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The Reality of Reality Show Participant Agreements

By Nima Daivari

The term “Reality Television” means so many things to so many people. It may invoke thoughts of shows like *American Idol*, *Survivor*, *Duck Dynasty*, *The First 48*, *The Real Housewives*, *Mythbusters*, and *Betty White’s Off Their Rockers*. As seen from just that small sampling, reality shows can be extremely different from one another, and trying to find a one-size-fits-all definition simply does not work.

A better way to categorize television programming is scripted vs. unscripted. One could argue that, for instance, *Idol* and *Survivor* are not reality shows at all—they are game shows. They have rules, contestants, and a prize. As such, the overarching term “unscripted” is what will be addressed for the purposes of this article.

The participants are the glue that holds unscripted programming together. Without actors or actresses, the participants become the stars of the series. As such, it is imperative to make sure that a production company has all of the rights and releases needed in place. Since unscripted programming can refer to so many different types of shows, below is a list of some general considerations to make when drafting a participant agreement for an unscripted series.

Participants as Stars

The participants in an unscripted series are not portraying fictional characters or known talent, but they are the stars of the show. If one is building a show like, for example, *The Bachelor* or *RuPaul’s Drag Race*, one has to view the participants not just as reality participants, but as television stars. A key issue with unscripted participants is making sure that they represent and warrant that they are who they allege to be. One of the most common representations the participant needs to make is that he or she is not playing a character. The participant agreement should have language along the lines of:

I understand and agree that if selected to be a participant on the series, I shall appear as myself; my appearance shall not be a performance and does not constitute an employment relationship between me and the producer. I understand and agree that my appearance on the series does not constitute a performance within the parameters of any performing arts union or guild and under no circumstances will compensation be payable to me or

on my behalf regardless of the results and proceeds of my appearance as exploited hereunder.

A provision such as the above eliminates three issues: Participants are appearing as themselves, there will not be any SAG-AFTRA or other union issues, and no employer-employee relationship is being established between the participants and the producer. Throughout this article, the word “producer” will be used in the loosest sense of the word, meaning the person(s)/entity responsible for the physical production of the unscripted series. When building a participant agreement, the network will certainly factor in heavily, but as this is *TV 101*, that additional wrinkle of network involvement will not be addressed.

The participants are not employees of the producer, but the producer is building a show around these people, and there are a slew of ancillary commitments that come with being featured on a television show, not the least of which are promotional appearances, merchandising, and talent holds.

Promotional appearances are a necessary part of television. The vast majority of unscripted series produce well below the average 18 to 24 episodes per season that a successful broadcast network show will produce. Since the series will be airing within a small window (around six to 13 episodes), the promotion and advertising is crucial. To promote the series the participants will not only appear in the series, but they will also need to be available to provide print interviews, satellite tours, red carpet appearances, television interviews, and print advertisements, to name a few. Imagine what would happen if one built a show around a participant who then refused to assist in promoting the series—it would be quite the challenge for the poor Marketing Department. As such, a production agreement needs to include a provision for promotional appearances. For example:

For the period commencing as of my execution of this agreement and continuing through and including the date which is two (2) years after the initial broadcast of the final episode of the cycle of the series in which I appear, I agree to participate in the development, production, promotion, advertising, and marketing thereof and for any ancillary products relating to the series. Promotional services may include, but are not limited to, media tours,

photography sessions, attending the Television Critics Association (TCA) press tour, lead-ins, lead-outs, teasers, promos, online chat sessions, tweeting, and other customary services as requested by producer. Ancillary products may include, but are not limited to, books, series soundtracks, and other merchandise.

With regard to such products, a producer will also need the right to use the participant in not just series related merchandise, but any additional product(s) with which the show is partnered:

I hereby grant to producer the irrevocable right to use and/or license my name, sobriquet, likeness, photograph, voice, caricature, and biographical material in connection with the series and the sale of any goods and/or services, irrespective of whether they are for producer or a third party. Such products may include, without limitation, books, magazines, tours, electronic sell throughs, home video products, and products of sponsors, advertisers, and integrations partners.

Such language not only protects the series, but also sponsors and integration partners of the series as well, such as Coke on *American Idol*, or Snapple on *America's Got Talent*.

The final issue addressed under this section is talent holds. There is a constantly growing list of celebrities who all started out as unscripted television participants, but have managed to parlay being a participant on an unscripted series into a multi-million dollar empire. Celebrities such as Lauren Conrad (*Laguna Beach*), Elisabeth Hasselbeck (*Survivor*), Snooki (*The Jersey Shore*), The Miz (*The Real World*), Bethenny Frankel (*The Apprentice: Martha Stewart*, *The Real Housewives of New York City*, *Bethenny Getting Married? And Bethenny Ever After*), Kim Kardashian (*Keeping Up With The Kardashians*), Kelly Clarkson (*American Idol*), and Travis Stork (*The Bachelor*) most likely had talent holds built into their participant agreements so that the producers could build upon the fame that arose from their appearances on the original unscripted series.

The above are just some of the examples as to why talent holds are so important. If one has a breakout star, it is important to make sure that the producer has the right to continue building that star's success:

For the period commencing as of my execution of this agreement and continuing through and including the date which is two (2) years after the initial broadcast of the final episode of the cycle of the series in which I appear, I hereby grant pro-

ducer an option to engage my services as a performer, exercisable upon written notice to me accompanied by the payment of \$xxxx.

Upon exercising the above mentioned talent hold, a producer would enter into a new talent agreement with the participant and the Development Department will figure out how to best further develop the participant. Carrie Underwood (*American Idol*), Bill Rancic (*The Apprentice*), and Kim Zolznick (*The Real Housewives of Atlanta*) were all developed in very different ways. Luckily, that is not something Legal needs to worry about—the creatives at the company further develop talent.

Relaxing At Home

Many unscripted series feature a group of participants who are living together. *The Real World*, *Big Brother*, and *Project Runway* are examples of three very different such series. Some considerations to make when drafting an agreement for this type of series are the very issues arise from living with strangers, hidden cameras, and dealing with health issues:

If I am selected to participate in the series, I may live with other participants. I understand that producer, in its sole discretion, may make limited information about other participants available to me but has no obligation to do so whatsoever. This includes any physical, medical, mental, or criminal investigations producer may conduct on participants of the series. In the event I decide to have intimate physical contact with someone I meet on the series I agree to disclose any adverse information concerning my health (for example, communicable or sexually transmitted diseases, etc.) prior to engaging in such contact and I grant producer the right, but not the obligation, to disclose any such information about me to other participants in producer's sole discretion. If I voluntarily choose to engage in intimate physical contact with another participant it will be of my own free will and not under any duress from producer or other parties. I assume any and all risks associated with any such relationship including emotional distress, STDs, HIV, and/or pregnancy.

The grave repercussions that could stem from intimate physical contact between participants are not to be taken lightly. Television shows rarely bounce back from that kind of scandal, not to mention the legal and moral implications that could stem from a worst-case scenario.

Protecting the participants of a series is paramount to any production, and making participants aware of any dangers is imperative (as is doing one's due diligence with respect to the participants).

A second prevalent issue that stems from having participants live together is one of secretive recordings. Many shows feature a house that has cameras and microphones strategically placed throughout. Secret recordings can run afoul of both privacy rights as well as wiretapping laws. In the United States, wiretapping laws are broken into two major groups—one-party consent states and all-party consent states. One-party states require that one of the people being recorded consents to the recording, whereas all-party states require all parties to a recording consent to being recorded:

I understand and agree that I may be recorded at any and all times in connection with the series. All rooms in the house may be outfitted with visible and possibly invisible cameras and microphones. My actions and conversations may be recorded at any and all times in connection with the series and may be recorded up to twenty-four (24) hours per day for national and/or international broadcast, including on the Internet. I understand and agree that I will have limited privacy (if any) and hereby waive any restriction of my privacy rights irrespective of whether or not I am aware I am being recorded. I understand I am free to leave the house at any time without the prior consent of producer but that in doing so I may be subject to dismissal from the series.

The last line in the above is an effort to thwart any kidnapping or unlawful restraint claims—something that is absolutely necessary to prevent the participants from mistakenly believing they are unable to leave the house.

We'll Fix It in Post

A running joke in film and television production is the saying "We'll fix it in post," which means any issues that occur while filming will be edited around or cut out entirely during the post-production editing phase of the series once shooting with the participants has wrapped. However, the reality is that not everything is fixable in post. That is why the below language is so important:

I understand that my interviews and/or appearances on the series may include statements by me, producer, other individuals, the viewing audience, or others (including, without limitation, coaches, personal trainers, experts, therapists,

counselors, doctors and referral services) which may be considered surprising, humiliating, embarrassing, derogatory, defamatory, or otherwise unfavorable and in a nature which may be offensive or injurious to me, the viewing audience, producer, and/or other third parties. Irrespective of whether or not such statements are factual or fictional, any such statements and any injuries allegedly caused thereby are hereby specifically included within the matters released and indemnified against herein and I fully assume all risk associated therewith.

In the event a statement is "published" (airing an episode is considered publication for defamation claims in connection with television), one needs the above language to protect the series from emotional distress and defamation claims. However, there are many shows that take place in front of a live audience, so fixing it in post production may not be sufficient if the statement was made in front of hundreds, or even thousands, of live audience members. As such, one certainly needs a release like the above in order to protect the series and statements made in connection therewith.

Bad Things Happen to Good People

A series can be well-established and take every safety precaution under the sun, but at the end of the day, sometimes bad things happen that are not anybody's fault. Shain Gandee (*Buckwild*), Phil Harris (*Deadliest Catch*), Gerald Babin (*Koh-Lanta*), Ryan Dunn (*Jackass*), and Megan Hauserman (*Megan Wants a Millionaire*) are a few examples of participants who passed away for various reasons that may or may not be attributed to their appearances on their respective series. Language like the below can mitigate some of the risk associated with production:

I authorize producer to conduct physical, psychological, criminal, and background investigations of me and/or other participants. I understand and agree that producer makes no representations or assurances whatsoever as to the background, mental or physical condition, or criminal history of any participants in the series and I assume the risk for any activities I participate in and for any interaction with any other participants in connection with the series.

Most series do a thorough job of investigating all participants, but unfortunately medical conditions can go undetected for years, individuals with no criminal history can engage in criminal behavior, and substance abuse can often go undetected.

In the unlikely event that something does go wrong, the below language is necessary both preventatively as well as curatively:

I understand and agree that any physical or mental assistance or examinations I receive in connection with the series shall not create a confidential relationship between me and any medical provider. I acknowledge and agree that any such medical information obtained may be shared with producer. I waive any provider-patient privilege I may have or that may arise and agree to the release of any records in connection therewith. I hereby authorize producer to arrange for or provide medical assistance to me as producer deems necessary. I also authorize any physician or other medical provider or facility to provide any medical or surgical care determined to be medically necessary, including, without limitation, application of anesthesia, surgical care, or hospitalization.

A brief column like this certainly cannot address the litany of issues that arise in the production of an unscripted television series. In fact, it is not even close as some participant agreements can be upwards of 50 pages long. Hopefully, however, this may be used as a jumping off point in discussions revolving around the needs of a specific production.

The language provisions and language in this column are for informational and educational purposes only and do not constitute legal advice.

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