Licensing 101:

DEBUNKING RIGHTS AND CLEARANCES MISCONCEPTIONS

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What is Licensing and why is it Important

- What is "Licensing?" – licensing is asking for permission to use or include a pre-existing work owned by someone else as part of your own creation
- Third Party Owned materials – you will never own this specific piece of intellectual property – even if you own the final product of your own creation
- Clearing rights to all third party owned assets means you are free and clear to exploit and showcase your own creation in a legally compliant way
- Copyright Protection – exists from the moment a work is created and fixed in a tangible form; registration is not required

What's in Store

- How to successfully identify pre-existing IP that might require clearance - anything that is recognizable might require a license!!!
- How to budget appropriately for licensing needs
- Understanding the "Layers" of clearance –Physical Assets (Property) versus Intellectual Property (Intangibles)
- Timeline: how long does the clearance process take?
- Rights terminology – understanding the licensing lingo so you know what to ask for
- Balancing Act between a Creator/Artist's First Amendment rights and a rights owner's interests in protecting his copyright, trademark, privacy, and publicity rights.

Image and Footage Licensing

- Copyright law protects original creations, including photographs. In most instances, you can't copy, use, or sell a copyright-protected image without permission from the person who created it
- There are **Two** levels to clearing an image or footage 1) clearing the rights to the image/footage itself and 2) clearing what is depicted in said image/footage
- Rights to the image/footage **DO NOT** extend to: logos, trademarks, products, artwork or people (without signed releases on file) depicted in the image/footage
- Sometimes these additional Third Party IP need to be cleared – other times they may not need to be

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Usage Rights

- Knowing **how** and **where** you want to use an image is critical to obtaining the correct license for your needs
- All licenses are single-use and limited use – meaning they are tied to one specific project and permissions are only as broad as you ask for.
  - Example – if you license an image to use on your website, and now want to use the same image in a film, you must re-license that image as your **Usage Rights** do not extend to the new use
- Types of Usage Rights – Broadcast, Web, Merchandising, Publishing, Film Festival
- Some of the most common misconceptions about image licensing include thinking that if you're not profiting off of an image, you don't need permission to use it

Editorial vs. Commercial

- What type of content am I creating, and how does that change clearances needed?
- Editorial uses have considerable protections automatically built in under the 1st Amendment as these uses are considered as a form of Artistic Expression.
- Once the use becomes "Commercial"– those protections are inherently stripped away and additional layers of clearance come into play-
- What is "Commercial?" Does NOT mean you are making money – this is essentially any type of marketing, promotional or advertising piece – including a trailer for your documentary, a print ad for your business, etc.
  - Example – Any Warhol created his famous Coca-Cola art without a trademark license under 1st Amendment protections. Subsequently using that same image to promote your company would not see the same protections

How Does Commercial use Change Clearances?

- Dissect every element of the image
- Rights unencumbered – no Third Party IP is depicted without specific permission from every Third Party IP Rights Holder
- Models in the photo will need to have signed releases
- All logos and trademarks will need to be removed or cleared.
- No Third Party IP can be considered "Incidental"

IP Identification: Anything that is recognizable might require clearance!!!

- Buildings (Empire State Building in focus, Eiffel Tower at Night Apollo Theater, Graceland, Grauman's Chinese Theater Las Vegas Hotels. Some have different restrictions regarding the exteriors and interiors! Example: For both the Notre Dame Cathedral and the Sistine Chapel, Exterior OK for commercial use, Interior is NOT
- Landmarks (Hollywood Sign, Beverly Hills Shield, Hollywood Walk of Fame)
- Artwork including murals, and Tattoos – so long as they display originality
- People – Rights of Publicity, Privacy and Likeness (more on this!)
- Logos - Nike Swoosh, Red Bull, Car logos, Band Logos, Hell's Angels
- Brands/Products - John Deere, Rolex, Kraft, Coca-Cola, Hershey's, Boeing
- Iconic Characters from Books, Movies and TV
- Quotes and Speeches (MLK's "I Have a Dream Speech", Mister Rogers "Helper" quote)
- Book and Comic Excerpts
- Newspaper and Magazine Headlines
- Advertising Slogans – "Where's the Beef," "Just Do It" and "Got Milk?"
- Social Media/ User-generated content -YouTube, TikTok, Twitter, etc – User posted content, but might not have rights to everything depicted – does it feature other people? Are they released? Does the video contain music? Products?

Case Study

- Commercial use requires additional Rights Clearance with:

1. Andy Warhol Estate
2. Coca-Cola
3. Art Bridges and Crystal Bridges Museum of American Art (who jointly own the copyright to the art itself)

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Trademark vs Trade Dress

- A trademark protects a slogan, phrase, word, company name, logo, or design that identifies a company and/or its goods/products.
- Trade dress protects all elements used to promote a specific service or product. It is the commercial look and feel of a product or service that identifies and distinguishes the source of the product or service. Examples of trade dress include the design and shape of the packaging and the atmosphere or décor within a place of business.
- **Duplicating Trade Dress even without the respective Trademarked Logos can still lead to infringement**

Footage/Clips

- Clips - film, television, newsreel, stock footage and other moving images
- It is often necessary to construct and secure a "package of rights" for what appears to be a single production element.
- One might have to go to several different parties to effectively clear all the various elements represented in the clip;
  - the physical footage
  - the copyright in and to the footage
  - Talent
  - Music (Scores and Commercial tracks)
  - Union/guild new use/re-use fees

Case Studies – Layers of Footage Clearances

Saturday Night Live

- Clip (physical footage) – licensed from Getty
- Copyright to the Production -NBC Universal
- Re-use of Chris Farley image/likeness negotiated through his estate

Choosing Not to clear these additional third party clearances could result in legal and financial ramifications

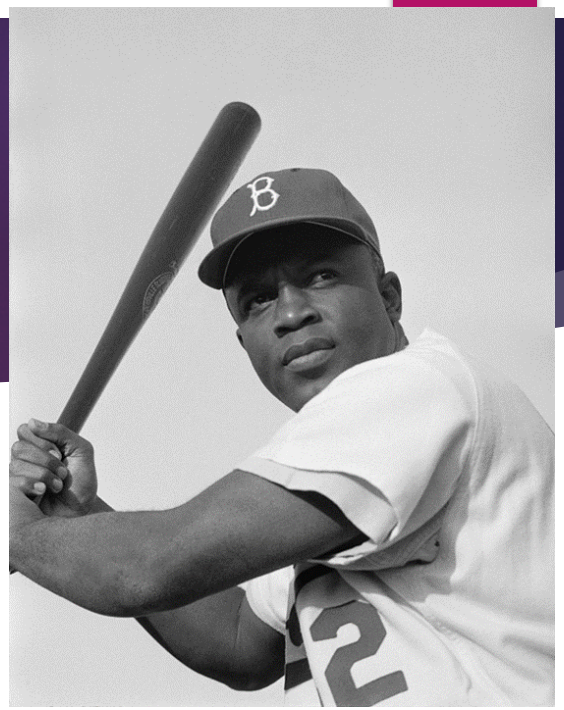
Grease

- Clip (physical footage) licensed from Pond 5
- Copyright to the Production – Paramount
- Re-Use of Olivia Newton John and John Travolta – negotiations with their respective agents
- Rights to Score – cleared through Paramount's Music department
- "We Go Together" – cleared through MPL Music Publishing
- Union actors – additional payments to SAG-AFTRA and AFM for all on and off-screen talent (background actors and extras)

Rights of Publicity, Personality and Likeness

- When your use falls under the Commercial Bucket, it is imperative that you clear rights with any people you wish to depict unless they are already released and grant specific permission for your purposes
- Right of Publicity: the right to control the **commercial exploitation** of a person's name, image or persona. Newsworthy, social and historical event = Fair Use
- The right of publicity is not only for celebrities. Any person whose name or image is used to sell products, goods or services of any kind may claim a misappropriation of this right.
- **Deceased Individuals May Still have Rights:** Many celebrities and famous people have estates who have filed trademarks for posthumous rights to publicity. Only twenty states recognize that the right of publicity survives death. (California and Tennessee recognize Posthumous Rights of Publicity; New York does not); postmortem duration varies by state
- Due to the monetization potential of deceased celebrities – using a person's likeness without their permission for commercial purposes can bring about extensive financial and legal ramifications!!! Elvis Presley, Marilyn Monroe, Charles Schulz and more!

Case Study



- This Image is labelled as in the Public Domain (per Wikipedia)
- Was being used for commercial purposes – promoting podcast
- His estate has a formalized business entity created to profit from the licensing of his name/image/likeness (CMG Worldwide)
- The image being *allegedly* in the public domain does not negate his estate's control to his Rights of Publicity

Cautionary Tales: Using Copyrighted Materials as "Inspiration"

- US Postal Service licensed an image from Getty of what they thought was the original 1886 Statue of Liberty which is PD
- Was actually an image of the Las Vegas replica sculpted by Robert Davidson in 1996
- The artist said that he made some key changes to his version of Lady Liberty, which differentiate it from the New York statue, including making it a little more modern, a little more feminine, softer and more contemporary than the iconic original.
- In 2013 he was awarded $3.5 million in compensation after Postal Service printed 3 billion stamps infringing on his original work

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Transformation

- Photographs protected by Copyright – derivatives and reproductions require permission
- Does not have to be a literal/identical copy for it to be considered copyright infringement
- Small changes – including changing the media, changing the colors and the dog nose shapes, did not substantially alter the original
- Anyone may duplicate the ideas or concepts reflected in artwork. For example, if you paint a horse, copyright law does not prevent anyone else from painting a horse – even if it is the exact same horse. What another may not do is duplicate the expressive elements used by you in your artwork. Expressive elements include the selection of lighting, shading, camera angle, background and **perspective**.
- A new work must be dramatically transformative and substantially different
- Mythical Rule – change 20% of the original – no mathematical formula
- Avoid too many "coincidental similarities"

Rogers v. Koons

Art Rogers - "Puppies"

Jeff Koons - "String of Puppies"

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Goodwill and Intent doesn't change need to License

- Famous street artist Shephard Fairey created the Hope poster during President Obama's first run for presidential election in 2008. The design rapidly became a symbol for Obama's campaign
- Image taken by Mannie Garcia for AP Images
- AP called Fairey's poster a "computerized paint by numbers"; Fairey maintained that it was an "abstract graphic rendition"
- Garcia himself stated he was "so proud of the photograph and that Fairey did what he did artistically with it, and the effect it has had," but still had a problem with the fact that Fairey took the image without permission and without credit for its originator.
- Settlement included AP and Fairey agreeing to share the rights and proceeds from the posters and respective merchandise

Beware of "Free and Clear" Sources

- Many "Free" Image Sources exist on the web - Unsplash, Pixabay, Pexels, Flaticon
- Even when using these sites, you must still use Rights and Clearances Best Practices as **there may still be restrictions and potential additional clearances required that you need to keep in mind**.
- Although the copyrights to the images are free for your use, what is depicted in said images might not be - may still be protected by trademarks, publicity or privacy rights - and those clearances will ultimately be the responsibility of the end user (you).
- Avoid implying endorsement of your product/service by people or brands in the image
- Identifiable people may not appear in a bad light or in a way that is offensive. This includes, for example, portraying people pictured engaging in criminal activities, suffering from a medical ailment, or in a pornographic context.
- Some free sites indicate content is for Editorial use only.

Where You Find Inspiration – Acquiring Rights to Underlying Works

- Always confirm what you are licensing does not infringe on any third-party rights!!!
- Do your research and go to the original copyright owner
- Rights to Adapt a Book, article, format, or play – Option versus Sale
- Acquiring Story Rights and Life Story Rights provide protection from suits based on defamation, invasion of privacy and the right to publicity
- Fictionalizing a true story. If you change the names of the individuals involved, change the location and make other alterations so that the real-life people are not recognizable to the public, you could avoid the necessity of a depiction release
- Rights – What's Covered? Remakes, sequels, television series, merchandising, novelization, live-stage rights and radio rights? Are the rights worldwide? Rights owner might want to retain some aspects
- Did you know? The movie "Hustlers" was based on a 2015 article called "The Hustlers at Scores" written by Jessica Pressler for NY Magazine
  - (If you are basing your screenplay on a story reported in the news or on a person's public life, you may not need to acquire the story rights **so long as you use your own research to create the screenplay** – example Truman Capote's "In Cold Blood" inspired by very short, relatively generic news article that ultimately inspired his own research**)**

Life Story Rights - Considerations

- Facts and Events are in the Public Domain (example – no one can "own" the date of an election) and you are free to use those to create an original work
- However, if you or someone else writes about these facts in **an original way,** that original writing is protected by copyright
- Example - if you love the expression of facts in a Vanity Fair article and want to use the story as written in that article, you need to acquire rights to that article. On the other hand, if you are simply culling facts from that article and it is one of many sources that you are using to craft your own story you don't need to secure permission
- Permission gets you access to other inaccessible stories and individuals, a higher chance of clearing other IP associated with the subject (copyrighted works like music and art) and decreases legal risk. On the flip side, you will almost definitely be relinquishing some creative control by working directly with an individual or their estate
- The question to ask yourself is: am I telling a story that has already been told or am I using facts to create my own story?

Case Study: Public Domain or Copyrighted Work– "Enola Holmes"

- The estate of Sir Arthur Conan Doyle sued Netflix over its film *Enola Holmes*, arguing that the movie's depiction of public domain character Sherlock Holmes having emotions and respecting women violates Doyle's copyright.
- *Enola Holmes* is based on a series of novels by Nancy Springer starring a newly created teenage sister of the famous detective. They feature many elements from Doyle's Sherlock Holmes stories, and most of these elements aren't covered by copyright any longer. Details from 10 stories, however, are still owned by Doyle's estate. The estate argues that Springer's books — and by extension Netflix's adaptation — draw key elements from those later stories.
- Although Sherlock Holmes started off as an aloof and cold character, Conan Doyle made the artistic decision to have him develop into a character with a heart – who expressed warmth and emotion – but only in the later stories
- Suit claims Sherlock's depiction in "Enola Holmes" is hence based on the later personality that's still protected.

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What if I can't Acquire Rights?? Evoke, (but don't copy)

Martin Luther King Jr.'s Famous Speeches

- **Who Killed him??**
- **Give us the Ballot!**

- **I know you are asking today, "How long will it take?" (Speak, sir) Somebody's asking, "How long will prejudice blind the visions of men, darken their understanding, and drive bright-eyed wisdom from her sacred throne?"**

Speech as depicted in the movie "Selma"

- **Who Murdered Jimmie Lee Jackson?**
- **Give us the vote!**

- **You may ask, when will we be free of this darkness? I say to you today, my brothers and sisters. Despite the pain, despite the tears, our freedom will soon be upon us. For truth crushed to earth will rise again. When will we be free?**

Miscellaneous – don't leave any Rights on the table, and don't assume any Rights

- **Location Releases:** securing releases to film inside a particular building or at a particular location. Be specifically proactive about clearing consent when trademarks are a part of the location (example – a McDonald's location)
- **Product Placement** – be cautious about the inadvertent inclusion of trademarks and other protected elements. For example, an extra wearing a t-shirt featuring a COCA-COLA® logo. Even more problematic if the trademarked product is deliberately used in a denigrating, offensive or otherwise controversial manner.
- **Appearance Releases:** for anyone that appears on camera. Minors also require parental or guardian approval. Materials they give you for use (i.e. personal photos) must be licensed separately
- **Crew** – Should sign Work-For-Hire Agreements so that you own the final proceeds of their work. Includes: Set Designers, Choreographers, Makeup Artists, Extras, Stage Hands
- **Why?** You want to own the copyrights for any unique makeup/wardrobe ensembles (KISS owns rights to their makeup designs); you want to release "Behind the Scenes" footage for your film, You don't want any crew members to claim Rights to any aspect of your production
- There are no "implied" licenses!!!!

Font Licensing

- Fonts Are Intellectual Property – just like art, music, or literary works, fonts are designed by real people and are protected by certain intellectual property rights. Beyond the design itself, fonts are software, engineered with features and flexibility that enable good design and usability. Fonts must be licensed from the respective Foundries that control Rights.
- Types of Font Licenses –
  - Desktop, Webfont, Embedded licenses, Mobile app licenses, ePub licenses, Server licenses and more
  - Always check that your license covers Commercial Use and Distribution and not just personal/home use
- Beware of "Free Sources" and "Indie" Licenses – most restrict to personal use
- Font Licenses limit to a certain number of "seats" or "workstations"
- Possible to commission an original Work-For-Hire Font that you can fully own and re-use and distribute as needed

Rights Lingo

- All clearances are for a very limited use
- All Media
- "Broadcast" – what does this mean? Does it cover Streaming networks?
- Editorial vs Commercial – do you need both?
- Internet – streaming only or also downloading? Itunes sales, etc
- Festival?
- Territory?
- Term – will your rights expire?
- Single Use
- Exclusive vs. Non-exclusive
- Merchandising (might require paying an advance on units)
- Publishing (might require paying an advance on units)

Fees and Timeline

Timeline!

- Images: 1-2 Weeks
- Stock Footage: 1-2 Weeks
- Film Footage: 2-4 Weeks
- Individuals: 1-2 Months
- Famous People: 3-6 Months
- Logos/Trademarks: 3-6 Months

Fees!

- $100-$1,000 per image
- $30-$200 per second; often a 30 second minimum applies
- $5,000-$15,000 per 30 second clip (aggregate vs per clip)
- Varies
- Varies, generally $$$
- Varies, Use is most critical in acquiring approval

Final Thoughts

- Ask permission BEFORE you use a copyrighted work!!
- Budget time for the clearance process and money for the licensing fees.
- Be organized. Decide exactly which elements need to be cleared and plan alternatives. It's possible you won't be able to clear or afford every element on your list. You may also receive permission declines.
- Know your Grant of Rights. The term, territory, media and use you are licensing should run parallel to your known and/or potential distribution. If possible, avoid going back to the copyright holders to ask for additional rights.
- Beware of Wikipedia and other online resources – always confirm Rights holders via a separate source
- Rep and warranties – pay attention to licenses that do not include this language
- Fair Use – NOT a work-around in lieu of clearing Rights
- When choosing not to formally license any element, always take Risk and exposure into consideration