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**Wendy:** As part of CINE's new online series of interviews with our sponsors and other interesting people, I am interviewing our new sponsor, the Chubb Group of Insurers. We are talking with Ken Goldstein, Worldwide Media Liability Manager for Chubb, and Joe Fitzgerald, National Manager of Chubb's Entertainment Division.

Joe, filmmakers are creative people, they are artists, that's their specialty. But to make a career in the industry they also must treat it as a business. How does Chubb help them do that?

**Joe:** Well the amount of money expended in making even a small film can run into the millions of dollars and it requires the use of expensive camera equipment, sound, lighting equipment. And with all this money invested, distributors, banks, finance companies, will require the film producer to buy a variety of film production insurance coverage. This would include cast insurance, production media coverage, extra expense to protect their investment. Equipment rental companies, studios, locations, municipalities require property and liability coverage at certain minimum limits. Even if your production is very small it is likely you will be required to purchase most if not all of these coverages. Aside from that, the most important reason is to protect your own assets and your ability to complete the film and eliminate any uncertainties in making the production.

**W:** Ken, can you tell us a little bit about Chubb's history, how Chubb got started?

**Ken:** Absolutely. It's a fairly interesting history as well. It dates back to the late 1800's and the founders of Chubb – Thomas and Percy – had really focused initially on the marine underwriting business. You have to fast-forward 85 years to when the Chubb Corp. was actually established in 1967 and then if you fast-forward a bit more to 1984, it was first listed on the New York Stock Exchange. At this point today, believe it or not, it has grown to be a multibillion dollar organization that provides a variety of customer solutions for personal and commercial customers worldwide. I'd imagine that both Thomas and Percy would be very proud of the length of the venture and how big it's grown and the solutions that they provide to folks generally.

**W:** I expect so. Well, when Chubb began, the maritime industry probably represented the latest technology or was involved in the latest technology, and here you are, over a hundred and twenty years later, and you're insuring something that once again is using the latest technology: film, television, and new media. Why was it important, Joe, for Chubb to become involved in this part of the industry?

**J:** Well, Chubb became involved in film, TV, and media insurance almost forty years ago and prior to that most of the film and TV production was controlled by the major studios that could self-insure these exposures. But as the industry grew, more of the financing started to come from banks, private investment funds, and even private investors. And these companies demanded broader protection of their assets. Chubb saw the need for the specialized protection and it was a good fit given our culture of taking on unique risks and providing creative coverage solutions for our customers. It is also a natural fit for a company such as ours that has a worldwide network of underwriting claims and loss control personnel throughout the world.

**W:** Right, because filmmaking is geographically dispersed, that's for sure. Before we get into the specific coverages that Chubb provides for the entertainment industry, I noticed that among other things you have cast insurance which traditionally would cover an actor getting sick, a narrator getting sick, that kind of thing. But I see that once you insured a flock of seagulls. What was that all about?

**J:** Well, we've insured flocks of seagulls, bears, dolphins, any kind of animal you could imagine. Producers usually buy cast insurance to protect them if the actor or one of the artists in the film becomes injured or ill and we'll cover the production loss they would incur due to the down time. The same is true if you have an animal that is a key film element in a production; they are just as important as one of the lead actors. So I think in that case, we had a flock of seagulls that if they were damaged, destroyed or became ill or something, a new flock of seagulls would have to be trained and the production would be down for a certain amount of time. So we are not afraid to take on unique exposures, anything from seagulls to animatronic bears to cats and dogs.

Chubb's appetite for film production is as diverse as the people that make the films. Our products are designed to protect a wide variety of productions. These would include feature films, TV productions, TV commercials, documentaries, music videos, educational films, and corporate or institutional videos.

**W:** Ok. Can you tell me about the film producer's risk policy?

**J:** This is our new state-of-the-art product that protects the film producer from really any loss resulting from damage to property, sets, production equipment, to additional cost to re-shoot a production when property used in the production is lost or damaged. It also provides coverage for cast insurance - which we previously talked about - which covers the production costs arising out of injury or illness to the declared cast member. We also cover production media, which covers losses caused by damage to the film, tape, or information contained on them. Some of the other unique coverages include loss resulting from action from a civil authority, response to an imminent peril such as hurricane or a riot, loss resulting from a strike that interferes with the shooting location, and we also offer a full spectrum of general liability coverages, auto, workers' comp, umbrella, or foreign coverage.

**W:** You mentioned that film is often damaged going through security X-rays; that would happen a lot with documentary filmmakers because they travel a good bit with film in hand, so I would think that would be an important coverage.

**J:** And we recognize this and for that reason we don't have an X-ray exclusion in our policy. It's up to the filmmaker to take all the necessary precautions to protect the film and what he really should do is check with the air courier, the airline, even the transportation security administration to see what information they have on protecting film when they travel.

**W:** Ken, could you explain Chubb's multimedia policy for us, and how technology – which is changing so rapidly – affects this part of your business.

**K:** Sure, absolutely. From a multimedia perspective, the policy is really designed to provide third-party content coverage for the individuals and organizations that are associated with the particular production. So the exposures that they may see from a content perspective may range from defamation to invasion of privacy to perhaps copyright infringement and trademark infringement maybe even advertising, you know.

In terms of your second question, Wendy, technology really could impact the business from the perspective of the type of insurance that you would need to be offering the applicants in film and television production space. I will give you an example: Traditionally, when we were covering motion pictures on a third-party basis, we were really covering the content in connection with that specific film. Let's say that it will be released to consumers to watch. Well, obviously technology has changed and often things go to DVD. And as a part of that process there's often supplementary type programming that is added, that is, different than what you would witness if you were to go to the film and actually see it there. Unless you actually modify the language and broaden it out to reflect the supplementary programming in connection with DVD, you may actually be gapping your client. So that is an example of making sure that you are up with the changes and that your language is broad enough so that if they have a claim that is more focused on the second piece than the first, you are in a position to cover them.

**W:** What about the internet? How has that affected your ability and your coverage?

**K:** I think the internet plays an important role because obviously a lot more folks can focus on the content. People seem to be less inclined to read things let's say in the paper, or perhaps even to go to the theater to watch, and yet they can perhaps pull up their computer and look at the internet and see something in terms of production in that fashion. So from the standpoint of just evaluating risk exposure when you are dealing with mass distribution such as the internet, maybe cell phones and the like, you just have to appreciate that more folks are ultimately going to see the content and my experience is when more folks actually see the content, the likelihood for a claim – whether it is legitimate or not – will probably go up.

**W:** Joe, can you get into any specifics as to how Chubb helps filmmakers mitigate or eliminate risk?

**J:** Well, one way we do that is when banks or when distribution agreements state that the lead actor is a required film element, they'll require key artist coverage. In other words the film cannot be delivered without that actor or director. The key artist coverage is also known in the industry as essential element coverage and it is offered under our film producers risk policy. The coverage states that if the declared artist is unable to complete the production due to injury, illness, or death, the insured can abandon the production and recoup all the cost incurred in the production to date. The coverage is normally required on a lead actor or director when the financing and distribution is secured based on that artist being part of the production. Basically it allows you to abandon if that talent is not part of the production and it is a coverage that is very prevalent today.

**W:** Would that apply to narrators in a documentary for example?

**J:** It could. We recently insured a very large documentary, a multimillion dollar documentary, where the director/producer/writer was insured for essential element coverage for a period of almost two years. That artist was essential for the delivery of this documentary film and if he had died or had become incapacitated and was unable to complete the production at any time during principal production or during post-production, we would have allowed the insured to abandon the production and recoup all their cost.

**W:** What can you tell us about stunts and pyrotechnics and special effects.? Are those insurable?

**J:** We want to solve people's problems. Upfront we might exclude those type exposures but also we want to know what you are doing and how you are going to control those risks. If the insured and the insured's broker and agent are willing to talk to us and tell us what they are doing and explain the process, we are more than willing to provide coverage for those stunts, whether it is on general liability coverage or on property coverage protecting the property when it is involved in a stunting activity. These are very unique exposures and our underwriters pride themselves on looking at something new and unique and providing something to the insured.

**W:** You had spoken earlier about civil authority coverage, could you explain what that is exactly and why a filmmaker would need that?

**J:** Civil authority basically covers a production company for any additional expenses incurred when your filming permit is revoked by a civil or military authority and you are denied access to the filming location. This coverage really emanated out of the 1993 riots in Los Angeles where all these filming permits were pulled and people found that they didn't have physical loss or damage to their property so technically there was no

insurance coverage. Chubb responded to those claims and paid them as if there was insurance---there was property damage under the policy. And since then we have offered the civil authority coverage which will give you that protection in the event that there is an unforeseen weather event such as a hurricane or a heavy snowstorm in the northeast or even something oddball like spraying for medflies in Central Park where the city may say that you can't come film because we have a infestation problem?

**W:** Things that people would never think of unless people had thought of it before, right? Ken, what about in your group? What do you do specifically to help filmmakers mitigate their potential liability?

**K:** I think you have to actually start with an assessment on the type of policy you want. There are different types of policies that you can ultimately get that will respond differently at the point of loss. One type is an occurrence policy, the other type is a claims-made policy. And within the occurrence context, which is a broader form, it's actually providing coverage for media activities that occur during the policy period. Think of your automobile policy where you have coverage for an accident that takes place during the policy period. But within the production context, it's typically triggered when the production is first released or disseminated to the public. On the other hand, it is important to note that there is also a claims-made coverage form in the industry available for use and what is different about that is that you actually have to have a claim that is first made against you during the policy period. So the first thing before I even get at how to mitigate loss overall is to make sure you understand the insurance you have in place; if you are looking for broader coverage, look for occurrence, which would probably be a little more expensive; if you are looking for something which may be a little bit more--less price significant--then perhaps you look towards claims made coverage.

**W:** I am curious whether it is necessary always to get a release from a person who is just depicted in a show or production and does it matter if that person is a public official or a private individual. What are the advantages of getting releases generally and when are they required?

**K:** Let me actually start with the last question first. When you have a release in place you are effectively obtaining certainty with regard to the person's permission that you are depicting. If it has been appropriately drafted, then you would have something comprehensive so that ultimately, if you're sued, hopefully it will act as a defense to the litigation.

But for some reason if you don't have a release, to get to the first piece of your question, it depends upon who you are dealing with and depicting and probably depends upon how you are depicting them, the content surrounding it. So I will actually break it down the way that you did in terms of public official and public figure versus private figure and maybe give you an example. I think that the best example would be a documentary that is maybe covering a newsworthy-type topic and is being done almost on 1<sup>st</sup> Amendment, free speech-type grounds; you'd be in a position perhaps to depict the public official or

public figure within that without a release if you avoid defamation exposures, if you avoid invasion of privacy exposures. If you're using intellectual property, then perhaps if you don't have a license, then you are within the area of Fair Use.

Defamation really for public officials and public figures, there's a higher standard that needs to be shown, from a plaintiff's perspective. You actually have to show actual malice, that the person who did the production, in this instance, acted that way. A knowledge of falsity, connection with defamatory statements, or if you are acting in reckless disregard of truth. So because it is a pretty high standard, I imagine it would be difficult to actually hit in connection with something that you were depicted in if you were in that category. Invasion of privacy is really more something that turns on your reasonable expectation of privacy and for folks that are public officials, like a governmental official or a sports person, they would probably have a little less of a reasonable expectation of privacy because they put themselves in the forefront of things.

I think when you are dealing with private figures, such as the folks on this discussion, it is actually more favorable to get a release because (for) the defamation exposure, instead of actual malice, you are dealing with a negligence standard, which is less. So what the reasonably prudent person would do under the same or similar circumstances and even in the invasion of privacy context, my guess is that either a jury or if a court were sitting, if they were trying it in fact, they would look at it as – “Hey, this is a private figure you are ultimately dealing with.” They may perhaps have a different reasonable expectation of privacy on how to depict them and in what fashion then the public figure or the public official might have.

**W:** If you could give us a little bit more information about that – when it's necessary to get a license to use somebody's copyrighted work or when it's permissible to use it under the fair use doctrine.

**K:** Sure absolutely. Let's start maybe with a definition of copyright, which protects original works of authorship that are fixed in some sort of tangible medium of expression, and it is actually going to protect the expression of the idea instead of an idea itself. So this could range from a dramatic work to a literary work to an artistic work and the like.

And really the benefit of being a copyright owner is that you actually hold exclusive rights up front in regards to your intellectual property. That might mean the right to reproduce the work, the right to distribute copies of the work, to prepare derivative works, to actually perform the work, and I guess most significantly for the purposes of your question – the right to display the work and use it in some fashion.

And where does Fair Use come in? Well, I guess Fair Use is effectively the core value of free expression within the copyright context, similar to free speech within the First Amendment context. And what the court does is they look to the copyright act and effectively say if you are using something on a Fair Use basis then you have an absolute defense. You don't actually have to license the work. Well, what does that mean? They

actually have a four-part test – there are different elements, which I will go through very briefly – and they balance them out overall and they come to a resolution on whether something is Fair Use or not.

So the test essentially boils down to the following: The first point is if you are re-using something for commercial gain, really for the same purpose, it is not likely to be Fair Use, versus if you are transforming the content, taking it in a different direction – for commentary, critique or the like, then you will be in a much more favorable position in regards to that element to suggest Fair Use. The second element has to do with the type of work or the nature of work that you are dealing with. Creative works are much less susceptible to being claimed for Fair Use purposes. While on the other hand, informational, newsworthy, or factual information might be much more oriented to Fair Use for the second element. The third has to do with how much you actually take. I think that the guidance from the cases I have seen is “less is more.” Unless of course you are going to take the heart of the work and then they’ll probably balance that whether something is Fair Use or not under that element. And the last element has to do with the impact on the market and the viability of the copyright holder to effectively, I imagine, profit from licensing stuff to others.

So they jumble all those elements together and then they ultimately get a resolution. While there hasn’t been too much litigation on Fair Use, there have been some interesting examples that have resulted in no Fair Use, and there have been others where there is Fair Use and cases have been dismissed.

**W:** What about parodies? How does that work with the Fair Use doctrine?

**K:** That is actually an excellent example. I mean, a parody effectively is that you are imitating a serious piece of work for humor or satirical effect which effectively requires you to refer to the intellectual property in order to do that, right? So if it’s transformative, if you are taking a limited amount of the original work, and it wouldn’t overall impact the original copyright, then it could be definitely deemed Fair Use. I think that the most recent example I have read about had to do with a case involving Carol Burnett and 20<sup>th</sup> Century Fox, where a parody was done in connection with Family Guy. Carol Burnett ultimately sued and the court concluded that it was Fair Use because it was in fact a parody, that it transformed the use of what they were trying to accomplish, didn’t take too much of it, and did it in a way where you wouldn’t necessarily confuse the Carol Burnett Show and what its purpose ultimately was for, versus what the Family Guy is about from a more animated maybe adult humor perspective.

**W:** Can you tell us a little bit about trademark? When a filmmaker would need the consent of the trademark owner to mention or show a product with a trademark – I am thinking soft drinks for example – what can you tell us about that?

**K:** Sure. The difference between really between how I defined copyright before and trademark – trademark, think any name, word, or symbol that is used to identify your goods and distinguish them from your competitors. In terms of your question about

consent, I guess it depends upon if you were just going to mention it or if you were actually going to show it or depict it. To mention it, as long as you are not doing it in a disparaging way, I would think you wouldn't necessarily need consent from the trademark owner. But I would say if you are going to depict it, it is good practice to actually get a release especially if the product is going to be depicted in an identifiable way as opposed to perhaps in the background in sort of a fleeting sense. And really the rationale behind that is because you perhaps could get claims for holding this product in a derogatory light, disparagement-type claims, or by actually depicting it front and center you may imply that the mark owner has in reality agreed to have that product endorsed in connection with the particular production and they may not have, so that may give rise to unfair competition-type claims.

I think about all the stuff we have been talking about, whether it relates to defamation or the invasion of privacy or copyright or trademark, it is really key to work with clearance counsel.

**W:** And how does a filmmaker know what is most important? What kind of coverage is essential for that particular filmmaker to secure for that particular production?

**K:** You know, I think it starts with a discussion with the intermediary between an insurance carrier perhaps and the applicant, just where the broker or the agent comes in and they could provide a background on the different carriers in terms of what they have on the perspective of products, what they offer that may differentiate themselves from one another, what the pricing type differences might be.

At the end of the day, from my perspective, I think the coverage component is probably the most important because they are not only protecting their own assets perhaps but they are protecting the assets of others who have invested in the process as well. And the benefit of broader coverage even if you end up paying more money is you've got certainty at the end of the day; if a claim comes in you should be in a position where you are covered.

I think a couple things. I think to kind of draw upon the civil authority example that Joe alluded to before. You're looking for a carrier that is designed to pay claims. At the point you have a claim, I think the first thing that you are going to do is turn around and report it fairly immediately to the agent or the broker that you are placing the coverage with, and they are going to turn around and get it to the carrier, and then you are going to have a direct interface with that carrier.

They are going to set up a claim file, or a loss-related type file. They are going to start by confirming their coverage investigation. They are going to get involved in investigating really what's at issue – if it's a loss they can handle directly with the carrier, it should be done that way; if it's litigation, it is obviously a little more complex and you are going to have to get counsel involved and the right level of counsel, so that it matches the level of claim and venue. At the end of the day, to me, what's

important is that you are with a carrier that is going to handle things in a good faith fashion, they are going to act with integrity.

**W:** How do you go about figuring out what the liabilities will be in the future? Predicting what you need to be thinking about, what you need to have your filmmaker clients thinking about?

**J:** Well, just from my perspective which is more on the property damage and production interruption side, the changes in technology will always necessitate the different types of insurance coverages and different approaches to it. The whole move to digital media may one day eliminate negative insurance, negative film insurance, because everything will be backed up and duplicated and triplicated, and there won't be any need to cover the negative. As everything changes, Chubb's approach to providing insurance coverage will evolve with the needs of our producers and that is the commitment we make to our customers and our brokers.

**W:** What about you Ken?

**K:** I think you could start by getting a sense of what the litigation trends are associated with the industry by being up with the particular reporters that are in your area--whether that is coverage-specific or media-specific. And making sure you are following them and going back to your coverage, and making sure your coverage is broad enough to address those trends. I think another way creatively to do it is to work with firms you are familiar with and sit down with them and they are closest actually to the film and television production type client, and I'm sure they have discussions and sometimes they actually come up with things you have never thought of before, to be market leading and to make sure you are taking into consideration technological advances. And I think that the last piece kind of dovetails back with the example about just covering the content of the motion picture versus, say, covering supplementary programming, in connection with DVDs. You have to understand really where the market is going. You need to understand what your coverage does. And really before it happens, in conjunction with it happening, you need to actually have coverage in place so that you are providing seamless solutions so that you are looked at as the expert and the place to go at the end of the day for the coverage.

**W:** That gave us a lot of information and I certainly feel we know more about the insurance business. Thank you so much.

**J and K:** Thank you Wendy.