

ENTERTAINMENT, ARTS & SPORTS PRACTICE

The attorneys in SGR's Entertainment, Arts and Sports Practice have a wealth of experience representing individual artists, writers, actors, producers, managers, agents, sports figures and other professionals and companies engaged in the music, film, performing and visual arts, literary publishing, and sports industries.

by Kate Rowe, Rich Rivera, Steve O'Day and A.J. Rollins

LITERARY PUBLISHING

Must publishers own the copyright to an author's book?

No. It is not essential for a publisher to own the copyright to an author's book to be entitled to publish it. The author can grant the publisher a license to publish, and yet still retain the copyright. Indeed, the license granted can be tailored to the rights applicable to the arrangement. For example, some book publishers focus only on U.S. English language book rights, including printed (hardcover and softcover) rights. Others require more extensive book rights, such as exclusive worldwide printed book rights, electronic book rights, and foreign language and audio book rights. Some publishers ask for stage and motion picture rights as part of the package of rights they seek. Each publishing arrangement can be different, depending on the type of book, the relative negotiating clout of the parties and the publisher's normal author arrangements.

Some publishers do insist on an assignment of copyright. This is more common in the academic and professional fields, for special commissions

and for textbooks. There are some concerns for an author when granting the copyright to the publisher. The copyright owner controls the right to modify the work (to change the words and substitute new illustrations, for example), and controls the right to permit new works to be created based on the work (such as a book series, a film or a television program). Authors who grant copyright to a publisher may be able to reduce their concerns by restricting in the publishing contract what the publisher is entitled to do, requiring author approval of the exercise of certain rights and providing for a reversion of rights upon the occurrence (or nonoccurrence) of certain events.



MOTION PICTURES

Can I make a film about a living person?

When making an artistic work involving the characteristics of a real person, there are few safe harbors. In 2005, the Florida Supreme Court found that the producers and distributors of the film *The Perfect Storm* did not violate the state law prohibiting commercial appropriation because the film was not directly used to market goods for sale. Likewise, in March of this year, a California appeals court dismissed a lawsuit by Olivia de Havilland over her portrayal in the FX series, *Feud: Bette and Joan*. The California court found that the First Amendment permitted FX to accurately portray her role in the infamous feud.

But other states' laws are less clear. Three days after the de Havilland case, New York's highest court ruled that a character in a video game could violate

New York's invasion of privacy law. However, the court found that the character in question was not recognizable as Lindsay Lohan, the plaintiff in that case. The New York privacy law, however, does not require that the persona be used to market other goods; rather, it need only be used for a commercial purpose. Notably, the New York high court did not adopt a standard used by the lower court that would exempt works of fiction or satire from the statute. And more than one court has found that sports-themed video games that depict real players can violate the players' rights of privacy.

In short, it depends. The inclusion of any real person in a dramatic work must be analyzed based on the similarities between the real person and the character as well as the aims of the work, its medium, the extent of artistic variation input into the work and the states whose laws would apply.

What OSHA standards are most likely to apply to a film set?

Set construction may require the use of ladders and scaffolding or electrical equipment, which may trigger OSHA standards. Shooting on location, particularly in older or abandoned buildings, may potentially expose crew members and actors to lead or asbestos, both of which are regulated by OSHA. The performance of stunts and special effects, which are not subject to a specific set of standards, may fall under the general duty clause, which requires employers to provide a place of employment that is "free from recognizable hazards that are causing or likely to cause death or serious harm to employees."

Have OSHA citations been issued to the film industry?

Yes. In 2016, California's Division of Occupational Safety and Health (better known as "Cal/OSHA") conducted 19 inspections of film productions that resulted in citations for 15 violations. OSHA has paid increasing attention to the growing film industry in Georgia. In 2014, a film crew member for the movie *Midnight Rider* was killed while setting up a set on an active train trestle that was used without the railroad company's permission. OSHA issued citations for serious violations for failing to adequately guard the sides of the trestle and exposing employees to fall hazards. More recently, the accidental death of a stunt person resulted in an OSHA citation for a single alleged general duty clause violation.

What parts of film production are eligible for Georgia Entertainment Industry Investment Act tax credit?

Georgia provides a transferable tax credit of up to 30% of a Georgia production's expenditures. A production can be a single televised commercial, a music video, a feature film, a TV episode or an original video game developed in Georgia. The project must spend at least \$500,000 in a single tax year. Eligible expenses include most everything spent in Georgia, but payroll is limited to \$500,000 per person for W-2 employees and must be for employees working in Georgia. Credit is even available for FICA and federal and state unemployment if attributed to Georgia.

What can be done with a Georgia Entertainment Industry Investment Act tax credit?

The credit is claimed when the tax return is filed for the tax year in which the expenditures are incurred. The production company can use the credit against its own income tax liability or it can be assigned to any Georgia taxpayer. This can be done directly by the production company or through the use of a broker. With advance notice to the Georgia Department of Revenue via Form IT-WH, the production company can even apply the credit against withholding, or the production company can assign the credit to affiliated entities under O.C.G.A. § 48-7-42.

Does OSHA apply to film production?

Yes. Although a film set is different from a factory or other traditional workplaces in terms of the risk of injury to employees, film production companies are still considered employers who have a duty under regulations promulgated by the Occupational Safety and Health Administration (OSHA) to provide a workplace free from hazards.



Kate Rowe is a partner in SGR's Intellectual Property Practice and also heads the Entertainment Practice, where she advises on software and Internet technology marketing, publishing, visual arts and licensing issues. krowe@sgrlaw.com.



Rich Rivera works both in the Litigation and Intellectual Property practices. He focuses on commercial litigation, with a special emphasis on defending actions brought under consumer protection statutes. rrivera@sgrlaw.com.



Steve O'Day is head of SGR's Sustainability Practice. He advises clients on sustainability initiatives, sustainable businesses and business practices, and renewable energy business issues, planning and litigation. soday@sgrlaw.com.



A.J. Rollins is a partner in SGR's Tax Practice. He focuses on representing individuals and businesses in their day-to-day operations, tax planning and tax controversies. arollins@sgrlaw.com.