yet, failure to execute a written agreement could result in litigation that costs far more in time and money than the agreement would have cost to execute.

Copyright clearance is not a formality to be addressed after the fact. It is a foundational step in the production process. The consequences of failing to address it correctly ripple across multiple legal theories, various categories of damages, and years of potential litigation. The earlier the agreements are executed, the better protected everyone is.

Footnotes

[1] 17 U.S.C. § 201(a).

[2] 17 U.S.C. § 201(a).

[3] 17 U.S.C. § 101.

[4] 17 U.S.C. § 101.

[5] 17 U.S.C. § 204(a).

[6] Cal. Civ. Code § 1621.

[7] 17 U.S.C. § 504(b).

[8] 17 U.S.C. § 504(c)(1).

[9] 17 U.S.C. § 504(c)(2).

[10] 17 U.S.C. § 505.

[11] 17 U.S.C. § 502.

[12] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-26 (2003).

[13] *Grosso*, 383 F.3d at 967.

[14] *Cohen*, 908 F.2d at 557.

[15] *Id.* at 558-59

[16] *Id.* at 558.

[17] *Ahanchian*, 403 Fed. Appx. at 169.

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