



Chilean Miners: Now That They're Out, What Rights Can They Sell?

October 13, 2010 by Bob Tarantino

Andrew Potter, writing in *Maclean's* last month, while ruminating on the plight of the Chilean miners trapped by a cave-in, pondered a question which nestles at the heart of legal theory: "if there is conflict, violence, and even death [while the miners are trapped in the mine], what legal regime should apply? Are the men even living under Chilean law anymore?"

Such considerations are a bit highfalutin - here at the Signal, we deal in more prosaic legal matters. So now that the miners are, thankfully, free and healthy, let's consider the situation from the point of view of entertainment law: how can these miners make some money by having movies made or books written about their ordeal? This post offers some of the considerations to be taken into account when thinking about what rights the miners may have, and what rights other may need to obtain in order to tell the story - I've tried to avoid making this analysis too "legal", focusing instead on broad-stroke considerations. (According to the *New York Times*, at least one miner is ahead of the game, seeing as he is "writing a book".)

What avenue of exploitation offers the likeliest path to riches for the miners? Ultimately, it will be those forms of exploitation which *require* the willing participation of the miners - participation for which they can bargain, thereby claiming some monetary compensation. Here we're looking for forms of exploitation which *only* the miners can provide. So, for example, potentially lucrative opportunities can likely be claimed by offering exclusive interviews to print newsmagazines or TV shows (a twelve-page spread in *Hello!*, for instance, with charming posed shots of the miners and their reunited families, replete with the results of exclusive sit-down interrogatories; or a walk-about with Diane Sawyer, say, or Oprah). Taking advantage of such opportunities will require the miners to be circumspect in their dealings with the media until such time as an exclusive deal is signed (and even more circumspect thereafter) - they want to avoid giving away too much for free, after all. Such deals are usually structured as involving an up-front payment in exchange for access - which has the benefit of money being put into their hands, but doesn't give them a cut of the earnings which are made from exploitation of their images. Advertising or endorsement deals are also a possibility - again, lucrative because they are predicated on the participation of the actual miners themselves, and not simply an actor portraying them.

Beyond that, things get somewhat more complicated. Writing a book (whether alone or with a co-writer or ghost writer) could be lucrative for an individual miner or small team of miners - a nice up-front advance (possibly multiple advances from different publishers for different territories) coupled with some sales royalties (traditionally pegged at 8-12% of the retail sales price of the book, becoming payable following recoupment of the advance). A book written by one or more of the miners (or with their significant involvement) would likely be more attractive in the marketplace than a book written without them, but anyone could write a book about the ordeal - cobbling together bits and pieces from news reports and interviews - so the premium for these rights likely won't be as high compared to the exclusive interview rights mentioned above.

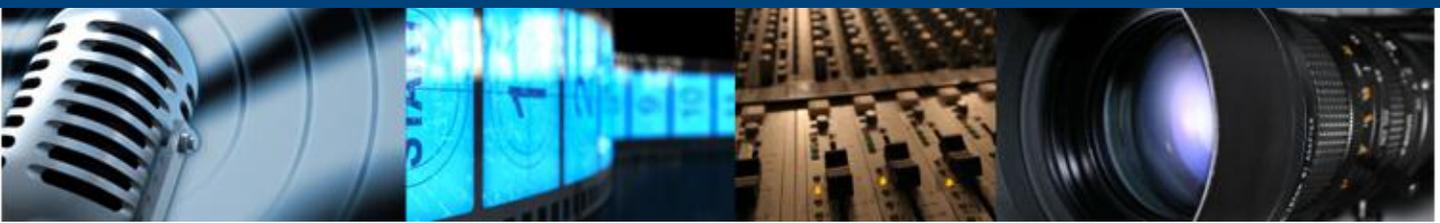


Many might think that the truly big paydays are to be had by exploiting film and TV projects - and there could indeed be significant money to be made by such projects, but probably not for the miners themselves. Film and TV producers will need to consider the issue alluded to above: do I *need* to contract with these miners in order to tell their story? (I highly recommend Mark Litwak's discussion on this point: [Purchasing Life Story Rights](#).) Potential concerns here are whether portraying the miners (or some fictionalized version of them) would impinge on a "right of publicity" or "right of privacy" that the miners may have. But because this is a highly public story, with significant public interest, freedom of expression interests counteract the extent to which the miners could assert such rights to prevent a producer from making a movie based on the story. Producers don't necessarily need to obtain permission from *anyone* in order to make a fictionalized depiction (as distinct from a documentary) about this saga (compare the (in)famous [near simultaneous broadcast of three separate MOWs about Amy Fisher](#): one network obtained rights from Fisher, one from her victim, and one network didn't bother contracting with any of the involved parties). Changing a few names and locations could go a long way towards making the project lawsuit-proof.

That being said, there can be value in obtaining co-operation from the miners - getting access to little details about their entombment ordeal which could make a movie more accurate than competing movies, for example. There's arguably some upside to having the "authorized" version of the story (compare unauthorized biographies to authorized biographies, for example) - but then again, the Amy Fisher movie which was made entirely without the participation of any of the concerned players also received the highest ratings.

"Co-operation" has another aspect as well: obtaining a release from the miners of any claims they might assert against the producers for invasion of privacy, infringing on the right of publicity, etc., regardless of whether such claims would stand a decent chance of winning in court. In a case such as this such a waiver of rights may have considerable value - the miners are likely to obtain some kind of aggressive representation at some point, who will frown on others making money from the story irrespective of the niceties of rights acquisition requirements (or lack thereof). At this point, however, there comes into play the matter which cuts against the miners: there's thirty-three of them. The portion of a film/TV project's budget which is allocated to rights acquisition is usually fairly modest - a million dollars would be outrageously high. But even if there *were* a million dollars available, that would need to be divided thirty-three times. While that share might go farther in an impoverished Chilean mining village, it's not exactly palaces-and-Ferraris-for-life kind of money.

If a producer does decide to obtain a release or enter into a rights acquisition deal with some or all of the miners, payments will likely be structured as a modest up-front payment, with perhaps a further payment for services rendered as a "consultant" to the movie (assisting the screenwriter with details, for example), and possible further payments based on bonuses if certain box office milestones are achieved, or a share in the gross or net proceeds of the project (hint: there will never be any "net" proceeds). However, the latter two forms of payment (ie box office bonuses and revenue participation) will need to be aggressively negotiated for, as producers are usually reluctant to provide them.



One aspect of this which will require careful management is going to be interpersonal relationships among the thirty-three themselves. Although at the moment the news is filled with heart-warming stories of gifts being showered on the miners, if they are interested in making money from their ordeal they will be entering a mercenary environment, where business decisions are made using a metric of obtaining the widest scope of rights for the least amount of money. It is almost inevitable that they will disagree about whether and how to involve themselves in opportunities for exploitation of their rights. Jealousy might erupt as one or more miners become media "favourites", leading others to grumble in the background. What appear at first to be enormous amounts of money will quickly dwindle once received and spent. Indeed, don't be surprised if a few years from now you start reading "where are they now?"-style stories featuring heart-breaking tales of frustration that hoped-for riches didn't materialize.

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