

ERRORS & OMISSIONS INSURANCE

The broadcasters, distributors and financiers of most film and television productions require errors & omissions insurance ("E&O") coverage. The E&O process is expensive and producers sometimes resent being required to complete it; however, this insurance provides those named in the policy with protection that would not otherwise be available.

What Does E&O Insurance Cover?

E&O Insurance covers a variety of claims including copyright and trademark infringement, invasion of privacy and defamation. The coverage is so broad that it is easier to identify what is not covered. It does not cover the legal costs of defending or the damages or penalties imposed in connection with criminal charges or deliberate wrong-doing.

The Process

The first step in obtaining E&O Insurance is to meet with an insurance agent. The benefits of using specialists in this field are great. Their experience is invaluable.

During your meeting, your agent will have you complete an insurance application form. The form is then forwarded to the insurance broker who, in turn, forwards the form to the insurer's lawyer. The insurer's lawyer will then discuss the contents of the application with your lawyer. Any areas of concern will be noted and discussed by the lawyers, and coverage may be granted at that time or additional work may be required.

For financial reasons, many producers choose to wait until delivery to the broadcaster or distributor before ensuring that the E&O coverage is in place. This is a dangerous practice. If a claim is made before the coverage is in place, any costs associated with defending the claim and penalties imposed must be borne by the producer. Insurance put in place after the producer is notified of a claim will not cover that claim.

Basic Terms and Conditions

Like most insurance policies, E&O policies have deductibles; however, the deductibles are usually much higher than those seen in other types of insurance. The norm is \$10,000.00. The premium payable for the coverage is also in the thousands of dollars.

Often during the E&O review process, matters may be identified as posing possible risks. If that happens, the insurer generally requires that additional safeguards be put in place. This is done in an attempt to minimize its exposure. These safeguards may include securing additional releases and

consents or, far less often, editing the matter of concern out of the project. Frequently, however, the insurer concludes that any claim made with respect to the matter will not exceed the \$10,000.00 deductible. In other words, if a claim is made as a result of the matter in question, the claim will probably be for less than \$10,000.00 and, therefore, will be payable by the producer and not the insurer.

On occasion, the insurer may exclude a risk from coverage under the policy. This means that if a claim is made in connection with that matter, the insurer will not cover the legal fees incurred to defend the claim or pay any damages which are imposed. The insurer may also increase the amount of the deductible with respect to that particular matter. This provides the insurer with an increased level of protection. The existence of such an exclusion or increased deductible may seriously impact on your ability to broadcast or distribute your project.

Chain of Title

As part of the E&O review, you will be asked to provide documentation relating to the chain of title for the project. If the project is based on your own original idea, this will not be a problem. If, however, the project is based on another work, it will be necessary to obtain written consents from its creators. Among other things, the consents must include the right to edit, modify and delete material, representations and warranties that the work originated with its creators and the right to license and market the production in all media throughout the world. Failure to obtain such consents may expose you to claims by the creators of the underlying work.

Consents and Releases

If the production is non-fictional or if identifiable characters, products or locations are depicted, consents and releases must be obtained. You must also ensure that the depiction of real characters does not defame them, invade their privacy or invade their right to publicity. These are matters which should be discussed in detail with your lawyer.

Music, Titles and the use of Existing Film Footage

Two exclusions which often appear during the E&O review process relate to the title of the project and the music used in it. The first one is easily dealt with. Your lawyer can order a title report on your behalf. Once the results have been obtained and provided to the insurance company, you will be able to remove the title exclusion from your policy; this, of course, assumes that the search does not reveal any other projects bearing the same name.

Music clearances are usually left until quite late in the process. You may either obtain the right to use existing music or commission new music. Many producers find it simpler to commission new music than to obtain the rights

necessary to use existing records. The rights which must be acquired include synchronization and performance rights. The rules governing music rights are complex and are not dealt with in this lawletter.

The use of existing film footage also raises many issues and concerns. If you wish to incorporate existing footage in your project, you will require consents from a number of parties including the owner of the copyright of the footage and every person depicted in it. It is possible to purchase existing footage from stock footage suppliers. If you choose to do so, you must ensure that the organization with which you deal is reputable and has the resources to defend you if any claims are arise as a result of the use of this footage. Issues relating to the use of existing film footage should be discussed carefully with your lawyer before you proceed.

Conclusion

Completing the E&O review process takes a great deal of time and attention to detail. The benefits, however, are obvious. The process, itself, provides peace of mind to the producer. The insurance coverage which results may protect the production company from a claim which could, ultimately, destroy it.

This Lawletter is intended to provide an overview of some of the issues arising in connection with errors & omissions insurance. Every situation differs in its facts. You must, therefore, consult with a lawyer for advice relating to your specific situation.