Q&A: What Does This Indemnification Clause Actually Mean?

By Jesse Saivar on February 24, 2012

Q: I'm a writer and just got an agreement with an "Indemnification" clause I see in all of my contracts but I've never really been sure what it means. This one says: "Writer shall indemnify, defend and hold harmless Producer, and its licensees, successors and assigns… from and against all third party claims, damages, expenses, and liabilities (including, without limitation, attorneys' fees) that may be asserted against or incurred by or imposed upon Producer arising out of any breach or alleged breach by Writer of any representation or warranty made by Writer herein." Can you shed some light on this please?

A: That's a pretty piece of literature isn't it? I could read language like that all day. (Wait a second, that's pretty much what I do!! Lord help me.)

In plain English (or as plain as a lawyer can make it), an indemnification provision is basically saying that if you do something wrong like lie to your Producer about something concerning the work you're doing, and, because of that lie, the Producer ends up getting sued by some third party, you're on the hook for the Producer's losses and attorney's fees associated with that lawsuit.

For example, if you're a writer, you've almost definitely promised to your producer in your representations and warranties that the work you've created is original and not based on some third party's work. Let's say you submit your script entitled "I'm So Excited, I'm So Scared" to the producer who produces a movie based on the script. It turns out that you based large portions of your script, and some of the dialogue in it, on one of your favorite episodes of *Saved by the Bell*. The owners of the copyright in that episode sue the producer for copyright infringement. Because you breached your representations and warranties by stating that your script wasn't based on any third parties' materials when it in fact was, you would have to indemnify the producer for any damages it had to pay in the copyright suit, as well as its attorney's fees.

If the agreement containing this provision is governed by the WGA, you should know that Article 28 of the WGA Basic Agreement deals specifically with acceptable indemnity provisions in writer agreements. Therefore, any language in your contract's indemnity provision that negatively affects your rights and is contrary to the specific points laid out in Article 28 would be in violation of the WGA Basic Agreement. For your viewing pleasure, here's a link to the WGA Basic Agreement (Article 28 can be found on page 182 of the document).

You should note that the language you quoted above actually does violate a specific provision of Article 28, namely Section E of that Article. Your indemnity provision obligates you to defend the producer in connection with your breach or alleged breach of your representations and warranties. Under Article 28, Section E, a writer can only be obligated to indemnify for actual breach. This is for good reason. Let's say you write a completely original screenplay. After the movie based on you screenplay hits the theatres, someone who has taken way too many caffeine pills in her life becomes convinced it is based on a story she's had in her caffeine-addled brain for several years. She sues the producer for copyright infringement. She had no valid claim and it's thrown out but the producer had to spend $15k in legal fees. Because the producer was sued for your "alleged" breach, it may be able to call on your indemnity obligations, even though you didn't actually breach your representations and warranties. The "alleged breach" language causes you to basically become an insurance company for the producer. Any five-year-old on a playground could analyze that as "no fair." Therefore, you should always strike "alleged breach" language in any indemnity clauses in your agreements, whether they are governed by the WGA or not.

One last thing to note here. Your indemnity obligations are triggered by a breach of your representations and warranties. Therefore, you must also look at those representations and warranties to make sure they are not overly broad. If they are, it will be much easier for you to breach them unwittingly and thus lead to potential indemnification obligations. Let's say in your agreement you represent and warrant that "no third party will ever claim copyright infringement based on the script." Using the example above about the caffeine-addled whack job, even if your indemnity provision doesn't contain the "alleged breach" language, you may still be required to indemnify the producer because you would have breached your broad representation that nobody would ever claim your script constituted a copyright violation. This would not be the case, on the other hand, if your rep was sufficiently narrow and only stated, for example, that you represent and warrant that "the script is original and not based on the work of any third party."

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