CreativeFuture
Creativity. Innovation. Tomorrow.

<u>**Rights and Intellectual Property**</u>

I. What is Intellectual Property?
Intellectual property refers to creations or products of the human intellect that the law protects from unauthorized use by others.

The principal legal modes of protecting intellectual property are copyright, patent, trademark, and trade secret law. The owner of an intellectual property is granted a bundle of rights that it can exclusively control for a limited duration (e.g., copyright and patents) or even in perpetuity (e.g., trademarks and trade secrets).

II. What are my rights?
Authors' legal rights in their work will be derived primarily from Copyright law. Copyright protection exists for a limited duration in "original works of authorship" (including literary, musical, dramatic, graphic, and audiovisual works) fixed in any tangible medium of expression. See The Basics of Copyright Protection to see if your work qualifies for copyright protection and the duration of the copyright.

Copyright owners have the following exclusive rights to the following and can authorize others for the duration of their copyright:

- **Reproduction right**: reproduce the works in copies or phonorecords
- **Derivative right**: prepare derivative works based upon the work
- **Public Distribution right**: distribute copies of the work to the public
- **Public Performance right**: perform the work publicly (literary, musical, dramatic, choreographic works, pantomimes, and motion pictures and other audiovisual works)
- **Public Display right**: Display the work publicly (literary, musical, dramatic, choreographic works, pantomimes, and individual images of a motion pictures and other audiovisual works)
- **Public Performance right**: Perform the work publicly (in the case of sound records) by means of a digital audio transmission

These rights are assignable and divisible – and can be licensed to others. This allows the owners to grant third parties certain rights to their work at their choosing for whatever compensation they demand. When licensing your work, it is imperative to define the scope of the following:

<u>**Term**</u>:

- When does the grant of rights begin (i.e., when can the licensor start exercising/exploiting the licensed right)?
- When does the grant of rights terminate?
    - After a fixed term?
    - Subject to an automatic extension for an additional period if the licensee has not recouped a certain amount at the end of the initial term?
    - Option for the licensee to extend the term for additional consideration?
    - Does the licensee have the right of first negotiation or last refusal?

- Holdbacks are requirements that the licensed rights cannot be exploited until a specified event (e.g., worldwide premiere in the U.S.) or after a specified time period (e.g., five months following the first theatrical exhibition).

Territory

- In which countries can the licensee exercise its rights? Worldwide rights?
    - Note: refrain from using such potentially ambiguous terms as "domestic," and instead specify the exact territories such as "United States and its territories and possessions."
- Include exhibition on ships and airlines?
- Exploitation on military bases?

Media

- Theatrical
- Television (which can be further divided into broadcast, basic cable, premium cable, etc.)
- Home Video
- Video-on-Demand
    - Subscription-Video-on-Demand (e.g., Netflix, Amazon Prime)
    - Free-Video-on-Demand *(*i.e., where the user does not pay a subscription fee per month, but can watch the content for free)
    - Transactional-Video-on-Demand (i.e., renting the content for a limited period of time)
- Electronic Sell Through (i.e., download to own)

Exclusivity

- Are the granted rights exclusive or non-exclusive? If the rights are non-exclusive, licensor may license the same rights to third parties.

It is important to note that works are copyrighted the moment the work is fixed in a tangible medium, meaning that copyright registration is not required for copyright ownership. However, formal registration with the United States Copyright Office is required in order to bring suit against an alleged infringer. In the event of a successful litigation, registration also allows an author to recover statutory damages and attorney's fees from the infringer.

Registration may take place at any time during the term of the copyright.

III. Who owns and controls rights in a creative work?

<u>Initial Ownership</u>

The "author" of the work is the initial owner of the copyright. While the term "author" is not defined in the Copyright Act, the author of a work is generally the person who is responsible for the creation of the work. The author can be 1) the person or persons who actually created the work (as an individual or as joint authors) or 2) the party who hired the individual to create the work as a "work made for hire."

Work Made For Hire

A "work made for hire" is either:

- A work that is created by an employee within the scope of his/her employment **or**
- A work prepared by an independent contractor that has been specially commissioned for use under certain categories of works and there is an express **signed written agreement** between the employer and employee specifying that the work is to be a work made for hire.
  - Specially commissioned categories are the following:
    - Parts of a motion picture or audiovisual work
    - Contribution to a collective work
    - Translation
    - Supplementary work
    - Compilation
    - Instructional text
    - Test or answer material for a test
    - Atlas

If the work is considered a work made for hire, then the author (and the owner) of the copyright is the **employer**.

For example, if you are making a film, it is especially important that the filmmaker enter into signed written work made for hire agreements with the key players involved with creating the film (e.g., the writers, the director, etc.) to ensure that there will be no doubt that the filmmaker is the owner of the film. The same would be true if you are hiring a translator for your literary work; you should enter into a signed written work for hire agreement with the translator.

Joint Authors

A joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." In other words, in order to qualify for joint authorship:

- Each author must contribute copyrightable expression;
- Each author intends to be a joint author when the work is created.

This means that a work is not a "joint work" just because more than one person worked or contributed to it. Each author must have **intended** to be a joint author.

As joint authors, each author is a co-owner of the copyright and has equal undivided interests in the copyright (absent an agreement to the contrary). Importantly, each author may use the work or enter into non-exclusive licenses for the work **without requiring permission from the other**. However, any profits from the use of the work or licenses must be shared with the other joint authors.

Collective Works

Separate and distinct from joint works are "collective works," which are works such as newspapers, anthologies, encyclopedias, and magazines that are collections of independent contributions. Absent an express agreement to the contrary, the author of the collective work (e.g., the editor) acquires only the right to reproduce and distribute the independent contribution as part of that collective work (and later revisions or editions of the collective work).

Transfers of Copyright

As mentioned above, ownership can be transferred in whole or in part (i.e., assignable, divisible, and can be licensed to others individually or together with other rights).

It is important to note that transfers of copyright ownership (including ***exclusive*** licenses) must be in writing and signed by the owner of the rights being conveyed. Although notarization or a "certificate of acknowledgment" is not required for the transfer to be valid, it does serve as prima facie evidence of the execution of the transfer (meaning the burden will be on the side challenging the transfer to prove that the transfer was invalid).