



The Top Ten Reasons For When You, As A Writer, Need A Lawyer By Robert L. Seigel

As an entertainment attorney, I have presented numerous talks concerning the legal and business issues concerning screenwriting for such venues as universities, film schools, the Independent Feature Project, New York Women in Film & Television, and the Association for Independent Video and Film. These lectures cover the basics such as rights definitions and protection, writing deals and different forms of compensation which a writer may receive.

A few years ago, in a David Letterman-inspired moment of whimsy, I compiled a "Top 10" List concerning the screenwriting business. Although it is not intended to be all inclusive in nature, this list does provide a solid starting point for writers to assess the need to consult with an attorney. Therefore, with no commercial interruptions (but with some explanatory commentary), here is:

THE TOP TEN REASONS FOR WHEN YOU, AS A WRITER, NEED A LAWYER:

10. WHEN YOU FIND THAT BOOK, PLAY OR RECORD THAT WOULD BE A GOOD BASIS FOR A MOVIE AND YOU WANT TO START WRITING THE ADAPTATION--BEFORE YOU EVEN KNOW IF THE RIGHTS ARE AVAILABLE AND HOW MUCH IT WILL COST YOU.

If a writer decides that he or she wants to write a script which is based upon pre-existing source material (as opposed to writing an original script) such as a



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book or a play, the writer should contact the copyright owner or administrator for such underlying work. In the case of a book, a writer should contact a book's publisher subsidiary rights department. A representative in that department would be able to provide such information as whether the motion picture and/or television rights are available and whom to contact if such rights are available. A book's rights are generally controlled by the book's author or the author's agent or attorney. In some cases generally involving beginning book authors, the publisher negotiates such rights on behalf of the author and the publisher, and the author share in the monies derived from granting such rights.

A writer contacted me several years ago and wanted me to read his adaptation of one of the James Bond novels which the Ian Fleming estate had commissioned a writer named John Gardner to write. I read the adaptation and told the writer that it was quite good; however, the script would be used a good sample of how the writer could adapt existing materials into a script. In terms of his adaptation, I informed the writer that if he did not contact the Ian Fleming estate or the Albert Broccoli family which has produced the James Bond franchise for the over forty years and secured the appropriate rights (or, at least, secure an option to purchase such rights), he was out of luck and would not develop the script any further into a motion picture.

9. WHEN YOU WANT TO COLLABORATE ON A SCRIPT WITH YOUR SOON TO BE FORMER FRIEND.

A writing partnership is like a marriage and a collaboration agreement is the pre-nuptial agreement. The best time for a writing team to enter into a collaboration agreement is at the start of the relationship when hopes are high



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and the stakes are low. The longer a writing team waits to address issues concerning their collaboration, the greater the likelihood for misunderstandings and acrimony between the writers. The collaboration agreement would address such issues as who owns a script's copyright, how monies are allocated and paid to the writers, how decisions are made whether to option or sell the rights to their script and how disagreements are resolved. In the best case scenario, once the writers sign the collaboration agreement, they can put it in a desk drawer and never have to look at it until an issue arises between the writers. The writers then can open the drawer and read the collaboration agreement as a guide and a reference concerning their contractual relationship.

8. WHEN A PRODUCER WANTS TO OPTION YOUR SCRIPT FOR THREE YEARS WITH A "NO MONEY" OPTION.

If a writer has already written a script and has found someone who is interested in further developing the script with a view towards producing a film or television program based on the script, that person who is taking on the producer role will want the motion picture and/or television rights in and to the script. Since most producers have no or very limited funds to develop their projects, those producers will want to option the rights to the script rather than purchasing the rights to the script outright. By optioning the rights to the script, the producer is taking the script "off the market" so that he or she shall have the exclusive right to further develop the script and to seek possible cast and funding for the project. The producer may offer the writer a "no money" option even if the agreement states the option price is one dollar or some nominal amount. In an ideal world or one where the rules of the Writers Guild of America ("WGA") apply, the option price would be ten percent of the purchase price for the script's rights for a period of time ranging from six



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months to a year and a half with the possibility of such term being extended with another payment to the writer. In the non-studio world, a producer may option a script's rights for some nominal amount for a year the right to extend such option by paying a nominal amount to the writer.

Producers generally need an initial one year option period with at least a possible renewal term of another year since it takes time for script rewrites and getting responses from possible cast representatives and funding sources. Why would a writer take his or her script out of the marketplace for no money for as long as three years? A writer has to judge whether a producer has the passion or belief in the property to work on it for what may be years to have a project produced and the experience and/or contacts to take the script to those sources that can finance the project. At best, it is a judgment call for a writer to make and will serve as the basis of any negotiations between a producer and the writer.

7. YOU ARE NOT COVERED BY THE WRITERS GUILD OF AMERICA AND YOUR SCRIPT COULD BE THE BASIS FOR FURTHER FILMS OR A TV SERIES AND THE PRODUCER WANTS TO PAY YOU A FLAT RATE FOR "ALL RIGHTS, THROUGHOUT THE UNIVERSE, IN PERPETUITY AND IN ANY AND ALL MEDIA, WHETHER NOW KNOWN OR CREATED IN THE FUTURE.

For the purposes of this article, let us assume that a writer is not a WGA member (or a "professional writer" as defined by the WGA) and that the producer is not a signatory to the WGA Basic Agreement. If the writer were a WGA member and the producer a WGA signatory, then such issues as compensation, credit, a writer's right to rewrites and how a writer shall financially participate in a script's ancillary rights would be covered by the WGA Basic Agreement. For the non-WGA member writer and the non-WGA signatory producer or a signatory producer negotiating with a non-WGA writer, almost all of the issues concerning the optioning and/or purchasing of a script's



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rights are a matter of negotiation. A writer and his or her representative and a producer can use the WGA rules as a basis for their negotiations of such deal points as credit determination and compensation; however, absent the use of such WGA rules, neither party is bound to such rules and whatever a writer can receive in his or her agreement must be discussed and negotiated preferably by the writer's agent or attorney with the producer.

One example of an issue which the parties should address is what happens if a producer cannot commence principal photography or complete production of a project after a certain period of time such as five or seven years after the producer acquired the script's rights. If this issue is not addressed by the parties, the writer's script could be left on the proverbial shelf to gather dust. Instead, the agreement could include a provision in which a writer could reacquire a script's rights if the producer does not produce a project within a certain period of time. The writer may regain the rights automatically or subject to a lien in the sum of money which the producer paid the writer for the rights and possibly for the writer's writing services. The producer generally does want the writer to set up the project elsewhere with the producer being out of pocket for his or development costs. How a writer deals with such a lien is a matter of negotiation between the parties. (The writer usually gets the producer or studio who wants to produce the project based on the writer's script to repay such development expenses to the first producer who acquired such rights.)

6. WHEN A PRODUCER GETS THE FINANCING FOR THAT PROJECT WHICH USES YOUR SCRIPT BUT THE PRODUCER WANTS TO GIVE WILLIAM GOLDMAN (OR SOMEONE'S RELATIVE) "FIRST CRACK" AT THE REWRITE.

One of the points of contention between a producer and a writer is whether the writer will have the right to perform the first rewrites which a producer may request. A writer usually can negotiate for the right to perform the initial rewrite or two. However, if the producer and the writer have reached a creative impasse or a producer does



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not believe that the writer can take the development of the script to the next level, the producer may seek to hire a more experienced writer to expedite the development process as well as be able to inform potential funding sources that a writer with a "track record" is now working on the script. In other instances, a producer may hire a writer with whom he or she has a relationship so that the producer has a sense of certainty that the script will be developed as per the producer's "suggestions."

5. WHEN A PRODUCER WANTS THAT "ONE LAST REWRITE"--20 TIMES AND FOR NO FURTHER COMPENSATION.

In negotiating his or her continued involvement in a script's development, a writer has to decide whether he or she is willing to work on one or two rewrites for no or very little money. If the writer requests compensation for each rewrite, a producer may decide to hire another writer who would be willing to rewrite "on spec" or for a very nominal amount. (In theory, this new writer should and/or would not be a WGA member since the WGA forbids no money or below WGA minimum compensation for their writer members' services).

Without that WGA safety net, a writer may wind up writing multiple drafts for little or no money. A writer should balance the need to be flexible when working with independent producers by providing perhaps a rewrite and a polish for no or a nominal amount of money and then should be compensated for further writing services.

4. AFTER WORKING ON THAT SCRIPT FOR NUMEROUS DRAFTS AND MONTHS, YOU NEVER RECEIVED THE CONTRACT THE PRODUCER PROMISED YOU ONLY TO DISCOVER THE SCRIPT IS GOING IN A "DIFFERENT DIRECTION" AND THE PRODUCER THANKS YOU FOR YOUR "HELP" AND THAT YOU WILL GET PAID ONCE THE FINANCING COMES



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THROUGH--ANY DAY NOW.

A writer can remove much of the vagaries and speculativeness of "spec writing" by negotiating and entering into an option agreement with a right for the producer to purchase the script's rights or a writing services agreements and ensuring that the agreement is signed by the writer and the producer. This agreement is a form of protection not only for the writer but for the producer as well as since any funding source will insist that a producer provide a "chain of title" regarding the script and any additional script versions. Such "chain of title" is similar to a "chain of title" to a house that one decides to purchase. A producer can prove that he or she has the right either to acquire the script's rights or has purchased and now owns such rights by providing the requisite signed agreements to a funding source. Otherwise, a producer will not be able to enter into an agreement with the funding source and the possibility of producing a project based on the script becomes increasingly dim. At worst, the absence of such documentation between the producer and the writer (as well as any other writers) can result in the parties behaving as if they are in a bad remake of "The Treasure of the Sierra Madre" in which all parties fight over what each person should receive (similar to the scenes when the movie's characters fight over who owns the gold), resulting not in a motion picture or a television project but an environment which is ripe for litigation and acrimony by the parties.

3. YOU ARE NOT A WGA MEMBER AND/OR THE PRODUCER IS NOT A WGA SIGNATORY AND THE PRODUCER WANTS TO GIVE THE PRODUCER'S "SIGNIFICANT OTHER" SOLE SCREENPLAY CREDIT.

As previously noted, if a writer is a WGA member (or is deemed a "professional writer" according to the WGA guidelines), then the rules and definitions pertaining to writing credits shall govern. However, a non-WGA screenwriter and a non-WGA signatory producer can agree by contract to be bound to the WGA credit rules. If neither of these scenarios apply, then the issue of credit becomes a matter of negotiation between the parties. One of the reasons that the WGA has credit rules and arbitration



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procedures to determine writing credits for a script goes back to the early (and not so early days) of the motion picture business in which studios and producers were responsible for who received credits. A studio executive, the producer or the producer's crony would receive a credit and the writer had to hope or insure by persuasion or a studio's or a producer's sense of integrity (or its or his desire to continue a relationship with that writer) that the writer received the appropriate credit or any credit at all.

I remind many writers that the issue of credit is more than one of vanity. A writer's credits is what establishes the writer's track record and helps set the writer's quote of how much a writer has been paid for writing in the past and expects to be paid by a studio or a producer. This is one of the rationales for including a provision in any writer's contract that if there is dispute between the producer, and the writer and the parties cannot resolve such dispute, then the credit issue should be determined in accordance with WGA credit rules. Such rules determine the basis for a writer receiving a "written by" "screenplay by" or "teleplay" credit, a "story by" credit or any credit at all. By using the WGA credit rules, the initial writer generally will receive a sole "written by" credit or a shared "written by" credit unless a subsequent writer(s) significantly rewrites the script. If a script has been so extensively rewritten by a subsequent writer(s) that the subsequent writer(s) either shares the "written by" or receives a sole "screenplay by" credit, the initial writer may receive a "story by" credit. In a non-WGA situation, the producer and the writer can include a provision in their agreement that the initial writer would be entitled to receive no less than a certain credit regardless of whether the WGA credit rules would deny the initial writer such or any credit.

If a writer can receive a "written by" credit for an original script or share in the "screenplay by" or "teleplay by" credit with a subsequent writer(s), then the initial writer would be entitled to receive monies when such subsequent productions as prequels, sequels, remakes, television films or a television series are produced even if the initial writer does not render any services on such subsequent productions. These monies are called "passive payments." The irony is that if a writer is hired to write a script for



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one of these subsequent productions, that writer would negotiate compensation for such writing services but would have to forfeit the passive payments for that subsequent production since the writer is obviously no longer passive for that subsequent production.

2. YOUR SCRIPT BECOMES A FILM AND YOU GO TO A SCREENING AND SEE SOMEONE ELSE'S NAME AFTER THE "WRITTEN BY" CREDIT.

One day political humorist and writer Art Buchwald attended a screening of *Coming to America* starring Eddie Murphy and noticed that many of the elements in that film's script were quite similar to those contained in a treatment which Buchwald had written and submitted to Paramount Pictures-the studio which produced and distributed the Murphy movie. Buchwald was further surprised to see that he did not receive any writing credit in the movie. Buchwald eventually brought a lawsuit against Paramount Pictures and did win (although he received less than a \$1 million rather than millions of dollars).

One of the reasons that Buchwald prevailed in his claim was that the claim was not for copyright infringement but for breach of an option agreement between Buchwald and Paramount Pictures, especially when the studio permitted the Buchwald option to expire before it produced *Coming to America.* Buchwald's breach of contract claim against Paramount Pictures could be litigated in California state court rather than federal court which is the venue for copyright infringement suits, and such breach of contract claims are easier to prove than a copyright infringement claim which calls for a fact-specific finding of "substantial similarity" between a potentially infringing property and the property owned by the person who has brought the copyright infringement suit.

1. YOU NEVER GET THAT CONTRACT THAT THE PRODUCER SAID WOULD BE HERE ANY DAY NOW.

Many writers are often surprised by how much time passes during the negotiation,



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review and revision process for a writing agreement with multiple rounds between the writer and the producer, the studio or the network.

There are several reasons for this protracted process. Although the writer is concerned with his or her deal, the business affairs executive or attorney for the producer, studio and network considers the writer's deal is one of many deals which are in different stages of negotiation and have different degrees of urgency and priority. In addition, the business affairs executive usually has to consult with the producer's, studios or network's legal department (which often sets contractual policy and precedent) that the business affairs executive must execute when negotiating with writers and their representatives. Therefore, as a rule of thumb, the more a writer and his or her representative want to propose terms which vary from the producer's, studio's or network's contractual precedents and policies, the longer the writer and the representative will have to wait for such proposed revisions to wind their way through a company's bureaucracy before the writer and the representative receive a response (favorable or not) to their proposed contract revisions.

Sometimes there is a delay in a writer receiving an initial draft and revisions to an option/ purchase or writing services agreement from a producer since that producer may be drafting or revising the agreement himself or herself rather than hire an attorney. The producer often is trying to cut down on costs related to the project or the producer believes that he or she can write or revise the contract since he or she has seen and negotiated many of these agreements. This approach by the producer is as "penny wise and pound foolish" as the writer who decides to negotiate his or her own agreement rather than incur legal expenses. Although some writers have agents who can negotiate a writer client's agreement for a ten percent commission, it is in the writer's best interest to have a lawyer at least review and comment upon the initial agreement and any revisions. An entertainment lawyer has the experience which comes from negotiating many agreements and is usually sensitive to certain details and nuances in agreement which may vary from the so-called "standard" contract.



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A writer should realize that engaging and paying an entertainment lawyer is part of the cost of a writer doing business as a professional writer. An entertainment lawyer's services can ensure that a writer receives not just immediate benefits (e.g., greater compensation and credit) but also long-term contractually guaranteed provisions, even when such provisions (such as a more favorable definition of profit participation, passive payments; the right to render additional writing services on a project as well as for the scripts for subsequent projects based on the writer's script) only may become apparent and valuable to the writer several years after the agreement has been signed by the parties.

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