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### Crowdsourcing Indie Movies

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# Crowd sourcing indie movies

Henry H. Perritt, Jr.<sup>1</sup>

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## **I. Introduction**

The Internet-centered technology developments are revolutionizing the ways in which movies can be made. Independent (“indie”) moviemakers now have access to video capture technologies that can produce quality equal to the best that Hollywood can produce. The revolution already has produced an explosion of publically available video content on Internet sites such as YouTube. As the revolution evolves, quality of story and characterization will improve, offering consumers a wider variety of good entertainment.

The use of crowdsourcing to make indie movies is a possibility that has not yet been explored fully, although the use of crowdsourcing is growing in other areas. Amazon’s

Mechanical Turk,<sup>2</sup> for example, is a website that allows crowdsourcing requesters and contributors to interact for payment. It is focused on software development. In video entertainment, the crowdsourcing possibilities are only dimly perceived, although Amazon Studios solicits screenplays and offers subsidies and studio participation in making indie movies.<sup>3</sup>

This article argues that crowdsourcing can be used for every step of making a movie, increasing the range of collaboration available to creators and reducing capital requirements.

It begins with a fictional account of a team of young moviemakers, and then steps through each step of making their movie, considering what plans they should make for crowdsourcing, the available Web-based and software tools, and the business and legal issues that arise from that use of crowdsourcing. It concludes by identifying desirable technology developments and legal reform.

## **II. The project: make a feature-length movie**

Merrick Sutherland recently graduated from the School of Communications at Northwestern, hoping to launch his career as a screenwriter and director. His fraternity brother in the SAE house, Brook Marion, graduated with Merrick and is interested in cinematography. Tripp Bond is another fraternity brother who is an actor. Together, they decide to make a movie based on Merrick's and Brook's short movie project in the Advanced Production course their senior year, which featured Tripp as the lead.

The story behind the movie was inspired by a stage play, "Airline Miles," which was on stage in Chicago in August, 2012. All three of them went to see it and were so intrigued by the possibilities that they saw it again, twice. Their short movie project took two of the characters from the play, Bobby, and his father Richard, and began to explore aspects of their backstory. In the play, Bobby was already dead, the victim of drug and alcohol abuse. In the movie, they intend to explore the genesis of Bobby's demons. Tentatively, they decide to call their movie, *Miles Traveled*.

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<sup>2</sup> <https://www.mturk.com/mturk/welcome>

<sup>3</sup> <http://studios.amazon.com/getting-started/movies>

They know that moviemaking is in the midst of a technological revolution that has upended virtually every aspect of video entertainment, and they are determined to make use of every new tool and the creative communities they have enabled. While Merrick and Brook are reasonably well organized—Tripp less so—they know they need to add someone to their team who is obsessive about planning and executing large creative projects. They remember Martha Peterfield, who dated another fraternity brother for most of their undergraduate years. Martha was a theatre major, generally regarded at the most outstanding stage manager in Northwestern's Theatre and Interpretation Center. Stage managers in theatre are responsible for managing a production from casting through the final performance. They attend to cast motivation and discipline, maintaining schedules, and making sure that all the pieces—script revision, rehearsals, set design, wardrobe, sound, lighting design, come together without problems. She has no movie experience yet, but that may be a good thing, because she is free of preconceived notions about movies are “supposed” to be made, which would make her a prisoner of old technologies and organizational models.

Merrick sends Martha a Facebook message and they agree that the three of them will get together at Le Peep for breakfast. Merrick and Brook enthusiastically present their idea to Martha. She saw the screening of their project and liked it, so she is receptive. She is considering applying to law school and wants to take a year off anyway, so she is available.

“We need to enlist some other collaborators,” Brook explained. “We certainly need another camera operator to help me and a sound person. We hope you will be the first assistant director, who is essentially the same thing as a stage manager in theatre. You might also be the producer . . .”

“Or a co-producer,” Merrick interrupted. “Probably all three of us should be the co-producers.”

Martha and Brook agreed with that suggestion. “We also should line up some miscellaneous folks to be production assistants. It would be better to have a stable team than to make assignments on an ad-hoc basis.”

“Okay,” said Martha, “how shall we go about recruiting the other people?”

“Let’s post a Facebook message on each of our Facebook pages. That will get the word out to our Northwestern friends. We also should put up one or more Craigslist notices. That will get the word out more broadly.

“Now,” said Merrick. “Let’s talk about our goals to make sure we are all on the same page. First, and most important, we want to make a good movie, one that will turn some heads and attract an audience. Second, we want to make it through robust collaboration with creative people who know their stuff. Third, we need to minimize capital requirements because none of us has much capital and if we go out to raise investor capital we’re going to get straitjacketed with old ways of doing things and loaded down with insistence that we adhere to conventional wisdom about what will produce commercial success.

“Three-D zombie movies with lots of car chases,” Brook said.

“We are intrigued,” continued Merrick,” with the possibility of using crowd sourcing for every major phase, beginning with the screenplay,<sup>4</sup> continuing through auditions and casting, pre-production location scouting, development of shot lists and story board, development of the shooting schedule, principal photography, editing, distribution, marketing, and exhibition. Lots of people have used crowd sourcing for one or more of these activities, but never, so far as we know, for the whole thing.

“Okay,” said Martha. “Sounds like fun. I’m in.”

So they agreed that Merrick would coordinate screenwriting, that Blake would coordinate principal photography, editing, and the pre-production activities most closely related, that Tripp would coordinate casting, and that Martha would help keep everything on track and would focus on location scouting, scheduling, and contracting.

## **A. Goals**

### **1. Enlist productive collaborators**

Anyone who has ever written a play, movie, or novel knows how valuable collaboration is. Collaborators can, from the earliest drafting stages, identify

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<sup>4</sup> This article uses the terms “screenplay” and “script” interchangeably, even though “screenplay” is the more common term for movie scripts, and “script” more commonly refers to scripts for stage plays.

shortcomings in characterization or plot development and provide new ideas that have not occurred to the creator. In later stages, they can perform activities outside the expertise or resources of the original creators.

Merrick and his team want to solicit collaborators broadly—collaborators who share their artistic vision for *Miles Traveled* and who are enthusiastic about pioneering new technological tools for collaborating on creative projects.

## 2. Minimize capital requirements

No member of the team has significant financial resources. Accordingly, they must develop a strategy that minimizes outlays. Crowdsourcing is at the core of that strategy, but merely to commit to crowdsourcing does not ensure that all crowdsourced collaborators will work for free. The sections of this article dealing with the business and legal issues involved with crowdsourcing particular phases of making *Miles Traveled* evaluate the likelihood that contributors to that phase will work without compensation, or conversely insist on cash payments or a share of the revenues when the movie is released—a “piece of the action.” “Deferrals” of compensation are standard in indie filmmaking.<sup>5</sup> Merely because a crowdsourced contributor may insist on cash payment does not negate the value of crowdsourcing. The author, for example, used Craigslist to solicit proposals for the cover art on one of his recent novels, *Jovan*.<sup>6</sup> He negotiated relatively modest cash payments for the most interesting artists who responded to an initial Craigslist notice, based on their portfolios, and in the case of two finalists, paid small amounts for submission of competing ideas.

## 3. Make a good movie

Good movies, like good plays and good novels, touch the audience.<sup>7</sup> They tell stories that involve the audience; they portray characters the audience can relate to at an

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<sup>5</sup> All About Indie Filmmaking, Film Deferrals (2008), <http://www.allaboutindiefilmmaking.com/2008/12/film-deferrals.html> (noting that motivations include friendship with producer, expectation of help on their projects, networking with individuals who may open up opportunities, and expectation of larger compensation if project is successful).

<sup>6</sup> *Jovan* is available on Amazon: [http://www.amazon.com/Jovan-Hank-Perritt/dp/1475079966/ref=sr\\_1\\_2?s=books&ie=UTF8&qid=1341757347&sr=1-2&keywords=jovan](http://www.amazon.com/Jovan-Hank-Perritt/dp/1475079966/ref=sr_1_2?s=books&ie=UTF8&qid=1341757347&sr=1-2&keywords=jovan)

<sup>7</sup> “When talented people write well, it is generally for this reason: They’re moved by a desire to touch the audience.” Robert McKee, *Story: Substance, Structure, Style, and the Principles of Screenwriting* 7 (1997) [hereinafter “McKee”]



emotional level, and they do so through sounds and images that are pleasing and tightly coupled to story and character.<sup>8</sup>

*a) Narrative structure*

A good story has tension and surprise, one or more clear protagonists, and a momentum that propels a reader forward.<sup>9</sup> One commentator suggests that the beginning must present a changed situation, an affected and motivated main character, a problem he is presented with, his objective to solve the problems, and his decision to pursue the objective.<sup>10</sup> The middle presents the character running into obstacles as he pursues his objective. There must be a series of obstacles, culminating in the “crisis” or “climax.”<sup>11</sup> The end involves the character “making a final desperate effort to overcome this ultimate obstacle to snatch victory from defeat, and reach the objective.”<sup>12</sup>

Good stories necessarily are selective: they portray particular events in the characters’ lives, events that effect meaningful change in a character’s situation and arouse emotional response.<sup>13</sup> Typical movies have 40-60 story events captures in scenes; typical novels more than sixty, typical stage plays fewer than 40.<sup>14</sup> Story interacts with character, in that, as the story proceeds, more of main characters’ complexities are revealed, and in most cases the events portrayed in the story change the character’s inner nature.<sup>15</sup>

Traditional ideas of story form require an interweaving of positive and negative developments of gradually increasing amplitude until the climax is reached.<sup>16</sup> There must be an inciting incident or precipitating event that “radically upsets the balance of

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<sup>8</sup> See Henry H. Perritt, Jr., *Technologies of Storytelling: New Models for Movies*, 10 *Virginia Sports & Ent. L. J.* 106, 111-120 (2010) [hereinafter “Perritt, Storytelling”] (summarizing Scribean concept of the “well made play” and using it as a template to analyze the movie, “Bambi”).

<sup>9</sup> McKee at 18 (contrasting two evaluations).

<sup>10</sup> Lee Roddy, *How to Write a Story 3* (2003) [hereinafter “Roddy”]

<sup>11</sup> Roddy at 3.

<sup>12</sup> Roddy at 3.

<sup>13</sup> McKee at 33.

<sup>14</sup> McKee at 35.

<sup>15</sup> McKee at 104-105.

<sup>16</sup> See Perritt, *Storytelling* at 116 (presenting diagram showing three turning points before climax); McKee at 123 (providing diagrams of the rising and falling action for “idealistic controlling idea,” “pessimistic controlling idea,” and “ironic controlling idea”).

forces in the protagonist's life,"<sup>17</sup> and evokes goal-seeking reactions that lead to the protagonist to encounter a series of obstacles until the crisis occurs. The precipitating event must happen early in the story, preferably within the first 25 percent of the telling.<sup>18</sup>

Conflict is the key to everything; nothing moves forward in storytelling without conflict.<sup>19</sup>

#### *b) Good characters who behave consistently*

Good stories have a multiplicity of characters. The principal characters, including the protagonist, are multi-dimensional, capable of surprise but nevertheless always act consistent with their inner—but maybe conflicting—values. Minor characters may be less complex, but the story includes them for some particular purpose relating to creation of obstacles and conflicts or fleshing out the main characters. One view of narrative construction suggests taking each triad of characters and putting each at the corner of a triangle, unless the legs of their triangle express the impact of each character on the other, the character is unnecessary and should be dispensed with.

Robert McKee offers the following principles for principal characterization:

"A protagonist is a willful character;

"The protagonist has a conscious desire;

"The protagonist may also have a self-contradictory unconscious desire;

"The protagonist has the capacities to pursue the object of desire convincingly;

"The protagonist must have at least a chance to attain his desire;

"The protagonist must be empathetic; he may or may not be sympathetic."<sup>20</sup>

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<sup>17</sup> McKee at 189.

<sup>18</sup> McKee at 200.

<sup>19</sup> McKee at 210.

<sup>20</sup> McKee at 137-141

### c) *Portray the story in a visually evocative way*

Much discussion and argument surround competing philosophies of moviemaking. The debate conflates writing, directing, and cinematography. The content of a movie limits the set of reasonable choices for photography, but it leaves open a wide range of options. Which scenes should be shot with diffuse lighting and soft voices, communicating dreaminess or intimacy? Which ones should be harder-edged with lighting that defines the subjects with stark clarity? Which ones should be dark interiors and which ones bright sunlight? When are long shots and when are close shots best. How many “establishing” shots are useful—subject matter that portrays the characters’ environment rather than the characters themselves and their interaction.

Answers to these questions necessitate close attention to the script, the director’s creative instincts as to how the actors should portray the events in the script, and dialogue among writer, director, and cinematographer in order to select the right locations, put together a shot list and storyboards, and then to see it through during principal photography. And, of course, equally important decisions about what shots to select and how to put them together are made in the editing process.

### B. *Getting organized*

Before Merrick, Brook, Tripp, and Martha frame their crowdsourcing collaboration, they must clarify the collaboration among themselves. The most basic legal framework for *Miles Traveled* is an agreement among themselves. This might be simply a contract, in which case it would define a common-law partnership, or it could be a more formal business organization form. An LLC would give them the most flexibility. The articles of organization<sup>21</sup> and operating agreement<sup>22</sup> of a typical LLC are contracts among the members, backed up by a state LLC statute—in this case, presumably the Illinois statute.<sup>23</sup>

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<sup>21</sup> 805 Ill. Cons. Stat. 180/5-5 (requiring articles of organization to be filed with secretary of state, as trigger for establishment); id. § 5-40 (providing that existence of LLC begins with filing of articles of organization).

<sup>22</sup> 805 Ill. Cons. Stat. 180/1-5 (defining “operating agreement”); 805 Ill. Cons. Stat. 180/15-5 (providing that operating agreement regulates affairs of LLC and conduct of its business and relations among members, managers, and company, and allowing agreement to modify any of the statutory default provisions, with limited exceptions).

<sup>23</sup> Limited Liability Company Act, 805 Ill. Cons. Stat. ch. 180.

Whatever form the contract takes, it should specify the areas of concentration for each of them, writing, script supervision and lead producer for Merrick, principal photography and editing for Brook, casting and acting for Tripp, location selection and supervision and cast relations for Susan.

Some capital is going to be required, even if they expect to raise most of the capital through crowd sourcing, and the agreement must specify how much each of them will contribute, in cash and in kind. An in-kind capital contribution takes the form of tangible assets or services rather than money.<sup>24</sup>

The agreement should specify who has authority to make particular kinds of decisions and, if agreement among two or more of them is required, how impasses will be resolved. It should specify who owns what intellectual property, and how profits and losses will be apportioned.

It also, considering the broad power of each joint copyright owner,<sup>25</sup> should set forth the circumstances under which part or all of the movie can be licensed or transferred to someone else, or at least the process for deciding, including at least a mechanism for resolving disagreements among the four.

Far too many collaborations have collapsed amid convoluted litigation and hundreds of thousand dollars in lawyer fees because the collaborators did not think through and memorialize the details of their relationship.<sup>26</sup>

### **C. Steps on the way to the screen**

Merrick and his team must develop and execute plans for each of the following phases, which are considered in more detail in § \_\_\_\_.

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<sup>24</sup> See 805 Ill. Cons. Stat. 180/20-1 (allowing member contribution to take form of cash, property, services rendered, or promissory note to contribute same); *United Nuclear Corp. v. Energy Conversion Devices, Inc.*, 441 N.E.2d 1163, 1178 (Ill. App. Ct. 1982) (referring to in-kind contribution to joint-venture partnership of "effort, skill, and knowledge in the development of technology").

<sup>25</sup> See § \_\_\_\_ discussing joint-copyright doctrine.

<sup>26</sup> See Michael S. Young, *Heavy Metal Alloys: Unsigned Rock Bands and Joint Work*, 86 Chi.-Kent L. Rev. 951 (2011) (recounting fictional story of rock band dispute and analyzing joint-copyright rights and powers).

- **Write the screenplay.** Merrick must complete the screenplay so that it reflects strong characters and an engaging story. In addition, he must structure it so that it accommodates plans for crowdsourcing of principal photography.
- **Develop a shot list.** Shot lists specify all of the shots to be included in a movie. Shot lists allow principal photography to be organized and scheduled according to location and cast members called, rarely in the same order that the story develops. For example, Merrick's script may begin with a shot of Bobby and his father at a restaurant, move back in time to other settings, with interspersed scenes at the same restaurant. A shot list would group all of the restaurant scenes together, and only Bobby and Richard would be called for those shots. Other shots, involving, say, Bobby and Brendan, similarly would be shot together, without Richard being called for them.
- A typical shot list is formatted to include columns for scene number, shot number, location, shot description, framing, action and dialogue, actors involved, props needed, and notes regarding extras and sound effects. No standard format exists, but these information elements are necessary. The shot description includes a subject and an action, for example, "Richard takes a big sip of his martini." Framing indicates camera position, shooting angle, and any movement, for example, "Close shot of Richard, camera zooms back to show both Richard and Bobby." Dialogue provides only a portion of the full dialogue, enough to identify the relevant part of the script.
- **Create storyboards.** Storyboards are sketches of each shot. They can be crude affairs with stick figures to identify character position, and x's to indicate the position of lights and camera, or they can be full color depictions, resembling comic book frames. Simple storyboards are adequate for planning the principal photography; more elaborate ones may be helpful to show investors or a cinematographer unfamiliar with the project.
- **Audition and select a cast.** Presumably, Tripp will play one of the lead roles. Auditions must be held to select other actors suitable for the other parts. Auditions and casting may be centralized, under the direct control of Tripp, or they may be decentralized, controlled by crowd-sourced collaborators.
- **Interview and select a production team.** Merrick and his team must fill out their production team, including people to handle sound, lighting, and to assist with principal photography.

- **Location scouting and selection.** Martha must scout and select locations for principal photography that are suitable for the scenes described in the screenplay.
- **Raise money.** They must prepare a budget and know where the money will come from to execute it. They or their families are likely to have some resources from savings or from expected income from “day jobs.” If that is insufficient, they must raise investor capital or obtain contributions and grants.
- **Develop a shooting schedule.** Once actor and production-team availability is known, Martha must develop a shooting schedule that is efficient, accommodating time of day called for by the screenplay, weather, and location constraints. Shots should be grouped so that no location need be revisited.
- **Principal photography.** Principal photography is the actual capturing of video images and sound from the performance of each scene. It must be performed faithfully to reflect the screenplay and to provide adequate options for later editing, in terms of character portrayal, camera angles, lighting, and movement.
- **Editing.** Movies are made more in the editing process than in principal photograph. It is during the editing process that sequencing, camera angles, selection from multiple takes, and transitions between camera angles and scenes are crafted.
- **Marketing.** Most indie movies are never seen by any audience beyond those participating in them. Merrick and his team must understand who is most likely to be interested in *Miles Travelled* and develop a plan for reaching out to them and persuading them to watch the movie.
- **Exhibition.** Once the team has elicited interest in *Miles Traveled*, they must make it easy to find and to watch, considering the full range of possibilities, including Internet downloading and streaming and exhibition in movie theatres.

### III. Use of crowd sourcing

Crowdsourcing for artistic endeavors is growing in popularity. It is a means for reducing costs, and gaining access to a wide range of collaborative input. It has been most popular for raising money on sites such as Kickstarter<sup>27</sup> and Indiegogo.<sup>28</sup> It can be

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<sup>27</sup> <http://www.kickstarter.com/>

<sup>28</sup> <http://www.indiegogo.com/>

used for every phase of making an indie movie such as *Miles Travelled*, although such extensive use has little precedent.

Crowdsourcing has been used to create musical works.<sup>29</sup> For example, Imogen Heap enlisted the help of her fans by inviting them to contribute ideas to melodies she created. With their help she will release a new song every three months, with a full album to be completed in three years.<sup>30</sup> The musical artist Feist asked her fans to create their interpretation of her album artwork using a paint-by-numbers system. While this was only a competition for fun, this highlighted a new way that artists work can be crowdsourced to fans.<sup>31</sup> A Canadian group, Oh No! Yoko asked its fans to create designs for their merchandise. This in turn drove its sales considerably higher.<sup>32</sup> Poptent uses crowdsourcing for creation of video advertisements.<sup>33</sup>

One case study of a crowd-sourced production of a web series showed that while the cost per minute is dramatically decreased when the project is crowdsourced it might not always be the best option. In the production of *Unknown Sender* the creators enjoyed decreased production costs and were surprised by the good quality of the work. The

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<sup>29</sup> The author's research assistant, Margaret Hill, performed the research for this subsection.

<sup>30</sup> See

Mark Mulligan, *Agile Music: Music Formats and Artist Creativity in the Age of Media Mass Customization* (2011), available at [http://musicindustryblog.files.wordpress.com/2011/11/agile-music\\_mark\\_mulligan\\_august\\_20112.pdf](http://musicindustryblog.files.wordpress.com/2011/11/agile-music_mark_mulligan_august_20112.pdf).

<sup>31</sup> See

Mark Mulligan, *Agile Music: Music Formats and Artist Creativity in the Age of Media Mass Customization* (2011), available at [http://musicindustryblog.files.wordpress.com/2011/11/agile-music\\_mark\\_mulligan\\_august\\_20112.pdf](http://musicindustryblog.files.wordpress.com/2011/11/agile-music_mark_mulligan_august_20112.pdf).

<sup>32</sup> See Mark Mulligan, *Agile Music: Music Formats and Artist Creativity in the Age of Media Mass Customization* (2011), available at [http://musicindustryblog.files.wordpress.com/2011/11/agile-music\\_mark\\_mulligan\\_august\\_20112.pdf](http://musicindustryblog.files.wordpress.com/2011/11/agile-music_mark_mulligan_august_20112.pdf).

<sup>33</sup> <http://www.poptent.com/our-solution> (crowdsourcing production of video advertisements)

advantages might not outweigh the cons of having to spend time sifting through submissions, the study authors concluded.<sup>34</sup>

A working definition of crowd sourcing is useful to distinguish it from many other forms of collaboration. On a spectrum of possibilities for adding labor inputs to movie production activities, one end represents pure DIY:<sup>35</sup> Merrick would tell Brook, Trip, and Martha to get lost and do everything himself. He would write the screenplay, seeking no input from others, prepare the shot list, sketch the storyboards, cast himself, scout locations, develop a schedule, set up his camera, lights and sound equipment, shoot himself performing, edit it, and put it up on YouTube. More conventionally, he could recruit others to help him with the screenplay and perform the specialized tasks involve in pre-production, principal photography, editing, and marketing, paying each of them a salary or a fee. Other nearby points on the spectrum represent various compensation arrangements, including deferred payments “Deferred payments” in the movie trade refer to liquidated amounts of pay that are not due until a particular milestone is reached, say the finished movie enters distribution, or earns a certain amount of money.<sup>36</sup> At the far end of the spectrum, Merrick would open every activity to anyone in the world who wants to participate, exercising no particular control over how other people contributed, and allowing the finished product to come together autonomously. Certainly types of on-line video games represent an example of this kind of free-wheeling collaboration, such as Massively Multiplayer Online Role-Playing Games (MMORPGs)<sup>37</sup> allow players to define their own characters, within limits--indeed character evolution is the primary feature of many such games. Increasingly, players may also create other content, altering the in-game culture and modes of social interaction. Most, however, involve an overall framework and game definition controlled by the developer.

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<sup>34</sup> See Steven de Souza & Sunil Rajaraman, Crowdsourcing Creative Content: A Case Study (2011), available at <http://gigaom.com/video/crowdsourcing-creative-content-a-case-study/>.

<sup>35</sup> DIY is a popular acronym for “do it yourself.”

<sup>36</sup> CITE SAGAFTRA low budget agreement.

<sup>37</sup> See [http://en.wikipedia.org/wiki/Massively\\_multiplayer\\_online\\_role-playing\\_game](http://en.wikipedia.org/wiki/Massively_multiplayer_online_role-playing_game).



There's nothing terribly mysterious about the kind of coordination that Merrick must perform. The activities and the decisions are those that must be made by any supervisor delegating work to subordinates. He must make a decision whom to select for a particular tasks. He must give us give clear instructions; he must set deadlines for work product so that the schedules for the pieces coalesce into a coherent schedule. He must evaluate work when it comes then and return it with the instructions for revisions, make the revisions himself, or reassign it to someone else either to make revisions or to start over.

What's different in the crowd sourcing context is that Merrick has less discretion to select his workers; and he has far less managerial authority over them because he doesn't control their careers in the long term. The nature of the compensation arrangements will determine how powerful is his managerial authority. More subtly, both sides of the crowd sourcing relationship will have different expectations about how everyone is supposed to work with each other and with Merrick. They are not part of an ongoing team, with loyalty to each other and to an enterprise. They likely will have expectations shaped by previous freelance creative endeavors rather than a hierarchy of traditional work organizations

How much control the producers exercise, and how collaborators are rewarded for participating, present the central questions for Merrick, Brook, Trip, and Martha as they decide how to use crowd sourcing to develop a good movie.

The following sections address each of the major activities of making a movie. Each explains how crowd sourcing can be used, reviews existing online tools for using it, and identifies major business and property issues that Merrick and his team must resolve in deciding how to use them. Important competition and labor law issues are addressed separately, in § \_\_\_\_.

## **A. Write the screenplay**

### **1. The plan**

The content of the screen play will be influenced by plans for crowd-sourcing other activities. For example, if principal photography is going to be done by different people in different locations, different cast members cannot be used for the same character. The script could be structured however, so that the scenes to be shot remotely by other

people involve characters that appear only in those scenes. Casting, of course, would have to be consistent with such a plan.

In constructing the script, Merrick can use crowd sourcing with varying levels of intensity. At the most intensive end of the spectrum. He could post a synopsis, character breakdowns and/or more elaborate character bios, and an outline of scenes, and solicit writers to write specific scenes from scratch.

He could write the initial scenes setting up the context, introducing the characters, and framing the precipitating event, and then solicit other to write scenes coming after that, according to the outline.

He could write most of the script, and solicit others to write language to fill gaps where he is stuck, or not happy with his own creative work. This could involve tricky dialogue, a challenging interaction between two or more characters, or an escape from a threatening situation. It is certainly common for a writer to have a conversation with a collaborator in which the writer says, "I can figure out how to put him into this situation," or "I can figure out how to get him out of it, so that we set up the rest," "or I can figure out how he would react in a believable way, consistent with his character." The crowd sourcing version of this conversation would be to toss the problem to other writers and see how they solve it.

The most modest approach use of crowd sourcing would involve Merrick writing a complete script and then soliciting critical comment.

Merrick almost certainly will need to preserve creative control; otherwise he will end up with a random collection of scenes that do not fit together coherently, characters that behave inconsistently, and story arc that is not what he envisions. A random selection of YouTube clips is presumably not what he and the others have in mind. That means that collaborator effort must be offered, with Merrick free to accept it or not. The compensation, considered in subsection \_\_\_, could allow compensation for anyone who submits something, or it could provide compensation only if Merrick accepts a submission.

One scene from the screenplay follows. It serves as the basis for the sections discussing shot lists and principal photography:

2       *EXT. - DAY Large swimming pool in the back of a spacious house in*  
3       *Kenilworth.*

4       *Bobby and eight of his friends are cavorting in the pool and on its*  
5       *apron, throwing one another in the water, wrestling, drinking beer.*

6       *Richard enters.*

7                               *RICHARD*

8               *Gentlemen! The neighbors are going to call*  
9               *the police.*

10                              *FRIEND 1*

11               *(his arm around Bobby's neck)*

12               *We'll throw them in the pool.*

13                              *RICHARD*

14               *(muttering to himself)*

15               *Christ! Only one date, and it sure as shit*  
16               *isn't Rob's.*

17                              *BOBBY*

18               *OK, Dad. We'll dial it down.*

19       *Bobby breaks Friend 1's hold and turns to the others.*

20                              *BOBBY (CONT'D)*

21               *Hey! Calm down a little!*

22       *The wrestling and fighting stops. All but one of the friends climb*  
23       *out of the pool and line up more quietly at the bar, pulling beers*  
24       *out of a cooler and opening them. The one friend remaining in the*  
25       *pool starts swimming laps in a graceful Australian Crawl.*

26       *Richard pulls Bobby aside.*

27                              *RICHARD*

28               *I don't mind your bringing your crew*  
29               *buddies over after a race.*

30                              *BOBBY*

31               *I hope not.*

32                              *RICHARD*

33               *But you don't have to be so rowdy.*

34 BOBBY

35 *And I suppose it's out of the question for*  
36 *us to hook up the amplifiers and do a*  
37 *little guitar riffing.*

38 RICHARD

39 *If you must. But keep the volume down.*

40 *Richard hesitates about his next move. He pats Bobby's bare*  
41 *shoulder awkwardly, looks at the others, and exits. Bobby flinches*  
42 *away and regards him resentfully.*

43 BOBBY

44 *(turning towards his friends by the*  
45 *pool)*  
46 *Alright, Phil go get your amp out of the*  
47 *car! Who has my guitar?*

48 RANDOM FRIEND

49 *Will had it last.*

50 WILL

51 *I tossed it off to Justin.*

52 JUSTIN

53 *Nope, I left it with Brendan.*

54 BRENDAN

55 *(pointing)*  
56 *Zach.*

57 BOBBY

58 *God damn it. Zach?*

59 *Zach just shakes his head and lifting his shoulders as in non-*  
60 *verbally saying, "I dunno."*

61 BOBBY

62 *Okay somebody better fes up!*

63 JENNIFER

64 *(tugs on the back of Bobby's shirt)*  
65 *Eh, Bobby?*

66 BOBBY

67                   *Yeah, what? you have my guitar?*

68                   JENNIFER

69                   *(pointing)*  
70                   *That it in the pool?*

71                   BOBBY

72                   *(raises eyebrows, shocked)*  
73                   *Oh god!*

74                   *Bobby jumps into the pool to retrieve his guitar.*

75                   BOBBY

76                   *(getting out of the pool with guitar)*  
77                   *Okay! Somebody is gonna pay for this! This*  
78                   *is a really nice guitar!*

79                   BRENDAN

80                   *(cracking up)*  
81                   *Bull. Shit. You bought that at a thrift*  
82                   *shop.*

83                   BOBBY

84                   *(hesitates, very serious)*  
85                   *So? It's still nice. Can't find that every*  
86                   *day.*

87                   BENJI

88                   *Dude, it was probably you. How much have*  
89                   *you had to drink?*

90                   BOBBY

91                   *Not that much--*

92                   BRENDAN

93                   *(smiling)*  
94                   *Ok--we're cutting you off. It is the*  
95                   *classic sign of a drunk when they forget*  
96                   *that they've had six beers and three jack*  
97                   *and cokes.*

98                   BOBBY

99                   *Four beers.*

100                  *Phil comes back with the amp*

101 *PHIL*  
102 *Alright who's ready to--!*  
103 *Phil notices the off mood.*  
104 *BRENDAN*  
105 *(continuing his talk with Bobby)*  
106 *Whatever, let's riff.*  
107 *BOBBY*  
108 *My guitar--*  
109 *BRENDAN*  
110 *I'll get my fucking guitar.*  
111 *Brendan leaves to go get his guitar.*

## 2. Available sites and software

Plotbot<sup>38</sup> is a free Web-based collaborative screenplay writing tool, advertising the capability of writing with invited friends by tracking changes to the writer.

Celtx<sup>39</sup> provides online screenplay and novel editing tools with the capability of sharing scripts or manuscripts with anyone, giving them comment-only, or editing privileges.

ScriptBuddy<sup>40</sup> allows cloud-based screenplay writing in standard formats, and has tools for sharing for comment, and tools for working with scene outlines and character lists.

Scripted<sup>41</sup> is a cloud-based family of products that permits "writers to simultaneously work on scripts in real time. Create writing groups to collaborate in your very own virtual writer's room. Members can form private groups or choose to make groups public to attract like-minded artists in the Scripted community. Our upcoming

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<sup>38</sup> <http://www.plotbot.com/>

<sup>39</sup> [www.celtx.com](http://www.celtx.com)

<sup>40</sup> <http://www.scriptbuddy.com/products/>

<sup>41</sup> <http://scripted.com/features>

"highlight authorship" and "revision compare" features will soon allow writers to access a comprehensive history of authorship." [scripped.com/features](http://scripped.com/features).

It has formats for screenplays and stage plays, and permits export of scene outlines and separate index cards for each scene.

WriteOurMovie<sup>42</sup> solicits anyone to submit scenes for a movie, which is under development.

Adobe Story<sup>43</sup> permits users to customize formats, import documents from Microsoft Word, track changes, predefine characters and sets, with auto-completion of entries in the body of the script, to share development of the script online with collaborators, to output shooting schedules and shooting scripts, to incorporate production script revisions, and to link to resulting video clips in Adobe's video editing software, Premiere. These and other software capabilities are available online in Adobe's Creative Cloud.

### 3. Business and legal issues

Many of the business and legal issues that Merrick and his team must address are common to every phase of movie making. Accordingly, this subsection treats certain issues in greater depth so that its analysis may be drawn on when pertinent in later sections.

It is not unreasonable to expect that members of the "crowd" will be willing to collaborate on Merrick's screenplay without getting paid for their crowd-sourced contributions. Screenplay writers and playwrights are used to attending readings on early versions of scripts and are accustomed to reading scripts and providing comments as a matter of professional courtesy. It is interesting and artistically stimulating work. Indeed some writers submit their scripts to competitions where they must pay a fee.

If crowdsourced contributors are asked to write major portions, however, some kind of compensation is more likely to be expected: not necessarily a monetary fee, but some share of the earnings if the project is successful.

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<sup>42</sup> [www.writeourmovie.com](http://www.writeourmovie.com)

<sup>43</sup> <http://www.adobe.com/products/story-plus.html>

Exposure of strangers to their work in progress means concern about someone stealing and misappropriating the work is less overblown than usually is the case.<sup>44</sup> Three solutions exist: two legal and one a combination of the practical and legal. Copyright and trademark provide some legal protection. As with all legal protections, however, there are transactions costs for enforcing Merrick's legal rights.

#### *a) Trade secret protection*

The practical solution – rooted in trade secret doctrine – does not involve such high transaction costs for enforcement, but it may impose other costs. A trade secret is any information which confers competitive advantage by virtue of not being known to the general public.<sup>45</sup> The core of trade secret protection is entirely practical: to keep the thing to be protected secret.<sup>46</sup> Merrick would take care always to hold something back that a corrupt contributor needs to exploit the movie. For example if he outsources principal photography, he would outsource considerably less than all of it or – conceivably outsource different pieces to different people under conditions that make it unlikely they would know each other or communicate with each other. Similarly, when he outsources screenplay writing, he would outsource only certain scenes and not the entire screenplay. Likewise with editing: he would outsource editing of particular scenes but not the entire movie.

#### *b) Copyright*

Copyright exists in any original work of authorship expressed in literary or audiovisual form when it is sufficiently “fixed” to permit it to be retrieved and perceived from a tangible medium.<sup>47</sup> One commits copyright infringement by copying, publicly distributing, publicly performing, or preparing derivative works from protectable elements of a copyrighted work.<sup>48</sup> Copyright arises as soon as the originality and fixation requirements are met; no registration with the U.S. Copyright Office is

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<sup>44</sup> One of the hallmarks of an inexperienced entrepreneur is to put far too much energy into worrying about intellectual property and misappropriation of his work before there is any work to protect. Usually, the best course is to devote everything into getting a product likely to interest the marketplace, employment only basic protections such as non-disclosure agreements, and to invest more energy into copyright, trademark, and patent issues only later in the development process.

<sup>45</sup> See Henry H. Perritt, Jr., *Trade Secrets for the Practitioner* (2d ed \_\_\_\_).

<sup>46</sup> See Henry H. Perritt, Jr., *Handbook on Trade Secrets* ch. 6 (20xx).

<sup>47</sup> 17 U.S.C. § 102(a).

<sup>48</sup> 17 U.S.C. § 106.



required, although registration is required as a prerequisite for filing suit for infringement.<sup>49</sup>

If one of their collaborators copies, distributes, or publicly displays the finished movie, the elements of copyright infringement are easy to establish. In earlier phases, however, establishing infringement depends on showing that what the collaborator took is protectable. Misappropriation of outlines and synopses of the movie, likely at the screenplay crowdsourcing stage, or of shotlists and directions for principal photography are likely to depend on Merrick's being able to establish the protectability of the characters and plots in *Miles Travelled*. Stock characters are not eligible for copyright protection because they are insufficiently original,<sup>50</sup> but distinctive characters are.<sup>51</sup> Plots likewise are protectable when they are sufficiently detailed and distinctive, as opposed to being humdrum.<sup>52</sup>

*Miles Travelled* is a distinctive movie. It portrays the conflict between a homophobic father and a gay son, who is torn between remaining closeted with his father while being out with his friends, and the struggle of the father to remain in denial about his son's gayness. This is hardly a generic idea. Presumably, the details of Bobby and Richard are sufficiently detailed and specific in Merrick's screenplay to qualify their characters for copyright protection. Likewise, if the structure of the screenplay satisfies the requisites of good narrative, as summarized in § \_\_\_, the plot also qualifies for

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<sup>49</sup> 17 U.S.C. § 411(a).

<sup>50</sup> "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Learned Hand, J.)

<sup>51</sup> *Halicki Films, LLC v. Sanderson Sales and Marketing*, 547 F.3d 1213, 1224-1225 (9th Cir. 2008) (reviewing caselaw on copyright protection for movie characters; finding that they are protectable if they are "especially distinctive," if they "constitute the story being told," and if they display "consistent, widely identifiable traits," noting protection for movie characters *Godzilla*, *James Bond*, and *Rocky Balboa*); *Warner Bros. Entertainment, Inc. v. X One X Productions*, 644 F.3d 584, 597 (8th Cir. 2011) (holding that copyright in movie extends to characters themselves if characters are sufficiently distinctive).

<sup>52</sup> See *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993) (affirming judgment and injunction on copyright infringement by book about popular television series; finding infringement and no fair use from "PIL's use of the protected expression in the teleplays consists primarily of summarizing in great detail the plots of the first eight episodes").

protection. Even if Merrick posts only a general description of Miles Travelled, the description is likely to be specific enough to qualify for copyright protection.<sup>53</sup>

TMTV, Corp. v. Mass. Productions, Inc.,<sup>54</sup> involved a dispute among collaborators who developed a comedy segment for a TV variety show. Some of the characters were based on roles from previous productions the actors had been involved in. The court of appeals opinion details some of the disputed facts:

"After this discussion of ideas, Logroño asked Morales to write scripts for two of the first three episodes of 20 Pisos and Jiménez to write the third. Logroño's recollection was that he framed the plots of all three, and Morales and Jiménez merely prepared dialogue to conform to Logroño's storylines. By contrast, Morales claims that he wrote the two scripts at home, by himself, based on the general concepts aired at the meeting; similarly, Jiménez claims to have taken the general ideas from the session and fixed them in writing for the first time.

"The writers delivered their scripts to Logroño, who retyped all three using special screen-writing software. On the cover pages, Logroño listed Morales as the author of episodes one and three and Jiménez as the author of episode two. Logroño claims to have made substantial changes in the scripts given to him, but the trail of drafts shows only minimal editing. And while Logroño appears to have co-written a number of later scripts for 20 Pisos, these reflected themes and characters set up in the first three episodes."<sup>55</sup>

The court of appeals affirmed summary judgment for the other collaborators against one (Logrono) who withdrew from the collaboration and set up his own TV series with

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<sup>53</sup> See *Forest Park Pictures v. Universal Television Network, Inc.*, \_\_\_ F.3d \_\_\_, No. 11-2011-cv, 2012 WL 2382528 (2d Cir. June 26, 2012). *Forest Park* involved a dispute over a "treatment" for a television series, which included character bios, themes and storylines. The plaintiff pitched the concept and received a favorable reaction, but the defendant ended up airing a similar program by someone else without paying the plaintiff anything. The plaintiff sued for breach of contract under state law, and the district court held that the claim was preempted by the copyright act. The court of appeals reversed, finding that the treatment qualified for copyright protection but that the extra elements of the contract claim saved it from preemption.

<sup>54</sup> 645 F.3d 464 (1st Cir. 2011).

<sup>55</sup> 647 F.3d at 467.

the same setting and most of the same characters.<sup>56</sup> It held that the defendant had not added enough value either to the original concepts and characters or to the second series to qualify for copyright protection.<sup>57</sup>

### *c) Joint copyright<sup>58</sup>*

The more ambitious forms of crowd sourcing would produce a screenplay that would qualify as a joint work,<sup>59</sup> in that the collaborators intend for their contributions to be merged into a single work, and each of their contributions would qualify for copyright protection as original works. "Each co-author of a joint work has the right to use or license use of the work, subject to accounting to the other co-owners for any profits."<sup>60</sup> Joint copyright owners are treated as common-law tenants in common, each having the power independently to use and license the joint work, subject to the duty to account to co-owners for profits. Each also has the power unilaterally to sell or give away his interest.<sup>61</sup>

Authors of a "joint work" own the copyright as tenants in common, unless they explicitly agree to other arrangements. Courts differ on their interpretations of the 1976 Copyright Act's section 101 definition of a "joint work." Section 101 states that "A 'joint work' is a work prepared by two or more authors with the intention that their

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<sup>56</sup> 645 F.3d at 471 (finding the two series virtually identical in every important respect).

<sup>57</sup> Id. at 471.

<sup>58</sup> Jeremy B. Abrams, the author's research assistant, performed the research and drafting for this section.

<sup>59</sup> "A 'joint work' is 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." 17 U.S.C. § 101.

<sup>60</sup> *Donavan v. Quade*, 830 F. Supp.2d 460, 494 (N.D. Ill. 2011), *Donavan* involved a dispute between two co-developers of a stage play. The plaintiff was a playwright, producer, and actor. The defendant was a playwright, producer, and director. 830 F. Supp. at 475-476 (describing parties). They registered as co-authors of the play. A written partnership agreement provided that the partners would share equally in revisions of the play and its characters and such other plays or scripts they might develop together. 830 F. Supp.2d at 477. The district court held that the partnership agreement did not entitle the non-contributing partner to a share of profits from a solely authored sequel involving the main character of the jointly authored play. 830 F. Supp. 2d at 493. The court awarded a one-third share of the royalties for a sole-authored derivative work featuring the main character from the joint work, under the duty imposed by copyright law for one joint author to account to the other for earnings from the joint copyright. 830 F. Supp.2d at 496.

<sup>61</sup> *Brownmark Films v. Comedy Partners*, 800 F. Supp.2d 991, 996 (E.D. Wis. 2011) (acknowledging intercircuit disagreement as to where one joint owner may unilaterally grant an exclusive license in the joint work to a third party).

contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (West). The broad nature of this language has led numerous courts to construe its meaning liberally in order to fulfill the purpose of the Act. For example, the courts add a contribution requirement (although not mentioned in section 101), and modify the requisite intent.

### (1) Contribution Requirement

Although section 101 does not make mention of a minimum contribution requirement, appellate courts infer the existence of such a requirement (albeit, for different reasons). Two general rules have developed: the first is that “[t]here has to be some original expression contributed by anyone who claims to be a co-author, and the rule...is that his contribution must be independently copyrightable.”<sup>62</sup> The second rule is complementary: the “scènes à faire doctrine” states that a contributor cannot copyright—and thus cannot claim joint ownership of—ideas “that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”<sup>63</sup> The same concept is at the heart of Professor Nimmer’s “de minimus” test, which “requires that ‘more than a word or line must be added by one who claims to be a joint author.’”<sup>64</sup> This rule prevents the creation of a restrictive atmosphere in which “[i]t would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses.”<sup>65</sup>

Both rules intend to further the purpose of the 1976 Copyright Act by raising the admittedly low bar for owning a copyright. However, the Seventh circuit has acknowledged that the first rule (requiring that each contribution be “independently copyrightable”) is a Catch-22: on the one hand, the rule prevents the world of writing from exploding into pandemonium as one alleged author after another files

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<sup>62</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) (Posner, J.); see also *Gaylord v. United States*, 595 F.3d 1364, 1377 (Fed. Cir. 2010) (stating that “as a general rule, each joint author must make an independently copyrightable contribution to the work.”); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233-1234 (9th Cir. 2000).

<sup>63</sup> *McFarlane*, 360 F.3d 644, 659 (quoting *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir.2003)); see also *Gaylord*, 595 F.3d at 1377 (“Joint authorship requires ‘an original work of authorship’ from each author”) (quoting, [CCNV](#), 846 F.2d at 1495).

<sup>64</sup> *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994) (quoting *Nimmer* § 6.07, at 6-21).

<sup>65</sup> *McFarlane*, 360 F.3d 644, at 660.

infringement (or accounting) claims; on the other hand, the rule makes collaborative works that lack individually copyrightable contributions not copyrightable (hence eliminating collaborative authors' incentive to create and defeating the purpose of the bill). The Seventh Circuit has thus acknowledged an exception to the "independently copyrightable" rule when no individual contribution meets this standard.<sup>66</sup>

## (2) Intent Requirement

The text of section 101 requires only that co-authors share intent to merge their contributions into a unified work. Many courts, however, have been convinced that, "an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress."<sup>67</sup> A stricter standard, however, has been imposed by the courts, which requires that contributors, not only mutually intend to merge their independent works, but also that they mutually intend to be joint authors of the resulting amalgamation.<sup>68</sup> In other words, alleged co-authors' intent merely to merge their works into a unified whole does not satisfy the intent requirement of section 101.

For example, consider a situation in which there are three contributors: A (a cinematographer), B (a screenwriter) and C (a musician). Assume that A agrees to shoot a scene for B's screenplay. Meanwhile, C agrees to record the sound for the same screenplay. A tells B that she intends to have her independent work (e.g., the video segment) merged with B's dialogue and C's musical recordings. She does not, however, intend to be considered an author of the unified work. On the other hand, C fully intends to merge her independent work (e.g., the sound recordings) with A's footage and B's dialogue, and intends to be an author of the unified work. B tells A and C that

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<sup>66</sup> *Id.* at 658-59; see also *Brown v. Flowers*, 196 F. App'x 178, 189 (4th Cir. 2006) (dissenting opinion) ("I would recognize that an individual who, in collaboration with another, provides a substantial original contribution to a copyrightable work satisfies the authorship requirement, regardless of whether his contribution, standing alone, would be individually copyrightable.").

<sup>67</sup> *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

<sup>68</sup> *Id.* at 508; see *Erickson* 13 F.3d at 1068-1070; *Gaylord*, 595 F.3d at 1377.

she shares each of their respective intentions. Additionally, C tells A that she does not intend for him to be an author of the unified work.

In this situation, A does not satisfy the intent requirement of section 101 because A, B, and C merely intend for A to merge A's contribution with the Contributions of B and C. Neither A, B, or C intend for A to be an author of the unified work. In order for A to be an author, all three would have mutually to intend for A to be an author. C, however, does satisfy the intent requirement of section 101 because C, B and A intend to merge their independent works, and both B and C (the only other author) intend for C to be an author of the resulting amalgamation.

### (3) Inferring Intent

Numerous devices are available to infer the intent of contributors. The second circuit has identified decisionmaking authority, billing, written agreements with third parties, and more (such as testimony) as evidence that may support or deny a contributor's claim that he is a joint author.<sup>69</sup> The Ninth Circuit approaches intent similarly but more generally, placing just as much emphasis on decisionmaking authority (which the Court calls the exercise of control), and written agreements (which the Court labels "[t]he best objective manifestation of a shared intent.").<sup>70</sup> The Ninth Circuit also gauges the value of a contribution based on how that particular contribution impacts the overall "audience appeal" of the completed work.<sup>71</sup>

### (4) Timing of Intent

Generally, the determinative intent is that which the contributors shared at the time the work was created.<sup>72</sup> With that said, the Ninth Circuit has alternatively refused to set forth a "rigid formula" for when to determine intent, stating that "[d]ifferent people do creative work together in different ways, and even among the same people working

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<sup>69</sup> *Thomson v. Larson*, 147 F.3d 195, 202-05 (2d Cir. 1998).

<sup>70</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

<sup>71</sup> *Id.*

<sup>72</sup> *Thomson*, 147 F.3d at 199; see *Janky v. Lake County Convention And Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009).

together the relationship may change over time as the work proceeds.”<sup>73</sup> That means that a joint work may result, even when contributors did not intend, at the outset, that it be joint, but decide only later, after they had created it.

#### *d) Copyright assignment*

It is unlikely that Merrick and his co-producers would be willing to give up so much power to exploit their movie. It may prove hard enough for the three of them to get along if the movie is successful.

Merrick could assure himself of greater control by requiring that contributors assign their copyrights to him, which would result in his being the sole copyright owner of the screenplay.<sup>74</sup> Whether or not is then is characterized as a collective work<sup>75</sup> would not matter. The contract assigning the copyright to could whatever provision for fees or future shares in the profits from the movie that the parties want.

A standard collaboration agreement for playwrights and screenwriters, distributed by the Dramatists' Guild, allow the joint authors to specific percentages that each shall own, and obligate them to register the work with the Copyright Office in all their names, if they elect to register it. It prohibits any of the co-authors from transferring the work or their shares in it.<sup>76</sup>

Who owns the copyright in rejected submissions presents tricky questions. Merrick must be wary of taking the position that he is not infringing the copyright of submissions that he rejects and doesn't use. He almost certainly will be subtly

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<sup>73</sup> *Aalmuhammed*, 202 F.3d at 1235; *see also Gaylord*, 595 F.3d at 1380 (“Although it arose after the creation of the statues in their final form, the 1995 agreement reflects the understandings of Cooper-Lecky and Mr. Gaylord with respect to authorship of *The Column* and ownership of its copyright. The 1995 agreement crystallizes the intentions of the parties, which are manifest from the 1994 agreement and actions of the parties preceding the creation of *The Column*.”)

<sup>74</sup> *See Morris v. Business Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002) (recognizing that author of a collective work also may own the copyright in constituent parts authored by others if they transfer their copyrights to him).

<sup>75</sup> “A ‘collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101.

<sup>76</sup> <http://jamesaconrad.com/writing/screenwriters-collaboration.html> (screenwriting collaboration contract forms), pointing to <http://jamesaconrad.com/writing/screenwriters4-collab-print.html>.

influenced to some degree by the vision expressed in the rejected submissions, for example, locations, character characteristics, and the ways the characters interact with each other. Under long-standing guidance for copyrightability of fictional characters, the greater the specificity of what the submitters come up with, and the greater the similarity of what Merrick ends up with, the greater the likelihood that a rejected submitter could recover for copyright infringement.<sup>77</sup> Rejected submitters are going to be far less attached to the project unsuccessful submitters, and indeed might be motivated to litigate simply because of their rejection.

The best way to protect the producers against this risk is to ensure that at least a basic agreement providing for assignment of copyright to Merrick must be executed before someone may submit anything. That agreement must be reasonably evenhanded and fair, or submitters will be discouraged from participating. It might preserve submitter rights in literal expression, while giving up only broader rights in characters, locations, or plot concepts.

Trademark protection depends on the use of a trade or service mark in commerce. That requirement is unlikely to be satisfied until the movie is finished and distributed and exhibited. Accordingly, analysis of trademark protection is deferred until § \_\_\_\_.

## **B. Develop a shot list**

### **1. The plan**

Extracting a shot list from the script can be a mechanical process, if the screenplay contains detailed shooting instructions. If it does not, considerable creative judgment enters into deciding how particular scenes will be shot. Which crowdsourcing approach Merrick elects depends on which he needs. If he mistrusts his artistic judgments about the best way to portray scenes visually, he is more likely to crowd-source the process—although Brook is a cinematographer and likely will want to weigh in on those judgments.

An example of a scene and shot list follows:

*Scene description,*

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<sup>77</sup> CITE Harry Potter, Haulden Caulfield, older Brandeis cases.



*Bobby, one of the main characters and subjects of the plot, is hosting a pool party at his conservative father's house. It is late in the day and the sun is setting. The party isn't out of control but it is wilder and noisier than would be typically accepted within an upper class suburban community. The friends are muscular, athletic and generally attractive. Everyone is in bathing suits. Only one female is present—and attractive young woman. Bobby's father comes out early in the scene to ask Bobby and his friends to quiet down. Bobby looks for his guitar to play with his friends. His friends leave briefly to get amplifiers. When Bobby finds it in the pool, he becomes irate. The friend returns with the amplifiers and Brendan leaves to go get his guitar. Everybody is wearing bathing suits except for Bobby's father, who wears professional attire. Some characters can also be wearing flip-flops or towels.*

#### *Shot list*

*Shot 1: long shot establishing view of backyard pool. (lines 2-6)*

*Shot 2: medium shot of Bobby's father Richard shouting at Bobby and his friends. (lines 7-12)*

*Shot 2A: close shot of Richard (lines 13-16)*

*Shot 3: close shot of Bobby responding to Richard. Bobby is in the pool. (lines 17-19)*

*Shot 4: medium shot of Bobby's friends rough housing and ignoring Bobby. Bobby shouts at friends. (lines 20-21)*

*Shot 5: Long shot of most friends exiting pool. (lines 22-25)*

*Shot 6: medium shot of Bobby getting out of pool to talk to Richard. (line 26)*

*Shot 7: big close shot of Bobby talking to Richard. Pool visible beyond them. (lines 27-39)*

*Shot 8: medium shot of Richard going inside and Bobby returning to the party. (lines 40-42)*

*Shot 9: close shot of Bobby asking his friend to go get an amp. (lines 43-47)*

*Shot 10: close shot of Bobby's friend responding to Bobby (lines 48-49)*

*Shot 11: close shot of Will responding to Bobby's friend (lines 50-51)*

*Shot 12: close shot of Justin responding to Will (lines 52-53)*

*Shot 13: close shot of Brendan responding to Justin and pointing to Zach (lines 54-56)*

*Shot 14: close shot of Bobby talking to Zack (lines 57-58)*

*Shot 15: close shot of Zach shaking his head in response to Bobby (lines 59-60)*

*Shot 16: medium shot of Bobby yelling at his entire group of friends (lines 61-62)*

*Shot 17: close shot of Jennifer tugging on Bobby's shirt (lines 63-65)*

*Shot 18: close shot of Bobby responding to Jennifer (lines 66-67)*

*Shot 19: medium shot of Jennifer responding to Bobby and pointing to guitar in the pool. Guitar can be seen floating in the pool (lines 68-70)*

*Shot 20: medium shot of Bobby shouting, jumping into the pool and retrieving his guitar (lines 71-74)*

*Shot 21: close shot of Bobby pulling himself out of the pool with his guitar in hand (lines 75-78)*

*Shot 22: medium shot of Brendan laughing and speaking to Bobby. Brendan is sitting down looking up at Bobby (who is standing). Bobby is irate. (lines 79-82)*

*Shot 23: close shot of Bobby responding to Brendan. (lines 83-86)*

*Shot 24: medium shot of Benji talking to Bobby (lines 87-89)*

*Shot 25: big close shot of Bobby responding to Benji (lines 90-91)*

*Shot 26: close shot of Brendan talking to Bobby (lines 92-97)*

*Shot 27: big close shot of Bobby responding to Brendan (lines 98-99)*

*Shot 28: long shot of Phil entering the backyard with his amp (lines 100-102)*

*Shot 29: medium shot of Phil noticing the upset mood of the other characters (line 103)*

*Shot 30: medium shot of Brendan speaking to the group (lines 104-106)*

*Shot 31: medium shot of Bobby responding to Brendan (lines 107-108)*

*Shot 32: medium shot of Brendan responding to Bobby and then standing up and walking away to get his guitar (lines 109-111)*

This scene, and the associated documentation for crowd sourcing the shooting of it were deliberately written to highlight a problem Merrick's team must work around. The three main characters: Bobby, Richard and Brendan all appear in the scene. The movie will not work if different actors play the main characters in different scenes. Moving the three principal actors around the country or around the world where different scenes are shot by different people is infeasible. That means that Merrick must shoot all the scenes containing Richard, Bobby, and Brendon himself and outsourced only shots that do not include them. This approach has limits, however. Merrick should shoot the shots in the pool scene for example that contain Bobby, Brendan, and Richard, and outsource the establishing shots of the house and pool and the crowd shots. Only shots 1, 5, 13, and part of shot 4 do not involve the principal characters. Shooting of these shots could be outsourced, or the screenplay could be rewritten to contain more shots of the friends, without the principal characters. But that would post significant challenges for editing: because of the difficulty of getting the background – for example the pool and its relationship to the house, exactly the same for the shots to be intercut.

## **2. Available sites and software**

Software tools exist that extract shotlists from scripts<sup>78</sup> For example, Celtx AV documents contain the necessary information for shot lists, which can be output via the TypeSet feature.

## **3. Business and legal issues**

It is relatively unusual for screenplay writers, directors, and cinematographers to farm out the development of shotlists once they have an acceptable script. The skill involved overlaps screenplay writing, directing, and cinematography. Writers are unaccustomed to cash payment for collaboration, directors are accustomed to taking a share of the earnings, and cinematographers are accustomed to cash payment for their services.

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<sup>78</sup> . <http://wiki.celtx.com/index.php?title=Shotlist>; [http://wiki.celtx.com/index.php?title=Celtx\\_for\\_AV](http://wiki.celtx.com/index.php?title=Celtx_for_AV).

As Merrick and his team solicit proposals for development of a shot list, they should expect respondents to have their attitudes toward financial participation shaped by the field in which they are most accustomed to working. They certainly can pitch the opportunity as one that will help younger moviemakers to develop their network and show their talents. The pitch, of course, will be credible only if Merrick and Brook offer some kind of credit for crowdsourced contributions by shot-list makers—more than simply being listed in the concluding credits of the finished film. Some kind of public competition among contributors might be useful in this regard.

The framework for intellectual property in shot lists is similar to that for the screenplay, except that the description of a single shot pulled from an existing screenplay contains far less original creation than a complete scene written to fit into an existing story outline. Therefore the claim by a shot list contributor to copyright in his own work is weaker.

In any event, Merrick and Brook should be just as aggressive in protecting their intellectual property—including both copyright and trade secret in any screenplay materials they make available to potential developers of shot lists.

## C. Create storyboards

### 1. The plan

Merrick and his team must decide how elaborate they want their storyboards to be. If stick-figure diagrams are sufficient, they may elect to create them themselves, as part of the process of defining a shot list. If they prefer to delegate the work, or if they need more detailed and pictorial storyboards, they may crowd-source the artistic endeavor.

The more detail they provide to storyboard creators, the more control they have over the video depiction of their story. On the other hand, they may welcome the collaborative mobilization of other creative ideas, either with respect to the entire script, or with respect only to particular scenes where which they feel stuck on how best to portray them visually.

## 2. Available sites and software

Some vendors offer to create storyboards and to work interactively in real time, online.<sup>79</sup> Other sites offer online creation of storyboards.<sup>80</sup> The Reelclever tools allow management of story boards by scene, and have standard entries for shooting angle, location, and shooting date. Users can upload pictures. Others offer tools for creating and sharing mockups.<sup>81</sup>

## 3. Business and legal issues

As with shot lists, development of storyboards by anyone other than the screenplay writer, director, or cinematographer is unusual. Writers are less likely to develop storyboards than cinematographers. Directors fall somewhere in the middle.

As with contributors of shot lists, Merrick and Brook must be careful to protect their intellectual property in the screenplay, and may be able to induce crowdsourced contributors to prepare a limited number of storyboards for free, if they take imaginative steps to publicize the contributors' work.

It may be that story-board preparation should be integrated with principal photography, in the sense that candidates for principal photography could be asked to submit storyboards as the first step in any competition to be selected actually to shoot scenes.

## D. Audition and select a cast

### 1. The plan

Casting, whether for a movie, a play, or modeling, involves getting the word out to as many potential candidates as possible, while limiting the outreach to those likely to be interesting. It must give the candidates enough information about the work so they can evaluate whether they are qualified. It must advise them when and where to audition, and how they must prepare. In the crowd-sourcing context, a casting call<sup>82</sup> will solicit audiovisual recordings. A typical audition process involves an initial round, and then a

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<sup>79</sup> See <http://www.storyboards.com/>

<sup>80</sup> See <http://generator.acmi.net.au/storyboard/byo-intro>; <http://www.reelclever.com/Blog/show/online-storyboard-software> ("If you create a storyboard on a public project then a storyboard teaser will be created on the films' public page, letting followers engage in the pre production processes").

<sup>81</sup> See <http://www.balsamiq.com/products/mockups>.

<sup>82</sup> A casting call is the same thing as an audition notice.

callback round. Only the most interesting three or four actors from the first round are called back for the second round. Usually, candidates perform something of their own choosing for the first round, and something specified by the casting director for callbacks—usually including an excerpt from the work for which they are auditioning.

To achieve the first objective—maximizing the scope of the outreach—Merrick and his team must use existing sites that have significant traffic from actors. If they construct a site of their own, they must have a feasible plan for attracting traffic to it.

Their instructions must be clear as to how to submit video auditions. Requiring actors to go to a studio to shoot a video audition will decrease the pool of candidates because it imposes higher costs on them. Virtually everyone has a smartphone with video capability, and that may be good enough for the first round, with more elaborate setups (and quality) required for callbacks.

Merrick could impose geographic limits. If the movie is going to be shot by multiple people, the candidates for particular characters need to be located near where they will be shot. This suggests that it may be efficient to delegate casting to—or at least to coordinate casting with-- those involved in principal photography.

#### Cast breakdowns

Audition notices almost always include a “breakdown” for each character being cast, for example:

***Bobby:** 18 years old, handsome—almost pretty, light-brown or blond hair. Fit and athletic looking. Slightly swishy in manner. Impulsive; oscillates between defiance and submissiveness.*

***Brendan:** 18 years old, handsome in a masculine way. Light-brown or blond hair. Fit and athletic looking. Steady and confident.*

***Richard:** 50-65 years old. Graying, out of shape. Able to range from experienced confidence and remoteness to great tenderness, with befuddled lack of concentration in between.*

The instructions for casting for remote, crowdsourced shooting should be more general:

*Each actor should be male, fit and athletic looking. Should be able to roughhouse with other actors convincingly.*

## **2. Available sites and software**

Some casting directors solicit only video auditions.<sup>83</sup> Others, including popular television programs, offer an option between traditional casting calls and video submissions.<sup>84</sup> Little will be lost by posting audition notices on popular sites and sending candidates to another site which makes it easy to submit videos for *Miles Travelled*. SAG-AFTRA permits those who sign up to post casting calls for free.<sup>85</sup> SAG—the Screen Actors Guild—and AFTRA—the American Federation of Television and Radio Actors—merged in in 2012.<sup>86</sup> An ordinary Facebook page makes it easy for “friends” to post their own videos. The downside of using Facebook is that each candidate’s audition video will be visible to other candidates.

## **3. Business and legal issues**

Big movies and stageplays hire casting directors, who expect to be paid. On the other hand, no actor expects to be paid for the privilege of auditioning. If Tripp, with involvement by Merrick and Brook directly arrange and conduct the auditions, they need not budget any outlays for this part of the process.

Whether the actors, once they are cast, expect cash payment is a more difficult questions. Many young actors are used to working for free. They do it because they enjoy it and because it helps them gain exposure. Others work for small amounts of money--\$100 for the full run of a play, or for participating in several days of shoot. Actors in small movies often agree to forego any cash payment in exchange for “deferred” payments, due only after the movie is exhibited and starts to earn revenue.

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<sup>83</sup> See Daniel Lehman, Casting Kids via Online Auditions for 'The Book Thief' Film Adaptation, <http://www.backstage.com/bso/news-and-features/casting-kids-via-online-auditions-for-the-1007072552.story?imw=Y>.

<sup>84</sup> See

<http://www.nbcthevoice.com/how-to-audition/video-submissions.php> (instructions for submitting video audition); <http://www.thexfactorusa.com/auditions> (describing options for online auditions); <http://www.nbc.com/the-voice/audition-online/> (describing rules for submitting auditions online)

<sup>85</sup> [http://www.sagindie.org/cgi/user.cgi?page=casting\\_create](http://www.sagindie.org/cgi/user.cgi?page=casting_create).

<sup>86</sup> See SAG-AFTRA Merger Agreement, [http://www.sagaftra.org/files/sagaftra/sag-aftra\\_merger\\_agreement.pdf](http://www.sagaftra.org/files/sagaftra/sag-aftra_merger_agreement.pdf) (Jan. 28, 2012).

SAG-AFTRA imposes strict limits on deferred payment arrangements, not allowing them for, even, “ultra-low-budget” commercial movies,<sup>87</sup> while allowing deferral for short movies.<sup>88</sup> The deferred compensation, at \$100 for each day worked, is due before ordinary exhibition of the short movie.<sup>89</sup> The premise for this requirement is, presumably, that exhibition will not occur until the producer has raised additional capital and some of this capital should go toward compensating the actors for their now completed work.

Tripp and his team can take three basic approaches to deferred compensation, reflected in the contract language set forth below:

***1. Piece of the action.** The Producer promises to compensate the Actor for the his or her performance by paying the Actor 2% of net profits from all distribution and exploitation of the Picture (including Picture trademarks, service marks, logos, slogans, likenesses, names, voice, or dialogue), including royalties, dividends, or payments of any kind arising from theatre, television, video, CD, DVD, or internet distribution and exploitation. Net profits shall be determined in accordance with generally accepted accounting principles. Payment will be made to the Actor on a quarterly basis in perpetuity as Producer receives such monies. Actor is entitled to obtain an audit of Producer’s financial records at his or her own expense.*

***2. Deferred cash payment.** The Producer promises to compensate the Actor for the his or her performance by paying the Actor a sum equal to \$100 per day for each day the Actor physically works on the production of the Picture. All payments will be deferred and paid from net profits, as they become available. Actor entitlement to deferred payment shall be reduced pro-rata with payments due to other actors on the Picture. from all distribution and exploitation of the Picture (including Picture trademarks, service marks, logos, slogans, likenesses, names, voice, or dialogue), including royalties, dividends, or payments of any kind arising from theatre, television, video, CD, DVD, or*

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<sup>87</sup> See § \_\_\_\_ (discussing SAG-AFTRA contract provisions).

<sup>88</sup> See SAG-AFTRA, Short Film Agreement, [http://www.sagindie.org/docs/sag-short\\_film\\_agreement-2011.pdf](http://www.sagindie.org/docs/sag-short_film_agreement-2011.pdf). The maximum running time is 35 minutes, and no more than 30 days of principal photography. Id. at § 3. A short movie may be exhibited without compensation of actors at film festivals to the Academy for award consideration, in conjunction with which the movie may be exhibited in a paying movie theatre for up to one week. Id. § 5.

<sup>89</sup> Id. § 6.



*internet distribution and exploitation. Net profits shall be determined in accordance with generally accepted accounting principles. Payment will be made to the Actor on a quarterly basis in perpetuity as Producer receives such monies. Actor is entitled to obtain an audit of Producer's financial records at his or her own expense.*

Both approaches require trust that Tripp and his team will account for revenues and expenditures honestly and in good faith. It is common in Hollywood, for example, for Producers to allocate costs, including overhead, so that movies providing for deferred compensation from profits never make a profit.<sup>90</sup> Variations on these approaches give priority to deferred compensation over all other costs, or priority over specified costs such as overhead or compensation to members of the Production team. The extreme version of this assurance is to make deferred payments due from total revenue, rather than from total profits.

Before casting is finalized, Tripp should obtain from each actor an assignment of copyright and an assignment of the actor's right of publicity. Assignment of copyright is considered in § \_\_\_\_\_. The right of publicity is conferred by statute in some states.<sup>91</sup> In other states an equivalent right exists as part of the common law right of privacy, although this particular branch of the tort is better understood as a property right.<sup>92</sup> "Throughout the tort's development, its underlying purpose has been to protect a person's name, likeness, voice, and biographical data from exploitation by others who seek economic or other benefit from that use."<sup>93</sup>

The following language would be appropriate:

*Actor, in exchange for Producer's performance under this agreement, hereby agrees that:*

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<sup>90</sup> CITE.

<sup>91</sup> See Indiana Code sec. 32-36-1-7 (defining right of publicity as encompassing name; voice; signature; photograph; image; likeness; distinctive appearance; gestures; or mannerisms). "A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent . . . ." Indiana Code sec. 32-36-1-8.

<sup>92</sup> Hart v. Electronic Arts, 808 F. Supp.2d 757, 772-774 (D.N.J. 2011) (reviewing right-of-privacy tort at common law, and granting summary judgment to defendant on First Amendment grounds; suit by college football player against producer of football video games).

<sup>93</sup> Hart, 808 F. Supp.2d at 772-773 (applying Restatement of Torts 2d definition).

*(1) The actor's performance under this agreement constitutes a work made for hire;*

*(2) The Actor hereby assigns any copyright he may have in his performance to Producer; and*

*(3) The Actor hereby assigns any right of publicity recognized by the common law or conferred by statute to Producer.*

If an actor is unwilling to make such an unlimited assignment, Tripp must make sure that the assignment of copyright and publicity rights covers the range of distribution and exhibition channels and media Merrick and his team are likely to use – promotional clips, stills, sequels, Internet streaming, Internet downloading.

At the casting stage, Merrick and his team must decide whether to include union actors represented by SAG-AFTRA. Most professional movie and TV actors become members of SAG-AFTRA as their careers begin to take off. Even the "ultra-low-budget agreement,"<sup>94</sup> limits the budget to \$200,000, exclusive of deferrals, requires classification of the covered actors as employees rather than independent contractors, requires submission of detailed budget information and the final version of the movie to SAG-AFTRA,<sup>95</sup> requires payment of \$100 per day to each performer,<sup>96</sup> limits work to eight hours per day with scheduled meal periods,<sup>97</sup> requires a contribution of 16.8% of covered payroll to the SAG-Producers Pension and Health Plans,<sup>98</sup> and requires the Producer to grant a first-security interest in the movie to SAGAFTRA, at the union's option.<sup>99</sup>

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<sup>94</sup> Screen Actors Guild, Independent Producers' Ultra Low Budget Letter Agreement, [http://www.sagindie.org/docs/sag-ultra\\_low\\_budget\\_agreement-2011.pdf](http://www.sagindie.org/docs/sag-ultra_low_budget_agreement-2011.pdf).

<sup>95</sup> Id. § 2.

<sup>96</sup> Id. at § 6.

<sup>97</sup> Id. at § 8.

<sup>98</sup> Id. at § 9.

<sup>99</sup> Id. at § 15.

## E. Interview and select a production team

### 1. The plan

Merrick will perform script supervisor functions, assuring that actors stick to the script and monitoring continuity—preventing an actor from wearing socks in one scene and no socks in a contiguous scene meant to portray the same location at the same time, and similarly assuring that props are in the same place. Brook will be director of photography, camera operator, and editor. Martha will be the first assistant director, responsible for location scouting, scheduling, adherence to the schedule, and commissary.<sup>100</sup> Tripp, as a co-producer as well as an actor, can be called upon to perform miscellaneous functions not otherwise covered.

This team probably can make an acceptable movie among the four of them. But it will be easier, if they also have some of the following:

- an assistant camera operator,
- a sound operator,
- a props master,
- a costume designer and wardrobe manager,
- a gaffer (chief lighting technician), and
- a key grip (responsible for set and correct lighting and blocking)
- an assistant editor.

Reliability and a good work ethic are more important qualities than specialized experience, although it is obviously desirable that the sound operator not be a completely neophyte in how digital sound equipment works. Likewise, a costume designer should have good instincts about clothing, colors, and how to make appropriate selections from actors' own wardrobes.

All four members of the team are likely to know people from Northwestern and other programs who can be recruited. Recruiting someone that they have already worked with reduces risk of unknown personality traits looming later as problems.

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<sup>100</sup> Most of what actors do on a movie set is wait. They need food and drink, at least on shoots lasting more than a couple of hours, and they also are happier if they have something to munch on while they are waiting.

Gaps can be filled with strangers, but it is essential that members of the team who will work most closely with them conduct face to face interviews and assure that the personal chemistry is right, as well as selecting according to objective criteria.

If Merrick and his three co-producers intend to do the principal photography themselves, any other production personnel must be available in nearby locations, without undue scheduling conflicts. If they outsource some of the principal photography, the other production personnel for each part of the movie to be shot elsewhere (except for the assistant editor) must be available where the shooting takes place.

## 2. Available sites and software

Craigslist is the obvious choice for recruiting production personal. It has an extensive reach, lots of traffic, and people looking for freelance moviemaking opportunities regularly monitor it.<sup>101</sup> Depending on the location, specialized web notice boards, such as BackStageJobs.com, allow posting of notices similar to audition notices.<sup>102</sup>

BackStageJobs.com offers similar postings for more than sixty metropolitan areas. BackStageJobs.com concentrates on the live entertainment industries, extending outward from live theatre. It permits posting of opportunities, and also permits postings by persons seeking work. Filmcrewpro.com is a similar site that, as its name suggests, focuses on movies. It allows candidates to register to review listings of opportunities, but only if they have three or more "professional TV or film credits," are union members, or have graduated from a film or TV production course lasting longer than a year.<sup>103</sup> It allows producers to post opportunities, sending details directly to subsets of crew professionals. Producers may track responses, review profiles and showreels online. They also can search a database of registered crew candidates, by skill, experience, and location.<sup>104</sup>

Once the production team is selected, a variety of online tools exist for managing their collaboration. Most of them allow those identified with a particular project to share

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<sup>101</sup> The author has successfully recruited candidates for directing movies, stage managers, editors, and other supporting personnel, multiple times, through Craigslist

<sup>102</sup> See e.g. <http://backstagejobs.com/jobs.php?region=chicago>.

<sup>103</sup> <http://www.filmcrewpro.com/us/candidate.php>.

<sup>104</sup> <http://www.filmcrewpro.com/us/employer.php>.

schedules, files, milestones, and progress reports, and to track time and expenses.<sup>105</sup> Pricing varies, but typically starts at about \$25 per month, with some varying by the number of users.

### 3. Business and legal issues

There is no standard approach for compensating members of the production team. Some, more experienced people will want either a monetary fee, ranging from a few hundred dollars to a few thousand, or will insist on a piece of the action. Their willingness to accept a piece of the action instead of monetary payment will depend on their assessment of the artistic merit and commercial potential of the screenplay, and the credibility of the other members of the team.

## F. Location scouting and selection

### 1. The plan

Martha must consider multiple criteria to determine acceptable locations for shooting. A good location must resemble the fictional location to be portrayed in a scene. It must be reasonably accessible, and any fees for using the location must be acceptable.

The starting point is to take the shot list and consider what location features are necessary—bar interior? Bedroom? Upscale condo living room? Urban exterior? Mountainous rural exterior? Farm? Then the production team should brainstorm about nearby places that may have the required characteristics. Friends or friends of friends often are delighted to make their premises available free for shooting a movie. Locations obviously have to be consistent with plan for principal photography; if principal photography is crowdsourced, locations need to be near the place where particular parts of the movie will be shot by crowd-sourced participants. They should shoot in their own locations, and presumptively should select them.

A location specification for a scene to be crowdsourced and shot remotely follows:

*Location specification*

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<sup>105</sup> See, e.g. [www.basecamp.com](http://www.basecamp.com); [www.clarizen.com](http://www.clarizen.com); [podio.com](http://podio.com); [www.teamworkpm.net](http://www.teamworkpm.net); [www.projectmanager.com](http://www.projectmanager.com).

*Takes place in Kenilworth, an upper-class suburb of Chicago, the backyard pool of one of the houses. The pool is large but fits comfortably into a huge backyard. Kenilworth is a mid-sized suburb (around 30,000-40,000 residents) with large houses on one- to two-acre plots of land. The houses are made primarily of brick and stucco and were built in the fifties and sixties. Garages can be found on most of the newer houses. Sidewalks border the streets, separated only by a line of mature, towering elm trees. Few cars are parked on the streets.*

## **2. Available sites and software**

Google Maps is probably the most flexible and widely available online tool for checking out exteriors. Craigslist and social networking sites can be used to drum up interest in offering candidate locations, although on-line solicitation of movie shooting locations is not as fully developed as online solicitation of actors and production personnel. Candidates for interior locations can be asked to send photographs of relevant portions of the interior, along with dimensions.

A few services exist that offer location scouting, especially in Southern California.<sup>106</sup> The existing services are aimed at well established production companies and are likely to be too expensive for Merrick and his team. Other, similar services aimed at the indie movie market are likely to spring up.

## **3. Business and legal issues**

Some locations require that a fee be paid before principal photography can be commenced there. Public spaces in large cities are examples. In contrast, most people in control of small restaurants, bars, farms, offices, and living spaces are delighted to have a movie made on their premises and will readily agree to make the location available without being paid anything.

## **G. Raise money**

### **1. The plan**

Early in their *Miles Traveled* project, Merrick and his team should have developed a business plan with financial projections that reveal their capital needs for the project. Such financial projects should be developed and expressed in a spreadsheet that shows

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<sup>106</sup> See <http://www.planitlocations.com/bio.html>.

line-item sources of revenue and expenditure on a cash basis, by month. The spreadsheet automatically can calculate the cash deficit for each month and the cumulative cash deficit. The maximum cumulative cash deficit is the total amount of capital required.

Conventional wisdom says that indie movies can be developed, produced and marketed for \$1-10 million. Ultra-low budget features require \$50-250,000. They hope to reduce their capital requirements, of course, through crowdsourcing.

## 2. Available sites and software

Kickstarter helped raise almost \$100 million in funds for small projects in 2011, and the most funded areas were movies and music.<sup>107</sup> This is ironic because these are the two segments of the entertainment industry where people are complaining about not having a good business model. Another area that Kickstarter can help with is new inventions. An engineer who wanted to develop a new line of watches got shut down when he went through the traditional route. With Kickstarter, however, he made \$600,000 in the first day and ended up with \$7 million.<sup>108</sup>

East WillyB is a web series that did a case study on how to raise money successfully on Kickstarter. This group raised its \$50 thousand in 50 days, and it emphasized the importance of advertising on social media.<sup>109</sup> It seems better to set shorter project lengths and more modest money goals in order to raise the funds on Kickstarter. Film,

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<sup>107</sup> Mike Masnick, Kickstarter Helped Raise Nearly \$100 Million in 2011...But There Are No New Business Models? (2012), <http://www.techdirt.com/blog/casestudies/articles/20120110/03263517361/kickstarter-helped-raise-nearly-100-million-2011-there-are-no-new-business-models.shtml>

<sup>108</sup> Jenna Wortham, Start-Ups Look to The Crowd (2012) <http://www.nytimes.com/2012/04/30/technology/kickstarter-sets-off-financing-rush-for-a-watch-not-yet-made.html?pagewanted=all>

<sup>109</sup> Aymar Jean Christian, How To Raise Money On Kickstarter: A Case Study (2012) <http://blog.ajchristian.org/2012/06/18/how-to-raise-money-on-kickstarter-a-case-study/>

video and music projects have the highest number of backers, but dance has the highest percentage of successful projects.<sup>110</sup>

One commentator reports that IndieGoGo is beginning to rival Kickstarter for crowdfunding, in part because of a slightly lower fee (4% as opposed to 5%).<sup>111</sup>

### 3. Business and legal issues

The Securities Act of 1933 prohibits “public offerings” of securities until a registration statement has been filed and approved by the Securities and Exchange Commission (“SEC”).<sup>112</sup> Sales, not involving a public offering, to accredited investors are exempt from the registration requirement,<sup>113</sup> as are securities aggregating less than \$1 million in amount meeting other requirements established by the SEC.<sup>114</sup> Sections 301-305 of the 2012 Jumpstart Our Business Startups Act,<sup>115</sup> the SEC is required to develop a new exemption for crowdsourcing.<sup>116</sup>

Because of this prohibition, crowdfunding has been limited to donations and contributions rather than investments. The new statute and SEC regulations should broaden the utility of crowdfunding.

## H. Develop a shooting schedule

### 1. The plan

Martha’s shooting schedule must reflect the availability of the cast and production crew and be efficient, in the sense that all shots at a particular location should be completed in the same shooting session, which can, if necessary take place on contiguous days. The schedule itself can be output from several of the screenplay-writing software products identified in § \_\_\_\_\_. If crowd-sourced collaborators undertake some of the principal

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<sup>110</sup> Samantha Murphy, About 41% Of Kickstarter Projects Fail (2012)

<http://mashable.com/2012/06/12/kickstarter-failures/>

<sup>111</sup> Tim Donnelly, How to Use IndieGoGo to Fund Your Innovation, <http://www.inc.com/guides/201103/how-to-use-indiegogo-to-fund-your-innovation.html> (Mar. 31, 2011).

<sup>112</sup> 15 U.S.C. § 77E(a).

<sup>113</sup> 15 U.S.C. § 77D(a)(5).

<sup>114</sup> 15 U.S.C. § 77D(a)(6).

<sup>115</sup> H.R. 3606, Public Law 111-203, 112th Cong., 2d Sess., 124 Stat. 1890 & 1904 (2012)

<sup>116</sup> <http://www.sec.gov/spotlight/jobact/crowdfundingexemption.htm>



photography, shooting by multiple teams can overlap, because the activities are independent of each other until editing begins.

## **2. Available sites and software**

Celtx allows development of a shooting schedule by dragging and dropping particular scenes in a screenplay onto days of a calendar, allowing the user to specify shoot times. Once the schedule is complete, it can be distributed to collaborators.

## **3. Business and legal issues**

It will be difficult to outsource completely the developing of the shooting schedule because it is so interdependent with location selection, cast availability, and principal photography.

### **I. Principal photography**

#### **1. The plan**

Crowd sourcing of principal photography has implications for all the pre-production steps that precede it. Brook will consider all of these. Obviously an acceptable movie cannot have different actors portraying the same character at the same stage of his life. Nor can a character's abode or office appear differently in different scenes. If Merrick and his team envision crowd sourcing of principal photography, he has to think about that when he writes the script. He can cluster character appearances so that some characters appear only in the scenes to be crowd-sourced to the same director of photography. Or, the team could elect to crowd-source only characterless shots, e.g. mountain scenes or beach scenes, or establishing shots. Alternatively Merrick and his team could shoot characters against a green screen, intending to edit them into background photography done by others.

In moviemaking an "establishing shot" is an extreme long shot, usually placed at the beginning of a scene, that portrays where a scene is taking place. The Chicago skyline could indicate that a scene is taking place in Chicago. A shot of MIT taken from the Boston side of the Charles River could indicate that the scene takes place at MIT. Other types of establishing shots might indicate an activity that is the context for a scene: sailing, rowing crew, fighting a battle.<sup>117</sup> Some types of establishing shots are ideal

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<sup>117</sup> See [http://en.wikipedia.org/wiki/Establishing\\_shot](http://en.wikipedia.org/wiki/Establishing_shot).

candidates for crowd sourcing. For example, some parts of the *Airline Miles* story take place at Harvard, where two of the main characters row crew together. If Merrick and his team want to include this subject matter in *Miles Travelled*, there is no need for them to pack up their equipment and arrange for the cast and crew to go to Cambridge. They can crowd-source the establishing shots for Harvard and its rowers to someone in the Boston area.

If principal photography is crowd-sourced, detailed instructions must be provided to each director of photography, so that continuity will not be lost when the pieces are edited together. This section offers examples of documents for crowd sourced principal photography, including: scene description, shot list, location specification, casting instructions, wardrobe instructions, and lighting and sound instructions.

The following is a Request for Proposals that would be posted on the appropriate crowdsourcing site:

## *Request for Crowdsourcing Proposal*

### *Miles Travelled-a movie*

*Below is a Request For Proposal (RFP) for a cinematographer for the independent film, Miles Traveled.*

#### ***Project Background***

*Miles Traveled is an independent film written by Merrick Sutherland and Brook Marion (the "Producers"). The film is being produced by Merrick Sutherland, Brook Marion, and Tripp Bond. It is based on the play, Airline Miles, written and produced by Hank Perritt. The film is scheduled for release by \_\_\_\_\_. For more information please see [www.milestraveledmovie.com](http://www.milestraveledmovie.com).*

#### ***Project Description***

*Miles Traveled has a limited budget and is seeking creative, talented, and passionate people who can help get this project off the ground. Contractors will use their own equipment, locations, cast, and transportation to complete each project. Communication with the producers will be via the crowdsourcing site, XXX (the "crowdsourcing site"), with supplementary communication by email.*

### ***Services to be provided***

*This RFP is for a cinematographer for designated scenes or shots of Miles Traveled. The selected party will:*

- 1. Operate the lighting and cameras.*
- 2. Select the cast according to specifications provided.*
- 3. Direct the actors, according to overall instructions provided by Brook Marion*
- 4. Work with the local director and Brook Marion to determine appropriate camera angles.*
- 5. Shoot the scene*
- 6. Deliver the resulting audiovisual clips to Brook Marion on the crowdsourcing site or via email.*

### ***Submissions***

*Submissions must be sent via the crowdsourcing site by MM/DD. Every proposal will be reviewed by the producers. A selection of finalists will be made by MM/DD, and posted on the crowdsourcing site. Email interviews of each finalist will be scheduled before MM/DD.*

### ***Assumptions and Agreements***

- 1. The cinematographer agrees not to disclose any material provided to him in conjunction with his participation, and further agrees that intellectual property in such material is retained by the producers and licensed to cinematographer only for the purpose of enabling his participation in this project.*
- 2. This is a work-made-for hire; the cinematographer will assign all intellectual property in the resulting work to the producers.*
- 3. The cinematographer must adhere to technical format and compression specifications provided by the producer.*
- 4. The proposal must be submitted by MM/DD/YYYY.*
- 5. The project must be completed by MM/DD/YYYY.*
- 6. The selected party will find his or her own equipment, modes of transportation, and modes of communication for the purposes of completing the project.*
- 7. The producer will either (a) pay the cinematographer a fixed fee, or (b) assign the cinematographer a share of the profits of the movie, as agreed on between the cinematographer and the producers before work commences.*

### ***For Additional Information or Clarification***

- 1. Merrick Sutherland: merrick@ milestraveledmovie.com (overall production)*

2. *Brook Marion*: [brook@milestraveledmovie.com](mailto:brook@milestraveledmovie.com) (direction, principal photography, and editing)
3. *Tripp Bond*: [tripp@milestraveledmovie.com](mailto:tripp@milestraveledmovie.com) (casting)
4. *Production Team*: [production.team@milestraveledmovie.com](mailto:production.team@milestraveledmovie.com)

## 2. Available sites and software

ShotList is an app for iPhones and iPads that is advertised as "allowing the planning and tracking of every scene of a shoot as it happens" on mobile devices.<sup>118</sup> It allows users to share shooting schedules and updates.<sup>119</sup>

## 3. Business and legal issues

Few cinematographers work for free, except on their own projects—ones in which they are the screenwriters, directors, or both. Someone with very little experience, just out of school might be willing to do so in order to get a chance to have his work exposed more widely.

Equipment also is an issue. If the cinematographer has his own equipment, he is less likely to work for free. On the other hand, a cinematographer who is just starting out and does not yet have his own equipment may be delighted with the opportunity to practice his craft with someone else's equipment. The approach Brook takes depends on whether he and the rest of the team can provide the equipment. Crowdsourcing principal photography to take place at a remote location makes it more difficult to offer this.

Expecting compensation, however, does not necessarily mean monetary compensation, payable now. If a cinematographer is drawn to *Miles Traveled* artistically and believes in its commercial potential, he well may be willing to work in exchange for a piece of the action.

The content of the agreement and on the framework for intellectual property must be crystallized accordingly.

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<sup>118</sup> <http://itunes.apple.com/us/app/shotlist-movie-shoot-planning/id424885833?mt=8>

<sup>119</sup> See <http://solubleapps.com/shotlist-guide-8-dropbox/>

## J. Editing

### 1. The plan

Editing is a tedious process, albeit one in which some of the most important artistic decisions shaping a movie are made. Merrick and his team are unlikely to want to crowd-source all of the editing, or they will end up with someone else's movie rather than their own. On the other hand, certain editing activities are well-suited for crowd sourcing, such as adding subtitles or voice-over audio. Brook, who intends to be the team member responsible for editing, can identify the footage over which subtitles are to appear or in which voice-over is to be heard, and send the relevant video and text or audio content to a crowd-sourced editor who will combine the relevant material.

It also may be that Brook feels insecure with his ideas for editing particular scenes. He can enlarge the creative possibilities by crowd sourcing the editing of such scenes to a collaborator, perhaps sending the collaborator an analysis of things Brook has considered and why he is unsatisfied with them.

It will be necessary, of course, to ensure that any crowd-sourced editors use the same video editing software as Brook, if he wants to fine-tune the results, or that the crowd-sourced editors at least can deliver formats to Brook that he can manipulate further.

It is not uncommon for Hollywood to use focus groups to test market movies before the final version is constructed and released. Merrick and Brook can do the same thing with *Miles Travelled*, using crowdsourcing techniques.<sup>120</sup>

### 2. Available sites and software

Wevideo<sup>121</sup> is a cloud-based video editing site that allows co-creation of videos from clips shared by collaborators. Stroome<sup>122</sup> similarly allows users to upload material and to collaborate on it. Of course the collaborators could simply use email, editing a video clip in particular software, and emailing it for further editing in another computer with

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<sup>120</sup> See Dorothy Pomerantz, *Crowdsourcing Movies*, *Forbes*, Mar. 9, 2010, <http://www.forbes.com/2010/03/09/movies-crowdsourcing-flixster-business-entertainment-selby.html> (reporting on interview with Horsethief Pictures founder Jack Selby who used YouTube and flixter to organize focus groups for director's cut of movie),

<sup>121</sup> [www.wevideo.com/features/collaboration](http://www.wevideo.com/features/collaboration)

<sup>122</sup> <http://www.stroome.com/>

the same software. Keeping track of email attachments and versions increasing transaction costs, however.

### 3. Business and legal issues

The potential copyright issues involving crowdsourced editors can be introduced by considering the polar case in which Merrick and his team crowdsource *all* of the editing of *Miles Travelled*. Assuming that Merrick and his team have protected their exclusive ownership of the audiovisual clips that were the inputs to the editing process, the important question is who owns the edited movie. The answer is—unless contract provides otherwise—that Merrick et al own the copyright in the scenes, but the editor owns the copyright in the overall movie, which is a derivative work. That creates an interdependency: Merrick and his team cannot distribute or exhibit their movie without infringing the director’s copyright; the director cannot distribute or exhibit “his” movie without infringing Merrick’s copyright in the scenes. Either has the power to block the other by obtaining an injunction against copyright infringement. If they are economically rational, they will negotiate a way forward and a share of the profits. But they may reach impasse, in which case the movie will never get exposed to a mass audience.

If portions of the editing activity are crowdsourced to one editor, the same issues potentially arise with respect to that portion.

Absent agreement the owners of the pre-existing works—the results of principal photography—own whatever from those shots make it into the finished movies. The editor would own the copyright in new elements he introduces. The copyright in the pre-existing work extends to any elements of that work incorporated in a derivative work, but only to those elements.<sup>123</sup>

That the editor is entitled to a copyright in the value he adds is apparent from considering the requirements for a copyrightable compilation of facts:

"Although facts are considered to be in the public domain and therefore not protectible under copyright law, see *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991), a compilation of facts may be protectible in certain instances.FN4 Three

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<sup>123</sup> See *Johnson v. Gordon*, 409 F.3d 12, 20 (1st Cir. 2005) (affirming summary judgment for authors of alleged derivative work).

requirements must be met for a compilation to qualify as protectible: “(1) the collection and assembly of preexisting data; (2) the selection, coordination, or arrangement of that data; and (3) a resulting work that is original, by virtue of the selection, coordination, or arrangement of the data contained in the work.”<sup>124</sup>

Editors do nothing else besides selection and arrangement, and they perform those activities creatively.

Accordingly, Merrick should not crowdsource any of the editing without having in place an agreement that allocates copyright ownership. One end of the continuum of possibilities would involve characterizing the editor’s work as a work-made-for-hire and, just to make sure, assigning any copyright arising in the editor to Merrick and his team. At the other end, Merrick and his team would assign their copyrights to the editor and the editor would end up owning the movie. The second possibility is obviously inconsistent with the overall goal of the team.

The impact of a crowd-sources cinematographer to perform will have greater impact on timely completion of the movie than any other crowd-sourcing failure. Accordingly, the following remedy language should be included in the contract:

### ***Crowd Sourced’s Agreements***

1. *Failure of CROWD-SOURCED to perform or substantially to perform the duties set forth in Section 1 of this document by the deadlines set forth in Section 2 of this document obligates*
  - a. *CROWD-SOURCED to forfeit payment and reimburse PRODUCER for all additional production-costs caused to PRODUCER because of this failure, including the cost of finding a replacement to complete CROWD-SOURCED’s duties.*
  - b. *CROWD-SOURCED to assign any intellectual property in such uncompleted projects to PRODUCER.*
2. *CROWD-SOURCED agrees that nothing within this section or any other section of this document is intended to limit PRODUCER’S power to seek injunctive relief as appropriate, and CROWD-SOURCED explicitly consents to an injunction forbidding CROWD-SOURCED from exploiting any intellectual property in a manner inconsistent with this agreement.*

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<sup>124</sup> Lipton v. Nature Co., 71 F.3d 464, 470 (2d Cir. 1995) (finding requirements satisfied).

### ***Producer's Agreements***

1. *Failure of PRODUCER to perform or substantially to perform the duties set forth in Section 1 of this document by the deadlines set forth in Section 2 of this document obligates PRODUCER to forfeit all intellectual property rights of work that CROWD-SOURCED contributed to the unfinished projects.*
2. *PRODUCER agrees that nothing within this section or any other section of this document is intended to limit CROWD-SOURCED'S power to seek injunctive relief as appropriate, and PRODUCER explicitly consents to an injunction forbidding PRODUCER from exploiting any intellectual property in a manner inconsistent with this agreement.*

There is no reason that the same language should not be included in all the crowd-sourcing contracts.

### **K. Marketing, Promotion, and Sales**

To use the term “crowdsourcing” for marketing is, to a significant extent, tautological. All mass marketing of entertainment products involves seeking to induce a “crowd” to participate by consuming the product. In this sense, Vimeo, YouTube, and certain uses of Facebook are examples of widespread crowdsourcing of the marketing function. Adaptation of the crowdsourcing concept to marketing, promotion, and sales, however, enables new activities not traditionally associated with other forms of Web marketing. Fans and audience members can be solicited for their feedback. They can suggest sequels. They can be enlisted to get out the word to their friends.

Automated advertisement targeting services popularized by Google, Facebook, and Amazon, can feed data to sponsors of advertisements about who clicks on their ads, and who clicks through their ads to websites or to order tickets.

#### **1. The plan**

The overall goal of marketing *Miles Traveled* is to get an audience. A common mistake is thinking that this can be accomplished by simply announcing to the world the existence of one's product. If Merrick, Martha, and Brook want to attract the largest possible audience in the smallest amount of time with the most limited budget, they must target specific categories of people. Their approach should be four pronged: First, identify who is the target community; second, create a virtual presence on the World Wide Web aimed at that community; third, contact members of the local community who are in a better position to inform the community about the project (think of these members as



tollbooth operators across a superhighway: if Merrick can pass the operator, he will cruise to his final destination, but if he instead takes side roads the journey will be full of red lights and crosswalks); fourth, personally distribute fliers around the targeted community.

While identifying the target community seems easy enough, it is undoubtedly the most important step. If Merrick, Martha, and Brook initially identify the wrong audience, the rest of their promotional endeavors will likely prove ineffective. In order to avoid this unfortunate outcome, the group should ask themselves the who, what, where, when, and why: *who* will relate to the characters in their movie, *what* is their movie's message, *where* is the movie showing, *when* is the movie showing, and *why* would someone want to see the film? A film about young girls on a cross-country adventure, being shown in brick-and-mortar movie theatres in Indianapolis, Indiana, in the middle of a weekday should not be marketed to single, middle-aged, middleclass men who live in Los Angeles, California and are probably working.

Establishing a virtual presence is itself two pronged: first create a virtual destination (e.g., Facebook "page," website, et cetera) and second make that destination known. The first prong is the least challenging; anybody can create a Facebook page or website for free.<sup>125</sup> The often insurmountable challenge comes with the second prong. Today the World Wide Web has billions of webpages, each vying for its own position in the cyber-universe.<sup>126</sup> To make themselves stand out amongst these mostly meager stars, website operators like Merrick must (1) optimize their site for search engines, (2) advertise, and (3) affirmatively contact members to the target community to steer them to the sites.

Optimizing a website for search engines is itself a daunting task. In the early days of the Internet, search engine optimization (SEO) was as easy as pasting a keyword eight to ten times across the index page.<sup>127</sup> Keywords are words used by the search engine to identify the subject of a website.<sup>128</sup> Keywords are also used by search-engine-users

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<sup>125</sup> <http://www.facebook.com>

<sup>126</sup> <http://www.worldwidewebsite.com/>

<sup>127</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 97 (2010).

<sup>128</sup> <http://www.searchengineguide.com/karon-thackston/what-are-keywords-and-what-the-heck-do-you-do-with-them.php>

(Googlers) to find websites (i.e., it's what you type into the search box).<sup>129</sup> Early on, it did not matter if a website's stated keywords were actually irrelevant to the content or the only content; search engines were simple crawlers<sup>130</sup> that were easily fooled.<sup>131</sup> That, however, is a far cry from the sophisticated virtual "bots" that today troll the Internet.<sup>132</sup> These bots look not only for the listing of keywords, but also keyword density, keyword relevance, thematic keywords, and keyword emphasis. And keywords are not all that search engines take into account: they account for site design (e.g., is it user friendly, is it attractive, is it grammatically correct?) and the site's authoritativeness over its subject matter (i.e., how many other sites link to this site, and how important are those sites?).<sup>133</sup> Sites with many incoming links are considered by search engines like Google to be more authoritative than sites with fewer incoming links).<sup>134</sup> A search engine can detect webmaster efforts to fool it into ranking the site higher than it deserves; in such instances, the search engine may temporarily or permanently ban the website from the search engine's index, essentially dropping it into a black hole where it will never be discovered.<sup>135</sup> In order to optimize a website for search engines properly, it is important that Merrick, Martha and Brook either recruit a professional or themselves become proficient in an increasingly complex field. Recruiting someone else can, of course, be done through crowdsourcing.

Advertising a website is not much easier than optimizing a website. Generally, advertising a website involves using companies like Google Adwords, which place ads on thousands of websites and apps across the Internet.<sup>136</sup> Keywords come into play once again with services like Google Adwords. Such services ask the advertiser to list

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<sup>129</sup> <http://support.google.com/adwords/bin/answer.py?hl=en&answer=2497976>

<sup>130</sup> A crawler is a computer connected to the Internet, running software that causes it to work its way incrementally through all conceivable domain names, downloading at least a portion of the pages that appear on the site with the domain name.

<sup>131</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 44 (2010).

<sup>132</sup> See Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 44 (2010).

<sup>133</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition pp. 58, 90, 124 (2010).

<sup>135</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 16 (2010).

<sup>136</sup> *Adwords Help*, <http://support.google.com/adwords/bin/answer.py?hl=en&answer=117120>

the keywords it would like to target with its ad. If a user types this keyword into a search engine like Google, the ad will theoretically display as a sponsored result.<sup>137</sup> However, how often the ad appears is determined by a “quality score.”<sup>138</sup> Websites with a higher quality score are displayed more often than websites with a lower quality score.<sup>139</sup> The quality score is determined by numerous factors, including the click-through rate (e.g., how often the ad is clicked compared against the number of times the ad was displayed), campaign structure, and keyword bid.<sup>140</sup> Even if one’s ad is displayed, it is difficult to convert visitors into customers. Advertising without experience using a site like Adwords can lead to low conversion rates, low click rates, or both.

Reaching out to the target community is by far the easiest of the three tasks. Whatever way Merrick and the others choose to do it, reaching out, like every other step, heavily depends on the three having accurately identified their target community. Once the community is identified, they simply have to begin communicating with it. Communicating with popular community blogs is particularly valuable, least if every comment to a blog entry contains a link to the commenter’s website. On some search engines, the incoming link could improve the site’s own rank on that same search engine. It is important, however, to be aware that search engines like Google often are indifferent to links posted in blog or forum comments.<sup>141</sup> In either case, however, making a link to the website ubiquitous in the web increases the number of entry points to the website and thus increases the likelihood that another webmaster will find and repost the link to its own website. There is, however, one more risk associated with this technique: if a blogger believes that a webmaster, like Merrick, is spamming the website with the *Miles Traveled* links, the blogger may ban that webmaster from posting in the future, essentially cutting the webmaster’s ties with the community. Merrick, Martha, and Brook must tread carefully.

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<sup>137</sup> *Adwords Help*, <http://support.google.com/adwords/bin/answer.py?hl=en&answer=2497976>

<sup>138</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 224 (2010).

<sup>139</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. 224 (2010).

<sup>140</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition location: 224 (2010).

<sup>141</sup> Kristopher B. Jones, *Search Engine Optimization: Your visual Blueprint for Effective Internet Marketing*, 2nd Edition p. xxii (2010).

The third prong for marketing *Miles Traveled* is far simpler than the first two, but it still has its challenges. Reaching out to the “toll operators” can be as simple as attending local festivities at which they are present, approaching them with a business card, and explaining the project. However, depending on how large the target community is, some toll operators are approached so often that it is fairly difficult to grab their attention (and others may just not want to be bothered). Under such circumstances, well-crafted press releases may attract the attention of the toll operators, although critical toolkeepers, such as movie reviewers for newspapers or television stations get so many they ignore them. Press releases are works of art; Merrick cannot simply write out an explanation of their project and expect the toll operators to read it. Press releases must insert the most important information first, in an attention-grabbing way, and then use the remaining space to provide supporting information.<sup>142</sup> Here, again, who, what, where, when, and why should be explained in as few words as possible.<sup>143</sup> It is easy to underestimate the difficulty of writing a good press release. Untutored instincts of the director or producer are likely to be a poor guide. But it is not rocket science; anyway with a way with words and good rhetorical instincts can learn the craft quickly from one with good experience. The activity is also a candidate for crowdsourcing. Decent, free, step-by-step guides are online.<sup>144</sup>

The fourth and final prong (distributing fliers) is the most straightforward of the four prongs. It is just important to make sure that the fliers are distributed in the proper community and in heavily trafficked areas. Professional tools like Adobe Photoshop CS or free tools like Apple’s iPhoto can also help develop stunning posters that catch the eye. Flyers, however, are relevant only if the movie is exhibited one or a few physical location. They are a waste of time if the movie is exhibited on a Web portal, in which case the target audience is spread all over the world.

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<sup>142</sup> Shira Levine, *How to Write a Winning Press Release: The Step-by-Step Guide*, <http://www.openforum.com/idea-hub/topics/marketing/article/how-to-write-a-winning-press-release-the-step-by-step-guide-1>

<sup>143</sup> Shira Levine, *How to Write a Winning Press Release: The Step-by-Step Guide*, <http://www.openforum.com/idea-hub/topics/marketing/article/how-to-write-a-winning-press-release-the-step-by-step-guide-1>

<sup>144</sup> See id.

## 2. Available sites and software

Google Search<sup>145</sup> should not be underestimated. Although only a simple search engine, Google can find a vast array of free tools and guidelines for just about anything. Just typing “how to write a press release” into Google reveals dozens of useful tips, lessons, and examples. That search found a useful step-by-step guide on writing a press release written by Shira Levine, a contributing writer and columnist for *Business Insider*.<sup>146</sup> The article was posted on OPEN Forum. OPEN Forum is a business community that provides helpful tools for small businesses.<sup>147</sup> Websites and communities like OPEN Forum exist all across the web—all Merrick has to do is search for them.

Facebook.com,<sup>148</sup> the world’s largest social network, is ripe with marketing opportunities. It only takes moments to create a free page for a service (or, in this case, performance) with Facebook. From there Merrick can build a fan-base by advertising his page using Facebook’s pay-per-click advertising service. Pay-per-click means that Merrick need not pay unless somebody clicks on his advertisement. Facebook eclipses other means for achieving “virality.” Facebook users who click a “like” button that announces that user’s interest in Merrick movie to the Facebook community. This means that for every “like” that *Miles Travelled* receives, many more may follow without Merrick having to pay for any additional clicks. If *Miles Traveled* attracts lots of attention (which Merrick and his team may arrange), the site may go viral,<sup>149</sup>

Web hosting services proliferate. 3ix.org<sup>150</sup> is typical. It is a reliable and remarkably affordable webhost that provides a 99.9% uptime guarantee and a domain management toolkit equipped with a user-friendly graphic interface. For one dollar a month, users can run a single website with 40 gigabytes of storage, 100 gigabits of bandwidth, and 50 domain e-mails. Users can upgrade their accounts to run up to three websites, receive 150 gigabytes of storage and unlimited bandwidth. If that still isn’t enough, users can

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<sup>145</sup> <http://www.google.com>

<sup>146</sup> Shira Levine, *How to Write a Winning Press Release: The Step-by-Step Guide*, <http://www.openforum.com/idea-hub/topics/marketing/article/how-to-write-a-winning-press-release-the-step-by-step-guide-1>

<sup>147</sup> <http://www.openforum.com>

<sup>148</sup> <http://www.facebook.com>

<sup>149</sup> “Going viral” means that knowledge of the service rapidly spreading (like a virus) throughout the Facebook community. In such cases, advertisements are no longer necessary.

<sup>150</sup> <http://www.3ix.org>

upgrade their accounts to receive three hundred or seven hundred gigabytes of storage for five or eight dollars a month, respectively. The five dollar a month account can host five websites and the eight dollar a month account can host unlimited websites. If a user hasn't purchased a domain name yet, or has already purchased a domain name on another site, 3ix makes it easy to purchase or transfer any name upon registering for a hosting account. This service is excellent for anyone, regardless of whether they are on a tight budget.

Wordpress.org,<sup>151</sup> originally started as an open-source blogging tool, is a "full content-management system" built on PHP and MySQL. Numerous themes, plugins, and widgets make the tool incredibly customizable—so customizable that the tool is now used for far more than just blogging. Although more complicated than the Wordpress.com web-application, using this popular tool is far more manageable than building a site from scratch. Just go to the website, download the software script and it's ready to go. Although basic knowledge of HTML, CSS, PHP, and MySQL are always helpful, such knowledge is not necessary to establish a Wordpress-based website.

Wordpress.com,<sup>152</sup> provides a free, elegant and simple blogging tool. While it's not as malleable as the original software,<sup>153</sup> it is even easier to use and provides helpful visitor statistics. Merrick need only go to the website, choose a blog address, username, password and he get started in seconds. From the online web-application users can easily develop and manage a successful blog from which to keep potential audience members (and fans) well-informed. Typepad<sup>154</sup> is another popular site that makes it easy to set up a blog.

Google Analytics<sup>155</sup> is one of the most valuable free services on the web. Just create a Google Analytics account, type your web-address into the proper field, copy and paste the provided code into the <HEAD></HEAD> of your webpage, and you are setup to receive daily, detailed updates about your web-traffic. Google not only provides you

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<sup>151</sup> <http://www.wordpress.org>

<sup>152</sup> <http://www.wordpress.com>

<sup>153</sup> CITE

<sup>154</sup> [www.typepad.com](http://www.typepad.com)

<sup>155</sup> <http://www.google.com/analytics>

with the number of unique visitors an hour, but also the location of the visitors, the referring site, the amount of time they spent on your website, the keywords they used to find your site (if relevant), the browsers they used, the operating systems they used, the visitor-to-customer (or, in this case, audience member) conversion rate and more. Google also provides an alternative mobile version designed specifically for tracking visits for mobile devices. A premium version will also get you 24/7 support (that includes personal training), more tools, more data, and service guarantees that you don't get at the free level. But don't get too excited about this just yet: Google charges an annual fee of \$150,000 dollars for premium users. For most users, the free version of Google Analytics works wonderfully.

Google Adwords<sup>156</sup> can be used with the same Google account Merrick creates for Google Analytics (or any other Google service). Google Adwords allows anybody to develop his own text or picture advertisements (linked to any website of their choosing). The advertisements can be directed towards any geographic market of the advertiser's choosing. Who the ad is exposed to can also be controlled through a tool that limits what devices and networks the ad shows up in, as well as what keywords should be present before Google displays the ad. Users use keywords to tell Google what their ad (and related service) is about. Google then displays the ad to search engine users who searched for the specified keywords, or on relevant websites that have agreed to display such advertisements. The service is pay-per-click, which means users pay nothing unless somebody clicks their ad. Google additionally allows users to set a daily budget, giving Merrick and his team control over their spending. Google uses sophisticated algorithms to maximize the number of clicks ads will receive, but the conversion rate for each click depends only on reader interest. In short, Google tries to display ads to the people most likely to be interested in the service being advertised. Advertisers compete, however, with each other for keywords. This means that Merrick, the advertiser, tells Google how much he is willing to pay for each click *Miles Travelled* receives from a certain keyword that he chooses. If a competitor is willing to pay more than Merrick, the *Miles Travelled* ad will display less often. This means that the price can quickly skyrocket for popular keywords. Nonetheless, this service is relatively effective, user-friendly, and useful.

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<sup>156</sup> <http://adwords.google.com>

Wordtracker<sup>157</sup> helps anyone use sites like Google Adwords to their full potential. Wordtracker is not free (in fact, it a minimum of \$379 dollars a year, it is relatively expensive) but it provides a valuable service that could save Merrick and his team from wasting a lot of money in the long run. Wordtracker supplies users with data regarding the keywords that they have chosen, not only for advertising purposes, but also for search engine optimization purposes. Included data is the volume of monthly searches for each of your keywords and the number of competitors optimized for the same keywords. Wordtracker also claims to provide professional guidance to its users, which can save any amateur from making irreparable mistakes. What important to know in determining whether or not to use a service like Wordtracker is that, although other free services exist (like Google's own Keyword Suggestion Tool), they often do not provide the same quality data.

Internet Marketing Ninjas<sup>158</sup> helps maximize keyword density. Not only can an advertiser understand its own website's keyword density, but an advertiser also can learn from the keyword density of successful competitors. The tool is about as easy to use as it gets: just copy and paste a URL into the proper box and click submit (or, as the site calls it, "ninja check"). Instantly the website shows a list of keywords it discovered and their respective densities.

### 3. Business and legal issues

The Internet already is in wide use for marketing and promotion. Merrick and his team need to make aggressive use of social network tools likely to reach target audiences. Simply putting up a website is insufficient. No particular legal issues arise, as long as they avoid trademark infringement and fraudulent misrepresentation.

#### L. Exhibition

In traditional filmmaking, the production process ended with the creation of prints of the finished film. These prints had to be *distributed* to movie theatres, who would *exhibit* them. The distribution and exhibition activities were distinct, performed by different entities.<sup>159</sup> Indeed, in 1948, in *United States v. Paramount Pictures*,<sup>160</sup> the Supreme Court

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<sup>157</sup> <http://www.wordtracker.com>

<sup>158</sup> <http://www.internetmarketingninjas.com/seo-tools/keyword-density/>

<sup>159</sup> Compare Robert G. Picard, *The Economics and Financing of Media Companies* (2002) [hereinafter "Picard"]; Jason E. Squire, ed., *The Movie Business Book* 361-374 (3d ed. 2004) [hereinafter "Squire"]



ordered the major Hollywood Studios to divest their movie-theatres and exit the exhibition business.<sup>161</sup>

The technological revolution is collapsing this distinction. When a movie is distributed for downloading or streaming through the Internet, there is no distinction between distributing it to a consumer and delivering it to the consumer, or said more precisely, there is no need for one entity to distribute it to another, which actually delivers it to a consumer. It is possible to collapse the functions even further: a producer can exhibit a movie directly, by posting it on Youtube or Vimeo. But finding an audience requires resources and expertise beyond most indie moviemakers themselves, so it is likely that a distinction will continue to exist between production on the one hand, and distribution/exhibition on the other. New players, such as amazon, Apple, Hulu, and Netflix, and imitators, will dominate the latter function.

### 1. The plan

Merrick's goal, like the goal of any moviemaker, is to get *Miles Traveled* on as many screens as possible. Sixty years ago, this meant screens in movie theaters. Twenty-five years ago, it meant a combination of movie-theater screens and television screens. Now it means computer monitors and iPhone and iPad screens. Merrick can make *Miles Traveled* potentially available to the screens of the 2.3 billion worldwide users of the Internet himself, simply by posting it on YouTube. The problem with that strategy is that there are some 120 million videos available on YouTube.<sup>162</sup> How would anyone find *Miles Traveled*? Merrick and his team can hardly depend on a fan base generated by people stumbling across their movie as they browse YouTube. To the extent that their marketing and promotion efforts, considered in § \_\_\_, are successful, people will look for it, and it will not be hard to find if potential viewers enter the appropriate YouTube URL in their browsers. Even that path to success leaves open the question how they

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(describing structure, functions, and economics of big-picture distribution; id. at 375-383 (describing structure, functions, and economics of independent distribution) with id. at 386-400 (describing exhibition business) and id. at 401-406 (describing independent exhibition business); see Harold L. Vogel Entertainment Industry Economics 126-142 (8<sup>th</sup> ed. 2011) [hereinafter "Vogel"] (describing economics of and business relationships between distributors and exhibitors).

<sup>160</sup> 334 U.S. 131 (1948).

<sup>161</sup> 334 U.S. at 173-174 (holding that vertical integration of production, distribution, and exhibition is not illegal per-se, but must be evaluated on remand under rule-of-reason test).

<sup>162</sup> CITE

could generate revenue. YouTube videos are not pay-per-view, and there is no option to make them so. Advertising revenue is a possibility, but advertisers are unlikely to pay much for an ad proximate to *Miles Traveled* until it draws a large audience.

They would be better off, in the near term at least, if they can strike a deal with an internet exhibitor that already commands a large audience, an entity such as Hulu, Amazon or Netflix.

## 2. Available sites and software

Tools for online exhibition are in their infancy. Sites such as Vimeo and YouTube are explicitly non-commercial. Vimeo<sup>163</sup> is well-known as a site for exhibiting high-quality videos, but it prohibits videos intended for commercial use, including videos with embedded ads.<sup>164</sup> YouTube<sup>165</sup> permits anyone to upload videos, but it prohibits commercial uses such as sale of advertising in uploaded content without YouTube's prior written approval.<sup>166</sup>

At the opposite end of the spectrum, services that established themselves by offering subscription-based access to content developed for television and movie theaters have begun to accept original content. Hulu has launched an original content initiative, but producers are selected in advance by Hulu.<sup>167</sup> Netflix has embarked on a similar strategy.<sup>168</sup> Amazon is funding production of selected movies, beginning with scripts selected through a competition.<sup>169</sup>

Newer entrants are competing with Vimeo and YouTube rather than offering commercial exhibition channels. ON Networks<sup>170</sup> is an Austin, TX startup that offers

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<sup>163</sup> [www.vimeo.com](http://www.vimeo.com)

<sup>164</sup> <https://vimeo.com/help/guidelines> (Guideline no. 2).

<sup>165</sup> [www.youtube.com](http://www.youtube.com).

<sup>166</sup> <http://www.youtube.com/t/terms> (section 4(D) and 4(E)).

<sup>167</sup> Sara Gates, Hulu Expands Original Content, Announces Three Series and Seven Exclusive Shows, [http://www.huffingtonpost.com/2012/05/21/hulu-expands-original-content\\_n\\_1532718.html](http://www.huffingtonpost.com/2012/05/21/hulu-expands-original-content_n_1532718.html).

<sup>168</sup> See Alex Ben Block, Netflix's Ted Sarandon Explains Original Content Strategy, The Hollywood Reporter, <http://www.hollywoodreporter.com/news/netflix-ted-sarandos-original-content-309275>.

<sup>169</sup> Frances Bea, Amazon Studios unveils first four original content series for development, Digital Trends, <http://www.digitaltrends.com/home-theater/amazon-studios-unveils-first-four-original-content-series-for-development/>.

<sup>170</sup> [www.onnetworks.com](http://www.onnetworks.com).

global distribution of episodic TV programming and associated ads. Pandora TV<sup>171</sup> launched in Korea and now is available internationally.

### 3. Business and legal issues

The likelihood, suggested in § \_\_\_, of a continued demarcation between indie movie production and distribution/exhibition of indie movies means that Merrick and his team have less control over the structure and economics of their business relations with distributor-exhibitors. Because of the volume of their operations, Amazon and Hulu are not likely to engage in individualized negotiations over the terms of their contracts with Merrick and his team, although they are likely to offer different standard packages.<sup>172</sup>

The biggest problem with exhibition on the web is monetizing the activity – finding a way to generate revenue from people who watch the movie or in conjunction with their watching it. One possibility is advertising. Another possibility is placing the movie with a subscription service like Netflix or Hulu, although he may have to compete with well-established writers and producers to gain a foothold there.

But Merrick's goal may not be to show a profit on the movie. He and his team may be satisfied by finishing it and getting people to watch it without having to go too deeply in the hole financially. That opens up the possibility of aggressive and successful crowd sourcing in the financial arena and not worrying about monetization too much in the exhibition arena. They also, as suggested in "Technologies of Storytelling," can increase the incentive to contribute to development of not-yet exhibited portions of the movie by serializing it – presenting it as sequels. The serialization approach, however, requires modification of the structure of the story. Each sequel must be a little story unto itself with teasers and links at the end to reduce a viewer to anticipate the next sequel eagerly. That requires a different screenplay.

Protecting against collaborator misappropriation relies on enforcing the crowdsourcing contracts with copyright and trademark protection in the background. Section \_\_\_ analyzed copyright protection.

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<sup>171</sup> <http://www.pandora.tv>.

<sup>172</sup> See <http://studios.amazon.com/getting-started/movies> (explaining standard terms for screenwriters and filmmakers).

In addition to copyright, Merrick and his team should consider trademark protection for the “mark” represented by the title, “Miles Travelled.” Trademark law protects against the unauthorized use of a trade or service mark so as to mislead consumers about the true origin of a product or service. Whether Merrick and his team can obtain trademark protection for the title *Miles Travelled* is questionable. The title of a single movie, not part of a series, is not eligible for federal trademark registration.<sup>173</sup> Refusal of registration by the USPTO does not exclude the possibility of a common-law trademark.<sup>174</sup> Common-law trademark infringement is redressable under the federal Lanham Act,<sup>175</sup> and under state common-law. “To prove [a] Lanham Act violation, a plaintiff must demonstrate that (1) it has a valid and legally protectable mark; (2) it owns the mark; and (3) the defendant's use of the mark to identify goods or services causes a likelihood of confusion.”<sup>176</sup> The elements of common-law trademark infringement are similar.<sup>177</sup>

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<sup>173</sup> “The title, or a portion of a title, of a single creative work must be refused registration under §§1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052, and 1127, unless the title has been used on a series of creative works.” USPTO, Trademark Manual of Examining Procedure (TMEP) § 1202.8 (8th ed. 2011), [http://tess2.uspto.gov/tmdb/tmep/1200.htm#\\_T120903q](http://tess2.uspto.gov/tmdb/tmep/1200.htm#_T120903q). “The title of a single creative work, that is, the title of one episode or event presented as one program, does not function as a service mark. In re Posthuma, 45 USPQ2d 2011 (TTAB 1998) (term that identifies title of a play not registrable as service mark for entertainment services). The record must show that the matter sought to be registered is more than the title of one presentation, performance, or recording.” USPTO, Trademark Manual of Examining Procedure (TMEP) § 1301.02(d) (8th ed. 2011), [http://tess2.uspto.gov/tmdb/tmep/1200.htm#\\_T120903q](http://tess2.uspto.gov/tmdb/tmep/1200.htm#_T120903q).

<sup>174</sup> See *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 220-221 (3d Cir. 2000) (reversing district court's finding of no Lanham Act violation; holding that refusal of registration by USPTO must be given weight only when USPTO has considered entire record); *American Angus Ass'n v. Sysco Corp.*, 829 F.Supp. 807, 823 (W.D.N.C. 1992) (giving deference to refusal by USPTO to register mark, but not conclusive on issue of Lanham Act violation).

<sup>175</sup> *A & H Sportswear*, 237 F.3d at 211 (“We measure federal trademark infringement, 15 U.S.C. § 1114, and federal unfair competition, 15 U.S.C. § 1125(a)(1)(A), by identical standards.”)

<sup>176</sup> *A & H Sportswear*, 237 F.3d at 210.

<sup>177</sup> *Halicki Films, LLC v. Sanderson Sales and Marketing*, 547 F.3d 1213, 1228 (9th Cir. 2008) (reversing district court and holding that standing to sue for common-law trademark infringement of unregistered mark can exist; dispute involved infringement of mark represented by movie title “Gone in 60 Seconds”); 1225 n.5 (elements of common-law trademark infringement are similar to elements of unfair competition under section 43(a) of Lanham Act).

The caselaw suggests that trademark infringement in a movie title can be established by providing secondary meaning and/or inducement of the public to believe that the second work originated with the creators of the first.<sup>178</sup>

#### **IV. Independent contractors and employees**

Only persons having the legal status of employees must have taxes withheld from their wage payments, while their employers must pay payroll taxes on them. Only employees are entitled to engage in collective bargaining, under section 7 of the National Labor Relations Act. Only employees are entitled to minimum wage and overtime payments. Only employees are covered by the workers compensation system. Only employees are entitled to have their employers pay unemployment compensation taxes.

Indy theatre and Indy movie producers rarely treat their collaborators as employees. They treat them as independent contractors. Whether this is permissible under the criteria for distinguishing the two types of work presents significant legal questions. To be sure, those that get involved in *Miles Traveled* through crowd sourcing are far more likely to be independent contractors than persons performing the same work with frequent face-to-face contact with the producers. But Merrick and the others still need to understand how compensation arrangements and the mechanisms they embraced to control the work might push some of their collaborators toward employee status and the implications of such status.

Whether someone performing work is an employee or independent contractor is determined under the general common law of agency, which requires evaluation of the hiring party's right to control the manner and means by which the product is accomplished, which involves analysis of the following factors:

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<sup>178</sup> See *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008) (affirming judgment for defendant video game producer that used name of strip club; consumer confusion as to sponsorship low, and therefore First Amendment privileged use of name); *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*, 996 F.2d 1366, 1379-1380 (2d Cir. 1993) (vacating judgment and injunction on infringement of alleged trademark in book about popular television program; infringement of unregistered trademark in title of movie, television series or book requires showing of secondary meaning and whether use of title induces public to believe that second work was prepared or otherwise authorized by creators of original work)

1. the skill required;<sup>179</sup>
2. the source of the instrumentalities and tools;<sup>180</sup>
3. the location of the work;<sup>181</sup>
4. the duration of the relationship between the parties;<sup>182</sup>
5. whether the hiring party has the right to assign additional projects to the hired party;<sup>183</sup>
6. the extent of the hired party's discretion over when and how long to work;<sup>184</sup>
7. the method of payment;<sup>185</sup>
8. the hired party's role in hiring and paying assistants;<sup>186</sup>
9. whether the work is part of the regular business of the hiring party;<sup>187</sup>
10. whether the hired party is in business;<sup>188</sup>
11. the provision of employee benefits;<sup>189</sup> and
12. the tax treatment of the hired party.<sup>190</sup>

Number 12 is under the control of Merrick and his team. The other factors point toward employee or independent contractor status depending on the qualities of the person enlisted through crowdsourcing. A crowdsourced cinematographer is highly likely to qualify as an independent contractor, because he provides his own instrumentalities and tools (factor #2), determines the location of the work, which will be under his control (factor #3), hires his own assistants (factor #8), performs his regular business (factor #9), and determines when and how long to work (factor #6).

An actor, on the other hand, is more likely to qualify as an employee, particularly because unionized actors are so treated, and non-union actors perform the same work.

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<sup>179</sup> Lower-skilled workers are more likely to be employees

<sup>180</sup> If the worker provides his own tools, he is more likely to be an independent contractor.

<sup>181</sup> If work is performed only at the hiring party's facilities, the worker is more likely to be an employee.

<sup>182</sup> The longer the relationship, the more likely is employee status.

<sup>183</sup> If the hiring party does, employee status is more likely.

<sup>184</sup> If the worker defines the times and durations, he is more likely to be an independent contractor; if he punches a time clock, he is more likely to be an employee.

<sup>185</sup> Periodic payment by the hour, week, month, or year makes employee status more likely. Payment by project makes independent contractor status more likely.

<sup>186</sup> If the worker hires her own assistants and pays them directly, she is more likely to be an independent contractor

<sup>187</sup> If it is part of her regular business, then employee status is more likely.

<sup>188</sup> If the hired party is in business, independent contractor status is more likely.

<sup>189</sup> Payment of benefits such as health care insurance and pension benefits makes employee status more likely.

<sup>190</sup> See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (applying common-law test in copyright case; citing Restatement of Agency § 220(2)).

They do not provide their own instrumentalities and tools (factor #2). They work on a schedule and at a place determined by the producer and director (factors #3 and #6). There are arguments to the contrary, however. Actors may be paid a flat fee instead of hourly or daily compensation (factor #7), and significant artistic skill is required (factor #1).

The federal Fair Labor Standards Act<sup>191</sup> puts a floor under labor-market competition, by prohibiting employers from paying less than the minimum wage<sup>192</sup> and by limiting the number of hours per week that employees may work without being paid a premium—usually time and a half their regular wage for hours worked in excess of forty.<sup>193</sup> These limits on competition, however, are not comprehensive in scope. The Act excludes independent contractors; professionals and managers, in particular actors and writers; and students.

The federal Fair Labor Standards Act exempts certain professional employees from the minimum wage and overtime provisions of the act.<sup>194</sup> State labor standards regulation typically provides a similar exemption.<sup>195</sup> Arguments persist, however, over when performers and writers perform sufficiently creative work to qualify for the artist exemption.<sup>196</sup>

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<sup>191</sup> 29 U.S.C. §§ 201-219.

<sup>192</sup> 29 U.S.C. § 206.

<sup>193</sup> 29 U.S.C. § 207.

<sup>194</sup> See 29 U.S.C. § 213(a)(1); 29 CFR § 541.302(c) (noting that actors generally meet the requirements of professional exemptions from FLSA)

<sup>195</sup> See California INDUSTRIAL WELFARE COMMISSION ORDER NO. 10-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE AMUSEMENT AND RECREATION INDUSTRY, <http://www.dir.ca.gov/IWC/IWCArticle10.pdf> (requiring \$8 per hour and time and a half for overtime). See *id.* sec. 2(A)(defining "amusement and recreation industry" to include theatres); sec. 1(A)(3)(b)(ii) (exempting original and creative work in a recognized field of artistic endeavor, to be construed pursuant to 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310)

<sup>196</sup> See Alexis Miller, Reality Check for Production Companies: Why Writers on Reality Television Are Entitled to Overtime Pay, 27 Loy. L. A. Ent. L. Rev. 185 (2006-2007) (arguing that reality television writers are not sufficiently creative to qualify for the FLSA artist exemption; also reviewing possibility of representation by Writers Guild).

The six-factor Silk test, discussed in sec. \_\_\_, is used to determine whether someone is a covered employee under the FLSA.<sup>197</sup> Actors, even participants in reality television shows, usually qualify as employees rather than independent contractors.<sup>198</sup>

## V. Technology development agenda

The biggest problem with current online tools and communities for crowd sourcing an entire movie is what stock exchange participants would refer to as "lack of liquidity."<sup>199</sup> There are too few participants on either side of the crowd sourcing relationship to assure producers of finding a collaborator or to assure potential collaborators of finding a match with the producer.

Craigslist is a fallback. It has enormous liquidity, but its categories are not sufficiently specialized to make crowd sourcing of particular phases of moviemaking efficient.

As the subsections for certain phases of moviemaking, particularly screenplay writing and financing indicate, liquidity is not a problem in those areas. But no well-developed tools exist for other aspects such as principal photography, editing, or casting, although it is not too hard to work around the casting problem by giving all of the collaborating casting decision-makers access to the same email address to which actors respond if they are interested in the project.

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<sup>197</sup> Adam P. Greenberg, *Reality's Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?* 82 S. Cal. L. Rev. 595, 612-617 (2009) [hereinafter "Greenberg"] (arguing that federal FLSA covers child actors; explaining each of the six factors and citing cases).

<sup>198</sup> See Greenberg, 82 So. Cal. L. Rev. at 632-638 (working through each of the six factors). Mr. Greenberg's analysis of child actors in reality shows leads, a fortiori, to the conclusion that adult actors on scripted shows are employees, because they are subject to even greater control by producers and directors. He admits however that involvement for less than a full season might cause the permanence-of-employment factor to militate against employee status. Greenberg, 82 So. Cal. L. Rev. at 644 (participating in only one episode is not permanent enough).

Mr. Greenberg argues that child performers on reality television shows should not qualify as exempt actors for policy reasons that should, in his view, narrow the actor exemption for reality show child participants. Greenberg, 82 So. Cal. L. Rev. at 642 (noting that producers often deny "actor" status to avoid union representation for AFTRA and SAG).

<sup>199</sup> See Wikipedia, *Market Liquidity*, [http://en.wikipedia.org/wiki/Market\\_liquidity](http://en.wikipedia.org/wiki/Market_liquidity).



Merrick and his team might be tempted to start their own crowd sourcing portal, but if they do so, that will not necessarily create liquidity. They might put considerable energy into writing and launching a good crowd sourcing site only to have the world adore it. Moreover, building a successful e-commerce site requires lots of effort, lots of resources, and lots of luck. Do Merrick and his team want to be in the Internet start up business, or do they want to make a movie?

Also, if they build a crowd sourcing site, and *Miles Travelled* is the only project, potential users may be suspicious that their projects will be discriminated against, by inattention is nothing worse.

Regardless of who builds it, the crowdsourcing site should have the following features:

Allow anyone to become a "member" or "participant". It should be easy to sign up, and certainly no fee should be required

- Participants should be segregated into "producers" and "contributors"
- The contributor sign up screen should provide fields for location, specialty, including more than one, equipment, experience, and links to the participant's work
- Producers should be able to create a new project, subject to the approval of the moderators. The new-project page should allow designation of the type of work, a brief description, projected release date, and the specific kind of crowd sourcing assistance sought.
- While separate templates for each of the phases of moviemaking would be desirable, Simplicity also can be useful, with producers being allowed simply to post whatever materials they want with a free text description of the services desired.
- The site should allow the uploading and downloading of large files by both producers and contributors, including text files in Microsoft Word, audio and video files, in .mp3, .mp4, and .MOV formats, and .pdf files.
- The submissions page should have elements that describe the status of a submission, including, at least:
  - [Filename] submitted [date] [file type] [file size]
  - Review commenced [date] feedback submitted to submitter [date]
  - Collaboration commenced [date]

- Status entries would be generated automatically, as part of the workflow management capabilities of the software.
- The producer section should establish a blog as soon as the producer signs up, and permit the author of any blog entry to enable or disable comments.
- The site should enable producers and participants to launch and view video, audio, text and graphical material from within the site, but such materials should not be publicly accessible.
- Whether the site should not be in the middle of financial transactions should be optional; producers and contributors may make their own financial arrangements offline. On the other hand, if the business model contemplates extracting a fee for match ups, some payments processing capability is necessary. If the site engages in payments processing it increases the likelihood of potential liability in the event of a dispute between producers and contributors, and it also may deter participation until it develops trust.
- Payments. Any step can require payment before a participant is allowed to proceed. For example, the acceptance of a proposal could require payment of a fee to the crowd sourcing site the submitted material is unlocked. \$50-\$100 intuitively is the right magnitude for this fee.
- Payment of a fee to the collaborator could be required before a producer is allowed to do any more than view a submission.
- These payments prerequisites should be configurable by the producer. Setting up payments requirements should be provided for in options given on a payments page in the producer section, separately for each project.
- A distribution/exhibition subsection should permit producers to upload finished projects to YouTube and Vimeo, without having to go outside the site for file manipulation. It also should have links to commercial distribution and exhibition sites such as Amazon, Hulu, Netflix, and Apple, with as much interactivity from within the site as is feasible.

A site meeting these specifications could be programmed in php (for the user interface) and mySQL (for the backend database)

## VI. Legal challenges

Existing contract-law and intellectual-property-law doctrines are adequate for Merrick and his team to crowdsource *Miles Travelled*. Certain challenges exist, however, that require careful attention and meticulous drafting.

As a general matter, they must recognize that legal rights against a crowdsourced collaborator are not worth much unless they can enforce them. Many of their collaborators will likely be judgment proof—lacking discoverable assets against which a money judgment resulting from a lawsuit could be executed. When collaborators are scattered all over the United States or the world, obtaining personal jurisdiction over any of them would be daunting. And, of course, litigation is expensive and uncertain.

Enforcing intellectual property in *Miles Travelled* presents a particular problem. Let's suppose Brook crowd sources editing to an editor in Romania. If the Romanian editor impermissibly takes the work and exhibits it in Europe, it might be months or years before Brook and his team discover the infringing conduct. Then they have to learn how they can maintain a successful copyright infringement action in a forum that has personal jurisdiction over the Romanian editor, and over assets against which a judgment can be executed. They have no claim under U.S. law, because the U.S. Copyright Act does not have extraterritorial effect.<sup>200</sup> If a crowdsourced collaborator located abroad markets infringing materials through the Internet to persons in the United States, however, the U.S. Copyright Act would apply.<sup>201</sup> An injunction against infringement issued by a foreign court is enforceable under the doctrine of comity, "provided the [foreign] proceedings were orderly, fair and consistent with United States policy."<sup>202</sup> But execution of a judgment in the United States requires that the defendant

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<sup>200</sup> "It has long been established . . . that the Copyright Act does not reach acts of infringement that take place entirely abroad." *Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353, 1366 (Fed. Cir. 2008) (internal quotations omitted).

<sup>201</sup> *Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004) (affirming judgment for copyright holder against French defendant who marketed infringing materials through website located in the United States and made sales to U. S. residents).

<sup>202</sup> *Murray v. British Broadcasting Corp.*, 906 F. Supp. 858, 865 (S.D.N.Y. 1995) (articulating rule in evaluating forum non-conveniens argument in copyright infringement action); see *Sarl Louis Feraud Intern. v. Viewfinder, Inc.*, 489 F.3d 474, 481 (2d Cir. 2007) (reversing refusal, on First Amendment grounds, to enforce French copyright-infringement judgments; explaining that refusal to enforce, on public policy grounds, requires searching inquiry into the contents of foreign law).

have assets in the United States subject to execution. A small, foreign, crowdsourced collaborator is unlikely to have such assets.

Brook and the others could lessen the cross-border jurisdictional problem by requiring that crowd sourced contributors post a bond as a prerequisite for participating in the project. But the incentives for participation already are thin, unless the budget increases substantially to cover current payments. Requiring a bond would increase the price for participants considerably and no one is likely to participate if they have to pay to pay a high price for the privilege.

Complicating the cross-border jurisdiction and enforcement problem is local nature of copyright protection: there is no such thing as an international copyright.