

# FROM SCRIPT TO SCREEN

THE IMPORTANCE OF COPYRIGHT  
IN THE DISTRIBUTION OF FILMS

Creative industries – No. 6

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## PREFACE

The objective of this publication is to introduce the novice filmmaker to the legal and business related issues needed to participate in what is now a well-structured global marketplace for films. It provides a broad overview of the principles and standards currently observed and practiced in the film industry at the international level. Readers should consult local copyright experts to gain a complete understanding of these issues in their respective countries.

This publication is written through the lens of the distributor. Broadly, this includes the local territorial distributor, the sales agent or even the producer acting as either of these. One of the central messages is the importance of copyright documentation, especially written agreements that identify copyright ownership in a creative work. Filmmakers and in particular the producer should be acquainted with the fundamental functions of the people and companies that will not only license their film but also market it to the public. The territorial distributor is responsible for the marketing and circulation of films to the end users (the audience) including cinemas, television, DVD and new media distribution technologies including Video on Demand (VOD). The sales agent on the other hand is responsible for the licensing of distribution rights to a territorial distributor in a particular country. This publication will describe the entire value chain with particular emphasis on the distribution agreement and rights transactions between a film distributor and the producer or between the sales agent and the territorial distributor. The producer will license or assign rights acquired by him at the development stage, against remuneration and the prospect of the film being exploited in key markets by a global distribution company or territorial distributors who have acquired local rights from a sales agent.

Pertinent issues and contracts will also be reviewed. These include the Acquisition Agreement or the Sales Agent Agreement, the Territorial Distribution Agreement as well as warranty issues including Errors and Omissions insurance (E&O). Agreements related to the underlying rights, including music, will be discussed but this is not meant to be an exhaustive exploration of the producer's obligations. The authors suggest that producers consult WIPO's publication RIGHTS, CAMERA, ACTION!<sup>1</sup> for more information on the related topics.

<sup>1</sup> WIPO Publication n° 869.

Dispute Resolution is also covered, particularly the WIPO Mediation and Expedited Arbitration Rules for Film and Media that are specifically tailored to resolve potential disputes in the film and media sectors and the WIPO dispute resolution options for collecting societies, e.g. WIPO Expedited Arbitration Rules for AGICOA and WIPO Expedited Arbitration Rules for EGEDA.

Finally, the chapter devoted to pitfalls and solutions will include a risk analysis checklist that will help identify the problems before it is too late. Issues explored include spotting people who are unlikely to meet their obligations, risks inherent in international transactions and working with lawyers.

The approach taken in this publication is a very practical one, incorporating advice and case law as well as the broad legal structure. It outlines international norms that allow people to know what they own or what they are buying and therefore what they can legally distribute or license to others for distribution. While it is limited to the film industry, with few exceptions, the same rules apply to television and all other audio-visual productions.

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## INTRODUCTION

*“The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may, for a season, reap what the copyright owner has sown.”*

- Lord Bingham of Cornhill in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* 2001

Copyright laws exist to protect not only authors or creators of original works of authorship but also all Chain of Title rights holders, including film distributors. The term Chain of Title refers to the documented collection of assignments to the producer, Special Purpose Entity (SPE), distributor or other entity that proves ownership of or distribution rights to a film. While differences subsist in national copyright laws from country to country, as to the regulation of copyright transfers, rules regarding the remuneration of authors and methods of dispute resolution, the guiding principles are enshrined in the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and relevant international treaties as administered by the World Intellectual Property Organization (WIPO).

A film is essentially a collection of copyrights, i.e. a screenplay, possibly based on a book, music, directing talent, actors’ performances, as well as the contributions of creative technical crew such as costumers and set designers. All rights need to be properly granted and acquired (by assignment or license) and documented for the rights holders to claim ownership to the film. Rights holders are then free to exploit the film through the transfer of distribution rights to a distributor. In many cases the local distributors will need the documentation to secure their investment and proceed to acquire and market the rights for their territory. Distributors must have confidence that they are licensing the rights from the film’s undisputed copyright holder. As film producers and distributors know, respecting all of the copyrights that go into a film can be a paperwork nightmare. Nonetheless, it is a necessary part of the filmmaking process.

The growth of local film industries (in volume and quality) around the world and the new technologies that allow films to reach global audiences have made it more important than ever that film producers adhere to internationally recognized standards for copyright ownership and transfer. This publication will outline those standards and demonstrate how they can effectively be applied to properly compensate creators, maximize distribution revenues and create investment sector confidence.

One of the first things to establish is what is meant by the distributor. The distributor is the legal entity, a person or a corporation, that has the right to generate revenue from the copyright by releasing the film to the public or licensing the rights to sub-Distributors who will release to the public in their defined territory, language and medium. For purposes of this publication, a distributor may be: a major studio such as Warner Bros., UGC, Gaumont or Universal, a local independent company such as Aurum in Spain or Ster Kinekor in South Africa, a television broadcaster like Canal+ in France and TV Tokyo in Japan, or a sales agent such as Summit International which licenses rights to the “Twilight” films to territorial distributors around the world.

Sales agents fall into a special category and we include them as distributors here only in the broadest context. In many countries and in particular under the laws of the State of California where many sales agents are based, their business is governed by a particular set of laws that makes it clear they are acting on behalf of a third party rather than acting on their own account. This creates a special set of obligations and many would argue that they are therefore not distributors themselves. Again, that distinction is not relevant to our definition of distributor for the purposes of this publication.

Though written through the lens of the distributor, the information contained in this publication is equally important for all copyright creators and owners, i.e. producers, directors, actors, set designers, costumers, screenwriters, novelists, character creators, those owning remake and sequel rights, and those on the business side of the industry such as lawyers, bankers, insurance providers, financiers and distributors. More will be said about each category of stakeholder but ultimately the producer and distributor are responsible for ensuring that all of the proper paperwork is completed in order to demonstrate clear ownership of a film or the distribution rights to that film. They are the ones, especially the distributor, presenting a face to the public, generating revenues and facing potential lawsuits due to the illegal use of copyrighted material. To cope with such responsibility, the paperwork, which includes all copyright documentation, must form part of a clear and cleared Chain of Title (COT). This starts at the very beginning of the filmmaking process. Reconstructing copyright documentation is difficult and often impossible if not well handled early in the life of a film property.

The COT documentation is essentially a passport that allows a film to enter the international marketplace – a baseline document that will open the door. That door will remain forever closed if copyright ownership cannot be proven, confirmed and, in many cases, insured through what is called an Errors & Omissions Insurance (E&O). Real estate is often used as a metaphor because most people in the business, banking and financial sectors have more experience with these types of financial transactions. No one would build a shopping mall on land she did not believe she owned or controlled. There are clear methods in most countries to determine who controls that land (the Title) as well as Title Insurance to insure against financial loss from mistakes in that paperwork. Correspondingly, all intellectual property contained in a film must be licensed and, where practical, insured before an investor will invest, before a banker will loan production funding and before a distributor will take the risk of putting the film in front of a paying audience.

Filmmakers may complain that the business side of the industry has overtaken the creative side. More lawsuits and audits mean more lawyers and accountants are involved. Unfortunately, the more successful a film is, the more the Chain of Title will be questioned by anyone with even a vague connection to the material. This has been the case since the early days of cinema. As challenging as it is today, it is difficult to say that it has gotten worse. One notable change has been that more of the practitioners on the creative side understand that they do have rights and in many places those rights have been codified, expanded and their application strictly enforced.

The illegal distribution of copyright-protected works (piracy) is not discussed in detail in this publication, except to note that it is much easier for distributors to enforce their rights when they can clearly demonstrate those rights to international standards. Intellectual property piracy is a scourge but this publication addresses proving ownership in the legitimate distribution marketplace. One of the most important reasons for distributors and creative workers to properly assign or license rights is that they want their rights respected as well.

Distributors around the world are always looking for the most creative, commercial and interesting films to present to their audiences. One of the greatest things about film is that new talent can be found anywhere. A small film from a country with a limited filmmaking culture can win the top prize at the Cannes Film Festival. When that happens, the rights holders are deluged with distribution offers. Potential distributors will demand that the rights holders are ready to clearly demonstrate their ownership of the film to international standards. The time to start preparing to close that big distribution deal is long before the cameras roll.

This publication does not offer legal advice. The authors encourage readers to seek legal counsel locally and to make sure that their counsel is well versed in standard international copyright agreements and application.

## CHAPTER 1

### THE GLOBAL STRUCTURE OF THE FILM INDUSTRY

#### 1.1 Opportunities for Films in Local Markets and Overseas

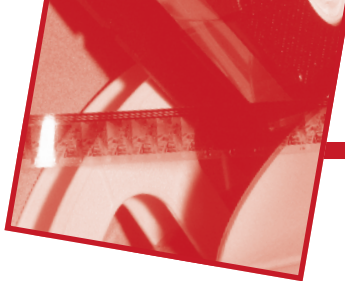
The film industry is a true global economy, a thriving collaboration among artists, financiers, producers, distributors, exhibitors and the audience. This globalization accelerated through the 1980s and 1990s when overseas revenues for American films grew from less than 30% of global revenues to well over 60%. This occasionally happened at the expense of local film production but in most cases was due to the general growth in distribution revenues worldwide – including the liberalization of television (TV) markets which resulted in the proliferation of for-profit channels – and benefited local and imported films.

The early twenty-first century witnessed the explosion of local production in China, India, Latin America, Africa and Eastern Europe. The Chinese box office topped 10 billion Yuan (US\$1.5 billion or Euro1 billion) in 2010 – a spectacular 64% increase on 2009. Though led by some U.S. blockbusters, 17 local films surpassed the 100 million Yuan mark (US\$15 million or Euro10 million). Successful internal markets have led to higher quality film productions which have in turn been able to access an established global distribution system previously dominated by the United States and Europe. The United States is no longer the epicenter of the global film industry. This has produced interesting opportunities for non-U.S. production and distribution companies and laid the groundwork for films from around the world to reach an even wider audience.

As background, it is important first to understand how the major U.S. Studios and independent companies around the world distribute films to global audiences and then to explore what this means for local filmmakers and financiers. Copyright ownership is crucial for entering this global system at any level.

##### 1.1.1 The Major U.S. Studios (Sony, Fox, Warner Bros., Disney, Paramount, MGM, Universal)

The major Studio side of the film distribution business is straightforward. They maintain their own wholly owned distribution offices in each of the principle



territories. These offices then book their films into cinemas, distribute DVDs to retailers and handle local marketing for both activities. For example, a Fox film opening in the United Kingdom will be managed by Fox executives based in their offices there, under the supervision of the international team at the Fox studio in Los Angeles. Many of the major Studios also operate so-called “specialty” divisions, which are comparable to independent production and distribution entities. They are usually U.S. distributors and may distribute outside the United States or sell rights to films they produce or acquire on a territory-by-territory basis. Some of these companies are Universal Focus, Sony Pictures Classics and Fox Searchlight which released Danny Boyle’s Oscar-winning film, *Slumdog Millionaire* (2008).

Increasingly, the Studios have transitioned to a near-simultaneous global distribution strategy (day-and-date release), releasing in as many territories as possible within a few weeks. In this way, Studios benefit from the huge publicity generated by the U.S. release, while limiting damage from piracy. The Internet, MTV, CNN and global media assure that on Monday, a global audience knows which films were in the U.S. Top Ten over the weekend. Such news can have a huge influence on global tastes and distribution success.

The major Studios are almost inevitably part of global media conglomerates such as NewsCorp (Fox), Time/Warner (Warner Bros.), Disney and Viacom (Paramount). Most of these have a significant TV distribution business that can include global cable brands like Fox Family, Disney Channel, MTV (Viacom/Paramount) and even substantial ownership of TV distribution outlets in other countries – usually cable and satellite rather than broadcast which is subject to greater ownership restrictions. Increasingly, these Studios are partnering with local companies around the world to create content including feature films. In some cases that content will travel outside the country of origin. Some Studios have even invested in cinema chains overseas.

Studios are also potential financiers and distributors of films produced wherever they operate and some will acquire distribution rights for both U.S. and select non-U.S. markets. Of course, they are more likely to buy through their specialty divisions and these are the groups which are more likely to finance a local film. When they do so, Studios will expect that all COT protocols are strictly respected – in many cases that can include granting them the rights for remakes, prequels, sequels or spin-offs. Studios have also invested heavily in non-English language production and distribution. A prime example is director Ang Lee’s highly successful *Crouching*



*Tiger, Hidden Dragon* (2000) which was substantially developed and funded by Miramax (part of Disney at the time), Good Machine and Sony Pictures Classics. In some cases, as in the late 1960s and early 1970s when they were funding films by renowned directors like François Truffaut (*The Mississippi Mermaid* (1969) with United Artists) or Luchino Visconti (*Death in Venice* (1971) with Warner Bros. Pictures financing), U.S. companies also invest overseas to penetrate local markets and bypass local film distribution regulations, such as quotas.

There are limits to the power of the major Studios. Many countries restrict the growth of local activities of the Studios for cultural as well as business reasons through quotas or laws against certain anti-competitive business practices. In South Korea, for example, some credit the rise of local films between 2000 and 2007 to the country's screen quota policy while others credit its success to a rise in quality that soon made the quotas obsolete because cinemas had started to play the films much more than the quotas required. Whatever the cause, the market share of local film production in South Korea reached 57% in 2005 and in October 2006, the Government of South Korea designed a specific support system for its Film Industry which includes the promotion of South Korea films abroad.

### 1.1.2 The Independent Distributors

Independent distributors are basically all distributors everywhere in the world who are not associated with the U.S. major Studios. These include huge territorial distributors like UGC and Pathé in France, and E1 and Alliance in Canada, which also have significant international operations. Independent distributors can be territorial distributors in their local countries as well as exporters (sales agents). They can be involved in all territorial distribution activities including theatrical, DVD, TV, VOD or through the Internet, or they specialize in more than one area. The one thing they have in common is that they are not part of the global, vertically integrated U.S. Studio distribution system. Yet as indicated above, the U.S. major Studios could be buyers (territorial distributors) and may even have long-term distribution arrangements with the independent distributors in various territories whereby the local territorial distributor releases all films from the U.S. major Studio in that country.

Germany, Italy, the United Kingdom and France, as well as India, Egypt, Russia, Japan and others have all developed their own film industries from the earliest days of the art. Decades ago, these countries boasted some of the world's pre-eminent studios,

such as UFA and Bavaria Films in Germany, The Rank Organisation and Ealing Studios in the United Kingdom, Gaumont and Pathé in France, MosFilm in Russia and Toho in Japan. In recent years, the rise of local production in many other countries around the world has had a major impact on the independent sector.

Local films are, by their nature, independent films. They are usually sold and released by independent territorial distributors locally and in other countries. As larger numbers of films are locally produced and find export markets, the number of films released in many territories has increased to the point where just getting a cinema booking can be very difficult. The U.S. major Studios have significant powers in most markets and often dominate cinema screens, making it difficult even for local independent films to find bookings, although in many territories like India, Japan, South Korea and France local films and distributors dominate the box office.

Despite the fact that U.S. films can take as much as 80% of the global box office, non-U.S. films are still competitive in local markets. In 2008, Japanese films took 57% of the local ticket sales revenue, while in France local films received 45.3% of the box office revenues, with U.S. films accounting for 43.2%. Distributors in France and many other territories, particularly in Europe, receive distribution support from the local governments as an effort to maintain a vibrant local industry and encourage additional private investment in the sector.

Between five and six hundred films are released in cinemas in the United States every year – roughly ten to twelve every week. Several times that number are released on DVD every week and compete for consumer spending. Adding to the thousands of films made in local markets around the world, such countries as India, Japan, Korea, the United Kingdom and France all make large numbers of films for the cinema. It is thus clear that getting any film into cinematic distribution anywhere is a challenge. Some say there are too many films being made while others would argue that producers have to make three films to get one good one. Investment in films, whether by individuals, corporations or governments, is often detached from the potential revenue from the marketplace. This leads to more films being made than could possibly be profitable. For example, more than 4,000 films were made in 2009. That number is expected to increase as countries like China, Russia and Brazil increase production levels.

The United States and France offer some of the most detailed statistics in this area. According to the Motion Picture Association of America (MPAA), there are approximately 150,000 movie screens in the world, with about 40,000 of those in the United States alone. About 560 films were released at the cinema in the United States in 2010 – about 11.5 every week. Of those, 419 were independent films. The average American buys only four cinema tickets per year (one third of Americans do not go to the cinema at all). The United States is considered to have one of the highest numbers of screens per capita as well as being one of the top territories for ticket sales per capita. Cinematic distribution is a challenging business and producers need to be aware of the current market difficulties to negotiate the most favorable distribution agreements.

Three levels of films in the distribution market can be distinguished:

- (i) The major Studio films – theatrical releases with larger budgets.
- (ii) The major Independent films – the local or international titles that are assured theatrical release in most markets because of budget, cast or director.
- (iii) Everything else, for example those films that will only be theatrically released locally, direct-to-DVD or TV films and perhaps the biggest sub-group here, the well-meaning art films that fail to perform at film festivals.

In the past, many of the larger independent films were developed to a certain point and then a sales agent and/or a global all-rights distributor, often acting as an executive producer, would present the elements – screenplay, actors, director, budget and domestic release plan – to buyers from around the world who would license the right to distribute the film in their territory. Those territorial distributors can also be called sub-distributors or national distributors in the country of origin homeland of the film. It is unfortunate that the word ‘distributor’ is used in so many different contexts but all are involved in generating revenues for the film, and this publication will try to be as precise as possible to avoid confusion. These “pre-sale” (prior to the film being made) contracts are used as collateral for a production loan and the film would be made. Few of these films lived up to the sales pitch and many were costly disasters for the buyers. Others, including the *Lord of the Rings* Trilogy directed by Peter Jackson (2001-2003) and *The Twilight Saga* (various directors, 2008-2010) were very successful. Some territorial distributors have decided to become producers themselves and now run production and territorial distribution companies making and distributing local language, and in some cases, particularly in Spain, English language films.

### 1.1.3 Film and TV Distributor Trade Organizations

Independent film and television distributors' trade organizations encourage the growth of local sales companies and distributors. Although many sales agents will handle films from anywhere in the world, there is no substitute for local companies offering their own films to the marketplace.

The U.S. Studios are organized in a trade organization called the MPAA (Motion Picture Association of America), and independent distributors have a similar organization called the Independent Film and Television Alliance (IFTA). Approximately 60% of IFTA members are non-U.S. companies. In addition to its other functions, IFTA organizes the American Film Market (AFM) every November in Santa Monica where producers, sellers and overseas distributors gather to make territorial licensing deals. There is also a European Film Distributor's organization called the European Film Export Association (EFEA) as well as local distribution groups in many countries and regions such as the Film Distributor's Association (UK Theatrical Film Distributors).

Almost every territory in the world has a local producer's trade organization as well as unions/guilds representing writers, directors, actors and technicians. Some are government funded but most are private groups formed by the practitioners. The Producers Alliance for Cinema and Television (PACT) is the UK trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media companies. In Hong Kong the HK Trade and Development Council works with the Movie Producers and Distributors Association of HK to organize the hugely popular FilmArt film market every March. UniFrance helps to organize the export efforts of French producers and sales agents around the world and IMCINE has developed a fine reputation for promoting Mexican filmmaking around the world. Filmmakers should access the resources of their local film promotion organizations and seek their guidance and support.

## 1.2 Entering the Global Marketplace for Films

### 1.2.1 Sales Agents and Film and TV Festivals and Markets

The real opportunity for local films outside their home territories or regions lies in the independent distribution sector. Even though ultimately a major Studio division

might distribute the film in the United States, it will most likely buy the film at a film market or festival where it will be considering a variety of other independent films. In essence, Studios are acting like any other independent territorial distributors in that market.

Such film markets as the American Film Market in Los Angeles, the Cannes Film Festival and Market, the European Media Market in Berlin and the Hong Kong Film and Television Market are opportunities for territorial distributors and sales agents to meet and license territorial distribution rights. There are also many TV markets, including two in Cannes (MIPTV and MIPCOM), as well as local events around the world. Of course, licensing activities happen year-round and are not limited to these events.

Film and TV festivals occur on a year-round basis and getting into the right festival can be a key factor in securing distribution. A producer might think that premiering at the Sundance Film Festival in Utah will be their ticket to success but history indicates that a film premiering at the Toronto Film Festival probably has a higher chance for strong commercial distribution. The Cannes Film Festival is the most highly-regarded festival in the world but its critics can be unforgiving. *Southland Tales* (2006), for example, a film by the director of *Donnie Darko* (2001), Richard Kelly, debuted in competition in Cannes in 2005. The reaction to it was so severe that producers completely re-cut the film and the version that was eventually released to the public was barely noticed by audiences or other critics.

There are also many examples of films that were 'discovered' at Cannes, including Quentin Tarantino's *Pulp Fiction* (1994) that won the Palme d'Or and went on to become a worldwide success.

Good sales agents will steer a film through the market and festival process. They will know when to pre-sell and when to wait to screen a completed film. They will also know whether the film will play better in Park City (Sundance) or Venice during the Mostra Film Festival. There are two types of sellers: the producer's representative ('rep') and the international sales agent. Producer's reps will represent a title to the U.S. distributors and may be involved in securing an international sales agent. They will receive a fee, usually around 5%, for closing a deal in the United States and may receive a portion of the revenues generated by the sales agent. The U.S. deal may involve an upfront payment referred to as a recoupable advance or it may simply

guarantee that a certain amount of money will be spent on the release (a prints and advertising (P&A) commitment, for example), or both.

A typical arrangement with a sales agent may involve a recoupable advance paid to the rights owner, usually the producer, and will require the recoupment of costs, as well as a distribution fee of between 10% and 35%. If the sales agent pays an advance against expected distribution revenues from her sales, she will usually take a higher percentage fee. If revenues are expected to be extremely high, the percentage is likely to be lower and vice versa. Since it is likely to involve the same amount of work, agents would generally prefer to make 10% of \$10 million than 30% of \$1 million.

The Role of Sales Agents – There is a notable variety of sales agents throughout the world and it is important that all participants learn as much as possible about everyone they are working with. Ask about the other films they have distributed and ask to speak with producers of those films to find out if they have been treated fairly. In return, sales agents need to know if the producers have done everything they were supposed to do in order to secure all of the rights they claim to own. If this is not the producer's first film, a sales agent may also want to know if she has behaved properly, supported distribution, etc. in the past.

All entities in rights transactions, including rights holders, sales agents and territorial distributors must have a good understanding of all agreements, especially those that they are to sign. If there is something that any party to the agreement does not understand, questions must be asked. Never accept the phrase "oh, that's just standard language." Poorly drafted contracts are a major source of litigation and bad feelings in the film industry. The Distribution Agreement is a rights transaction and becomes part of the Chain of Title documentation.

In many jurisdictions, particularly in Europe and the United States, where many sales agents are based, agents' activities are governed by very specific laws that make it clear they are acting on behalf of a third party rather than on their own account. This not only creates clear obligations regarding the payment of monies under the terms of the agreement but also creates a relationship that theoretically can be terminated at will. This is a controversial topic but again, it is important to fully understand the

obligations and rights of each party as explained below.

Territorial distributors will usually not meet with producers on individual projects. A sales agent has those relationships and knows how to negotiate the best agreements, prepare delivery materials, ship materials, collect monies, follow up for royalties and perhaps most importantly, how to properly and effectively resolve disputes when they inevitably arise. It is highly unlikely that a producer will be able to prepare agreements and make delivery to the satisfaction of the territorial distributor, which could lead to cancellation of the agreement, and no revenue to the film.

However, there are areas where producers can handle certain aspects of the distribution of their films themselves. In many territories, the local filmmaker is also the territorial distributor. When producers make deals with sales agents or global distributors, they should be sure to reserve for themselves any rights that they have either already licensed to other parties or that they plan to exploit themselves. This usually means retaining the local or regional rights and sales agents expect this. Rights of foreign co-production partners also need to be reserved if the co-producers are also the territorial distributors in their territories or if the relevant co-production regulations require that they retain these rights.

It is important to know what the sales agent, producer's rep, territorial distributor or other entity has been contracted to do for the producer and/or the rights holder, i.e. which territories have been licensed, which media rights licensed and what each entity's role in the distribution process is. Are they also territorial distributors in their home territories, like Lionsgate in the United States, which acts as a sales agent but is also a major North American distributor? If the territorial distributor or sales agent wants to also have merchandising rights, producers should make sure they know how to exploit them. Otherwise the producers should keep those rights for themselves. If possible, the producer will retain any derivative rights (rights to make sequels or remakes) unless the distributor has the demonstrated ability to exploit those rights. The producers might not be able to exploit the rights but that does not mean that she should give them up to someone else who will not exploit them.

### 1.2.2 TV Distribution

TV offers one of the best options for locally produced films. The problem at this point is that the revenues from TV distribution of non-local, non-U.S. films in many places, are extremely low. Part of this is due to the quantity of films available and part of it is

that the films have not had the exposure at the cinema that would make them more valuable. In some territories, though, broadcasters are required to invest a certain amount of their profits in the production and acquisition of local films.

There are also specialty cable channels around the world catering to diaspora communities including The Africa Channel in the United States, channels featuring Tagalog soap operas in the United Kingdom and Korean dramas in Brazil. A little research will quickly produce a list of potential outlets for local films on these services. Obviously, distributors should wait to tap these outlets until the film has completed festival runs and it is apparent whether or not the film will be successful in more mainstream distribution outlets.

TV distribution is possibly even more of a specialized area than cinema and DVD distribution and therefore more difficult for producers to handle on their own. Among the various complications is the issue of overspill, that is, the situation where the broadcast signal “leaks” from one geographic area that has been properly licensed to a broadcaster to another where that broadcaster does not have the rights. This is most common in Europe where a French-language broadcast originating legitimately in France might be received in Belgium or Switzerland. This might violate the copyright granted to territorial distributors in these other countries but is most often provided for in the various distribution agreements.

### 1.2.3 New Media Distribution

New media is clearly the fastest growing area of distribution. Though revenues are still quite low, Internet, cable, satellite, on-demand services and streaming services are beginning to generate significant revenues around the world. With the advent of Internet-enabled televisions, higher speed Internet connections (allowing on-demand access to hi-definition versions) and increasing screen quality of hand-held devices, including tablet computers, the digital online environment has become a legitimate and mainstream platform for film distribution. Deals for these rights and the associated contracts are evolving but will continue to reflect the general contract points discussed in chapter 3, which presents issues of which distributors and producers should be aware.



There are three principle revenue models for new media distribution :

- (i) Video-On-Demand (VOD)/Pay Per View (PPV)/Download to Own, where payment is made for a specific film and revenue is very easy to track,
- (ii) Ad-Supported, where the viewer must watch advertisements as “payment” for the film (and where it is much harder to track revenues on a per-film basis),
- (iii) Subscription, where a flat monthly fee is paid for unlimited viewing of a set of films (again, very difficult to track revenues due to the variety of complicated models in place for sharing revenue).

The general rule is that the Licensor (often an “aggregator,” a company that has a deal with a VOD service such as iTunes, Amazon, Hulu or DailyMotion to provide films) of the film to the Internet VOD service receives 50% of the gross revenues the VOD provider receives from the consumer. The rights holder in turn receives between 50% and 70% of that amount. Of course, covenants can vary widely. For example, there will be different percentages for distribution in cinemas and for broadcast television.

Most territorial distributors and sales agents will demand that licensors include all digital rights including Internet and all forms of VOD, including download, streaming and Internet protocol television (IPTV). They will probably require that the licensor give them rights to all delivery technologies ‘currently in use or developed at any point in the future’. Though some organizations, such as IFTA, recommend that these rights be licensed separately, this is often extremely difficult to accomplish as the rights become integral to the overall distribution strategy for films. It is expected that by 2020 these technologies will entirely supplant DVD and Blu-ray. In some countries this has already happened.

New media is such a rapidly developing area that new terms are minted almost daily. One of the new concepts is “Catch Up Rights,” the right to re-transmit broadcast programs through the Internet on a free access basis for a limited period of time immediately after the first broadcast in a territory. The BBC offers this service in the United Kingdom, as does M6 in France through M6 Replay. Most broadcasters in the United States through their proprietary web sites or sites such as Hulu also offer such services and similar services exist around the world. It is probably not possible to exclude these rights from most broadcast distribution contracts but it is necessary to understand what they are and how they may affect other rights that may be licensed.

The most important issues to address in terms of new media and Internet distribution are exclusivity, geo-filtering and digital rights management (DRM). In most cases, the rights are locally held by the all-rights territorial distributor and then licensed to the various new media outlets on a non-exclusive basis, meaning that multiple services and platforms can offer downloads, streaming, VOD or S-VOD (Subscription VOD) of the same film concurrently. However, in some territories the distributors are trying to negotiate specific exploitation windows for each of these rights in order to maximize revenues.

Geo-filtering allows rights to be offered only to a limited territory, as has always been the case with traditional territorial licensing. This has been a major topic of dispute from the time films were available on the Internet in the late 1990s. Contracts need to clearly specify the territory and the distributor must guarantee that the integrity of the territory will be respected through geo-filtering. That leads to the third issue: DRM. The quality and effectiveness of DRM systems vary but all contracts containing new media rights should specify that the signal must contain some form of DRM.

When new media was first discussed, independent producers instantly dreamed of being able to bypass traditional distribution systems and access consumers directly. In many ways, this has become a reality. Independent producers start to build their fan bases, to generate interest and excitement about their films, to sell merchandise and eventually to show the completed film through new media. Most independent and Studio productions now establish Facebook pages, Twitter accounts or web sites. Proving that there is significant consumer interest in the film can lead to a better distribution deal.

Exploiting new media outlets is very different from bypassing the traditional distribution system. Unfortunately, the companies dominating feature distribution continue to be large entities that do not take direct submissions from producers. Amazon, iTunes and Hulu, for example, rely on aggregators for their films. These aggregators in turn rely on the same distributors for their films that producers would like to bypass.

Film industry 'aggregators' are those companies that organize large numbers of films, strike deals with the producers or territorial distributors, confirm Chain of Title, format the master elements and meta-tag the files. The term 'aggregator' is often poorly understood. Any company claiming to be an aggregator must have a

clear arrangement with one or more of the major VOD (whether cable or Internet) outlets in a given territory to supply a steady stream of films to them. In this way, they behave something like sales agents on behalf of rights holders but can be the only way to get on these important Internet VOD systems. They are often territorial distributors as well as aggregators. Anyone doing business with an aggregator should confirm its claims to being able to place material with these distribution outlets.

Many aggregators are companies that have come from the DVD distribution and TV licensing business, such as Warner Bros. (by far the largest aggregator in the United States), Fremantle and Brainstorm Media in the United States. Belgacom TV and VOO in Belgium, OD Media in the Netherlands, Orange and Glowria in France are among the most well known European aggregators. This is an evolving business model and it is unclear whether aggregators will be the pipeline for films to Internet VOD services in other regions.

As discussed above, one of the most promising areas for new media lies in reaching a nation's overseas communities with local content. Whereas previously, a local Indonesian or Nigerian store in London might have offered gray market (legitimately produced but not licensed for the territory) DVDs or outright pirate copies of films for rent or sale to their customers wanting a taste of home, filmmakers can now reach those populations directly through the Internet. There are already a number of outlets doing this but they should be considered distribution companies because they offer titles from a variety of producers. There are also aspects of self-distribution at work here.

It is, however, possible for producers to post their films on the many free sites that offer such services like YouTube. There is little to no revenue to be earned on these sites but there may be recognition that could lead either to revenue from other sources or to being acknowledged as a filmmaker whose work and career warrants attention. One of the greatest challenges is to get people to see the film and that requires marketing skills. Many filmmakers quickly discover why the traditional distribution system exists: getting people to see a film and more importantly pay for it, is no easy task.

It is ultimately up to producers to encourage people to see a particular film and they need to monitor web sites closely to make sure they are receiving their due. Many of the same concepts apply, namely: that rights holders should try to make contracts non-exclusive so their films can be presented on multiple services, that they should make sure there is geo-filtering so the signal is not available worldwide (potentially

violating territorial agreements) and that they make sure that the signal is somehow encrypted to slow the pirates. If producers are truly ambitious and feel that they can assemble a suitable line-up of films, they might want to launch film site themselves.

#### 1.2.4 Self-Distribution

If there is no other option, it is possible for producers to distribute a film themselves or at least to present the film to international festivals and markets. The producer might already be a territorial distributor locally and have some experience with that process. Good festivals support producers and want them to walk away with a distribution deal. If they do not have a sales agent or other representative, they may need to handle the initial festival submissions and screenings themselves. There are significant resources to help with that process as well as web sites for all the major festivals. Should a producer choose to start a new sales company, it could be an option that might be explored through their national association, through IFTA or another distribution trade organization.

Many countries offer financial help to encourage producers to attend festivals and markets. Whether or not they have distribution, producers should find out if there is local funding and try to attend as many festivals and markets as they can. Producers will learn more from attending one of these events than they will ever learn from books or seminars. There are many ways producers can now be involved in marketing their films and most sales agents and territorial distributors welcome the enthusiastic support that filmmakers bring to the process.

It is increasingly possible for producers to carve out niches where they are able to exploit certain rights directly, i.e. to act as distributor for certain revenue streams. If a producer has developed a significant fan-base and wants to retain the right to offer merchandise and special edition DVDs at higher prices, then they will need to secure those rights in the agreements. If the producer wants to publish a graphic novel based on the film or wishes to hold public screenings and charge a fee, then they should make sure they do not have to later go back and buy those rights from their distributor.

**Self-distribution** – At the 2011 Sundance Film Festival, director/producer Kevin Smith announced that he would be distributing his film, *Red State*, himself. Mr. Smith has since launched a national tour where the film is screened followed by a question and answer session with his fans. As he has quite a following, this is expected to be a successful launch of the film, which will be followed by more traditional distribution in DVD and on TV. Internationally, he is expected to secure the services of a sales agent. Some in the distribution industry were shocked that a director would decide to release a film like this himself (reports put the budget at about \$4 million supplied by private investment) but acknowledge that Smith is uniquely suited to this method thanks to his large fan base and outgoing personality. They also realize that there is still a role for them in the distribution of all the other rights after the director has completed his national tour and moves on to his next directing project.

### 1.3 Distribution Finance

#### 1.3.1 Basic Finance Issues

Securing the complex pre-sales, subsidies and financing arrangements necessary for the development, production and exploitation of a film property is best left to an experienced sales agent or producer. Sales agents and other distributors often function as executive producers. As part of understanding the entire process of production and distribution, it is important to understand how distribution and finance are linked. We will discuss those links but first will examine general finance issues. Three major finance trends can be identified:

- The Subsidy Finance Model – where direct public finance is the principle source of funding (in the form of grants or tax credits) often featuring multi-territorial co-production where multiple public finance sources are used.
- The Pre-Sale Model – where the sale of distribution rights to territorial distributors (usually by a sales agent but often by the producer) forms the collateral for a production loan from a bank.
- The Pure Equity Model – where investors provide the funds (often as part of a tax advantaged program such as SOFICA in France or the German film funds that provided finance for many films during the 1990s including *The Lord of the Rings Trilogy*, Peter Jackson, 2001-2003).

The first two of these models are explained below and the third is probably self-explanatory. Most often, a film's budget is raised through a combination of these models – usually favoring one over the others depending on factors such as budget and nationality.

**The Subsidy Finance Model:** The starting point for the finance of many films in Europe is the amount of funding that can be supplied through government programs, either through direct subsidies (grants or investments) or through tax rebates, credits and offsets. This is increasingly the case in the United States where many states offer subsidy programs. These programs rely on various systems to determine the amount of funding available from a particular jurisdiction to a specific production. This might depend on the cultural content of the film (Is the film written by a European writer? Is the director European? Are other creative elements from the European Union?), the location (Will the film be shot in New Orleans to qualify for the Louisiana tax credit program?) or the amount of money spent in that jurisdiction. Most countries outside the United States provide some level of funding to films and in the United States there are state subsidies based purely on the amount of money spent in a specific location.

In many cases, countries pool their production resources based on the terms of co-production treaties. The United States is one of the few countries that maintains no co-production treaties with any other country. The October 2<sup>nd</sup>, 1992 European Co-Production Convention outlines the major features of multi-national cooperation between E.U. countries but each country has specific laws and regulations governing film finance and co-production. These financial benefits may even extend to co-productions with countries outside of Europe. For example, since the Co-Production Treaty between France and Israel was signed on October 11<sup>th</sup>, 2002, many films have been co-produced with the financial support of the French CNC (Centre national du cinéma et de l'image animée) and the Israel Film Fund. Each Producer must invest at least 20% of the budget. Under Article 10 of the Co-Production Treaty, co-production benefits can be extended to third country producers. For Eran Riklis's *Lemon Tree* (2007), there were four co-production partners: Israel (28%), France (30%), Germany (31%) and Italy (11%) that together provided 100% of the film's budget.

**The Pre-Sale Model:** When a film is not yet produced, a sales agent (and sometimes the producer or even the local territorial distributor) may try to secure pre-sales of the territorial distribution rights that can then function as collateral to secure a production loan from a bank. Under a territorial pre-sale deal, a distributor in a particular territory

agrees to pay an advance against a negotiated royalty (or a flat price) upon completion and delivery of the film. A combination of these sales, plus private investment, subsidies and gap financing from a bank will complete the financing package. Gap financing is the part of the production loan not covered by distribution contracts and subsidies but instead is secured by the value of unsold distribution rights.

Pre-selling the rights to a film has become difficult unless the film is made by a “name” director, has a significant internationally recognized cast or has secured a cinematic distribution in its home market. Clearly, it is harder for films from smaller territories to be pre-sold and the exceptions tend to be films with known stars that have had success overseas such as Jackie Chan, Tony Jaa, Shakira or Maggie Cheung. This has also become the case with most independent films produced in the United States or in Europe and is having a profound effect on budget levels and the volume of films being produced. Generally, a film budgeted under \$1.5 million or €1 million cannot be pre-sold as the expense of using this method to finance the film is prohibitive. A lack of pre-sales is certainly not a reflection on the quality of a film. Apitchapong Weerasethakul’s *Uncle Boonmee*, a co-production between Thailand, France, Germany, the United Kingdom, Spain and the Netherlands was not pre-sold before being awarded the Palme d’Or at Cannes in 2010 and subsequently achieved significant international sales.

The Equity Model: Though this is fairly self-explanatory, there is one aspect that should be discussed as it is often a significant source of equity investment funds: the obligatory production finance that some end-users such as TV broadcasters and S-VOD platforms must invest due to local regulations. In France and some other E.U. countries, television stations must contribute a share of their net turnover to the production of European films. Since November 2010, S-VOD platforms have had the same kind of investment obligation in France.

The subsidy, equity, and pre-sale models are often combined as will be discussed. In Europe, films strongly depend on pre-sales to the major local television broadcasters or local distributors in other media. This can sometimes take the form of an equity investment which includes the license of the local distribution rights. In some cases, the local broadcaster can also be a statutory co-production partner. For example, a recent French-language comedy was a France/Belgium co-production budgeted at about €3.5 million. The subsidy portion (from the CNC in France and tax credits) was about €600,000 and the pre-sales, including the sale of the distribution rights to the

French and Belgian co-production partners (which could be considered an equity investment) and other pre-sales concluded by the sales agent contributed the balance of €2.9 million.

The following case study, a hypothetical based on an actual film, will describe the steps of the pre-sale process and negotiation.

### 1.3.2 Distribution and Finance Case Study: *Sunny Days in Africa*

#### a) A Pre-Sale Model

*Sunny Days in Africa* is a U.K. film that will be shot in Africa but the same issues would hold true if it were any independent production originating anywhere in the world. It probably helps that the film will be shot in English, though this is less a factor than in the past.

Funding for the film could be raised through a combination of pre-sales, subsidies (sometimes referred to as 'soft money'), equity and debt. The film would require each of those components if no one is willing to invest \$10 million (about €7.5 million) on the potential success of the film. Pre-sales help to spread the risk to territorial distributors who are gambling on the fact that the film will be good (or, more specifically, profitable) and that the premium price they pay to get in early on the process will pay off. The soft-money components lessen the risk by assuring higher production value at lower cost.

*Sunny Days in Africa* is lucky. Because the project is based on a U.K. novel and will be directed by a U.K. producer based on a U.K. script, the film will qualify for approximately 25% subsidies from the United Kingdom. The production team will shoot most of the film in Kenya where costs are quite low. That savings will allow them to make the film at a lower budget. They still need about \$7.5 million to finance the film. They have secured \$2.5 million from investors who have previously been well rewarded for investing in other films from this producer. The need for pre-sales and a bank loan have been reduced but not eliminated. The producers need to engage a sales agent to secure the territorial distribution contracts that will form the basis for the bank loan. It is also possible that they may need to cash flow the U.K. subsidy through a bank loan as well.



They will choose the sales agent based on reputation, experience, relationships and ultimately, all other factors being equal, the deal offered. Variables include whether or not the agent will offer an advance (rare), the fee (10% would probably be standard for a film of this budget), costs (the agent may require a significant “off-the-top” reimbursement for expenses – possibly as high as \$250,000, but more likely around \$150,000) and finally, the level of confidence in the film as demonstrated by sales projections. Those projections will also form the basis for the GAP loan as mentioned above.

Sales agents will make their offers based on the value they believe they can realize for the film. They may have suggestions that the filmmakers might or might not follow depending on how much they alter the creative core of the project (and how much the filmmakers care about the creativity of the project). In many cases, the sales agent and other distributors are very aware that what they are selling is the director’s reputation, style and creativity, and their suggestions are not an attempt to commercialize the film but rather to help the entire team to make the best possible film that will reach the widest possible audience. They might give their opinions on casting (some great actors can actually be harmful to a film’s chance of finding an audience), content (excessive sex or violence can harm a film’s chances for distribution in many places), length (ideally between 90 and 120 minutes) as well as technical factors (shooting digitally or on film and whether or not to have a scored soundtrack or to rely on pop songs).

Also at this early stage the sales agent will start looking for a local partner who will be responsible for releasing the film in the home country. This is often part of the package before the sales agent is engaged. In either case, that deal is crucial to many aspects of the marketing of the film including beginning to develop the distribution plan. Possibly alone but preferably in cooperation with the local distributor, the sales agent will begin to envision the way the film will be marketed both to the public and to territorial distributors. They will identify the main selling points (director, cast, script and genre) as well as where the film might premiere (Cannes, Sundance, Toronto or another festival). They will require access to the set and will want a publicist assigned to the project (at the producer’s cost). On set still photography as well as interviews with the cast and crew will be another requirement that will help the sales agent effectively do their work.

After fully analyzing the project, the sales agent will develop a list of minimum guarantees that they expect to receive from territories. These are the amounts they expect the territorial distributors to advance against potential royalties. The contracts stating these amounts will form the basis for the collateralized portion of a production loan. These are often referred to as 'take' prices or 'minimums'. Of course, they will also develop a list of 'ask' prices, which will be their starting point for negotiations.

At some point prior to production, the sales agent will start to offer the film to potential distributors in the territories they have been engaged to cover – usually worldwide or worldwide outside the United States and the home territory. In this case, that may be either the United Kingdom or both the United Kingdom and English-speaking Africa. They will send out the script, meet with potential territorial distributors at film markets and introduce the project during international sales trips. If they are lucky, they will start to close deals. With a great project like *Sunny Days*, they will close distribution license deals with a significant number of territories prior to production for prices somewhere between the 'ask' and 'take' levels. They will get signed agreements from these distributors and a promise from the distributors that they will execute all necessary paperwork to allow these contracts to be used as collateral in the production loan.

The sales agent has closed deals in half the world and has US\$3 million worth of contracts. The UK distributor (which we will consider the home distributor as the producer is based in London) has agreed to pay US\$1 million for the U.K. rights. That still leaves US\$1 million in order to complete the budget. The producer has the choice of cutting the budget, deferring fees and salaries, seeking additional investors or taking a GAP loan against the value of the unsold international rights. Each of these options has pros and cons. No one likes to cut a budget or defer fees, additional investors are difficult to find or insert into the process at this late a stage (and would be very demanding) while GAP loans can be expensive and their requirements difficult to meet. *Sunny Days* still has enough territories open (almost half the world). The sales agent is very respected and has done well with the film already, proving it has commercial value, so the producers are able to secure a GAP loan from the collateral lender (the bank lending against the value of the distribution agreements).

The producers of *Sunny Days*, with the cooperation of their sales agent, then close their bank loan (with the subsidies mentioned, the distribution contracts and the value of the unsold rights as collateral) and with the equity investment, they are able

to produce the film. As the film is being produced, there is an increasingly amount of information to supply to potential territorial distributors. If things are going well, it is likely that more territories will be sold prior to the completion of the film. Once the film is finished, it is delivered to the licensees who pay their minimum guarantee amounts into a collection account from which the bank as well as other designated parties are paid. If all goes as planned, the bank is repaid the entire loan amount, their full fees and expenses are paid to the sales agent, investors are repaid and deferred fees and salaries are paid to producers and talent. That is all before the film is released in a single territory. Of course, this is a best-case scenario, but then again, *Sunny Days* is a great project.

At this point, the distributors will work together (usually with the sales agent or home territory distributor taking the lead) on the best strategy to get the film out to the public. That includes introducing the film at the right festival, picking a release date in the home country and possibly positioning the film for Oscar consideration. A good distributor will involve the producer and talent in these decisions and seek their input and support throughout the process.

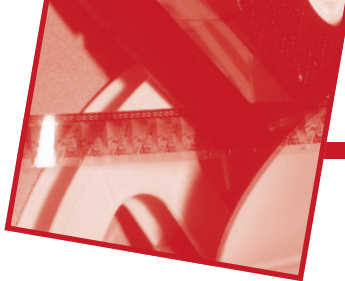
#### b) The No International Pre-Sales Model

In some cases, films made outside the larger territories will probably not be able to rely on international pre-sales and bank loans for production. These productions rely on subsidies, sponsorship, local distribution deals and equity investors. In such cases, the film will not be offered for distribution outside the home territory prior to completion and frequently, the film will be released locally prior to any international exposure at all.

To take another hypothetical – *Sunny Days* is fully funded from private investment and the producers have a choice to seek distribution themselves or to engage either a producer's representative or an agent. Experienced producers often do this themselves and will work with companies that have distributed their films in the past.

Let's take two scenarios – in the first, the film is very hot and likely to spark a bidding war amongst distributors, in the second the film is excellent but it might need to be 'discovered'.

Of course, *Sunny Days* is a hot film. It is likely that it would be identified as such early in the process, probably in script stage. An experienced producer might already have



high-level contacts within the distribution community or they will have the help of an agent from one of the major talent agencies which have offices around the world (including CAA, ICM and WME). That agent will have access to the decision-makers and top distribution people and can craft the most advantageous distribution deal for the film's producers. These agents are sometimes called 'producers' reps' but this can refer to non-agency players as well. In the case of *Sunny Days in Africa*, the producer has won an Oscar and is very respected, so they can call many of the top people themselves but have also chosen to engage WME to represent the rights as this allows a broader range of options and frees them to do the job of producing the film.

The agent will contact the most likely distributors and they will evaluate the project, screen anything that is made available (including the completed feature if this is a festival situation or if it is available prior to the first festival screening and the agent thinks that this is the best strategy). Once that distribution deal is completed (with a global distributor, local distributor in the home territory or the sales agent), the producer's job is to support the distribution company's efforts – making sure that the talent is available to promote the film at festivals, dealing with completion and final delivery of the title and performing other duties that might or might not be specific in the agreements. Of course, the producer also needs to watch closely and will try to influence the distribution in ways that will not only result in the best financial results for that film, but a good producer is also always trying to leverage current success to launch the next project.

The financiers of a hot film need to be entirely concerned about the net results of distribution and recouping their investment. This means watching fees and costs closely. The agent might take 5% for doing the deal. The distribution company will take costs as well as interest on costs and advances plus a fee ranging from 10% to 35%. Lawyers take fees for negotiating the deals and drafting the contracts. There are always new fees that are introduced that over the years can become 'standard'. Many producers have seen potential revenues eaten up not even by fees but by interest alone, as it can take a year or more to get a film into cinemas after completion and then many of those costs may not be recouped until the DVD or TV release. Financiers should make sure that they have oversight of all of these aspects of distribution arrangements.

*Sunny Days* secures a distribution deal with a major U.K. distributor that will also act as an international sales agent. The deal includes an advance that covers a significant

amount of the production cost and a release guarantee that requires the distributor to release the film in the United Kingdom on at least 100 screens with a Prints & Advertising budget of \$1.6 million. At that point, the distribution company will decide how best to introduce the film to the public. It may decide that *Sunny Days* should be submitted to the Cannes Film Festival instead of Sundance. Maybe it will bypass festivals entirely and start working towards a major release at the cinema. There is very little that the producers can do to influence this if a well-established distributor has paid a significant advance.

Sometimes a film is great but has not yet been discovered. A producer/financier can approach sales agents and festivals directly in hopes that they will share the producer's enthusiasm. It is common for producers to develop significant marketing materials to showcase the film, including a trailer, poster and web site. Let's assume that *Sunny Days* is not receiving an acceptable offer from a sales agent and that the agents (reps) are not sure that they can secure a major distribution deal in the home territory. The producers have submitted the film to the top-tier festivals (it is always good to aim high) and they have been accepted by Sundance and the Cannes Film Festival (which is four months and \$50,000 in interest later in the year). They weigh the options: Sundance is often better for U.S. films, Cannes is a more expensive venture for filmmakers but probably a better venue for a film which is likely to get great reviews and features an interesting cast. Additionally, it is much easier to get press for an Official Selection in Cannes than a selection at Sundance.

Many producers get into trouble by overestimating the value of their films. This can be a particular problem when approached by the first (and possibly only) distributor showing interest. The offer is rarely as much as they wanted, they are not promising a release at the cinema, there is no advance or the producer just believes that the distributor is not at the high level necessary to assure that the film will be properly distributed. Often that first offer starts looking very good six months later when the film still has not found that ideal distribution deal. Many films that are selected for Sundance and many other famous festivals never receive distribution of any kind. These are difficult times and distribution is distribution. Hopefully the financiers will understand that the producer had to take a deal with no advance, abysmal royalty terms and no guarantee of release at the cinema. There is still a chance that the film will be a sleeper hit but that will not happen if the film sits on the shelf. Many smaller distributors that cannot afford to pay advances more than make up for it in passion for the film.

So the film is going to premiere in Cannes. As soon as the film is selected (and even before for insiders who seem to be able to guess which films will be offered slots), all those distributors who said “no” will knock on the producer’s door to tell them they changed their minds. At that point, it is again advisable for the producer to secure a good producer’s representative or agent to represent the project with the goal of securing an international sales agent and perhaps even a home territory distributor before, during or after the festival.

If *Sunny Days* still does not have a sales agent or a rep handling the rights to the film then the producer will have to try to offer it herself, in this case acting as a sales agent and rep. The Cannes publicity machine is complex and difficult to navigate but this producer knows enough to do it on her own. Perhaps most importantly she goes into the process with a goal: securing distribution. She gets as much advice as possible from trade organizations, the British Film Institute and Film London, sales agents, anyone who can offer good counsel on how to deal with the situation.

*Sunny Days* gets to the festival and people are interested in the film. The producer manages to get a great offer for distribution of all rights worldwide. She will be getting paid an advance and the distribution company wants her to sign a contract. The distributor must require as part of that contract that the producer shows she has licensed all copyrights necessary to exploit the film and that she has secured or can secure the proper Errors & Omissions insurance for the film.

At this point, the producer brings lawyers into the process and the two negotiate the deal with the distributor and its lawyers. The producer needs to understand why the distributor wants the film, while the distributor must make it clear why he thinks that he can make the film a success. Do they understand each other? How much money do they think it will make? How many cinemas will they release it in? Is that in the United Kingdom, the United States, France? What about Japan? Can the producer keep the rights for Africa?

The producer’s lawyer or perhaps other representatives will try to make sure the production team gets paid, that the contract is properly prepared and signed, and that distribution takes place according to the agreement. The producer’s job at that point is to supervise this work and use the situation to get her next film made.

## 1.4 The Unlawful Distribution of Films

Copyright infringement in the film industry ranges from cases involving the producer not clearing rights for the use of a specific copyright work to the unlawful distribution of copies of films by third parties. The unlawful distribution of copyrighted works, such as films, is a global problem with no current and sustainable solution, particularly when new media technology facilitates duplication of copyrighted works on DVDs and encourages the illegal uploading and downloading of films on the Internet. Both industry groups and governments around the world are trying to find the most appropriate responses to these challenges. Some are meeting with limited success, while others are overwhelmed by the phenomenon.

Some governments have developed legislation to address these challenges. For example, in France, the Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society was the basis of a new French regulation to fight piracy, challenge peer-to-peer networking and prevent unlawful DVD private copying.

The Creation and Internet Laws n°2009-669 of June 12<sup>th</sup>, 2009 and n°2009-1311 of October 28<sup>th</sup>, 2009 (better known as the HADOPI Laws) have clear goals of not only promoting the legal online distribution of content but also protecting films on the Internet from third party illegal uses. A new Government Agency, Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet (The Supreme Authority for Transmission of Creative Works and Copyright Protection on the Internet or the HADOPI) has been established to enforce the law, to prevent the exchange of copyrighted material without prior agreement from the copyright holders and to pursue infringers with a graduated 'three-strike' proceeding. This proceeding begins with an email message on the first offense, a certified notification letter (a takedown notice) on the second offense and a final formal notice to the ISP to suspend the offending user's Internet access for up to one year on the third infraction. This 'three strikes' proceeding does not prevent separate prosecution for breach of copyright.

Distributors and even producers can also play a role in limiting piracy simply by monitoring illegal distribution and making those infractions known to the authorities. For example, in specific cultural communities in the United States and in major cities around the world, shops carry illegally duplicated versions of films that are popular with diaspora populations. U.S. authorities take piracy seriously but cannot act against

these infractions without reports of infringement from the legal, recognized copyright holder. That entity is often an individual in Nigeria, Korea, France or Italy, who is not aware that he has the right to file a copyright infringement complaint against the offending shop, the duplicator or web site. In the same way that police cannot pursue the culprits in a robbery without a complaint from the victim, they cannot act against pirates without complaints from the rights holders. Producers can ask the infringing party to simply stop stealing their property. Many people involved in piracy might not even be aware that what they are doing is stealing.

Much illegal distribution occurs online. Systems exist for monitoring Internet downloads of films, including for example, Peer Media Technologies. Armed with the knowledge of infractions and the contact information of the infringers, rights holders have a range of actions they can take from simple cease and desist letters to lawsuits against the offending parties or even the ISPs, depending on the jurisdiction.

**Inadvertently Violating a Distribution Agreement – The Problem of Multiple Versions**

– A prominent territorial distributor believed he had licensed the rights to all versions of the blockbuster Lord of the Rings. He found out the hard way that he had only licensed certain rights to certain versions. He had played one of the director's cuts of the film on TV and incurred the wrath of the producer and sales agent, and was then compelled to pay a significant fine. Most films are not available in as many versions as Lord of the Rings, but it is still crucial to fully understand exactly what is being licensed where and that you should never assume you have rights that are not clearly granted.



## CHAPTER 2

### COPYRIGHT OWNERSHIP: FILM CHAIN OF TITLE DOCUMENTATION

Broadly, there are two legal approaches to understanding copyright, one from the common law perspective or the other from a civil law perspective. The distinction between the two can have practical implications for the transfer, assignment and exploitation of copyrighted material, including films. The Droit d'Auteur, or Author's Rights, system is prevalent in civil law countries. This concept is also central to the Berne Convention<sup>2</sup> and therefore all signatories to the Convention are expected to adhere to the basic concepts that authors have the rights of authorship and integrity. Whereas common law systems tend to be most concerned with the economic aspects of ownership and exploitation, civil law systems emphasize the principles of natural justice and individual rights, particularly the right to ongoing control of creative work.

#### 2.1 Global Copyright Overview – Establishing Ownership

The following key principles form the foundation of copyright law around the world:

- Exclusivity – authors or rights holders have the right to decide whether to authorize or prohibit certain use of a copyright work by a third party,
- No formalities for establishment – ownership of copyright exists from the time of creation and does not require any formal registration,
- Contractual freedom – authors or rights holders can define the terms and conditions under which they will grant exploitation rights to their work,
- Remuneration – the rationale behind copyright law is to stimulate artistic creation by providing equitable remuneration and acknowledging creators' efforts to produce literary, dramatic, musical and artistic works, including films,
- Territoriality – the author or rights holder decides on the geographic scope of a license,
- Enforcement – the author or rights holder can enforce her rights against any unauthorized use of the work.

<sup>2</sup> At the time of writing, 164 countries are signatories of the Berne Convention on the Protection of Literary and Artistic Works.

### 2.1.1 Moral and Economic Rights

It is important to distinguish two aspects of copyright: moral rights and economic rights. The concept of moral rights exists nearly everywhere in the world. In the United States, there is a more restrictive approach to this concept since it is still not part of copyright law but is instead embodied in other sections of the U.S. Code, such as statutes related to defamation and unfair competition. Under Section 17 of the U.S. Copyright Act (17 U.S.C. § 106), copyright holders only have the right to control adaptations – the creation of “derivative works” including remakes, sequels and novelizations. Outside of the United States, the concept of moral rights varies, depending primarily on whether those rights are considered inalienable. In many jurisdictions, including most of continental Europe, it is not possible for authors to assign or waive their moral rights. According to the Berne Convention, moral rights are independent of authors’ economic rights and remain with the author even after the transfer of economic rights. The principles of moral rights are:

- The Right of Attribution or Paternity – meaning that the work must always be identified as being the creation of the author,
- The Right of Integrity – the right to object to any distortion or mutilation of the work that might be considered derogatory or that would denigrate the author or their reputation.

Under the moral rights principle as it relates to film, a work shall be deemed completed when the final version has been established by common agreement between the director (as well as the joint authors) on the one hand and the producer on the other. Notwithstanding, the right to final cut may rest in the hands of the authors with the notable exception of the United States.

Directors in the United Kingdom have the right to be identified as the author of the film. Under the Copyright Design and Patent Act of 1988 (Articles 77 to 89), the script writer, director, cinematographer, lyricist, composer and other authors of a film also have certain moral rights, but they can waive those rights and those rights are not perpetual or inalienable.

Despite the specific interpretations of moral rights in the United States and United Kingdom, these rights are considered universal rights and can be claimed by anyone in certain jurisdictions. For example, when a distributor wanted to release a colorized version of John Huston’s classic *Asphalt Jungle* (1950), his heirs – who had lost a

similar claim in the U.S. because the concept of moral rights did not exist there – sued in France. The French Supreme Court ruled that the transformation of the work was a clear breach of Huston’s moral rights (Huston’s heirs vs La 5 – French Supreme Court, May 28<sup>th</sup>, 1991).

### 2.1.2 Copyright Term

The duration of copyright protection for a film differs from country to country. As a general rule the duration of copyright is the life of the author and not less than 50 years after her death. In cases of joint authorship, the term can be calculated from the death of the last surviving author. For a feature film produced in most of the world, there are multiple authors (usually the screenwriter, director and anyone who composed music specifically for the film). The copyright then expires 50 years from the death of the last author to survive. In the United States and Europe, the copyright term is the life of the author plus 70 years. In the case of corporate authorship in the United States, the term is calculated from the time of first publication or release and is currently the earlier of 95 years from that date or 120 years from the creation of the work.

### 2.1.3 Public Domain

The concept of public domain applies to established facts and historical events, some works created by public employees in the course of their employment and works for which the term of copyright protection has expired. All of these are available for use in new creative works without the consent of the original authors. Once the term of copyright protection expires, the work passes into the public domain and can be exploited by anyone for any purpose without any authorization. The concept of public domain stimulates the creation of new work and provides an excellent source of material to future generations. For example, the films of French directors Georges Méliès, Louis Feuillade, Max Linder and Louis Delluc are in the public domain and therefore available to anyone for distribution, provided that their moral rights, which are inalienable and perpetual, are respected. The same is true in the United States for D.W. Griffith’s *The Birth of a Nation* (1915) and Tod Browning’s *Freaks* (1932). In addition to distribution, if a director or screenwriter wants to create a derivative work (remake or sequel) based on one of their own films, they have the right to do so.

A recent case involving Japanese director Akira Kurosawa is instructive. Before 1971, under Japanese copyright law, films entered the public domain 38 years after



the death of the director. In 1971, the law was modified and the term of protection was extended to 50 years from first release of the work. In 2003, the term was extended to 70 years from release. Kurosawa died on September 6<sup>th</sup>, 1998. His first film, *Sanshiro Sugata*, was released in 1943. In 2007, Toho Studio, the owner of the original copyright, sued Cosmo Content, a DVD sales company that was selling Kurosawa's early works including his first film (which was released before 1953). On July 14<sup>th</sup>, 2007, the Tokyo District Court ruled that Kurosawa's works will enter the public domain at the end of the thirty-eighth year after his death, on December 31<sup>th</sup>, 2036. This confirmed an earlier ruling from a 2006 Paramount Pictures case where the court decided that films produced prior to 1953 were in the public domain as long as the original thirty-eight year time period from the death of the director had elapsed. A Japanese bargain-price video distributor releasing film classics produced prior to 1953 was authorized to do so because the 2003 copyright extension could not be enforced retroactively.

If there is the slightest doubt about whether or not a work is protected, one should first obtain a copyright report and then review the report with a lawyer specialized in the area.

#### 2.1.4 Authorship and Ownership of Copyright

It is important to distinguish between the meanings of 'authorship' and of 'copyright ownership'. While 'authorship' refers to the status of the person who created the work, 'copyright ownership' defines the legal status of the person or entity that has acquired the exclusive right to exploit the work. In most countries, contractual agreements will clarify the specific circumstances of 'ownership of copyright'. These circumstances include works created by an employee, commissioned works or works created collectively by several people.

Depending on the jurisdiction, the initial owner of a film may be either the producer or a single purpose entity (SPE) as described herein, controlled by the producer. If one is dealing with a 'work-for-hire' under U.S. law, according to which authors are commissioned to create the film and related copyrights, the owner will usually be an SPE. Usually, the producer establishes an SPE, which is a corporation that will license from the original authors, i.e. writers, director, music owners and other creative elements, each of the individual rights that are part of the Chain of Title confirming ownership of the rights to the film. That SPE is the owner of the copyright to the film

having the mandate to secure financing for the film, to hire the talent, to produce the project and to deliver the film to the distributor. The distributor must license the right to distribute the film from that company or, in the case of sub-distribution, from that company's agents.

In practical terms, the copyright owner of a film should confirm the following elements:

- That the creative effort of everyone who has contributed intellectual property to the project has been properly recognized, that all have been compensated for their contributions and that the rights they granted have been properly recorded.
- That distributors and other interested parties can easily verify (through the Chain of Title) that the producer can legally transfer, assign or license to them the right to generate revenue (distribute).

### 2.1.5 Formal Aspects of Establishing Copyright Ownership

In the Berne Convention signatory countries, there is no formal requirement such as registration that is necessary for authors to obtain copyright protection for their works. In contrast, written agreements are essential for the further transfer of rights. In the film industry context, these are agreements between the rights holders for the music or the script granting rights to the producer and from the producer to the distributor. As discussed above, proper documentation of the transfer of rights throughout the film value chain is of utmost importance for the establishment of copyright ownership.

### 2.1.6 Collective Management Organizations

The Collective Management Organizations (CMOs) administer the collection of secondary rights monies. These include monies paid into collecting societies for blank media levies, re-transmission, music use, certain public performances, among other purposes. National organizations (mostly in Europe) such as AGICOA, CRC, Procirep and EGEDA collect these monies and disburse them to the registered rights holders – usually through organizations specialized in supervising the collection and disbursement of worldwide secondary rights monies, such as IFTA Collections in the United States, Compact Collections in the United Kingdom and Fintage House in Hungary. Some sales agents (particularly if they are also acting as executive producers) will insist on collecting these amounts and should report them as gross revenues.



Registration is usually a requirement to receive these monies and the right to be paid these monies may in many cases be assigned to third parties or SPEs.

## 2.2 Chain of Title (COT) Basic Documents

Distributors need to know with certainty that the distribution rights they are licensing are free and clear of any potential claims, lawsuits, or competing claims. The basic documents that potential distributors (as well as financiers, overseas partners and others) will want to see are consolidated in the COT. Production and distribution contracts form the basis of this COT documentation.

### 2.2.1 Pre-existing works

Films are often based on works such as novels, comic books, news stories, short fiction and even songs that are the work of previous authors. Examples include novels by authors like Tom Clancy (*Patriot Games*, *Hunt for Red October*) or Stephen King (*The Shining*, *The Green Mile*), comic books like Goscinny's Astérix & Obélix (*Astérix et Obélix: Mission Cléopâtre* (2002)) and *300* (the film version of which was directed by Zak Snyder (2006)), and stage plays like Wajdi Mouawad's trilogy of tragedies (*Incendies* (2010)). *Spiderman*, *Harry Potter*, *The Lord of the Rings* and *Batman* all existed as published works long before they appeared in blockbuster films.

Any other copyrighted material appearing in a previously published work, from video games to motion pictures, can be included in a new film production provided that the appropriate clearances have been obtained. This is true of the most obscure work to box office hits. Coline Serreau's French hit, *Trois hommes et un couffin*, which had lawfully been turned into a U.S. remake had almost been turned into a local TV series. The director sued the production company arguing that the right to make the series had not been properly licensed. The French Supreme Court agreed, emphasizing the fact that the two works were indeed very similar and that the TV series project, based on the main elements of the film, was not distinct enough to be considered an independent work (Flach Films vs Dune – French Supreme Court, February 19<sup>th</sup>, 2002). Indeed, when some elements of a copyrighted work such as a film are found identical to the elements of a secondary work such as a sequel script, it is considered a derivative work, requiring permission from the copyright holder of the original work. The Paris Appellate Court confirmed this in a May 12<sup>th</sup>, 2004 decision declaring

a French sequel to the film *Alien* as unlawful since it had not obtained the proper permission from the copyright holders of the original work.

The license of a copyright contained in these underlying elements as well as the script usually takes the form of an Option Agreement, since at that point in the production cycle, there is often still a strong chance that the film will not be produced. The Option Agreement will state that the owner of the copyright in the underlying work agrees to grant the right to the producer for a limited period of time to produce a film and that, if the film is made (that is, if the option is exercised), then the owner will be paid a certain amount of money for the ongoing right to use the work in the film.

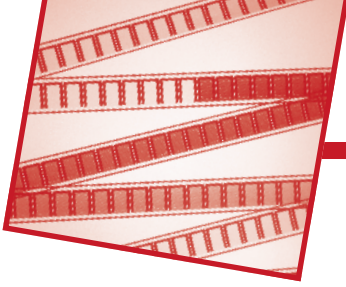
Some of the basic terms in these and other rights acquisition agreements have been standardized by writers' guilds such as the Writers Guild of America and France's Société des Auteurs et Compositeurs Dramatiques. A more complete description of an Option Agreement can be found in chapter 3.

### 2.2.2 Music Licences and Clearances

Every piece of music in a film must be cleared and licensed both for synchronization rights (the right to use the composition itself – usually this is obtained from the music publisher) and for master use rights (the right to use the recording of the music). Together, these include the right to synchronize the music with the images in the film. Producers and distributors do not have to obtain public performance rights, as these are licensed by performing rights societies such as ASCAP and BMI to end users: cinemas, broadcasters or other public outlets. These rights to use the composition and the recording may be held by the original writers, composers (in the case of synchronization rights), the performers or record producers (in the case of master use rights). More likely, however, they are held by either a specialized music publisher, such as Warner Music or Sony BMG, or a service specialized in providing pre-recorded music, such as Associated Production Music.

Music clearance and licensing is a complex business. If at all possible, these issues should be handled by specialized professionals such as music supervisors or lawyers with experience in the area.

Many producers prefer to commission a score, that is, a specific original music for a film. The same licenses as those described above must be obtained for a score,



though in some cases the owner of the music might be the producer or the SPE if the music is created as a “work-for-hire”.

Music blaring from a car stereo as it drives through a scene, the music on a TV program playing in the background or a bit of a song that one of the actors sings are all examples of music that must be licensed in the case of a fiction feature. The rules for documentaries may not require specific licenses however. If an actor sings “Happy Birthday” in a film, those rights must be licensed as well. This can be one of the biggest problems faced by producers (and consequently distributors) around the world. Music licensing is thus one of the first issues that distributors should address when considering a film. Distributors know that their clients and in particular broadcasters, will ask for confirmation of music clearance for the specific usage. Changing out music in a film can be very expensive. Moreover, given the very public nature of film distribution and the sophistication of companies that control music rights, the probability of getting a claim for failing to clear music is nearly 100%. Distributors and broadcasters will request a “music cue sheet” (sometimes referred to as “needle drops”) listing every piece of music, how long it is used and whom the owner is. They will also want to see the license agreements for each piece of music as well as proof of payment for the agreements. In terms of the rights granted, these agreements can be very specific and will state for how long (down to the second) the music can be used, whether it can be used as a theme song, and whether it can be included in a soundtrack album or on the trailer.

Distributors should know about a “standard” music license agreement as small mistakes can be very costly. It is often considerably less expensive to pay for a music license with significant restrictions: for a limited geographic area (only Nigeria, for example) or a limited set of usages (only for festival screenings, for example). There is no problem in so doing as long as the agreement also allows the producer to pay pre-negotiated sums for the other rights they may need in the future (up to and including all rights worldwide in all media in perpetuity whenever possible). Obviously, costly problems will arise if the producer needs to negotiate those rights after the world discovers that the film is likely to be a global hit.

### 2.2.3 Clip and Still Photography Licenses

When a previously recorded audiovisual work is presented on a TV, cinema screen, mobile device or computer screen in a film, a clip license must be secured. This



license grants the right for the usage (including the use of the music contained in the clip). Similarly, the use of a still photograph or a painting may also require a specific license, even if just seen in the background of a scene. These licenses are similar to music licenses in that they specify the authorized terms of use, including the agreed length of the film clip. The distributor should make sure that the producer has secured all rights for the specific use including underlying music in a clip, the artist's authorization in the case of a painting (and in some cases the owner of the painting's permission as well) for all possible uses for the most appropriate term as determined under national law, or, as is standard practice in some jurisdictions, in perpetuity worldwide. The distributor also needs to do their best to confirm that the producer has confirmed that the person licensing the material has all of the underlying rights and the right to license the material for the specified purposes.

Unfortunately, in most cases the licensor of the clip will often not give any warranties or representations that they have cleared all the elements for use in another work. They will instead grant the rights as a "quitclaim" and the producer will have to also clear the performance of actors in the clip in addition to the music.

Ensuring proper clearance of rights can also be the job of the distributor when preparing the release of a DVD. To illustrate the first DVD cover of Jean-Luc Godard's *Pierrot le Fou*, for example, a still photograph taken during the original filming during the 1960s was reproduced without prior authorization of the photographer. A clear copyright infringement was found and the distributor was ordered to pay damages to the copyright holder.

In some cases, the use of artwork, still photos and other visual images may be considered incidental and no clearance will be required. For example, the opening scene of Karim Dridi's *Bye-Bye* (1995) was shot in the harbor of Marseilles where a street painting could be seen in the background. The ADAGP, the French Rights Collection Society representing the artist of the street painting, sued the production for breach of copyright. The court ruled that because the work was accessible to all and appeared for only a few seconds, it was incidental to the main topic of the film and did not require specific clearance (*ADAGP vs ADR Productions – Paris Appeals Court, September 14<sup>th</sup>, 1999*).



#### 2.2.4 Trademark Clearance

It is a good idea to avoid using products with a recognizable trademarked logo. There are many reasons for this. Some are based in law (particularly if the product shown is disparaged in any way or used improperly – murdering someone with toothpaste for instance – which may invite legal action) while others are more commercial. For instance, broadcasters are sensitive to the fact that Pepsi might not want to advertise during a film presentation if that film prominently features people drinking Coke. If a producer does use a recognizable logo, then it is usually best to clear that use with the owner beforehand. If the product is featured in a positive light, then it is often possible to secure compensation to the film’s producer in the form of payments for product placement. In exchange, the producer agrees to feature a product and must make sure that they adhere to their obligations or face a possible dispute. Usually the agreements will be very specific about each side’s obligations and buried in the agreement will be permission to use the logos or packaging of the brand.

Whenever a brand’s logo or other trademarked image or phrase is used in anything but an incidental manner, it may need to be cleared and licensed for that specific use. This is almost always true if the product is highlighted in any way or integral to the story or dialogue. For example, in Marjane Satrapi and Vincent Paronnaud’s Cannes Film Festival award-winning animated feature *Persepolis* (2006), a teenage girl wears Nike shoes. For that production, the Nike swoosh had to be cleared because there was specific reference to the brand, in spite of the fact that the reference was in animated form. Trademark is a tricky area and it is always better to be cautious and avoid the use of trademarked products unless it is creatively necessary, in which case the product, logo, image or phrase probably needs clearance. In the end, whether the producer is right or wrong, a major corporation can make the distributor’s life completely miserable if it sees its unlicensed intellectual property in a film.

#### 2.2.5 Name, Life Story and Likeness

In theory, anything that happens in public or that is reported as news (facts) can be used without a specific license. However, if someone, even a public figure, portrayed is defamed in the work, then the distributor as well as the producer can run afoul of the law. If the film uses someone’s name, phone number, picture or other personal details, it is always better to get that person’s permission. This falls under the concept of “right of privacy” and “right of publicity”, the notion that someone has the right to

keep her private life out of the public eye. Licensing “life story rights” from someone usually means that she waives these rights. This is a complex area and laws differ between countries.

On April 10<sup>th</sup>, 2009, the Paris Appeal Court fined broadcaster France 3 for airing a TV series based on a famous child murderer. The perpetrator had never been arrested, but the film implied that a specific person was guilty. The person’s heirs claimed it damaged his reputation, that is, that the program defamed him. The producer was also held liable and the series had to be removed from the market. Another court in Europe has recently ruled that unusual family names cannot be used for villains in fictional works and that families bearing those names can sue producers and distributors if they feel their good ‘names’ have been sullied.

In the case of documentary films, clearance of people appearing on-screen can be more complicated. In some cases, people appearing may even consider themselves actors and demand payment for their appearances. In *Être et avoir*, a documentary directed by Nicolas Philibert (2002), the main subject of the film, a school teacher, claimed that he was performing and asked for payment. The French Supreme Court ruled that he was not acting but only depicted in the normal performance of his duties in a documentary film. Although he did not sign a proper release, it was obvious that the teacher was perfectly aware of the nature of what was happening and therefore implicitly granted the right to use his image for the production and exploitation of the film (Maïa Films vs Georges Lopez – French Supreme Court, November 13<sup>th</sup>, 2008).

#### *Contractual Publicity Issues for Actors*

Distributors also need to worry about name and likeness provisions in their actor agreements. How the actors agree to be portrayed in posters, paid ads or publicity photos is another area where distributors can get into significant trouble. If any of the actors has too much control over any aspect of the release or marketing, distribution of the film will become more difficult. American actress Sharon Stone agreed to appear in a film that starred Woody Allen directed by Mexican director Alfonso Arau called *Picking up the Pieces* (2000). Her contract specifically stated that her face could not be used in the poster to advertise the film and the sales agent duly included this clause in all of the agreements with territorial distributors. However, several of those distributors ignored that provision and used her image (prominently) anyway. As soon as the violations were discovered, there were legal letters sent to the sales



agent asserting Ms. Stone's rights under her agreement. The sales agent required the offending territorial distributors to modify their campaigns at great cost.

### 2.2.6 Character Licenses

These agreements are very similar to licenses for scripts and underlying property. However, these usually only confer very limited usage rights and rarely include rights for sequels or merchandising for instance. The problem with these agreements often stems from determining the actual ownership of the characters and whether or not the purported owners have the right to grant the right to use the characters in alternative media – a film, for instance. Some characters were just licensed for comic books, cartoons or video games and the publishers of those do not really have the right to make a film from the character. In addition, over the years, certain characters may have changed and each change may have produced a new trademark claim and/or copyrighted work. This is an ongoing problem for both the Batman and Superman franchises. Most people avoid using characters they did not create in their work.

### 2.2.7 Talent Agreements

The other agreements that are needed for the film are talent agreements. The complexity and variety of these makes it impossible to cover them here, but there are excellent examples available from National Actor and Director Guilds, i.e. International Federation of Actors, FIA – [www.fia-actors.com/en/agreements.html](http://www.fia-actors.com/en/agreements.html) and Screen Actors Guild – [www.sag.com](http://www.sag.com), and for Director Agreements, Directors Guild of America, DGA – [www.dga.org](http://www.dga.org) and [www.saa-authors.eu](http://www.saa-authors.eu). In the United States and many other countries, there are three key issues that distributors will require in all talent agreements: grant of rights, waiver of injunctive relief and the right to assign the rights obtained in the agreement.

Distributors should not base their analysis of COT on whether the producer used the exact terms in any specific agreement pulled from the Internet or found in a book but should instead consult lawyers specialized in these issues.

Distribution agreements often cover a wide range of issues of interest during the production process, some of which have nothing to do with rights transfer. These include the promotional efforts that are expected from the talent (including name and likeness ad restrictions, attending openings, giving press interviews), budgetary

issues including a minimum expenditure for the talent salaries and access to the set by press or people involved in the distribution. The distributor will simply want the agreements to confer all rights to do anything with the performance or work.

### *Director Agreements*

The obligation to respect a director's work is often included in director agreements. A true final cut provision is rare in U.S. and UK agreements but impossible to exclude in France and in most of the rest of Europe, as the notion of "final cut" is integral to the moral rights principle.

Directors' moral rights, as well as the scriptwriter's moral rights, can go further than just having the final cut, even if they have assigned their copyright to the producer. Radu Mihaileanu, director of *Train of Life* (1998) who won the Fipresci Prize of the Venice Film Festival for this film, exercised his moral rights when he realized that the film's distributor had replaced the original digital cinematic version of the soundtrack with a lower quality soundtrack on the DVD. He obtained a court injunction that called for the immediate destruction of the existing DVDs that did not conform to the original work and the replacement of the original soundtrack as well as damages (Radu Mihaileanu vs AB International – Paris Appeal Court, June 29<sup>th</sup>, 2001).

It is important to be extremely specific with talent agreements and base them on a final script and production and delivery schedules. If any changes need to be made in the agreements, it can be extremely difficult and may result in full compensation being paid to the talent with no work performed (often referred to as a "pay or play" provisions).

Regarding directors' agreements, it is important to remember that they can be considered both talent deals (holding a corresponding copyright) and employee agreements (they will be paid wages from the producers during pre-production, principle photography and post-production). They will receive compensation for their work during production and royalties from the distribution of the film. Most importantly, they are authors of the film and in most cases considered the primary author. This gives them specific rights that are different from the rights granted to actors in their agreements.

### *Actor Agreements*

As far as actors are concerned, in most countries outside the United States, they own neighboring rights, including the right of publicity, and the producer (and by contract the distributor) must respect those. Their agreements obligate them to play a role according to the director's instructions but also specify that their performance may be reproduced and exploited when the film is released in various media.

**Get It in Writing** – The transfer or assignment of copyright must be in writing. Contracts must be explicit and must involve the exchange of consideration. In other words the owner of the copyright must be compensated in some way. It is important to get confirmation that the compensation, if any, has been duly made, by canceled check, bank transfer confirmation or signature for cash payment.

#### 2.2.8 When is it not necessary to license the copyright? Public Domain and Fair Use

It is always recommended to err on the side of caution. If it seems like it might be necessary to license the copyright, it probably is. If it is possible to avoid the use of the copyrighted or trademarked material without harming the creative content of the work, it is probably wise to do so. When in doubt, during filming turn the product around so the label cannot be seen, ask the extra to change his/her logo T-shirt or turn the TV in the background off.

There are situations where it is legal to use copyrighted material without obtaining permission from the copyright holder, particularly in documentary films or when reporting facts, current events or when the use is for criticism or review. This is referred to as "fair use". It is rarely permissible in fiction features, however. In *Être et avoir* (2002), Nicolas Philibert showed educational charts on the wall of a classroom. Copyright holders of those charts sued the distributor and producer for copyright infringement. The Paris Appeals Court dismissed the case, ruling that the use of the posters was incidental. They were not the main subject of the film, appearing only in short sequences and always in the background (SAIF vs Maia Films – French Supreme Court, May 12<sup>th</sup>, 2011).

As previously discussed, works in the public domain include works that are no longer protected by copyright. Because of changes in copyright terms over the years and differences between the laws of each country, determining what is in the public domain can be complicated. A film in the public domain in the United States might not be in the public domain in France and vice versa.

### **2.3 Errors and Omissions (E&O) Insurance**

E&O insurance is a type of insurance that covers any problems with rights acquisition. To help keep all those elements in order, Annex II of this publication provides a checklist that is similar to what these insurers will use to make sure that producers have all the documentation a distributor would require and that all necessary rights are cleared. Potential territorial distributors and TV companies may require an E&O policy (almost always in the case of U.S. and UK distributors). These usually cover up to USD \$3 million in liability. If all of the paperwork is in order, E&O policies are not expensive. If the paperwork is not in order, however, and E&O cannot be obtained by the producer, the film may be impossible to distribute.

Experienced acquisitions executives and television programmers will be very sensitive to the major issues, i.e. music, underlying rights, characters, trademarks, clips and stock footage use, images of celebrities or known contemporary artwork. They will expect to see the license agreement for each of those rights. The E&O insurer will perform the same review and expect to see the same documentation. If a film has obtained E&O insurance, potential distributors will not be as concerned about doing the checks themselves. The checklist offers a very thorough list of the requirements for obtaining E&O insurance. Many producers will not be in a position to secure E&O insurance prior to securing distribution. However, it is wise to be ready to supply all of the paperwork mentioned in the checklist when it becomes necessary.

E&O insurance provides protection from lawsuits that allege:

- Invasion of privacy,
- Plagiarism or pirating of ideas,
- Infringement of copyright,
- Libel or slander (defamation),
- Degrading or defamation of products (trade libel),
- Infringement of trademark, slogan or title.

**Mike Tyson's Tattoo in Todd Phillips' *The Hangover Part II***

S. Victor Whitmill, the tattoo artist who created a distinctive tribal tattoo for boxer Mike Tyson, sued Warner Bros. to prevent the release of the hit sequel because his copyrighted artwork had not been properly licensed. Though the tattoo appeared in the original film in its usual place (Mike Tyson's face), in the sequel it is on the face of star Ed Helms and appears prominently in posters for the film. The artist's attempt to block the release failed but he is proceeding with a copyright infringement suit. In her rejection of the injunction, U.S. district court Judge Catherine D. Perry indicated that she believed Mr. Whitmill's suit had a strong chance of success. Judge Perry has confirmed that a tattoo can be copyrighted and rejected Warner Bros. "fair use" claim: they had said the tattoo was a parody. It is unknown who will prevail but it is clear that the issue could have been avoided by licensing the copyright from the artist in the first place. Interestingly, when Tyson received the tattoo in 2003, he signed a document stating that the artist kept the rights. Warner Bros. claims that their right to use the image is part of their agreement with Tyson, but if Tyson never had those rights in the first place, that will be a difficult argument to make. It is crucial to specify what rights are granted and that the person you believe is granting those rights actually owns them.

There are a limited number of companies that offer E&O insurance and they have strict requirements that must be fulfilled before they will issue the policy. The best course is to stay organized. Distributors should know which contracts are needed and methodically make sure that producers have executed them with the proper parties. If everyone is lucky, the film will be a hit and no one will try to sue – and if they do, everyone will have that crucial piece of paper that proves ownership or the right to distribute the film.



## CHAPTER 3

### SAMPLES OF REQUIRED AGREEMENTS FOR FILM DISTRIBUTION

For any copyright assignment to be binding, it must be in writing. For any contract to be binding, a few things have to happen. There has to be an offer by one party and acceptance of the offer by the other party. In many jurisdictions, there has to be an exchange of consideration – meaning that one thing has to be given for another thing, i.e. a copyright license in exchange for a cash payment for example. There has to be certainty as to the terms of the contract – meaning that the contract cannot be so vague or so confusing that a reasonable person would not know what it means. Finally, there has to be the intent of the parties to create a legal relationship, usually clear from the existence of the other contract elements. These agreements will be discussed in much more detail (including all of the elements that ideally should be included) but if distributors choose to simplify things drastically, at the very least they should make sure that the copyright transaction (distribution agreement) is recorded in writing, in the form of a contract, with the above minimal requirements being met.

The way agreements are viewed by the courts in a particular jurisdiction can determine who actually owns a film and which entity can license the distribution rights to another party or derive revenue from the film. Jurisdiction can also determine if the rights owner has properly licensed the rights to a sales agent or territorial distributor and who may be liable for costs and damages if there are problems. It is highly recommend that all parties to an agreement seek local legal counsel on these matters but it is important that everyone begin with a basic understanding of the issues.

The foundational agreement for all films and the first agreement a distributor should make sure has been properly executed by the producer is the license of the underlying material, the script and works that the script might be based on. Since this agreement contains all of the various terms and conditions one would normally find in other rights agreements, it is useful to analyse this agreement in some detail. It is important to understand which points are negotiable, which are absolutely crucial to transferring copyright usage or ownership and ultimately what distributors need to confirm to make sure they are going to be able to release the film.

### 3.1 The Option Agreement

The collection of copyrights that constitute ownership of a film, the Chain of Title, begins with the script and, if the script is based on previously created material, the copyright to that material as well. These licenses can be complex and are part of a development process that very often fails to produce an actual film. For this reason, they take the forms of options rather than outright licenses or assignments of the copyrighted material. An option is a term that means exactly what it says – it grants the producer the option to license the material under negotiated circumstances. Therefore, an option agreement will also contain an acquisition agreement for the underlying material should the option be exercised (meaning that the film is put into production). As the starting point in a distributor's confirmation of Chain of Title, they will make sure that the option is properly documented, includes all rights necessary to exploit the finished film and was properly exercised i.e. has not expired, payment was made and all creators were properly credited.

The option of a script based on the screenwriter's original idea is, of course, the easiest option because there is only one copyright. If the producer is optioning a screenplay based on previously existing material (a novel for instance), it is important to confirm that they also have the option for the underlying material and that they will be able to acquire those rights when needed. The right to make a film based on a script based on a novel is clearly of no value without the right to make the novel into a film.

In either case, it is important that the option contains the right to acquire all rights that the distributor could possibly need or want from all parties that may have some claim to the copyright. This might include the author, playwright, screenwriter, previous screenwriters if any of their original material was used and even possibly previous option holders if their option gave them an ongoing interest in the material after the expiration of the option. Having an option usually requires the expenditure of monies to develop the material and the option might allow for the recoupment of those costs if the material is one day made into a film.

The rights a distributor will want to see included in the option include the right to make a film based on the material (book, screenplay, magazine article, short story, song lyrics, biography, etc.) as well as the right to exploit the film in any format anywhere in the universe in perpetuity.

Films based on true stories can raise issues that option agreements might want to address to limit and to protect a producer's future liability. Such scripts are often based on news of crimes, political scandals or tabloid stories about the rich and famous. Under the European Convention on Human Rights, the right to privacy is a fundamental right and it must be balanced against the right to information as granted under Article 10.1 of the same Convention. It can be hard for the producer to find a fair balance between those two principles, knowing that a court will favor the solution giving protection to the most legitimate interest (French Supreme Court, July 9<sup>th</sup>, 2003).

The producer should also acquire sequel, remake, character licenses, merchandising rights and anything else she thinks might be useful in the future (and that the copyright holders will allow them to have). At this point in the process everyone should plan for success. These rights are easy to obtain at the beginning of the process but nearly impossible to obtain after the film is a hit. The producer should also try to secure an ongoing interest in the material past the expiration of the option period (usually one year but often with pre-negotiated extensions based on further payments or progress in developing the film such as attaching a director or cast for instance or securing distribution). If a producer invests time and money into developing the material she should reap some of the benefit should the film start production with another producer a month after the option expires.

All of the terms of the option agreement described below are necessary elements for the agreement to be enforceable. The option must describe the terms of the acquisition, it must be more than an agreement to agree to some terms at a later date if something happens. It must also provide for some form of compensation to the rights holders; free options might not be enforceable. For most purposes the option agreement will be sufficient if it covers the points below.

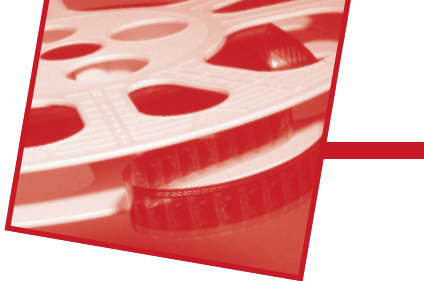
As the assignment of rights to the producer or single purpose production entity is incorporated in the option agreement, there is no need to subsequently sign an additional agreement to make the film once the option is exercised.

1. **Parties to the Agreement** – The production company established as the rights aggregating entity on the one hand (the Single Purpose Entity or SPE) and the author, screenwriter or another legal entity that controls the copyright to the material for the screenplay/underlying material on the other hand. In all cases, the distributor needs

to confirm that the party claiming the rights is truly the owner. That is, that the writer has not assigned the rights to another entity or that the entity claiming to control the rights has properly acquired those rights.

- a. The option may contain the author's date of birth, nationality, their age at the time of the creation of work and, if they are deceased, the date of their death (all elements to establish duration of the copyright). This is not the case in U.S. options.
  - b. If the work was published previously then the agreement must also list the date and country of first publication.
2. **Description of the Optioned Work** – The work has to be clearly described in an all-inclusive way. If it is a script, it must specify if it is an original idea or based on other material by the same or other writers. If based on previously existing material it is important that the producer licenses rights to both.
3. **Rights Optioned** – The option is an exclusive right and should include all rights needed to make and release the film in all media worldwide in perpetuity – or for the maximum copyright period allowed by local copyright law – based on the material. If it is not already a script, this will include the right to adapt the material into a screenplay. If possible, it should also include the right to create sequels, remakes, TV series, stage plays and games – basically any ancillary rights of any kind. This is often expressed as “any and all rights now known or hereafter invented, including without limitation...”, followed by the above list of rights. The option should also include the right to assign, the right to transfer the agreement to a third party, which may be necessary for financing purposes. If the rights holder refuses to assign any rights that might be exploited in conjunction with the release of the film, it is best to specify restrictions (usually “holdbacks” that require the exploitation subsequent to release of the film in various media) on the exploitation of those rights.
4. **Credit** – What screen credit will the author receive?
5. **Option Period (Term) and Renewal** – The duration of the exclusive option, usually 12 to 18 months with at least one pre-agreed renewal for an additional 12 to 18 months upon payment of an additional fee or upon demonstrated progress in bringing the film to production.

6. **Initial Option Fee** – This may be 10% of the exercise price but often a fixed amount if the exercise price is a percentage of the budget. The initial option fee must be paid as part of the exchange of consideration making the contract binding on the parties. It is credited against the payment of the full exercise price.
7. **Option Renewal Fee** – The fee paid to renew the option at the end of the initial option period. Again, this could be 10% of the exercise price but is often the same as the initial option fee.
8. **Exercise Price (Purchase Price/Acquisition Price)** – The price for which the rights will be acquired to produce the film once the producer exercises the option on the script. This can be expressed as a hard number or as a percentage of the film's budget subject to a minimum and a maximum (i.e. "2% of the bonded production budget however no less than \$100,000 and no more than \$200,000"). 100% of this amount less previous payments may be due on exercise or the payments could be spread out during the production. For example 50% on first day of principal photography and the balance on completion of photography.
9. **Writer Obligations** – If the option is with the screenwriter then they may be required to complete additional work on the script (rewrites, polishing) either in exchange for fixed payments that might be outside the exercise price or simply in exchange for the option fee in hopes that the improvements will lead to the screenplay being produced.
10. **Additional Fees** – These could be guild residuals as mentioned above (in jurisdictions where applicable, as in the U.S. for example), if the author is a member of a union such as the Writers Guild of America (WGA). Such additional payments will be based on the success of the film (profit participation/royalties) or payments for derivative works and ancillary properties (sequels, remakes, games). In each instance, it is important to clearly define how and when these amounts become payable. A net profit definition might be included as well as examples of how additional payments from derivative works will be calculated. Audit rights are generally included.
11. **Expenses** – If the screenwriter's active involvement in the production is necessary or required then all reasonable expenses should be paid.



12. **Standard Warranties and Indemnities** – These can include the parties confirming that they have the legal authority to enter into the agreement, that the author is indeed the sole author and that they control the rights being granted, that the material in no way infringes the intellectual property rights of any person nor is it defamatory or obscene based on local laws, that there are no pending lawsuits or other legal problems and that there are no encumbrances or liens on the property.

13. **Dispute Resolution** – This must include the forum, such as court litigation or an Alternative Dispute Resolution (ADR) method, for example mediation and/or arbitration. Institutions such as WIPO and IFTA provide specialized ADR procedures, as well as model dispute resolution clauses that parties may use in their agreements (see WIPO model contract clauses and submission agreements in Annex III hereto). These clauses should indicate in particular the relevant authority and jurisdiction, including the applicable law that controls the agreement between the parties, as well as the place of arbitration and/or mediation. The parties might also want to agree on a limit to damages, in order to cap potential liability risk. For example damages may be limited to a return of a distribution advance rather than a speculative estimation of lost profits. This is discussed in more detail in chapter 5 below.

14. **Termination** – The agreement may provide for a termination mechanism in the case of non-performance, i.e. non-payment on the part of the producer, failure to comply with obligations on the part of the writer or incomplete or faulty documentation on the part of the underlying rights holder. Such termination must specify the rights and obligations of each party in the event of termination. This could provide for full repayment of all compensation paid to an author or the reversion of rights to a rights holder. In the U.S., most contracts in the Chain of Title documentation do not provide any right of termination, injunction or rescission and in fact, those rights are usually specifically waived by the party assigning or granting the rights. This is also true in the U.S. for all talent agreements, the reason being that anything that could give rise to any party having the right to block (enjoin) distribution of the film will not be acceptable to a distributor. Termination provisions are often difficult to enforce as the event that gives rise to the termination can be a dispute or even a legal problem.

15. **Certificate of Authorship** – This is a document required in some jurisdictions in order to confirm the details of the authors and the fact that they are, indeed, the authors of the material and that no rights have been assigned to any third party or that

the work is a work for hire. It is best to get this certificate of authorship as part of the option as it will likely be necessary at a later point.

16. **Signatures** – All interested parties should confirm that all documents are signed and, if there is any doubt, it is advisable to go back to the parties to confirm that they have, indeed, signed the documents. Though unusual, fraud does exist in this area and part of due diligence can be confirming proper execution of all documentation.

### 3.2 Music Agreements

As discussed above, two separate rights must be licensed in order to use music in a film – “synchronization rights” (the right to use the composition itself – usually this is obtained from the music publisher) and “master use rights” (the right to use the recording of the music). Together these will constitute the right to synchronize the music with the images in the film. Producers and distributors do not have to obtain public performance rights as these are licensed by performing rights societies such as ASCAP and BMI to end users including cinemas, broadcasters and other public outlets. In those cases it would not be practical for the rights holders to manage each relationship where their rights are being exploited, so those rights are managed collectively on their behalf and the revenues are distributed to the rights holders through Collective Management Organizations (CMOs) or Collecting Societies in each territory.

The synchronization and master use rights may be held by the original writers, composers (in the case of synchronization rights) or the performers, producers of the music or record companies (in the case of master use rights) but are more likely held by a specialized music publisher (such as Warner Music or Sony BMG) or even a service specialized in providing pre-recorded music such as Associated Production Music ([www.apmmusic.com](http://www.apmmusic.com)).

If the producer commissions music especially for the film (the score) then things become much simpler. It is even easier if the composer will also arrange for the recording and delivery of the music. In that case, it is important to confirm that the composer has secured all proper licenses from the performers. The following agreement assumes that all rights are controlled by a single entity (the composer/lyricist/performer) and that the entity will be the sole performer of the music.



a) The Composer Agreement

1. **The Parties** – The production company on the one side and either the composer as an author or a company established by the composer specifically for these kinds of transactions (often called a loan-out company).

2. **Statement of the Engagement** – That is exactly what is expected of the composer, to compose new music for exclusive use by the producer for the soundtrack to a specific film (or possibly for any other purpose whatsoever if created as a work for hire), arrange for the recording of the music and deliver the score in a specific format by an outside date and to clearly convey rights as discussed below to the producer. This needs to be very clear ensuring that the composer will be able to fulfill their responsibilities and that they will compose original music rather than use music they might have licensed previously to another party.

3. **Payment Terms** – Fee, payment schedule (usually an advance on signature and then the balance on delivery), payments for recording sessions (which might be paid directly by the producer or by the composer but reimbursed by the producer or they could be built into the fee) and finally royalties, if any. If the composer belongs to a talent union there are often standard agreements, terms, royalty rates and residual obligations that must be adhered to. If a soundtrack album is to be released, that is often subject to a different set of royalty terms.

4. **Exclusivity** – As mentioned above, the music composed for the score should be for the exclusive use of the producers and the composer should not have the right to use it for any other purpose.

5. **Rights Ownership and Transfer** – It should be clear exactly what rights to the music the composer is able to grant. At the very least, the composer will be granting the synchronization rights (the right to match the music to the picture) and the master use rights (the right to use the performance of the music). These contracts need to clearly be for both the underlying musical composition (and lyrics) and for the recorded performance of the music. They may also be granting the publishing rights, which should include both the music and the lyrics (two separate rights). Often, the publishing rights are jointly held though controlled by the producer.



Whether the producer exclusively holds the copyright or if it will be shared with the composer is a negotiated point though most union and guild agreements provide for sharing revenues derived from public performance revenues between the composer and the owner of the publishing rights. In Europe, under some copyright regulations, it is not possible for the composer to entirely assign their copyright (though they can waive their right to exercise elements of those rights in the UK). At the very least, the agreement needs to confirm that the composer/performer has properly assigned the synchronization and master use rights to the producer. Among the rights that may be retained by the composer/performer will be the neighboring rights which are administered by the CMOs mentioned above. It is not uncommon for a composer or a performer to earn more money from the neighboring rights than from the original contractual payment.

Whatever rights they are getting, the producer should try to obtain the rights and the consent of the performers for use of the music in all media 'now known or invented in the future', worldwide for the life of the copyright. It is best if no further payment obligations exist (this does not include payments made through the CMOs which are not the responsibility of the producer) but that is not always possible. In some places, that may mean that the producer can use the music in other films, license it for use in commercials, video games or in other media. Such secondary uses for the music must clearly be granted in the agreement and in many cases cannot be easily granted as in many jurisdictions (though not in the U.S.) they are contained in the composer's moral rights that preserve the integrity of the work.

If there are other musicians involved then the composer must properly arrange for all contracts to clearly assign the necessary rights to the producer and make payments to the musicians including contractual royalties and union or guild obligations.

**6. Composer Warranties and Representations** – The composer will promise that the music is original and that they have the right to enter into the agreement and grant the producer the right to use the music in the ways stated as it does not infringe the intellectual property rights of any third parties. They will hold the producer harmless from any legal problems arising from their bad deeds (if the music is plagiarized for instance). They will also warrant that all necessary licenses and waivers have been obtained from any other composers or musicians involved and that any royalty or residual obligations will continue to be met so that the producer will have ongoing free enjoyment of the work.

7. **Producer Warranties and Representations** – The producer must promise to use the music only in the ways indicated in the agreement, to give the composer proper credit in all instances, to properly register the usage of the film with Secondary Rights Collection Agencies and in some jurisdictions where Droit d’Auteur applies, to assure the integrity of the work. The producer also agrees to hold the composer harmless in case the use of the music outside the terms of the agreement creates legal problems including problems arising from any union or guild obligations.

8. **Pre-Existing Relationships** – The composer might have an exclusive contract with a music publisher or record company that could require payments be made to that company. In that case, it might be difficult to secure all of the rights the producer would like to have (soundtrack for instance). It will therefore be necessary to secure at least the rights needed to exploit the film (synchronization and master use) and to restrict the other uses of the music (no use in other films for instance). This should all be made clear in the agreement.

9. **Dispute Resolution** – This must include the forum, such as court litigation or an Alternative Dispute Resolution (ADR) method, for example mediation and/or arbitration. Institutions such as WIPO and IFTA provide specialized ADR procedures, as well as model dispute resolution clauses that parties may use in their agreements (see WIPO model contract clauses and submission agreements in Annex III hereto). These clauses should indicate in particular the relevant authority and jurisdiction, including the applicable law that controls the agreement between the parties, as well as the place of arbitration and/or mediation. The parties might also want to agree on a limit to damages, in order to cap potential liability risk. We discuss this in more detail in chapter 5 below.

10. **Signatures** – Signatures from both parties are required on every document.

#### b) Contracts for Pre-Existing Music

If a producer is using music that has already been recorded then many of the contractual terms described above are the same, but some differences should be noted. First, synchronization rights for all uses needed for the film must be obtained from both the owner of the copyright in the composition, usually referred to as the publishing right and often held by a music publisher, and master use rights from owner of the copyright in the sound recording itself, which usually but not always

includes the rights of the performers. That may or may not be held by a separate entity, often a record company or specialized company offering pre-recorded music for films such as Associated Production Music (APM).

If a production licenses pre-existing tracks, the composer of those tracks is not considered a co-author. Fees for pre-recorded music are usually calculated based on time of use. There may be additional costs if the music is used as the theme music during the opening credits, in a trailer, in a soundtrack or if the rights include derivative rights, such as use of the music in video games or on the film's web site. There is also the ability to license clips of the film containing the music. While it is best to get all rights everywhere in perpetuity or for as long as possible, licenses for pre-recorded music are usually much more limited (for example, they may not include the right to use the music on a soundtrack album or to license clips containing the music).

Often, the producer works with the composer to choose additional, pre-recorded music for a film. In that case, it needs to be clear who is responsible for licensing the appropriate rights for that music. In the Australian biopic *Shine* (1996), directed by Scott Hicks (1996), about the famous pianist David Helfgott, the commissioned composer was David Hirschfelder. He was in charge of composing the music for the original soundtrack but was also asked to choose well-known classical music pieces such as Frederic Chopin's Polonaise in A Flat Major 53 and Paganini's La Campanella. These pieces are clearly in the public domain but the actual recorded performances by third party musicians are protected by copyright. The film's producer was sued for lack of clearance of the recorded music. The court confirmed that all pre-existing music must be cleared by the production no matter what kind of "artistic compromise" is arranged between this kind of music and the original soundtrack by the commissioned composer (Paris District Court, May 24<sup>th</sup>, 2004).

**Music Rights Licensing** – There are extensive texts devoted to the topic and, as noted, the rules can change from country to country. Producers should, wherever possible, use the services of an experienced music supervisor and a lawyer with experience in the area. If producers encounter problems later, they can at least demonstrate that they have made an effort to comply with what everyone acknowledges is a complicated process.

### 3.3 The Distribution-related Agreements

Distribution agreements for films have changed significantly over the past hundred years but the basic elements have remained the same. Emphasis is placed on the main elements which are common to the wide scope of distribution agreements by specifically analysing both a sales agent agreement, i.e. the agreement between the copyright holder/producer and the company that will license the distribution rights to territorial distributors, as well as a territorial distribution agreement, usually between a sales agent and territorial distributor or between the producer and the distributor in their own country. The general terms and concepts can just as easily be applied to any type of distribution agreement anywhere in the world.

Both the International Federation of Film Distributors Association (FIAD) based in Europe, which is more focused on European Distributors, and the Independent Film and Television Alliance (IFTA), which includes members from around the world, have created sets of standard agreements that cover everything from the producer's and sales agent's relationship to new media distribution. The elements in the agreements discussed in this publication are based on a simplified version of these standard agreements that can be found in Annex I, but also on other standard agreements available in other markets. In response to what is viewed as bias in the standard agreements developed by distributor organizations, many territorial distributors have developed their own versions of these agreements – often favourable to themselves. This publication has tried to provide neutral versions of these agreements.

Distributors and producers need to keep in mind that these are negotiable agreements. They can ask for changes and, depending on how much the other side wants the film, they might be able to negotiate a much better deal than the “standard” deal being offered. Because of the nature of film distribution, these relationships last for many years and it is nearly impossible to change the distribution terms once the contract has been signed and the film released.


**Distribution Agreements** are among the core contracts of the industry because they dictate how revenues will be generated. Therefore two of the most important sections of all distribution agreements deal with how revenues will be generated and how those revenues will be divided between the parties.

Two of the most important sections of all distribution agreements deal with where the revenues will be collected and how they will be disbursed. Increasingly, distributors and producers rely on collection account managers such as Fintage House and Freeway (both based in Hungary) or Compact Collections (in the United Kingdom) for this service. A collection account management agreement (CAMA) assures that monies are paid to a dedicated collection account and then disbursed according to instructions agreed to in advance by the parties. That means that the sales agent is not controlling the revenue stream. There are always companies to avoid in all businesses and there are other ways that sales agents may behave improperly. Producers and territorial distributors have learned that the best defense is always to get to know the company and speak with others who have done business with them to find out if they are honest. Word of problems spreads quickly in the small world of film distribution and it is therefore crucial that everyone maintain a spotless reputation.

### 3.3.1 Analysis of Gross Receipts

Since so many aspects of the below agreements involve the generation, calculation and distribution of film revenues, and because this is usually the biggest area of concern and frustration for producers and distributors alike, this aspect deserves further analysis. Most disputes between rights holders and producers are between producers and distributors and arise due to a misunderstanding of the way revenues will be shared.

On the talent side (script, director, actors), the biggest confusion comes in the calculation of net receipts. If the talent belongs to a guild or union, there are usually ongoing payments (residuals) paid to that person. It is also possible that they will be paid a percentage of the film's revenues, but usually only after recoupment of production and distribution costs (sometimes called "first break-even" though definitions of terms in this area vary greatly). In some agreements, there seems to be an effort to make these clauses as difficult as possible to understand. "Producer's Adjusted Gross", "Net Profit at First Break Even", "Net Profit" and "Adjusted Net Profit" might all have exactly the same definition in different agreements. The parties to the agreement should not be fooled by the use of the word "gross" – these days it is often defined in a way that most reasonable people would understand to mean "net" – after the deduction of significant costs (including production, marketing, overhead and possibly even interest and payments to true "gross participants"). Of course, what everyone wants and almost no one gets is to be one of those true gross participants. That means having a "First Dollar Gross" deal, i.e. being paid a



percentage of revenues from the first dollar that comes in, before any deductions. If the parties need to worry about how that works, then they probably have a high-priced lawyer or agent negotiating for them already.

In Europe, payment of the talent is based on the copyright principle that the assignment of rights shall comprise a proportional participation for the author in the revenue from sale or exploitation of the work. Therefore, the definition of net revenues is quite standard and mainly includes the elements of production cost for the film, including fair payment to the producer, as well as the distribution expenses and commission (which are strictly capped) for local and worldwide sales.

What is important to thoroughly understand is how the potential payment will be made. What amounts will go into the gross receipts? Box office, a percentage of DVD revenues, TV sales, VOD and other new media revenues are standard but what about merchandising revenues? What about fees paid by film festivals (not common)? What about secondary rights revenues? Then everyone needs to understand what will be deducted. Obviously costs of distribution, but is there a cap? Will the distributor be required to report those in detail? What about taxes? Are there first-dollar gross participants? Is there interest? Is there studio overhead?

In a typical deal, the distributor is allowed to recoup all costs of distribution as well as any advance paid to the producers, sometime with interest. They may also be able to charge a distribution fee and possibly, in the case of the major studios, an overhead charge (a charge that pays for the general expenses of the studio). The distribution fee may be calculated as a percentage of gross revenues or after expenses have been deducted. A general rule of thumb is that a good deal for both the distributor and the producer/rights holder is when revenues less expenses are split evenly.

From the producers' share of revenues, they are allowed to recoup all costs of the film including interest and any deferred payments. Often, producers will be forced to forego a portion of their up-front fees and defer the amount until investors and banks are repaid, while actors and directors may agree to similar arrangements if they believe in the film's potential. Of course, lenders are usually repaid first, then investors, and only then are net revenues paid to talent participants.

Producers will almost always demand an audit right if there are potential future payments (either from distributors or from the production itself). Sales agents should

demand this right from territorial distributors. This gives the parties the right to check to make sure that the other side is accounting fully and accurately. It does not assure that they will not cheat, but at least they will have to devote more time and energy to doing it creatively if they know the other side can check.

There should always be a termination mechanism in the contract, although these are usually subject to significant dispute, as by the time a cause for termination has arisen, such as bankruptcy, non-payment, non-performance or some other breach, there is a major problem between the parties.

#### a) The Sales Agent Agreement

Though most of the elements are the same, the sales agent agreement involves more rights (usually all rights worldwide with the exception of the country of origin) and spells out exactly what services the sales agent is providing in exchange for their fee (usually expressed as a percentage of revenues). Other provisions, such as up-front marketing costs, expenses and dispute resolution are surprisingly similar to terms in the deals the sales agent will conclude with territorial distributors.

The services of a sales agent may include a variety of functions but principally sales agents are responsible for licensing the distribution rights to territorial distributors around the world, collecting and accounting for any monies due, making delivery of materials necessary for distribution and confirming that the distributors remain in compliance with all aspects of their distribution agreements. They may be selling a completed film or they may be responsible for securing pre-sales for the film that will be used for financing purposes. In the latter case, they will be responsible for providing sales estimates and working with financiers to secure production loans or other funding.

Sales agents might in fact be licensees of the distribution rights if they are acting on their own behalf (often the case if a substantial advance has been paid) or they may simply be agents acting on behalf of the producers. This is an important legal distinction in many jurisdictions. It is advisable to seek legal advice when negotiating these agreements.

The principle elements of the sales agency agreement are :

1. **The Parties** – the production company (often a Single Purpose Entity or SPE as previously discussed) on the one hand, the sales agent on the other hand. It is important to include the full legal name of the sales agent and the legal address of their principal place of business. Both parties should confirm that they are closing a deal with the proper legal entity either providing distribution services or the film rights. This might sound simple but there are many legitimate reasons that the companies in the contracts might not be the ones expected. This might be for legal protection, tax reasons, bankruptcy protection or reasons related to local incorporation regulations. It is important to understand why this is the contracting entity, to make sure the contract can be enforced against that entity if there is a dispute and that they have the authority (through the Chain of Title) to transfer the rights.
2. **Title of the Film** or films subject to the agreement.
3. **Territory** – Usually the world with several exceptions for the home territory of the producer or co-production partners. The U.S., sometimes including Canada and then referred to as North America, is often treated as a separate right. If North America is included, it would be wise for the producer to confirm that the sales agent has experience closing deals there. The agreement must be very clear about the definitions of any territories excluded (for instance, the phrase “English-speaking Africa” might be misunderstood so it is best to list each country included.)
4. **Term** – This is usually limited and may also be subject to the agent reaching certain milestones. It is typical for these licenses to last more than ten years but not more than 25 years. It is not uncommon for the producer to retain the right to terminate the agreement if a certain level of sales has not been reached after the first year or two.
5. **Rights Granted** – The grant is usually exclusive and includes all possible means of distribution now known or subsequently developed. In some jurisdictions “future means of distribution” have to be described and listed. If it is just an Agency agreement, where the sales agent is not also the producer or rights holder, then the sales agent is granted the right to license these rights to third parties “as agent for” the producers. If the sales agent is acting as an executive producer, as is very common, then they are directly licensing the rights to the territorial distributors and the sales agency agreement grants the right to do that to the sales agent.




If the producer believes that they can better exploit certain rights or that the sales agent is incapable of exploiting those rights, then they should retain them and explicitly exclude them from this agreement. The sales agent may seek to secure additional rights such as merchandising or sequel rights. The producer should make sure that it is very clear what rights are included and that the agreement clearly states that any rights not explicitly included are reserved for the producers.

Regarding new media rights (as previously discussed), the sales agent will certainly request these rights and they will, in most circumstances, be necessary for them to conclude territorial distribution licenses. It is important that all Internet distribution arrangements provide for geo-blocking and DRM security.

6. **Sales Agent Obligations** – In addition to making sales in the territory (and maximizing those potential revenues), these can include preparing promotional and delivery materials including trailers and posters, attendance at film markets and promotion of the film at those markets, submission to festivals in consultation with the producers, arranging for certain aspects of the finance of the film including assuring that distribution contracts can be used as collateral for production loans if necessary and that withholding and other taxes are minimized; delivery of all materials and paperwork to distributors; collecting all revenues including advances and pursuing royalty statements and collecting royalties; and possibly, if the producer can negotiate it, hitting sales targets or losing the rights.

7. **Sales Agent Restrictions** – It is important that the sales agent recognizes that they are subject to certain restrictions that might include maintaining agreed-upon minimum pricing, not making outright (no royalty) sales, limits on including the film in packages during the first year of sales, making sure that no underlying rights are violated including moral rights, i.e. making sure the integrity of the film is respected – such as not changing the music for local release to add locally popular songs, that proper credit is given, that no rights are licensed that have not been explicitly granted or a ban on the use of sub-agents. Of course, most of these restrictions can be modified with the written approval of the producer.

8. **Minimum Advance Guarantee** – In many instances the sales agent will agree to pay an advance to get the right to offer the film. In that case the agreement needs



to be clear when and how that payment will be made. If the film is completed then 100% may be payable upon full delivery. Clear bank details should be given in the agreement to assure that there are no misunderstandings. The producer should also be aware of what will happen to the money once received. Are there withholding or exchange taxes? Will the producer need to send the money back out to third parties (investors for instance) in other countries and what are those tax implications? The distributor relies on the producer to fulfill all of their obligations and the contract will require that they do so in order to allow the distributor “quiet enjoyment” of the rights granted. The advance is recoupable with interest and usually the larger the advance, the higher the fee the agent will charge.

9. **Fees and Expenses** – Sales agents receive a fee (also called a commission) from the distribution revenues (both advances and subsequent royalties if any). Generally these fees are between 10% and 35% of collected amounts net of any withholding taxes and bank/collection account charges. The best way to think about fees is as an actual amount of money that is likely to be paid to the sales agent rather than as a percentage. If they are likely to do \$10 million in sales, the fee might be as low as 5% (\$500,000) but if they are likely to only do \$250,000 in sales, a 30% fee (\$75,000) might be appropriate. The producer wants the sales agent to be motivated to sell the film and a low fee might result in lower enthusiasm.


Expenses are often a point of contention. This is partly because bringing a film to market can be very expensive and partly because of the way expenses are defined and explained in agreements. Distributors need to understand what costs they will incur and make sure that these costs will be reimbursed. It is possible that expenses will exceed revenues on small films (especially if they play a lot of festivals). First, there is usually a one-time market overhead charge that covers the cost of market attendance for the sales company. Rather than divide the cost of plane tickets, booth space, shipping and entertainment being offered between the pictures being offered, most sales companies will charge a flat amount of between \$30,000 and \$200,000. This is probably beneficial to the producer as it limits double billing for expenses (it is important for producers to remember that they will not have the opportunity to review expenses for other films being offered by the sales agent). The other expense category is the direct costs. These are costs that are directly associated with an individual film (as opposed to general expenses). These can include preparing marketing

materials such as trailers, promo reels, posters or fliers as well as other festival and market expenses such as screening prints, shipping costs, screenings and advertisements in trade magazines, possibly even a party at a film festival at which the film is featured.

For example, having a film selected for the Cannes Film Festival sounds great (and is great) but the costs can be enormous. The Festival will pay to fly in the director and several cast members, will put them in a nice hotel and will arrange a press conference but they will not pay for hair and make-up people, the director's family he insists on bringing, the luxury suite the star requires or the lavish party that the producers and sales agent are expected to host. They will also not pay for the suite where press from around the world will interview the cast and director nor the publicist who will make those arrangements. Having a film at Cannes might require the additional expenditure of between \$50,000 and \$500,000 (Euro 37,000 – 370,000). That would be considered a direct expense.

If the producer is unable to supply adequate materials for delivery to all territorial distributors, the sales agent may need to create those materials (including the trailer and poster) and they will charge that expense against the revenues. They might advance monies needed to complete the film but will charge interest on those monies. There is no way to avoid most of these expenses but they should be clearly listed in the agreement and there should be a statement that these are the only allowable expenses. The producer will also have some right to audit the costs and the costs are normally capped at a specified maximum amount (which can only be exceeded with written approval).

10. **Application of Gross Receipts** – As mentioned above, it is always possible to have a collection account established, and that means there will be a collection account management agreement (CAMA) that will clearly say where monies are paid as they come in. First, the CAMA will deduct their fee (about 0.5% to 1%), then the sales agent will be paid their fee, then expenses, then their advance if any (plus interest and this is always from the producer's share as it will be an advance against revenues due to the producer) and finally whatever is left is paid to the producer.



Producers almost inevitably believe their sales agent is not being honest with them when they see the first statement. They cannot believe that their masterpiece did not make more money; they cannot believe that expenses were so high and finally they cannot believe the sales agent's fee is so high even though they signed a contract that clearly indicated that fee. There is always the possibility that the producer is, indeed, being deceived, but in most cases careful comparison to the terms of the agreement will make it clear that the statement is accurate. The producer might have misunderstood the terms of the agreement and now regrets certain aspects that they would have tried to negotiate differently. These agreements are very tough on producers but it is also very difficult to get a sales agent to take on a film these days.

11. **Secondary Rights Collection Monies** – Certain monies are paid into collecting societies for blank media levies, re-transmission, music use, certain public performances and other reasons. Organizations such as the Canadian Retransmission Collective (CRC), Société Civile des Producteurs de Cinéma et Télévision (Procirep), Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) and Association for the International Collective Management of Audiovisual Works (AGICOA) collect these monies and disburse them to the registered rights holders – usually through organizations specialized in supervising the collection and disbursement of worldwide secondary rights monies such as IFTA Collections in the U.S., Compact Collections in the UK and Fintage House in Hungary. Some sales agents (particularly if they are also acting as executive producers) will insist on collecting these amounts and should report them as gross revenues.

12. **Delivery** – The agreement will need to specify by when the film must be delivered (outside delivery date) and what materials will constitute delivery (the delivery schedule). Will delivery be by physical transfer of the materials to the possession of the agent or by access to the materials at an agreed-upon lab facility (in the case of master elements such as inter-negatives for release printing for instance)? What will happen to the delivered materials at the expiration or termination of the agreement?


Delivery schedules can be extremely detailed and burdensome. If the film is being released in cinemas, the list of deliverables can seem infinite (particularly if delivering to a major Studio). The producer will have to work

with the agent to make the list of deliverables as short as possible and clearly specify who will pay for what. Usually the territorial distributor that has licensed the film will pay for the materials delivered to them under a distribution contract. The producer will have to confirm that they are not billed for items that are paid for by the territorial distributor. Also, if a territorial distributor creates language tracks or other materials, the producer will try to get free access to those items following the expiration or termination of the distribution deal and ultimately the sales agent agreement.

Failure to deliver per all of the terms of the delivery schedule can lead to the termination of a distribution agreement. Raoul Ruiz's *Les Ames Fortes* (1992) was licensed to a U.S. distributor at the Cannes Film Festival and a deal memo was signed with quickly defined delivery terms and conditions. When the distributor asked for deliverables (a main character voice over and English subtitles) in a very short period of time, the sales agent was not able to provide the elements. The distributor declared the sales agent in breach for non-delivery and in turn the sales agent sued the distributor for not paying the agreed advance. The Court ruled that the distributor's delivery request – simple implementation of the terms of the deal memo – was proper since no long form agreement was ever concluded which might have specified more generous time limits for providing materials (*France Television Distribution vs Paramount Classics – Paris Commercial Court, September 8<sup>th</sup>, 2004*).

Delivery schedules inevitably include Chain of Title documentation! They might also require E&O insurance. Trying to assemble this documentation after the film has been completed is extremely difficult if not impossible.

13. **Reporting and Audit Rights** – The sales agent is required to report expenses and revenues on a regular basis. They should also be responsible for reporting the status of their efforts, where the film has been licensed and what efforts they are making in the unsold territories. Reporting can be as frequent as monthly during the first year after the film is delivered to annually later in the film's life. There are even agreements that specify that no report will be issued if there are no monies due. Sales agents are notoriously bad at issuing statements on time (or accurately) so it is a good idea to remind them when statements are due and to review them carefully



to make sure they comply with the terms of the agreement. The agreement should specify what information should be in the reports but at a minimum it should include a list of revenues and expenses with details regarding the sources (usually a list of distribution agreements with the territory, company name of the distributor and amount of the contract/payment/balance due) and uses (detailed list of expenses) of all monies reported and a final statement of the position of the account – a deficit or an amount due that should be immediately remitted to the account specified in the agreement.

Producers should always have the right to audit these reports. This audit right will be limited and if the audit does not uncover significant (at least 5%) under-reporting then the expense of the audit will be paid by the producer. Often they will have only a limited amount of time after a statement has been issued to request an audit (two years is standard). After that time the statement cannot be challenged unless fraud is alleged, in other words that the “mistake” was intentional, which is something that can be very hard to prove. It is recommended that the producer maintain friendly relations with the sales agent and part of that is not threatening to audit if there are concerns about a statement. The sales agent should be happy to answer producers’ questions and explain any concerns. Of course, if they do not issue statements or return phone calls and emails then producers may need to resort to stronger measures.

The sales agent will have similar rights to audit the territorial distributors and if the producer suspects that the film performed much better in a territory than revenues would suggest, the producer can request that the sales agent research the issue and perhaps initiate an audit.

14. **Representations and Warranties** – Up to this point both parties have made a lot of promises and this section is where they confirm that they can fulfill those promises. The producer represents and warrants that they are the rights holder and has the authority to grant the rights to the agent free and clear of any encumbrances or liens. They will also promise to defend and hold harmless the sales agent against any legal action resulting from their exercise of the rights granted. The producer will promise to make ongoing payments to guilds (unless this is a designated responsibility of the agent or unless the guild requires that the agent assumes that duty under an “Assumption Agreement” – an agreement that obligates a party other

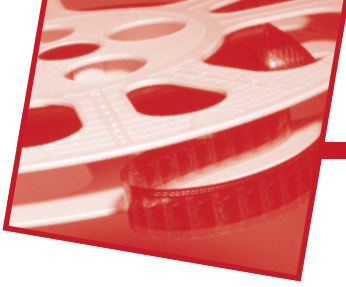
than the original producer to assume the responsibility of making residual payments to guilds or unions). Generally the producer will clearly state that they are legally responsible if there is a problem with any of the rights granted.

In return the sales agent confirms that they are capable of properly fulfilling the terms of the agreement. They also promise not to violate any of the terms of any of the underlying agreements as supplied by the producer and that they will not hold the producer responsible for any problems that are the result of the sales agent's actions that fall outside the terms of the agreement (if they sell a territory that was withheld for example – it happens).

15. **Termination** – Usually both sides have lists of reasons for which they can terminate the agreement. These can include misrepresentations, failure to properly deliver, bankruptcy, failure to achieve certain pre-negotiated sales goals, non-issuance of statements or non-payment of monies due. Usually the party being terminated is given a chance to “cure” the breach of the agreement. If the breach is not cured within the specified time then the termination becomes effective.

Termination usually only happens when both sides are very upset and will often lead to legal action by one or both parties. It should not be taken lightly and should only be pursued if all other avenues have failed and then only with significant input from legal counsel. A party may become liable for additional damages based on improper termination. The experience may become much more costly than it at first appears.

16. **Dispute Resolution** – This must include the forum such as court litigation or an Alternative Dispute Resolution (ADR) method, for example mediation and/or arbitration. Institutions such as WIPO and IFTA provide specialized ADR procedures, as well as model dispute resolution clauses that parties may use in their agreements (see WIPO model contract clauses and submission agreements in Annex III hereto). These clauses should indicate in particular the relevant authority and jurisdiction, including the applicable law that controls the agreement between the parties, as well as the place of arbitration and/or mediation. The parties might also want to agree on a limit to damages in order to cap potential liability risk. This topic is further explained in chapter 5 below. Disputes arising from sales agent agreements are among the most common and the most difficult for the producer to win. The agent is usually either an



established company with resources to defend themselves or they are specifically acting improperly based on years of experience which will make it almost impossible for the producer to even bring the matter to a hearing. Usually the most that the producer can hope for is a return of the rights to their film. At that point, though, the film is probably considered damaged goods and it will be difficult to find another sales agent or to attempt to distribute the film in any other way.

17. **Signatures** – Never forget to get signatures on every document.

b) The Territorial Distribution Agreements

The sales agent (and possibly the producer, particularly in the film's country of origin) either in their own name or as agent for the producer will grant the distribution rights in a territory or several territories to a distributor with an agreement that is very similar to the sales agency agreement above. Attached as Annex I, there is a sample Territorial Distribution Agreement.

Below are the principle differences in the Agreements.

1. **Territory** – As this agreement will be for a limited geographic area and/or for limited language rights, it is crucial to specify and understand exactly what rights are being granted. This sounds easier than it is. When Benelux (Belgium, Netherlands, Luxembourg) rights are granted they may or may not include French-speaking rights. For example, French is spoken in parts of Belgium but these rights will often be included with the French distribution agreement – that may or may not contain the African Francophone countries as well. IFTA publishes a suggested list of territory definitions as part of their standard distribution agreements. This has generally been adopted as the industry standard but it is still best to be extremely specific.

2. **Rights Granted on an exclusive basis** – Some agreements are for all rights, including theatrical release, DVD and VOD. Some may just be for television distribution. Usually terms are shorter in territorial distribution deals than in sales agent agreements but vary greatly between territories. Most sales agents are skilled at limiting the rights included in a contract and limiting the term. Most derivative rights: the right to produce a sequel, remake, novelization and merchandising should not be included nor should the right to seek monies from secondary rights collection agencies. Often, however, the right to license subsequent films if they are produced



(sequels) will be included. Any rights not explicitly granted should be reserved to avoid confusion.

3. **Distributor's Obligations** – The territorial distributor is almost always required to pay an advance, issue statements and pay royalties. They are also obligated to respect holdbacks – they cannot release prior to release in the country of origin or prior to the appearance of the film in a film festival for instance and perhaps most importantly cannot release the film on DVD, TV or Internet prior to the expiration of the holdback periods to avoid ruining other markets.

The Distributor might also commit to release the film theatrically by a certain date and to spend a minimum amount promoting the film. These amounts are usually established through negotiation and closely monitored.

4. **Sales Agent's Obligations** – The sales agent promises to deliver the specific film they sold. That means all elements including cast, director, approximate budget, script and, if applicable, the size of the theatrical release in the country of origin must be “as advertised”. They must also commit to delivery by a certain date. Any changes must be negotiated and committed to writing and may involve a reduction (or increase – thought that is rare) in the financial terms of the agreement.

5. **Distribution of Gross Receipts** – Unlike the simple formula used for the distribution of gross receipts by the sale agent, territorial deals often contain extremely complex formulae for calculating how monies will be shared. Each release medium (theatrical through to Internet) will have a different formula for sharing revenue. These are perhaps the most common:

- Theatrical – After recoupment of release costs all revenues split 50/50.
- DVD – No recoupment of expenses. The distributor retains 80-90% to cover expenses and their distribution fee and the rest goes to the sales agent.
- TV – No expenses with 30% going to the distributor and the rest to the sales agent.
- Internet – This can vary but approximately a 60/40 split of the distributor's revenues (which are usually 50% of the consumer price).

6. **Expenses** – Some of the most common expenses incurred by distributors in addition to the advance, are the costs of delivery materials, sub-titling, dubbing, striking release prints or creating digital cinematic release elements, advertising costs,



taxes (most taxes cannot be considered expenses – these need to be specified but could include withholding taxes and box office levies), DVD mastering and encoding for broadcast and the Internet. It is the sales agent's responsibility to closely monitor these expenses and make sure that expense caps are respected and if necessary audits are conducted.

7. **Payments** – Payments are usually directed to a collection account rather than an account controlled by the sales agent. Usually a deposit is made (10-20%) upon signature of the agreement and the balance made by a certain date but always prior to delivery of master materials.

8. **Delivery** – Again, requirements can be complex but among the other important items are master elements, trailer, key art or other physical elements. Distributors will expect to receive documentation including the Chain of Title, the credit obligations (since they will be creating marketing materials, they need to know what rules they need to follow related to giving credit to the talent), the music cue sheets (required for distribution of secondary rights music collections), the Certificate of Nationality in some cases and Copyright Registration (as discussed below, which can be a very easy process but does not confirm copyright ownership). Of course, there can be other documents required and sometimes the distributor might even want to be named as an additional insured under the E&O policy.

In most other respects the territorial distribution agreement is very similar to the sales agency agreement.

### 3.4 Other Agreements / Documents to be aware of

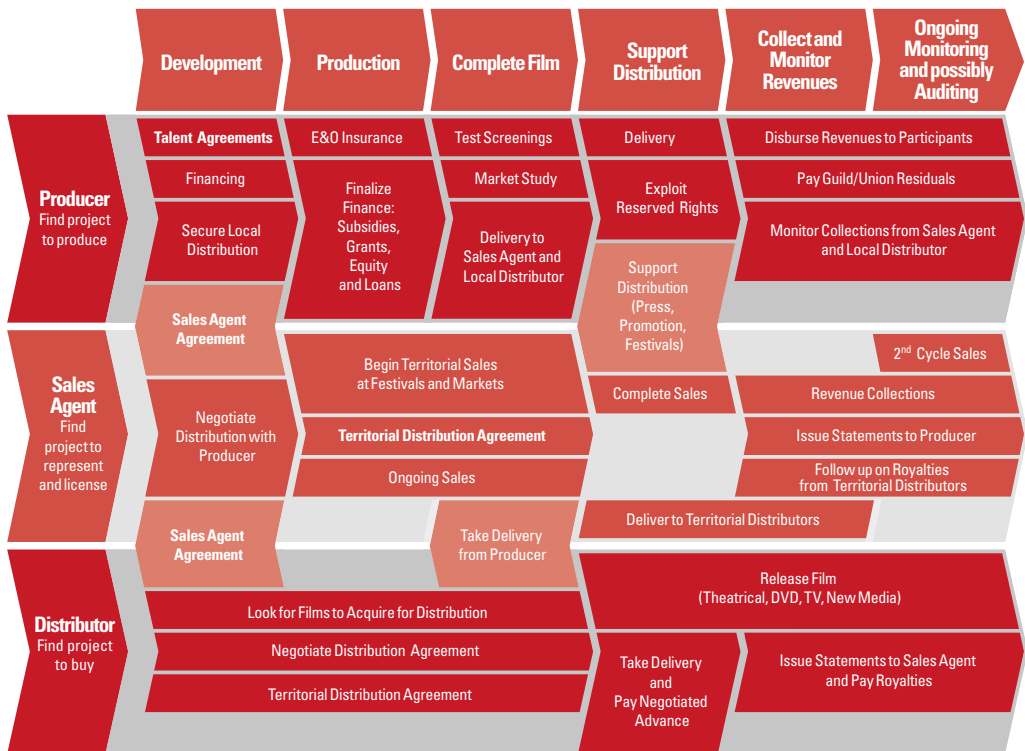
This chapter has so far covered a few of the most important agreements but film production, distribution and finance can involve a dizzying array of documents. Producers and distributors could have long and healthy careers without ever seeing any other agreements outside the ones already discussed. However, it is important to be aware of these other agreements and documentation.

- **Certificate of Authorship** – A document that confirms the details of the authors and the fact that they are, indeed, the authors of the material.
- **Certificate of Origin** – A document issued by the relevant government authority in a jurisdiction that confirms that the work is a qualified production of that jurisdiction.

- **Security Agreement** – An agreement required by entities with a financial stake in the revenues of a work that grants them an interest in the copyright until they are repaid or in perpetuity in the case of certain ongoing obligations such as residual payments to guilds and possibly profit participants.
- **Home Video/DVD Distribution Agreement** – Identical to the distribution agreement discussed above but limited to the distribution of physical copies of a film for personal use by consumers. Traditionally these agreements will specify that this can include any format (DVD, Blu-ray, VHS or other formats created in the future). The agreement should clearly specify how revenues and costs will be accounted as costs can constitute a significant portion of the potential revenues (often 50%). Often the royalty rate is based on a percentage of gross revenues (varying between 10% and 30% depending on the territory, local cost structure and wholesale pricing).
- **Television Distribution Agreement** – Identical to the distribution agreement discussed above but limited to the TV rights only, often containing more specific details regarding the number of broadcasts allowed and the exact method of diffusion (broadcast, cable or satellite).
- **New Media Distribution Agreement** – A specialized distribution agreement that establishes the parameters for the distribution of a work through the Internet or other non-traditional means. These are evolving agreements and require a higher degree of understanding and scrutiny to assure that rights are properly transferred/retained/exploited. Please see the discussion of issues related to the licensing of these rights in chapter 1 above, under new media.
- **Bank Loan Agreement** – Bank loans can be extremely complex and require a large number of documents starting with a loan agreement that will set down all of the terms and conditions of the loan – fees, interest rates, repayment terms, producer requirements and other responsibilities of each party.

- **Interparty Agreement** – Part of the bank loan documentation whereby parties to the loan (producers, sales agents, distributors, banks, financiers and possibly others such as co-production partners) agree to all of the terms of copyright exploitation, ownership, security, collections, disbursements and payment of guild obligations.
- **Notice of Assignment (NOA)** – A document executed by a distributor acknowledging that all revenues will be paid to a designated account.
- **Collection Account Management Agreement (CAMA)** – All parties with a financial stake in a production will often agree to establish a collection account that will receive all revenues and disburse those revenues in accordance with the terms of a CAMA.

**Chart: Timeline: Agreements and Responsibilities**



This chart summarizes many of the basic concepts addressed in this publication organized in a timeline format with the roles of producer, sales agent and territorial distributor delineated. The chart also cites a number of the agreements that are concluded by the parties at each step in the process.

## CHAPTER 4

### COPYRIGHT CLEARANCE PROCEDURES

To be cleared to use copyrighted material in a film, the producer must have a valid (signed with the owner of the copyright) transfer or assignment of that copyright. Required payments, if any, must be made under those agreements. Below is a list of issues a lawyer will address in seeking to confirm that all necessary clearances have been obtained to the degree expected in many countries. In some cases where an agreement may not be necessary, the producer may need to obtain a written opinion from a lawyer confirming this. This is what will be necessary to obtain the E&O insurance that may be required for international exploitation by sales agents and territorial distributors. Whereas it would be preferable for all producers to adhere to these strict guidelines, that is not always possible or practical. It may be possible to obtain an acceptable level of E&O insurance without strictly following these procedures.

#### 4.1 Registration of Copyright

Among the things distributors can do to check copyright ownership, is to consult Copyright Registries, where they exist. In most of the world (and in all Berne Convention signatory countries), there is no formal requirement to register copyright ownership. The copyright exists from the moment the original work of authorship is fixed in a medium.

Systems exist in some countries for registering copyright ownership, transfer or assignment. These systems are of varying quality and usefulness. One of the simplest to use is the U.S. government's system, which is open to works from around the world ([www.copyright.gov/forms/](http://www.copyright.gov/forms/)). A copyright holder can file a Form CO online, pay a USD \$35 fee and his/her ownership claim is registered. This is not a guarantee that the claim is valid or that it cannot be challenged, but it is a good place to start. Other governments have similar registration procedures and there are lawyers who will recommend registering ownership in as many localities as possible. At the very least distributors and producers should file in their home country and in the United States.

These systems are only useful to a point and will often provide out-of-date or even misleading information. For example, recent research on the U.S. registration site ([www.copyright.gov/records/](http://www.copyright.gov/records/)) indicated that the copyright to a certain film was the

property of a company that no longer exists and was subject to a bank lien held by a bank which closed several years ago. The new owners (a conglomerate that holds thousands of film rights) failed to transfer the registration when it bought the other company and the bank that held the lien had not bothered to update the records to indicate that the lien no longer existed. That does not mean that the system is inadequate but that the information is not always as up-to-date or accurate as it might be.

In France, a specific mandatory registration system exists, the public registry of film and broadcasting – RPCA ([www.cnc-rca.fr](http://www.cnc-rca.fr)) – which is managed by the CNC (Centre Nationale du Cinéma et de l'Image Animée). This is not required for the copyright to exist, it exists in France from the time of creation. The RPCA provides in-depth information regarding registered films and has spawned an original system of investment based on the assignment of future revenues. Like a mortgage registry, this public registry publishes acts, agreements and rulings relating to the production as well as distribution and representation information. Either the producer or the distributor can register the film. For example, *Harry Potter and the Deathly Hallows Part 1* directed by David Yates was registered on November 4<sup>th</sup>, 2010 by Warner Bros. and assigned n° 127998 based on the distribution agreement between Warner Bros. Pictures International and Warner Bros. Entertainment France. Since it is publicly registered at the RPCA, this agreement as well as any other relevant information on the film is available to the public.

Distributors thus have easy access to elements of COT as long as the producer has duly and promptly registered the agreements the distributor would want to see to acquire the rights. For a small fee she can even request hard copies. The RPCA does not judge the validity of registrations but does allow registered contracts to have a binding effect upon third parties. In a dispute, priority is generally given to the earlier registration.

During the registration process, it is possible that a distributor or producer will find that the work has already been registered by another party and that she will need to dispute that registration and prove ownership. If a film achieves international success, it is usually dubbed into various languages and the title is often changed. Copyright filings should include all titles by which the film might be identified anywhere in the world.

Registration with non-governmental organization and guilds (the Writers Guild of America provides a service for screenplay registration as does the SACD in Paris), producers' organizations or even private lawyers will also provide a measure of proof of the date of creation of a work if not proof of authorship. Various organizations around the world are considering establishing a global registration system that may provide an additional level of proof of ownership. For now, the best thing to do is register ownership of the copyright with as many entities and in as many countries as possible and to make sure that ownership can be proven if challenged.

Among the various registration initiatives, international bodies have begun offering International Standard Identification Numbers (ISAN) for audiovisual works. These numbers are embedded in the work (in a non-visual manner – often called a “watermark”) and will provide an internationally recognized way of identifying a unique work. These do not identify the copyright holder and are not proof of ownership ; however, they will make the work easier to identify in various language versions and under various titles.

## 4.2 Copyright Reports and Other E&O Requirements

Ideally the producer will have files containing all of the below items which will be reviewed and confirmed by an E&O insurance provider who will promptly and inexpensively issue the policy. Though it is rarely that simple, if the producer has a good start and the basic documentation, then it is highly likely that she will not encounter any challenges to ownership of the copyright to the work or her ability to transfer the distribution rights and derive revenue.

- **Copyright Report/Clearance Report/Clearance Opinion** – reports often issued by law firms or other specialized entities which provide data regarding other registration/uses of the copyrighted material as well as the proper assignment and transfer to the production of the rights. They are often accompanied by a clearance opinion based on the data provided by a law firm specialized in the area. Taken together the report and opinion will confirm that the copyrights to underlying material have been cleared for worldwide use for the creation of the work. These reports will confirm that the rights transactions have been properly documented and registered with the appropriate government registries.

- **Title Report/Opinion** – This is a report that provides data about other uses of the film’s title or specific words in the title that might form the basis for a future claim against the film for trading off the good will created by another work. A lawyer specialized in this area then uses that information to determine whether or not the title actually infringes on any other rights in films, books, songs or other works. They will then issue an opinion letter that will state whether or not there is reason for concern about any conflicts. Remember that the title of a work is not protected by copyright, only the work itself is protected. In many cases, there are other works that may use the same title but the conflict is not significant enough to warrant concern because there is no chance that the public will confuse one work with the other. Generally there will not be a problem unless the title specifically tries to mislead or confuse the public into thinking that there is a relation to another work or product with the same name or title.
- **Written Rights Agreements and Releases** – There must be executed agreements with all authors as well as other players including actors and other creators (including costumers and set designers). It is also necessary to confirm that these agreements are in full force and effect (that there is no term expiration and all obligations including guild/union obligations have been paid). Some of the agreements will take the form of releases for the specific use of performances or other creations that may be copyrighted or trademarked.
- **Confirmation of Rights to Source Materials** – In some instances, and always if the work is based on historical facts or previously copyrighted material, there will need to be additional confirmation that all necessary clearances and authorizations have been obtained.
- **Avoiding Problems with Proper Names and Telephone Numbers** – All personal names and identifying personal information must be clearly and demonstrably fictional and not based on any identifiable elements. In the United States, all phone numbers used in movies contain the numbers “555” after the area code to assure that there are no matching numbers. Of course, it is important to extend this fictionalization to email addresses and URLs.



- **Trademarked Products including Retail Outlets, Identifiable Artwork, Architecture or Book Design** – If there is an identifiable image that was designed by another person, there may be an intellectual property concern. This can include logos, a display window design, fine art, an architectural design that plays an integral role in the work or even book covers. It is always better to err on the side of caution and either avoid the use or seek permission. Not securing this permission might make it impossible to secure E&O insurance.
- **Location** – Specific releases should be obtained if filming takes place in an identifiable location. This is rarely a significant concern for rights clearance unless the location is on private property and identified.
- **All contracts, releases, etc.** must explicitly specify the grant of right and that the rights are granted in all media in perpetuity, where or when appropriate. The rights obtained should be as broad as possible depending on the situation, i.e. right to edit, duplicate, market, promote, use in derivative works, license for clips, publish a soundtrack recording, etc.
- **Music licenses** must be properly documented and all necessary music rights as previously discussed must be obtained.
- All **clip licenses** must confirm that all underlying rights to the clips have been properly documented and remain in full force and effect.
- **Right of privacy and right of publicity** of third parties must also be cleared, especially for films based on true stories or biographies. It may be necessary to obtain written releases from people who can be identified in the film or whose name or likeness is used or identifiable. It is important to confirm that no elements constitute defamation, invasion of privacy or violation of the right of publicity. Generally the right of privacy means that a person should expect that personal details cannot be used by someone without their permission. The right of publicity means that a person's name and likeness cannot be used in a commercial manner to promote a product (including a film). Public figures portrayed accurately do not usually have a claim to a right of privacy (at least for their public behavior), though they do have a right of publicity. These rights and their enforcement vary significantly between jurisdictions.

- **Everything Else** – There are always issues that are rare but must be included: confirmation that the material was not derived from a source that has not been acknowledged and credited, confirmation that no animals have been harmed and no human beings were subject to treatment that would violate their human rights or welfare (in particular children) and finally that there is no additional information that has not been made known.

The work will be subject to a final screening by the insurer or insurance broker prior to acceptance for insurance to confirm all of the above has been properly accomplished. Of course, it is possible that the producer will never seek to obtain E&O insurance but producers should still strive to utilize best practices not only to avoid potential legal conflicts but also to properly credit and compensate other owners of intellectual property contained in the work.

## CHAPTER 5

### DISPUTE RESOLUTION

All business transactions are, at some point, subject to disagreements, non-performance or worse. The film industry is no exception. Film disputes can have highly disruptive effects on distribution schedules and budgets. They can severely affect successful partnerships and tarnish reputations. If not properly resolved in an efficient forum, such disputes may be time-consuming and costly, particularly in the case of a film, as the value can decline due to piracy and other market challenges.

The international nature of film disputes adds a layer of complication not only to their resolution but also to the enforcement of decisions against the offending party. This is why it is important to explore all available dispute resolution options and choose an appropriate and effective mechanism that fits the parties' needs. There are a range of available dispute resolution options which will be discussed in this chapter.

#### 5.1 Court Litigation

##### 5.1.1 Basics of Court Litigation

Parties may indicate in their distribution agreement that any disputes that arise be resolved through court litigation. In cases where parties have inserted a clause referring to alternative dispute resolution (ADR) in their distribution agreement, they will proceed otherwise. However, if the parties failed to insert a clause referring to ADR or to court litigation and if they cannot reach an agreement to refer disputes to ADR at a later stage, a competent court will have to adjudicate the dispute.

Court litigation may be an appropriate forum for a number of disputes. For example, it may be necessary to resort to the courts if there is a dispute that cannot be settled through arbitration or mediation (e.g. if criminal fraud is alleged). Also, where a party has obviously acted in bad faith or where a public precedent is sought, it is more efficient to resolve the issue in court.

In general, the court process will require the use of lawyers who know the intricacies of litigation and the applicable legal system. The court's decision is binding and enforceable in the jurisdiction in which it is rendered.

### 5.1.2 Applicable Law and Jurisdiction

Parties must agree on the applicable law to the distribution agreement. Such choice is normally recorded in the distribution agreement. For example, if a Russian producer licenses distribution rights to a U.S. distributor, the parties may agree that U.S. (most often specifically California) law will apply to the transaction. If a Turkish distributor buys the DVD distribution rights to a film library from a French studio the parties may agree that French law will apply to the agreement. Of course, each party will seek to use the system most favorable to her side and it is important at this stage to clearly understand why one system might offer an advantage over another.

Once parties have agreed on the applicable law, they will have to decide on a jurisdiction to which they will submit the potential dispute. Most of the time this will be the jurisdiction of the signing party whose law is applicable to the agreement. In some countries it is possible to have the dispute submitted to judges from the specialized copyright section of the court with jurisdiction. The dispute will first be heard in a trial court after which it may be appealed to a higher court and in some cases it may then be heard by the local court of last resort, which would render a final decision.

In certain jurisdictions, fair practice in film distribution can be based on prior Supreme Court judgments. It can be very useful for producers and distributors whether they are from the United States, France, Morocco or Singapore to be familiar with these precedents. For example, the French Supreme Court has ruled for two Hayao Miyazaki films - Porco Rosso (1992) and My Neighbor Totoro (1988) - that, once a distributor agrees to sign an agreement with the rights holder of a film, she must be willing to discuss conditions of theatrical release and the possibility of allowing a global distribution deal with a third party (*Ucore vs Europictures Distribution* – French Supreme Court, May 27<sup>th</sup>, 1997).

Precedents also help parties understand how certain contract terms work in practice. For instance, if a distributor agrees to a distribution fee (commission) of 40% of gross receipts that must include any potential commissions to sub-distributors (*Procidis vs AAA* – French Supreme Court, February 13<sup>th</sup>, 1996). These agreements can also include limits on expenses that must be obeyed even if there are additional expenses due to sub-distribution. On *Narjiss Neijar Les Yeux Secs* (2003), a French/Moroccan co-production, the distributor was entitled to a commission and to recoup its P&A

(Prints and Advertising) expenses up to €61,000 from first revenues. When the distributor tried to invoice the producers for expenses beyond that amount, the court ruled that any extra spending beyond the agreed limit would need to be agreed in writing by the parties. The distributor was not able to recoup expenses beyond the limit and was ordered to pay royalties per the original agreement to the Producers of €73,397.39 (*Terre Sud Films vs Pierre Grise Distribution* - French Supreme Court, February 6<sup>th</sup>, 2007).

### 5.1.3 Disadvantages of Court Litigation


Unlike arbitration, a court's decision is not final, unless it is the court of last resort and it is often possible to appeal the decision to a higher court. This may lead to lengthy and expensive court proceedings. In international film disputes that concern several countries, court litigation can be filed in the national courts in all relevant jurisdictions. Since there is no fully harmonized international agreement on film and distribution rights, such multi-jurisdictional court litigation may lead to contradictory court decisions. Also, court litigation is normally public and tends to end with a winning and a losing party. This may interfere with long-term business relationships and not provide an adequate solution for the parties. An additional difficulty is that judges are rarely specialized in film and distribution rights and do not necessarily know the market realities.

Finally, there may be international enforcement difficulties, as there is currently no international instrument that allows for the effective enforcement of foreign court judgments, unlike arbitration where such instrument exists.

## 5.2 Alternative Dispute Resolution (ADR)

### 5.2.1 ADR Basics

In light of the disadvantages of court litigation, more and more parties now choose to resolve their disputes through ADR. ADR refers to a number of dispute resolution methods such as mediation, arbitration and expert determination, which allow parties to resolve their disputes in a private and flexible forum. ADR is a consensual process, which means that in order to use ADR, parties have to agree to submit their disputes to ADR. This can be done by inserting an ADR clause in the distribution agreement providing that any future disputes that may arise in relation thereto will be resolved



through ADR. If no such clause exists in the contract, the parties can conclude an ADR submission agreement, submitting an existing dispute to ADR. Several institutions have model clauses and submission agreements that parties may use (see for example the WIPO clauses in section 5.3).

In ADR procedures, the general principle is that parties can choose the applicable law. This choice can be expressed in the ADR clause or in the submission agreement. While in arbitration, the arbitrator decides on the basis of the applicable law while in mediation, the parties normally base their settlements on business interests and practical options rather than on a national law. In ADR, the parties can also choose the venue. It is important to note that the seat or place of arbitration is a legal concept that determines the applicable procedural arbitration law, the nationality of the award and the powers that the courts have at the place of arbitration (for example on interim measures while the matter is being arbitrated). However, the parties are free to have physical hearings and meetings in another place rather than the seat of arbitration if that is more convenient for them.

ADR has become increasingly popular as it is usually less expensive and faster than court litigation. Instead of filing several court actions in all concerned countries, the parties can resolve an international dispute in a single ADR proceeding. Moreover, the parties can choose as mediator, arbitrator or expert a person that has expertise in film and distribution rights and experience with disputes in the entertainment industry. ADR is also a neutral process, which is particularly important in disputes involving parties from different jurisdictions. ADR is flexible and gives the parties control over the process. ADR procedures are normally confidential, which allows the parties to focus on the issues in dispute and preserving their professional relationships.

### 5.2.2 Mediation

In mediation, an intermediary, the mediator, helps the parties to settle their dispute. The mediator assists the parties to identify their interests to come to a mutually satisfactory outcome that often consists in a practical business solution. The focus on business interests helps to achieve win-win solutions that allow the parties to preserve their relationship or to create a basis for a new collaboration. The mediator cannot impose any decision on the parties.

Mediation usually results in a settlement agreement, which has the force of a contract. It can be combined with arbitration or other ADR procedures and is often attempted during or after court litigation.

### 5.2.3 Arbitration

In arbitration, a dispute is submitted to one or more arbitrators who make a binding decision regarding the dispute. Arbitration is a more formal procedure conducted within a framework of rules, including the applicable substantive law and the procedural arbitration law. Binding arbitration usually ends with a legally enforceable decision, the arbitral award. Though arbitration is usually faster and less expensive than a trial in court, it may involve considerable costs as it usually requires significant work by lawyers specialized not only in the issues but also in arbitration. This is why it is important to look for efficient arbitration mechanisms, such as the WIPO Expedited Arbitration for Film and Media described in section 5.3 below.

Arbitral awards can be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It should be noted that no such international enforcement system exists for national court judgments. The New York Convention has 145 member states and allows efficient international enforcement of international arbitral awards in national courts. The courts cannot review the merits of the arbitrator's decision but can only review limited elements. This is one of the reasons that the enforcement of arbitration decisions tends to be relatively efficient.

### 5.2.4 Expert Determination

Expert determination is a procedure in which a dispute or a difference between the parties is submitted to one or more experts who make a determination on the matter referred to by the parties. The determination is binding unless the parties have agreed otherwise. This procedure may be particularly useful for technical issues such as the determination of a royalty or a distribution commission rate.

### 5.3 WIPO ADR Options for Film and Media and Collecting Societies

#### 5.3.1 The WIPO Arbitration and Mediation Center

The WIPO Arbitration and Mediation Center (WIPO Center) is an international and neutral dispute resolution provider with headquarters at WIPO in Geneva, Switzerland and an office in Singapore. It administers, on a not-for-profit basis, a range of ADR procedures such as mediation, arbitration, expedited arbitration, expert determination and domain name dispute resolution procedures. To date, the WIPO Center has administered some 250 mediation and arbitration. Most of these cases were filed in the last five years. Over 70% of the administered disputes are international. The WIPO Center has also developed tailored procedures for the film and media sector and for certain secondary rights collecting societies as further explained below.

#### 5.3.2 WIPO Mediation and Expedited Arbitration for Film and Media

In December 2009, the WIPO Center launched the WIPO Film and Media Rules. These rules were developed with industry experts and are specifically tailored to resolve disputes in the film and media sectors. They are appropriate for international film and media transactions, in particular for film distribution disputes. While other institutions focus on arbitration, the WIPO Film and Media Rules provide a set of ADR options including mediation, which may be useful for producers and distributors.

Under the WIPO Film and Media Rules, the parties can choose to have either a mediation procedure, an expedited arbitration procedure or a combination of both. The procedures have particularly short timelines in order to take account of the short production and market cycles in international film transactions. Depending on case complexity, a mediation procedure under these rules may take two to four months and an expedited arbitration procedure between four and six months. In the procedures under these rules, the parties are free to choose the venue and the applicable law.

The mediation procedure under these rules is flexible as described in the definition of mediation under 5.2 above. The mediator focuses on practical business solutions with the parties. The expedited arbitration procedure is conducted by a sole arbitrator in a fast-track procedure which saves costs and time. The award rendered by the arbitrator is binding, final and enforceable under the New York Convention.



The parties can also combine the mediation and expedited arbitration procedure. The parties first attempt settlement through mediation and, if after 30 to 60 days no settlement is found, the dispute is submitted to expedited arbitration. Combining these procedures has the advantage of increasing the chances for settlement and thereby saving costs. Indeed, even in the expedited arbitration, the parties can still decide to settle their dispute amicably before an award is rendered. 73% of WIPO mediations have resulted in settlements. 58% of cases submitted to WIPO arbitration settled, while the rest ended in final, enforceable awards.

The WIPO Film and Media Rules are available on the WIPO Center's web site in different languages at [www.wipo.int/amc/en/film/rules/](http://www.wipo.int/amc/en/film/rules/). A general explanation is provided at [www.wipo.int/amc/en/film/index.html](http://www.wipo.int/amc/en/film/index.html) and the detailed WIPO Mediation Guide and WIPO Arbitration Guide can be downloaded free of charge from : [www.wipo.int/amc/en/publications/](http://www.wipo.int/amc/en/publications/).

#### a) WIPO Film and Media Panel

For disputes under the WIPO Film and Media Rules, a special international WIPO Film and Media Panel has been established, including mediators, arbitrators and experts with expertise in the film and media sector from different countries worldwide and to which further candidates are being added. Parties in mediation and expedited arbitration under the WIPO Film and Media Rules can choose the mediator, the sole arbitrator or another appointment procedure. They can even choose someone from outside the WIPO Film and Media Panel. If the parties cannot agree or do not know suitable mediators or arbitrators, the WIPO Center provides them with a list of candidates from the WIPO Film and Media Panel that have the relevant expertise for the particular dispute. The parties can then agree on a candidate from that list or indicate their preferences. The WIPO Center then makes the appointment accordingly, after confirming the mediator or arbitrator's independence and impartiality.

#### b) Reduced Schedule of Fees and Costs

A reduced schedule of fees and costs applies to cases under the WIPO Film and Media Rules. These fees are not-for-profit and take account of the typical features and amounts in dispute in the film and media sectors. The detailed schedule of fees and costs can be consulted at : [www.wipo.int/amc/en/film/fees/index.html](http://www.wipo.int/amc/en/film/fees/index.html).

### c) Recommended WIPO Contract Clauses and Submission Agreements

In order to facilitate agreements, the WIPO Center makes available model WIPO ADR clauses that parties can insert into their distribution agreements and related contracts. It also provides model WIPO submission agreements for existing disputes where there is no ADR clause in a contract. Parties can choose their preferred procedural option by selecting the appropriate model clause or submission agreement. They are also free to adapt these models further to fit their specific needs. The recommended WIPO clauses and submission agreements are set out in Annex III hereto and are also available in different languages online at [www.wipo.int/amc/en/clauses](http://www.wipo.int/amc/en/clauses).

### 5.3.3 WIPO ADR Procedures for Certain Collecting Societies

The WIPO Center provides specialized procedures for certain collecting societies involving film producers and distributors, which may be of interest to stakeholders in film production and distribution as they regulate disputes between rights holders over conflicting rights. The WIPO Expedited Arbitration Rules for AGICOA (Association of International Collective Management of Audiovisual Works) offers a second optional phase for AGICOA rights holders that could not resolve their disputes in a first mandatory phase of an AGICOA recommendation process (see [www.wipo.int/amc/en/arbitration/agicoa/](http://www.wipo.int/amc/en/arbitration/agicoa/)). The WIPO Expedited Arbitration Rules for EGEDA (Entidad de Gestión de Derechos de los Productores Audiovisuales), the Spanish collecting society representing audiovisual producers, work in a similar way (see [www.wipo.int/amc/en/arbitration/egeda/](http://www.wipo.int/amc/en/arbitration/egeda/)). Both procedures are particularly efficient as the arbitral awards are immediately enforced by the collecting society which releases the blocked royalties in accordance with the award.

## 5.4 Other Options

Many other institutions provide general arbitration services, such as the International Court of Arbitration within the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). However, only a few institutions, such as the WIPO Arbitration and Mediation Center and the Independent Film and Television Alliance (IFTA) provide specific services for film related disputes.

In addition to the WIPO system, IFTA Arbitration offers an additional, specialized option for film related dispute resolution. IFTA is a trade association of the independent motion picture and television industry and has its headquarters in Los Angeles. IFTA Arbitration has resolved disputes in more than 1,700 cases involving more than USD \$500 million in claims since 1984 in a wide variety of domestic and international entertainment situations involving film, television, multimedia licensing and sales agent agreements. Although the IFTA arbitration clause can sometimes be challenged by one of the parties to a distribution agreement, the IFTA arbitrator is still in a position to declare termination of the distribution agreement and order the defaulting party to fulfill their obligations pursuant to the distribution agreement (*Sociedad General de Derechos Audiovisuales vs Audiovisual Enterprises S.A. - IFTA Final Award, February 2010*). In addition to compensatory and punitive damages, the IFTA arbitrator can forbid the losing party from participating in the American Film Market (the AFM) if such party has failed to comply with a judicially confirmed IFTA Award or has failed to pay an IFTA arbitrator's fees. This can be strong motivation for the party to comply with the decision.

Before that occurs, either party may seek confirmation of and/or file or register the arbitrator's award with a court having jurisdiction to confirm the award in order to effect the enforcement of the award in any and all courts throughout the world. Examples of recent IFTA Arbitration decisions are available at [www.ifta-online.org/recent-awards](http://www.ifta-online.org/recent-awards).

## CHAPTER 6

### GENERAL PITFALLS AND SOLUTIONS

#### 6.1. Pitfalls

Entertainment lawyer Schuyler Moore begins his book *The Biz: The Basic Business, Legal and Financial Aspects of the Film Industry* (Sillman-James Press, 2000) with the statement “Most Films Lose Money!” (p. 11). That is probably the biggest pitfall in the film industry. It is nearly unavoidable. There is a famous and perhaps apocryphal story that when Sony purchased Columbia Pictures in 1989, they summoned the head of Columbia to Tokyo and asked how many films Columbia made. He told them they made 24 films in 1988. They asked how many were profitable, and he proudly responded that 8 of those had made money. Then they asked why he made the other 16 films. The implication is that most films, even from major studios, will not be profitable, but it is necessary to take the risk on the entire slate of films in order to make the hit films that drive the business. What they did not understand was that Columbia needed to make all 24 to have 8 that made a profit.

No matter how often financiers and filmmakers are told that most films lose money, they cannot be convinced. This creates additional problems when the reality of the industry hits. Just as the head of Columbia probably wished his new bosses understood more about the industry, all people who survive more than a few years in this business will at some point wish they could surround themselves with nothing but experienced professionals. There are experienced professionals that are easy to work with and there are others, whether it is due to inexperience or general lack of skills, who are very frustrating to work with. Determining which are which can be difficult and working with the wrong people is probably the second biggest pitfall.

##### 6.1.1 Rights Transaction Problems

Distributors should consider some of the things that can go wrong with rights transactions and ways to avoid those. The main reason for many of these problems is that producers are not aware that they need to know about these things, they are not taught to deal with them in film school and by the time they realize they should have documented their ownership of the film, it is too late. This happens with sobering frequency. Directors hope that their producers are taking care of these things and

financiers expect bond companies or lawyers to address them. It is ultimately the producer's responsibility but it should be everyone's responsibility to ask questions – including the distributors if they are involved during the production stage of the film.

**Get Signed Releases** – If people see an actor they do not remember on set, it is not inappropriate to see if the actor has signed a contract or release. In Keith Fulton and Louis Pepe's 2002 documentary, *Lost in La Mancha*, about the making of Terry Gilliam's *The Man Who Killed Don Quixote*, the executive producer begins the first day of photography by asking if Vanessa Paradis has signed her talent agreement.

If there is music playing in a scene, someone should ask if it has been properly licensed. If someone is wearing an Adidas T-shirt, ask if the trademarked logo has been licensed. Better yet, is there a deal with Adidas to have them pay the production a fee to have the lead actor wear the shirt? Also, it is important to always acquire the right to use the IP in every possible instance – not just for festivals, for a few years or just for TV. If producers cannot afford a global music license, they should at least pre-negotiate the terms of the global license while paying for more limited rights in advance.

### 6.1.2 The Producer Must Acquire the Rights from the Owner

This is one of the biggest problems, particularly in the area of scripts and music. All parties have to make sure that they check the COT on any copyrighted material. Screenwriters might forget that their screenplays were based on a book. If it is a life story, then all of the details in the film are either in the public record or the work they are contained in (a biography might contain original material for example that is subject to the author's copyright) has been licensed. If someone claims to own the publishing rights to music being performed, parties should make sure that that person can prove it. The producer and the potential owner of the film should do this work, but the distributor will also have to face consequences if these rights are not acquired from the proper owners. The producers and original screenwriter of Martin Provost's *Séraphine* (2008) – a biopic about a French painter of the early 20<sup>th</sup> century – were sentenced by the Paris District, being liable for violating the copyright of a French scholar who had written a book on the subject (*Éditions Albin Michel vs TS Productions* – Paris District Court, November 26<sup>th</sup>, 2010).

**Music Rights Clearances** – A respected director completed a documentary of a rock concert tour and was assured by the producer that all of the bands had signed releases for the music being performed and that he was free to shoot anything and to include it in the documentary. When the film was finished and about to be acquired for distribution, the potential distributors asked for the contracts for the music publishing rights. Unfortunately, the agreements the bands had signed were only for performance rights. In many cases, the bands did not own or control the publishing or synchronization rights to the music performed. Even though it was the band's music, those rights were managed and controlled by a third party. The film, one of the great rock documentaries, has still not been released and may never be.

### 6.1.3 It is Easy to Become Confused about which Rights are Included in a Deal

When someone licenses a book to make it into a film, that doesn't mean she has the right to make a sequel, TV show, novelization or anything else, unless she acquired those rights in the agreement with the copyright holder. Producers and distributors should always try to get as many rights as possible but should not start selling toys or T-shirts without confirming they have the right to do so.

### 6.1.4 It is Difficult to Understand the Potential Value of Rights and Put a Price on Them

Instead of telling fairy tales, parents in Hollywood tell their children about what happened in a galaxy far, far away when George Lucas made himself one of the richest people in the world by keeping the merchandising and sequel rights to Star Wars. It is not surprising that the people that did that deal at Fox were not very popular at the studio when the film was a hit and every child in the world wanted a Luke Skywalker action figure. Since then, creative people have tried to keep as many rights as possible, while finance and distribution people have tried to take as many of those away as possible.

### 6.1.5 Not Adhering to Obligations Can Result in the Loss of the Film

Certain governments require that scripts be submitted to them for approval; insurance companies might have requirements that need to be met; banks might require certain

covenants be adhered to. All of these things could result in giving someone else the right to take the film away or block distribution.


### 6.1.6 Sometimes it is Not Clear Who Owns Which Rights or How Those Rights Can Be Enforced

Never assume that persons have certain rights simply because they are financing, directing or distributing the film. Contracts grant specific rights and certain conventions are there to enforce those rights. All transfers or assignments of copyrights must be in writing. It is not necessary to understand all international intellectual property-related treaties such as the Berne Convention and the Universal Copyright Convention, but it is crucial to understand whether producers and distributors own what they think is theirs and can effectively transfer any of those rights. Just as important, the various parties need to understand what they can do if someone tries to take their property away.

## 6.2 Trademarked Product and Sponsorship Obligations Can Be Difficult to Understand

It is recommended that Producers and Distributors always play it safe with trademarks, including any kind of logo on T-shirts but not necessarily if the logo is simply integral to a product being used and therefore incidental, such as the brand emblem on a car or a Nike swoosh on a tennis shoe. Of course, if a specific product is denigrated by name, there could be trouble. For example, if a character gets out of a car and says he'll never buy another Ford, then it is probably not a good idea to have the Ford logo visible. The safest thing to do is to get a release and authorization signed by the owner of the trademark. The owner might want to look at the script or simply receive assurances that the product will not be misused, disparaged or defamed. Even if the producer believes that the use will not create a problem, many distributors will not want to take the chance that there might be a problem. This is an example where the producer may be legally correct but in practice may still have a problem.

Two related topics are product placement and sponsorship. These can be very lucrative side businesses. They involve charging companies to use their products in the film (product placement) or receiving goods/services/money in exchange for that use (sponsorship). James Bond films are good examples: Bond might flash his fancy



Omega watch while climbing out of his BMW and ordering a Grey Goose martini (shaken, not stirred). When the films are released, the distributor may benefit from commercial tie-ins (ads) using images or footage from the film. These deals have become increasingly complex with actors refusing to lend their images to marketing campaigns for products unless they receive payment and companies complaining that despite large payments, their brands are not featured as prominently as they would like. Directors have been known to rebel by hiding labels in scenes or cutting key product placement scenes entirely.

Sponsorships are a similar but usually broader type of product placement. Rather than focusing on a product, a sponsor might want to project a type of lifestyle and associate its name with something potential clients want to see. A bank might want to sponsor a film that shows the growing prosperity of a particular country and the incredible economic activity in order to attract clients from overseas. Having the characters walk into the bank might be too overt and look like a traditional commercial whereas potential bank clients might like to know that the bank is involved with the local creative communities.

Using trademarked products properly can be a financial boon to a production but using them incorrectly or failing to obtain a license can have dire consequences. Distributors need to be aware of producers' obligations under these agreements so that they are not violated, by, for instance, serving Absolut vodka at the premiere party when Grey Goose provided funding for product placement.

### 6.2.1 Character Licenses are a Minefield

Characters are often both trademarked and copyrighted creations and therefore must be licensed if someone wants to use them. There may be characters that are made famous in a book or film but are still part of the public domain because they are no longer under copyright. However, the way that character is depicted can still be under copyright or trademark. A famous example of this is the protagonist of *The Little Mermaid*, Ariel. She was created by Hans Christian Anderson well over a hundred years ago, even at that time she was based on popular stories. However, when Disney made its blockbuster film, she was depicted in a certain way, as did Japanese Studio Toei in 1975 in a cartoon based on the same story directed by Tomoharu Katsumata. Anyone is free to use the character but cannot depict her in the same way Disney or Toei did without written permission.




Great filmmakers often look to their own cultures, histories and traditional stories for inspiration and source material. This has resulted in confusion between elements of the original story (fictional or factual), which may not be protected by copyright and later embellishments, which might be copyright protected. Producers should understand what elements of these traditional stories and historical events are subject to copyright.

**All story elements and characters must be in the public domain** – There are currently two versions of the Snow White story in development, one at Relativity Media and the other at Universal Pictures. Though based on a traditional fairy tale recorded by the Brothers Grimm in their 1857 story collection, the famous seven dwarfs featured in Walt Disney Production’s Snow White and the Seven Dwarfs (1937) are not in the original tale. They were created specifically for the film and are still under copyright. As the original story as told by the Brothers Grimm is in the public domain, anyone is free to make a film based on that story, but cannot include dwarves named Sleepy, Doc, Sneezy or Happy. If the producers of either of the new Snow White films innocently believe that these were part of the original story and use those characters without licensing the copyright from Disney, that would probably be copyright infringement.

Characters are big business. They can be spokespeople for products, they can star in TV series, games and films. The distributor should confirm that the producer has determined ownership of a character and if necessary gotten permission before using her in the film. If in doubt, it is always better to avoid potential problems by not including the character, unless it is absolutely integral to the creative goals of the film.

All of the above identified pitfalls can lead to problems with the basic underlying ownership of the film. Because of financial issues, some rights holders might not be paid. As discussed above, not paying an actor or director, or failing to give a writer residuals under certain talent agreements can lead to the loss of the film.

So should everyone give up? Of course not. Some films make a lot of money. The systems outside the United States are more likely to produce a profitable film than the Hollywood system simply because costs are lower and in many cases government support is higher. Also, films can be produced for a targeted local market and it is



likely that distributors will know exactly how to release the film there, the costs involved and the likely revenues. Avoiding surprises can help reduce risk. By simply researching the people with whom they are working, everyone can save a huge amount of trouble down the line.

### **6.3 One Last Issue - Global Currency Transactions**

Most films will never achieve the level of success where the producer or distributor needs to worry about global currency fluctuations, withholding taxes or the viability of various transactional instruments. If the film does reach that level, however, the producer or distributor will likely have access to experts on those issues. International financial transactions can be complex and costly, generate significant tax liabilities, severely reduce potential revenues and increase risk. There are banks and specialized financial service companies whose services have become increasingly necessary and even required but stakeholders should bear in mind that their services are negotiable and are offered in a competitive environment. These services can include reduction or elimination of withholding taxes, collection account management, currency hedging or exchange, collections services and negotiation of letters of credit. Producers and distributors should make sure they learn what each of these entities does and that they do their research to obtain the best price for these services.

### **6.4 Some Basic Solutions**

#### **6.4.1 Get Educated**

What are the problems in the global film industry or specifically in the local community and what can a distributor do about them? Knowledge is the most important commodity anyone can have. Understanding where a person needs to learn more and where she can get the advice she needs is crucial. There are professional seminars and books like this, but there is no substitute for doing it.

Some of the best sources for current information are the trade papers. Film is one of the only industries in the world that, until recently, published two daily trade papers, Variety and The Hollywood Reporter (which has recently converted to a weekly format). There is also a weekly out of London called Screen International (and their online version – [www.screendaily.com](http://www.screendaily.com)). Screen International does an excellent job covering non-U.S. topics. There are also two weekly trades based in Paris - Ecran

Total – with a daily updated online version at [www.ecran-total.fr](http://www.ecran-total.fr) and Le Film Français ([www.lefilmfrancais.com](http://www.lefilmfrancais.com)). There are innumerable web sites, including Deadline Hollywood ([www.deadline.com](http://www.deadline.com)) that offer the latest industry news along with comments from Hollywood insiders and the Internet Movie Database ([www.imdb.com](http://www.imdb.com)) that contains extensive information about producers and distributors as well as release information for tens of thousands of films from around the world.

#### 6.4.2 Know the Players

Rising budgets and quality levels lead to greater specialization as well as the involvement of more players in the process, forcing people to trust others who are not always well known to them. Who are the financiers, executive producers, producers, distributors, sales agents, etc.? Which ones can be trusted?

As all distributors and producers who have been involved in at least one film know, a large part of the film business is solving problems that could have been avoided with a few phone calls to find out whether this or that player could be trusted or whether she was competent. Some of the saddest tales are those about people who thought they were working with financiers when they were actually working with people who had access to finance but were unclear about the difference.

Equally tragic is when someone claims to hold certain copyrights when in fact she does not. It is often prohibitively complicated, time-consuming and costly to determine the facts with 100% certainty, so instead it is important to rely on the reputation and history of the people involved.

Part of understanding the players is to know what roles people play in the production and distribution process – and more importantly, what the producer or distributor expects those people to do. The duties of a producer or executive producer can vary from film to film or even inside the structure of a single film and each person's contract must clearly state that person's role. The same is true for lawyers at various stages of the process as well as the creative elements (screenwriters, directors, actors, costumers, set designers, cinematographers and others). For each person, it is important to know his or her history and whether she is reliable. Will the director try to remove their name from the film if they do not get everything they ask for? Will any of the copyright holders create problems that could endanger the distribution of the film?



In the case of writers it seems like it would be simple because the producers are just licensing their completed work. Once upon a time there was a film based on a famous public domain children's story. Warner Bros. was distributing the film in cinemas across the U.S. and an independent company was selling the rights internationally. A few weeks prior to production the producers discovered that the writer had copied the script verbatim (he had simply replaced the title page and inserted his name in place of the actual writer). The original writer had not licensed any rights to the person who claimed to be the writer. When the real writer (and therefore the copyright holder) appeared and demanded a large payment, the producers had to pay him otherwise the film could not be distributed. Paying a legitimate claim against the copyright was cheaper than shutting down the production, which certainly could have happened since the producers had no rights to the script they were shooting and the distributor would have had no right to distribute the film. In fact, the plagiarism of the script was not a huge secret in the industry. The producers could have found out with a few phone calls but they assumed the writer was being truthful.

#### 6.4.3 Research and Verify Business Partners

People should conduct the same level of research and verification for each of their business partners, producers, lawyers, bankers and others as they would for any transaction involving huge amounts of money. They should find out everything they can about their partners. Any reputable partner or businessperson will be happy to have the other party check them out and will help them do it.

Distributors should make sure that people can follow through on their obligations. If they are producing a film, they should be able to prove ownership. If they are providing funding for a film or a release, they should demonstrate that they have the money. If they are sub-distributing, then they should have the infrastructure to handle the job. It is not just about avoiding illegal offenders but people in the film industry tend to exaggerate their abilities, so all parties must make sure that these people can do their jobs. Making sure they are not wrongdoers should, of course, also be part of this process.

#### 6.4.4 Distribution Supervision

Agreements should provide accountability on both sides. Producers are usually allowed to exercise a degree of supervision. This can take the form of assignment of distribution revenues – an agreement that says that monies otherwise payable to the


sales company or distributor are payable to the financier, bank, an escrow or collection account – or something as simple as the right to visit the distributor’s office on a regular basis to get an updated report about what monies have come in and to take their share. Usually contracts call for specific reporting requirements, i.e. monthly, quarterly, including certain expenses, interest, when payments are due, where they are sent and other deductions. One of the most important things a financier or producer can do is to never let a distributor depart from those terms.

If the distributor does not adhere strictly to the terms of the agreement, she may have a perfectly good explanation. Rather than threatening audits and lawsuits, the producer should ask questions, listen to the responses and then try to get the distributor back into compliance with the agreement. In turn, the distributor should cooperate with the producer to promptly and thoroughly answer questions. The producer will want to make sure the distributor spend what they are obligated to spend on distribution, that they are making mandated guild payments (if they are responsible for those), that the film is promoted properly and that they are following up on payments from sub-distributors. Distribution is a technical, demanding and risky profession. People who do it are usually professionals who have spent many years developing specialized skills that allow them to generate revenues for a film. They should be happy to explain the intricacies to producers.

#### 6.4.5. Do Not Relinquish Any More Control than Necessary

This is as important for producers as it is for distributors. At every level people want to take control away from the person who controls the rights. A film is a collaborative medium, as is film finance and distribution, so everyone will have to give up some control. When a party gives up control, they should try to maintain supervision and some effective method of dispute resolution, i.e. audit rights to see if there really is a problem, arbitration as discussed in chapter 4 and, if absolutely all else fails, then litigation. Currently, most Studio distribution agreements say that a producer can audit the distribution statements during the 24 months after they are issued, but after that they are out of luck. It is nearly impossible to get a longer audit period from a studio. That is a level of control a producer turns over to the distributor.

Distribution contracts should clearly specify who has what rights and who has control over marketing materials, expenses, release strategies and other distribution decisions. Phrases like “meaningful consultation” (on marketing materials for



instance) are so vague that they might as well not exist. If there is no way to enforce rights under an agreement, it invites fraud. This is particularly true of financiers who often forfeit rights to check expenses or take over properties without even knowing it. For all independent films featuring guild actors (most U.S. actors), the actors' guild (SAG) has a first security interest in the film. That means that if mandatory guild residuals are not paid, the guild could actually take control of the film even if the investors have not recouped their investment.

#### 6.4.6 Insurance

There are all kinds of insurance that producers can and sometimes must have and that distributors should insist on. Errors & Omissions insurance can cover the parties against Chain of Title paperwork problems, a completion bond can make sure that the film gets finished (or that financiers and lenders are compensated if the film is shut down) and liability insurance can cover the various parties when other things go wrong. Some or most of these types of film insurance may not currently be available or common in some film communities but they may be at some point.

Insurance agents can help producers to avoid pitfalls. Good film insurance providers, whether they issue E&O related to paperwork or Completion Bonds related to actual production, can point out pitfalls and help producers and distributors avoid them. Talk to them, make friends with them and use them.

#### 6.4.7 Be Nice

There is a film called *Road House* (1989) directed by Rowdy Herrington that has some great advice for life and business in it. Patrick Swayze plays a "cooler" – the guy who controls unruly patrons in a bar. His employees are bouncers and it is their job to maintain order. His first piece of advice to his employees is "Be Nice". It is a good policy whether you are the producer or the distributor to be nice. If you think someone is cheating you, not adhering to the agreement, lying to you, stealing from you - be nice. Ask questions, sit down with the person in charge, buy them a drink. They might have made an innocent mistake. You might have made an innocent mistake or misunderstood something. By being nice, you avoid the costs of not being nice both monetarily and in personal relationships. Besides, it is a perfect excuse to pitch a new project or sell the distributor a new film.

#### 6.4.8. Know When Not to Be Nice

After telling his bouncers to be nice, Patrick Swayze says, "Until it's time not to be nice." They ask how they will know and he says, "I'll tell you." It's great to have someone who can tell when not to be nice. You might have a lawyer or a boss who can help you decide. When it is time not to be nice, you have to clearly understand your options – whether an audit, arbitration or lawsuit is your best option. Some options can be very costly. A well-placed threat of action might have the desired effect. The value of reputation is important to many people and the threat of exposure of misdeeds can be an important weapon in the close-knit film community.

#### 6.4.9 Make Friends

The most important bulwark against many problems is to have friends. It is nice to be able to phone associates, lawyers, bankers or others and ask questions, check out potential hires or business partners. One good way to do this is to join local and international trade groups and/or associations. Actively participating in those groups can pay huge dividends.

It is equally important to give back to the film community in the form of teaching and speaking. It might not help directly, but helping improve the industry at large, elevating skill levels, developing talent and professionalism is important and readers should facilitate that in any way possible.

Ultimately, the best way to avoid problems is to develop a professional industry where the people who do things the right way rather than the fast way, the cheap way or even worse – the unwisely optimistic way. Unfortunately, that last one is an epidemic in the industry among people who are financing films, whether as the ultimate distributor, producer, director or any other party that might put their money into a production. Many people will say that they know how to do it better, that their film will make a fortune, that they have a business plan that can't fail. It is important to understand the right way to do things and to take advantage of things happening in both the local and the international film industries.

#### 6.4.10 Importance of Legal Representation

One of the most crucial elements of all distribution activities is a good lawyer who is familiar with the agreements and the players. It is not possible to walk through Century City in Los Angeles without bumping into a dozen entertainment lawyers. There are also many in London, Paris and even quite a few in cities such as Lagos, Nigeria and Kingston, Jamaica (in the music industry where many of the same principles apply). Lawyers are just like other employees – they work for the person paying them. They should explain everything to their clients and make sure they understand the contracts before their clients sign. Distributors should make sure their lawyer knows how to close the deal (as opposed to just knowing how to negotiate) because ultimately the distributor wants the film and, if it is a good film, so do other distributors. They need clear instructions on the points to pursue and the ones to concede. An effective lawyer can make the difference between a distributor getting the top films playing at a festival and losing them to the competition.

#### 6.4.11 Understand the Agreements

Lawyers should not be relied upon to understand everything. Even the best of them cannot make sure that their clients are fully protected. Lawyers are often specialists. The lawyer that can make sure the COT paperwork is in order might not be the right one to negotiate the distribution agreement, bank financing, much less the one to take charge of a litigation (or criminal defence, for that matter) if it becomes necessary.

The person putting their name on an agreement must understand every word of that agreement. Their lawyer should be able to explain it all to them and if they cannot then they should find someone who can. There have been many lawsuits where the defendant's defence was that they did not understand the contract that they signed. Judges do not usually think that is a good excuse but it is often the truth. Often a contract was terribly drafted by the lawyers and the parties to the contract did not have the legal expertise to see where the lawyers got it wrong.




## FINAL WORDS

### THE CHANGING MEDIA LANDSCAPE

The global film industry is undergoing a period of radical restructuring that is increasing opportunities for producers and distributors alike, while offering new challenges. Whereas traditional methods of finance and distribution continue to dominate, new business models and digital technologies are challenging those traditional models and creating entirely new distribution channels that can reach ever wider audiences at lower costs (both for production and distribution). One thing that does not change is that quality and creativity are prized and the business community is very often responsible for recognizing and nurturing these rare commodities. Part of that responsibility is properly documenting copyright transactions, giving credit to the authors and properly compensating all parties.

While small countries are clearly at a disadvantage due to their limited internal markets that cannot support a significant output of films, it is possible for these very same countries to produce films that can travel within the region and to diaspora communities around the world. Some will even cross over to new, unexpected audiences completely unconnected to the country of origin. Many local communities have a distinctive way of telling stories which gives them a competitive advantage in reaching audiences. The barriers to entry are high, but all countries can point to creative areas where they excel already, whether it be in music, literature or art. Maybe there are international musical stars who can transition to feature films, novelists and playwrights who can become screenwriters and visual artists who would make great directors. These factors are unlikely to change and the industry needs to focus on training professionals, developing and producing high quality film productions and taking advantage of the local creative communities that already exist.

Above all, communities should not lose what is distinctively theirs – the things that have made their creative industries successful in their own country and abroad. It is not necessary to imitate Hollywood. It is highly likely that every country has a community whose creative talent connects with people in a distinctive way, and this skill, if not lost in the rush to internationalize and to tap into the riches of global distribution, will be what leads to their successes.



As the authors have repeatedly stressed throughout this publication, wherever a country is in terms of the development of its film industry – from a very local market with a limited number of films to a thriving export market like the one that developed in Europe for Korean cinema in the 1990s – it is important to have at least a general understanding of the laws related to intellectual property as well as the business of film distribution. The value of a film and a financier’s ability to recover her investment (and for a film to find an audience) is the intellectual property created and held by the film’s authors. A fair and transparent global copyright system assures an ongoing supply of quality films (from David Fincher’s *Zodiac* to Hou Hsiao Hsien’s *Three Times*) to global audiences by properly compensating authors and assuring that those who supply funding to make and distribute films will reap the rewards.

Our increasingly interconnected world is giving ever greater economic value to cultural products, no matter where they are produced. A film is one of the most valuable of these cultural products and can be one of the most important ways we learn about other cultures and share our stories. The system for properly licensing the distribution rights for films is well established and should be familiar to all stakeholders. The authors of this publication hope that readers have gained a greater understanding of this system and will achieve success in their sectors.

## GLOSSARY

**Acquisition Executive** – The representative of a territorial distributor who is responsible for seeking/sourcing films and programming to fill her company's distribution needs in a territory.

**Acquisition of Copyright** – The establishment by the author of copyright of his or her work by virtue of law, through the act of creation and fixing that work in a medium (written, filmed or otherwise recorded). According to the Berne Convention and the laws of all signatory countries, the acquisition of copyright should not be subject to any formal registration and exists from the moment of creation.

**Acquisition of Rights** – The party licensing the rights from another party is said to be acquiring those rights and often executives who find films for distribution are referred to as acquisition executives cited above.

**Adaptation** – The modification of a pre-existing work from one genre of work to another, such as film adaptations of novels or musical works. Since adaptation involves altering the composition of the work, unlike translation, which transforms only the form of expression, adaptation of another's work protected by copyright law must be authorized by the copyright owner.

**Aggregator** – In many cases new media outlets such as Amazon, iTunes, Hulu or DailyMotion will not acquire titles on an individual basis and will only acquire large packages of rights being offered by companies they have designated as aggregators to gather rights from individual rights holders. These aggregators can include media conglomerates such as Viacom and Warner Bros. or specialized companies.

**Assignment** – The transfer of copyright from an author to a producer or Special Purpose Entity (SPE) as a sort of property. Unlike licenses, which involve only the grant of specified rights to use the work accordingly, an assignment transfers the copyright itself. Laws governing the assignment of rights, which rights can be assigned (in particular whether or not moral rights can be assigned), the duration of the assignment and other issues - vary by country. The enforceability of any assignment should be confirmed through

local lawyers to assure that it cannot be challenged. The person who transfers copyright is called the assignor, the first assignor of a copyright is generally the author or their heirs. The person to whom the copyright is transferred is called the assignee.

**Audiovisual Work** – A work which appeals at the same time to the ear and to the eye and consists of a series of related images and accompanying sounds recorded on suitable material (audiovisual fixation), to be performed by the use of appropriate devices. It can be seen and heard only in an identical form, unlike the performance of dramatic works which appeal to the eyes and the ears in ways depending on the actual stage production. Examples of audiovisual works are films with sound, television productions or productions for the Internet.

**Author** – National legislation will define who are considered the authors of a film but in most cases they are the producer, the director, the screenwriter and those involved in creating the music. These authors have specific rights depending on the jurisdiction and may not even be actual people. For example, in the United States, due to “work-for-hire” issues, the production company itself is often considered the author.

**Catch Up Rights** - The right to re-transmit broadcast programs through the Internet on a free access basis for a limited period of time immediately after the first broadcast in a territory.

**Chain of Title (COT)** – The COT is the documented collection of assignments to the producer, SPE, distributor or other entity that proves ownership or distribution rights to a film.

**Distribution** – The business of trading or exploiting the copyright of a film. This may include licensing the broad distribution rights in a specific territory, booking a film into a cinema and collecting the revenues, or even posting the film to a free site on the Internet. Distribution is the entire value chain of the exploitation of a film’s copyright. This starts with the first distribution agreement between the producer and any distributor.


**Distribution Channels** – This can refer to the various ways a film can be distributed – cinema, home entertainment (DVD), TV (broadcast, cable and satellite), Internet (streaming and download), mobile devices (phones, iPads and tablet computers) and non-theatrical (public performance, educational, ships, hotels and airlines) - but can also refer to the way the film reaches that medium – through a sales agent, a global distribution organization such as a major studio, through film or TV sales markets.

**Distributor** – This and “producer” are two of the most misunderstood words in the film and TV industries. There are several types of distributors. When using the broad term distributor, the meaning will be any entity involved in either the retail presentation of the film or TV program to the public (also referred to as the territorial distributor) or the transfer of distribution rights to an entity that will offer the rights to other distributors (this could be a sales agent or other entity).

**Exclusivity of Rights** – Rights can be either exclusive or non-exclusive. The owner of an exclusive right in a work may exercise it to the exclusion of the acquisition of similar rights in the same work by any other person. Copyright as a whole and all rights of authors comprised therein are likewise exclusive, no person other than the owner of such rights can exploit the work without authorization, except in certain cases explicitly permitted by law. Licenses granted by the owner of copyright to use the work may also comprise exclusive rights if agreed upon or provided for by law. With many new media distribution technologies, rights are acquired on a non-exclusive basis, meaning that multiple entities might offer the same rights to the public in the same way that multiple cinemas play the same film and could be said to have non-exclusive exhibition rights to that film.

**Exploitation of a Work** – Use of a work for profit-making purposes by exhibiting, reproducing, distributing or otherwise communicating it to the public. The exploitation of works protected by copyright goes hand in hand with the exploitation of authors’ rights in such works.

**Film** – This can include feature films, short films and documentaries for release in any medium (cinema, TV, DVD, new media). Films are stand-alone audiovisual works as opposed to series television or webisodes. For copyright purposes



a film is actually a collection of copyrights held by a single entity. These rights include the screenplay, underlying rights (the book the screenplay is based on for instance), music, performances, costumes as well as logos, artwork or other intellectual property that is included in the visual or audio portions of the completed film.

**Filmmaker** – Filmmaker may refer to the producer or the authors of a film. For the sake of precision, the term will rarely be used in this publication.

**Geo-Filtering** – Technological solutions that allows new media rights (usually Internet VOD or streaming rights) to be offered only to a limited geographic territory.

**License** – The authorization given by the author, other owner of copyright or appointed agent (licensor) to the user. Unlike an assignment, a license does not transfer ownership, it only constitutes a right to use the work under the copyright in it which remains with the licensor, though restricted according to the scope of the license granted. The license is either exclusive or non-exclusive. In the latter case, the owner of the copyright may lawfully grant similar licenses to other licensees at the same time. Copyright conventions and national copyright laws may provide for compulsory licenses and statutory licenses in special cases.

**License Agreement** – A contract containing a license for the use of a copyright protected work. Many different license agreements have been developed. These include contracts for publication, performance, broadcasting, distribution and translation. License agreements are distinguished from other kinds of contracts relating to copyright, such as contracts of assignment of copyright or contracts of employment with authors and contracts for commissioned works. Local copyright laws may contain mandatory rules on the contents of contracts for the use of authors' works, such as provisions for restrictive interpretation of the scope of the licenses, stipulation of the equitable authors' fees, possibility of rescission of the contract in cases where the rights are not being used and limitation of options to secure licenses for future works by the author.

A license must be specific as to what rights are being licensed and what compensation is being paid (including all on-going compensation). These


rights may be exclusive (will not be granted to another entity) or non-exclusive (may be granted to multiple entities). The rights might be restricted by time (the Term), geography (the Territory), by language or by any other factor agreed by the parties.

**Producer** – For purposes of this publication, the producer is the entity responsible for organizing and documenting the creative, business and physical elements necessary to complete the film. This includes negotiating and documenting all appropriate rights transactions as discussed below. producer is also a generic term for the entity that holds the copyright to the film (the Single Purpose Entity or SPE). When using the broad term “producer”, it will refer to the original rights holder for the film. That might be a major U.S. studio or a local producer or financier.

**Producer’s Representative (or Rep)** – An entity that represents a producer or rights holder in seeking a local deal (most common in the United States) and possibly in securing a sales agent.

**Rights Holder** – When referring to a film, rights holders are entities that ‘own’ or hold the copyright to that film. In other words they are the designated licensees of all of the various copyrights that have come together to form the creative basis for the film. They are ultimately the entities that have the right to license the distribution rights (and in some cases even sell the copyright to a new rights holder). The underlying rights holders are the entities that ‘own’ or hold the copyright to the copyright protected elements that go into creating the film, including the screenplay, the material the screenplay is based on and the music contained in the film.

**Royalty** – A particular kind of author’s fee representing the author’s share in the revenues from the use of the work. Royalties may be calculated based on gross revenues (all monies generated through the exploitation of the work) or on net revenues (all monies after the deduction of specified costs such as prints and advertising, distribution fees, interest, production costs and in some cases overhead costs). Royalty structures can be complex and it is important that authors understand how their royalties will be calculated and paid.



**Sales Agent** – A type of distributor acting as a middleman to transfer the distribution rights to territorial distributors. Often the producer or rights holder will license the worldwide distribution rights to a sales agent who will then license those rights on a territory-by-territory basis. ‘Sales agents’ are often referred to as the ‘sellers’ or ‘licensors’ and in many jurisdictions their activities are governed by a specific set of laws that specifically do not recognize them as distributors but as agents acting on the behalf of a third-party with specific obligations. In this context they will often sign contracts to “as an agent for” the rights holder. It is important to understand what rights and obligations the sales agent can transfer on behalf of the producer. These may be limited to territorial distribution rights but could include other derivative rights or obligations.

**Single Purpose Entity** – Company (SPE) – This is the rights holding company which holds the copyrights that together comprise the Chain of Title (COT) and therefore ownership of the film. As stated above, these copyrights include among other things the underlying rights, the screenplay and the music. In turn the SPE licenses distribution rights to the distributor or other rights holding entity. Besides locating all rights and obligations of the production with a single entity so that no unrelated obligations of the principals will affect the picture, the SPE allows financiers to establish a security interest in all assets of the SPE (the film and underlying rights and options) – which is often necessary for them to commit funds. While the SPE does not in any way protect distributors from liability, it simplifies insurance issues including E&O protection. As copyrights are acquired from the authors or other entities for the film, they are assigned or licensed to the SPE. In the case of most authors, the rights assignments are governed by local laws, contracts and guild or union agreements that specify the authors’ rights and ongoing obligations of the SPE for payment of royalties and residuals.

**Statutory License** – Sometimes referred to as a ‘legal license,’ the statutory license is an authorization given by law to use a work protected by copyright in a specific manner and under certain conditions, against payment of an author’s fee.



**Territorial Distributor** – The entity that directly derives revenue from the exploitation of the film or TV program in a specific geographic area (could be worldwide as in the case of the major U.S. studios or in individual countries or regions). A territorial distributor might be an all-rights distributor or specialized in a specific right, a TV or online distributor for instance. Also called a “buyer”, “sub-distributor”, or “licensee”.

**Transfer of Rights** – The conveyance of rights of an author to another person or legal entity by contract, enabling them to use the work in a special manner. The documents discussed herein all relate to the transfer of rights between various entities – authors, producers, distributors and others. This transfer of rights is documented by the COT referenced above.

## ACKNOWLEDGEMENTS

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- Mr. Richard Tan – Attorney and Arbitrator, Stamford Law Corporation, Singapore

## REFERENCES

### Books

- Cones, John W., Film Finance and Distribution: A Dictionary of Terms. Silman-James Press (June 1992)
- Donaldson, Michael C., Clearance and Copyright: Everything the Independent Filmmaker Needs to Know and The American Bar Association's Legal Guide to Independent Filmmaking. Silman-James Press, 2 Rev Update edition (September 2003) and American Bar Association (August 16, 2011)
- Erickson, Tulchin et al., The Independent Film Producer's Survival Guide. Schirmer G Books, 3<sup>rd</sup> edition (October 1, 2009)
- Lee Jr, John J., The Producer's Business Handbook, Third Edition: The Roadmap for the Balanced Film Producer. Focal Press, 3<sup>rd</sup> edition (November 15, 2010)
- Litwak, Mark, Contracts for the Film and Television Industry. Silman-James Pr; 2<sup>nd</sup> Expanded edition (February 1, 1999)
- Moore, Schuyler, The Biz: The Basic Business, Legal and Financial Aspects of the Film Industry. Silman-James Pr, 3<sup>rd</sup> Expanded Updated edition (June 10, 2007)
- Squire, Jason, The Movie Business Book: 3<sup>rd</sup> Edition. Fireside, (June 29, 2004)

### Magazines

- DAILY VARIETY – The most respected daily film industry magazine.
- WEEKLY VARIETY – Many of the same stories from the daily but with in-depth coverage of many topics – published in New York.
- THE HOLLYWOOD REPORTER – Weekly film magazine with emphasis on independent and international markets.
- SCREEN INTERNATIONAL – Weekly film industry magazine with coverage of international topics - published in London.
- LE FILM FRANCAIS – French film weekly with excellent coverage of national and international film news published in Paris.
- ECRAN TOTAL – French TV/film weekly with excellent coverage of national and international film, TV and media news published in Paris.
- LEGIPRESSE – French monthly entertainment legal review.

## Online Resources

[www.wipo.int](http://www.wipo.int) – World Intellectual Property Organization

[www.wipo.int/amc](http://www.wipo.int/amc) - WIPO Arbitration and Mediation Center

[www.ifta-online.org](http://www.ifta-online.org) – Independent Film and Television Alliance

[www.imdb.com](http://www.imdb.com) – The Internet Movie Database – information about thousands of films including box office, distribution and producers – IMDB Pro is cheap and valuable for the address database.

[www.lefilmfrancais.com](http://www.lefilmfrancais.com) – Site for France’s top film weekly – in French

[www.thelegalelite.com](http://www.thelegalelite.com) – Compendium of legal issues related to film and TV

[www.michaelcdonaldson.com](http://www.michaelcdonaldson.com) – Compendium of legal issues related to film with a special emphasis on “fair use” considerations and copyright

[www.marklitwak.com](http://www.marklitwak.com) – Another great legal source with an emphasis on contracts

[www.cinando.com](http://www.cinando.com) – Database associated with the Cannes Film Market

[www.variety.com](http://www.variety.com) – Variety Magazine – great archive, box office charts, and other useful information

[www.screendaily.com](http://www.screendaily.com) – Web site for the magazine Screen International

[www.netflix.com](http://www.netflix.com) – The most successful on-line DVD distributor in the U.S.

[www.hulu.com](http://www.hulu.com) – Streaming/Download VOD service

[www.dga.org](http://www.dga.org) – Contract information for the U.S. directors union and information about their activities

[www.sag.com](http://www.sag.com) – Information about the U.S. union for actors – information about contracts, using U.S. actors in your films, etc.

[www.wga.org](http://www.wga.org) – U.S. Writers Guild site. Contract terms and information for writers

[www.mpa.org](http://www.mpa.org) – Motion Picture Association of America – includes significant data on global theatrical markets

[www.ifp.org](http://www.ifp.org) – Independent Feature Project New York – support group for independent filmmakers

[www.filmindependent.org](http://www.filmindependent.org) – LA based support group for independent filmmakers

[www.marklitwak.com](http://www.marklitwak.com) – Mark Litwak is one of the top entertainment contract lawyers in the U.S. and he has written a number of books featuring sample contracts in all areas of film and TV production.

Reports :

Multi-Territory Licensing of Audiovisual Works in the European Union – Final Report

Prepared for the European Commission, DG Information Society and Media – October 2010

## FILMOGRAPHY (BY DECADE)

**(P) – PRODUCER / (D) -DISTRIBUTOR**

### **Before 1970:**

- *The Birth of a Nation* (1915) directed by D.W. Griffith - (P) David W Griffith Corp ; Epoch Producing Corporation / (D) Epoch Producing Corporation
- *Freaks* (1932) directed by Tod Browning - (P) MGM / (D) MGM
- *Snow White and the Seven Dwarfs* (1937) directed by William Cottrell, David Hand, Wilfred Jackson, Larry Morey, Perce Pearce and Ben Sharpsteen – (P) Walt Disney Productions / (D) RKO Radio Pictures (original theatrical release)
- *Sanshiro Sugata* (1943) directed by Akira Kurosawa – (P) & (D) Toho Films Studio
- *Asphalt Jungle* (1950) directed by John Huston – (P) & (D) Metro-Goldwyn-Mayer
- *Pierrot le Fou* (1967) directed by Jean-Luc Godard – (P) Films Georges de Beauregard, Rome Paris Films, Dino de Laurentiis Cinematografica / (D) Société Nouvelle de Cinématographie, Pathé Contemporary Films
- *La Sirène du Mississippi (Mississippi Mermaid – 1969)* directed by François Truffaut – (P) Les Films du Carrosse ; Artistes Associés / (D) United Artists

### **1970s:**

- *Morte a Venezia (Death in Venice – 1971)* directed by Luchino Visconti - (P) Alfa Cinematografica / (D) Warner Bros. Pictures
- *Noces Rouges (Wedding in Blood – 1973)* directed by Claude Chabrol - (P) Les Films de la Boétie, International Italian Film / (D) New Line Cinema
- *Andasen dôwa ningyo-hime (The Little Mermaid – 1975)* directed by Tomoharu Katsumata – (P) &(D) Toei Doga
- *Le Vieux Fusil (The Old Gun – 1975)* directed by Robert Enrico – (P) Les Productions Artistes Associés ; (D) United Artists Films
- *Alien* (1979) directed by Ridley Scott – (P) Brandywine Productions ; Twentieth Century Fox Productions / (D) Twentieth Century Fox Film Corporation

**1980s:**

- *The Shining* (1980) directed by Stanley Kubrick – (P) Warner Bros. Pictures / (D) Warner
- *Trois hommes et un couffin* (*Three Men and a Cradle* – 1985) directed by Coline Serreau – (P) Flach Films, TF1 Films Productions / (D) AAA, The Samuel Goldwyn Company
- *Three Men and a Baby* (1987) directed by Leonard Nimoy – (P) Interscope Communications, Touchstone Pictures / (D) Buena Vista Pictures
- *Tonari no Totoro* (*My Neighbor Totoro* - 1988) directed by Hayao Miyazaki – (P) Tokuma Japan Communications Co. Ltd. & Studio Ghibli / (D) Toho Company, Walt Disney Pictures
- *Coming to America* directed by John Landis (1988) – (P) & (D) Paramount Pictures
- *The Little Mermaid* (1989) directed by Ron Clements and John Musker – (P) Walt Disney Pictures / (D) Buena Vista Distribution Company
- *Road House* (1989) directed by Rowdy Herrington – (P) Silver Pictures / (D) United Artists, United International Pictures (UIP)

**1990s:**

- *The Hunt for the Red October* (1990) directed by John McTiernan – (P) Paramount Pictures / (D) United International Pictures (UIP)
- *Kurenai no buta* (*Porco Rosso* – 1992) directed by Hayao Miyazaki – (P) Nippon Television Network Corporation (NTV) & Studio Ghibli / (D) Toho Company
- *Patriot Game* (1992) directed by Philip Noyce – (P) Paramount Pictures / (D) United International Pictures (UIP)
- *Bye-Bye* (1995) directed by Karim Dridi – (P) ADR Productions, La Compagnie Méditerranéenne de Cinéma, La Sept Cinéma / (D) Diaphana Films, Arab Film Distribution
- *Shine* (1996) directed by Scott Hicks – (P) Australian Film Finance Corporation and Film Victoria / (D) Buena Vista International
- *Train de Vie* (*Train of Life* – 1998) directed by Radu Mihaileanu – (P) Noé Productions, RTL-TV1 / (D) AB International Distribution, Paramount Classics
- *Fait d'Hiver* (1999) directed by Robert Enrico – (P) At Productions, 3 Emme Cinematografica / (D) Ideal Films

**2000s:**

- *Crouching Tiger, Hidden Dragon*, (2000) directed by Ang Li – (P) Asia Union Film & Entertainment Ltd., Columbia Pictures Film Production Asia / (D) Warner Bros., Sony Pictures Classics
- *Salsa* (2000) directed by Joyce Bunuel – (P) Canal + España, Mate Producciones S.A. / (D) United Artists International (UIP)
- *Picking Up the Pieces* (2000) directed by Alfonso Arau - (P) Comala Films Production; (D) Kushner-Locke
- *Evolution* (2001) directed by Ivan Reitman – (P) Columbia Pictures Corporation / (D) DreamWorks Distribution (USA), Columbia TriStar Distributors International
- *The Lord of the Rings: The Fellowship of the Ring* (2001) directed by Peter Jackson – (P) New Line Cinema, WingNut Films / (D) Warner Bros.
- *Les Âmes Fortes (Strong Souls – 2001)* directed by Raoul Ruiz – (P) MDI, Films du Lendemain / (D) France Televisions Distribution, Paramount Classics
- *Mulholland Drive* directed by David Lynch – (P) Les Films Alain Sarde, Asymmetrical Productions / (D) Bac Films, Universal Pictures
- *Astérix et Obélix: Mission Cléopâtre (Astérix and Obélix Meet Cleopatra - 2002)* directed by Alain Chabat – (P) Renn Productions / (D) Pathé Distribution
- *Lost in la Mancha* (2002) directed by Keith Fulton and Louis Pepe – (P) Quixote Films / (D) IFC Films – Haut & Court
- *Être et Avoir (To Be and to Have - 2002)* directed by Nicolas Philibert – (P) Maïa Films / (D) Films du Losange
- *Harry Potter and the Chamber of Secrets* (2002) directed by Chris Columbus – (P) & (D) Warner Bros. Pictures
- *The Lord of the Rings: The Two Towers* (2003) directed by Peter Jackson – (P) New Line, WingNut Films / (D) Warner Bros.
- *Les yeux secs (Cry no More - 2003)* directed by Narjiss Nejjar – (P) Jbila Méditerranée Productions / (D) Pierre Grise Distribution
- *Un long dimanche de fiançailles (A Very Long Engagement – 2004)* directed by Jean-Pierre Jeunet – (P) 2003 Productions, Warner Bros. / (D) Warner Bros.
- *The Lord of the Rings: The Return of the King* (2003) directed by Peter Jackson - (P) New Line, WingNut Films / (D) Warner Bros.
- *Brodeuses (A Common Tread – 2004)* directed by Eleonore Fauchet – (P) Disney / (D)

- *Zui hao de shi guang (Three Times)* (2005) directed by Hou Hsiao Hsien – (P) 3H Productions, Orly Films, Paradis Films / (D) IFC Films, Artificial Eyes
- *300* (2006) directed by Zak Snyder – (P) Warner Bros. Pictures / (D) Warner Bros.
- *Persepolis* (2006) directed by Marjane Satrapi and Vincent Paronnaud – (P) 247 Films, The Kennedy/Marshall Company / (D) Diaphana Films, Sony Pictures Classic
- *Rohtenburg* (2006) directed by Martin Weisz – (P) Senator Entertainment Company, Atlantic Streamline / (D) Lightning Entertainment, Senator Films
- *Zodiac* (2007) directed by David Fincher – (P) Paramount Pictures, Warner Bros. Pictures / (D) Warner Bros.
- *Lemon Tree* (2007) directed by Eran Riklis – (P) Heimatfilm, MACT Productions, Eran Riklis Productions, arte France Cinéma, ZDF/Arte / (D) Océans Films, IFC Films
- *Slumdog Millionaire* directed by Danny Boyle 2008 – (P) Pathé Pictures International / (D) Pathé, Fox Searchlight Pictures
- *The Hurt Locker* (2008) directed by Kathryn Bigelow – (P) Voltage Pictures / (D) Voltage Pictures, Summit Entertainment
- *Séraphine* (2008) directed by Martin Provost – (P) TS Productions / (D) Diaphana Films
- *Twilight saga* (2008 – 2010) – (P) Summit Entertainment / (D) Summit Entertainment

### **2010s:**

- *Harry Potter and the Deathly Hallows Part 1* (2010) directed by David Yates – (P) & (D) Warner Bros. Pictures
- *Incendies* (2010) directed by Denis Villeneuve – (P) TS Productions / (D) Happiness Distribution, Sony Pictures Classics
- *Uncle Boonmee* (2010) directed by Apitchapong Werasethacul – (P) Anna Sanders Films, Eddie Saeta S.A. (co-production), Geißendörfer Film- und Fernsehproduktion (GFF), Match Factory, with the support of the Ministry of Culture, Thailand and the World Cinema Fund / (D) The Match Factory
- *The Adventures of Tintin: The Secret of the Unicorn* (2011) directed by Steven Spielberg – (P) Amblin Entertainment, Kennedy/Marshall Company / (D) Paramount Pictures
- *The Hobbit: Part I & Part II* (2012-2013) directed by Peter Jackson – (P) Metro-Goldwyn-Mayer, New Line, WingNut Films / (D) MGM, Warner Bros.
- *The Hangover Part II* (2011) directed by Todd Phillips – (P) and (D) Warner Bros.



## ANNEX I

This Distribution Agreement is an example drawn from various sources including the IFTA standard forms as well as forms developed by the authors. It is important to keep in mind that these Agreements can vary greatly and are subject to local laws and industry customs.

### DISTRIBUTION AGREEMENT

This Distribution Agreement is made as of \_\_\_\_\_, 20\_\_\_\_ between ABC Distribution, ("**Licensor**") and \_\_\_\_\_ ("**Distributor**") Address: \_\_\_\_\_ Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Subject to the terms hereof and conditioned upon payment of the Minimum Guarantee, Licensor hereby grants Distributor the Licensed Rights for the Territory(ies), Language(s) and Term, each as defined below:

A. **Picture(s)**: \_\_\_\_\_

B. **Territory(ies)**: \_\_\_\_\_

**Authorized Language(s)**: \_\_\_\_\_

C. **Term**: \_\_\_\_ years from Licensor's Notice of Initial Delivery Availability to Distributor.

D. Financial Terms:

1. **Minimum Guarantee**: \_\_\_\_ US\$ \_\_\_\_\_ payable:

#### Instalment Payment Method (if other than Wire Transfer)

\_\_\_\_% (US\$ \_\_\_\_\_) on execution of this Agreement \_\_\_\_\_

\_\_\_\_% (US\$ \_\_\_\_\_) on \_\_\_\_\_

\_\_\_\_% (US\$ \_\_\_\_\_) on \_\_\_\_\_

\_\_\_\_% (US\$ \_\_\_\_\_) on Notice of Initial Delivery \_\_\_\_\_

\_\_\_\_% (US\$ \_\_\_\_\_) on \_\_\_\_\_

The Minimum Guarantee is a minimum net sum and no deductions of any kind may be made from it. Rights in the Picture do not vest in Distributor until payment in full of the Minimum Guarantee in accordance with the terms hereof. The Minimum Guarantee will be allocated: \_\_\_\_% to Theatrical Rights, \_\_\_\_% to Video Rights and \_\_\_\_% to all other Licensed Rights.

2. **Payment:** Unless otherwise indicated above, Distributor will pay all sums payable to Licensor hereunder by wire transfer of unencumbered funds, free of any transmission charges, to the following account (unless notified to the contrary in writing by Licensor):

- ABC Distribution
- c/o City National Bank
- 400 North Roxbury Dr.
- Beverly Hills, California 90210
- Account # 001-123456
- ABA # 122-122-122

If required by Licensor, Distributor agrees to execute a Notice of Assignment and Distributor's Acceptance in the form attached as an Exhibit hereto (or, if none is attached, in the form required by Licensor's bank).

3. **Letter of Credit:** If indicated above, Distributor will pay the indicated instalments of the Minimum Guarantee by an irrevocable Letter of Credit in the form attached as an Exhibit hereto or, if none is attached, in the form and on the terms provided by Licensor's bank.

**E. Notices:**

1. All notices from Distributor to Licensor will be made to:

- ABC Distribution
- 1925 Century Park East
- Los Angeles, CA 90067
- Phone: 310.555.8300; Email: sales@abcdistribution.com

2. All notices from Licensor to Distributor will be made to the address stated above unless otherwise noted.

F. **Licensed Rights**: Licensed Rights are limited to the Rights indicated below. Distributor shall not enter into any sub-distribution agreements without Licensor's prior written approval of the terms thereof. Distributor shall not have the right to exploit the Picture in any non-linear format. All other rights not specifically licensed herein are reserved to Licensor.

**Cinematic Rights**:       Theatrical                       Non-Theatrical       Public Video  
**Ancillary Rights**:       Airline                               Ship                       Hotel  
**Video Rights**:                       Rental                       Sell-Thru  
**Authorized Video Formats**:       NTSC                       PAL  
**Pay-Per-View Rights**:       Residential               Non-Residential       DemandView (VOD)

**Pay TV Rights**:      **Licensed** **Free TV Rights**:      **Licensed**

Terrestrial  Yes  No \_\_\_\_\_Runs      Terrestrial  Yes  No \_\_\_\_\_Runs  
Cable  Yes  No \_\_\_\_\_Runs      Cable  Yes  No \_\_\_\_\_Runs  
Satellite  Yes  No \_\_\_\_\_Runs      Satellite  Yes  No \_\_\_\_\_Runs

No Pay TV or Free TV Rights licensed hereunder may be exploited by Distributor prior to the date which is \_\_\_\_ months after the commencement date of Licensor's pan-territorial satellite window. Licensor shall notify Distributor in writing of such commencement date as soon as possible.

**New Media Rights**:      Internet Distribution Rights  Yes  No  
Wireless Rights  Yes  No

(If yes, see IFTA Internet & Wireless Rider attached hereto.)

G. **Distribution of Gross Receipts and Cross Collateralization**:

Licensor and Distributor shall share the Gross Receipts arising from Distributor's exploitation of the Picture(s) as follow (all Gross Receipts shall be calculated "at source" as defined in Paragraph 7.2 of the Standard Terms and Conditions):

1. **Cinematic Rights**: Gross Receipts derived from the exploitation of the Cinematic Rights (the "Cinematic Gross Receipts") shall be divided as follows:

\_\_\_ a. **Costs-Off Deal**: Distributor shall first deduct the Recoupable Distribution Costs that relate solely to the exploitation of Cinematic Rights (the "Cinematic Distribution Expenses").

OR

\_\_\_ b. **Distribution Deal**: Distributor shall first retain \_\_\_% as a Distribution Fee, until Distributor recoups all of the Cinematic Distribution Expenses from the balance.

Following recoupment of the Cinematic Distribution Expenses, \_\_\_% of Cinematic Gross Receipts shall be applied toward recoupment of the Minimum Guarantee and \_\_\_% shall be retained by Distributor. Following recoupment of the Minimum Guarantee, \_\_\_% of Cinematic Gross Receipts shall be paid to Licensor and \_\_\_% shall be retained by Distributor.

2. **Ancillary Rights**: Distributor shall pay to Licensor \_\_\_% of Gross Receipts derived from the exploitation of the Ancillary Rights, without any deductions therefrom.
3. **Video Rights**: Distributor shall pay to Licensor the following percentages of [Gross Receipts derived from the exploitation of applicable Home Video Rights] without any deductions therefrom: Rental/Commercial: \_\_\_% Sell-Thru: \_\_\_%
4. **Pay-Per-View, Pay and Free TV Rights**: Distributor shall pay to Licensor \_\_\_% of Gross Receipts derived from the exploitation of the Pay-Per-View (PPV), Video-on-Demand (VOD) and Pay and Free Television Rights, without any deductions therefrom.
5. **New Media Rights**: Distributor shall pay to Licensor \_\_\_% of Gross Receipts derived from the exploitation of New Media Rights without any deductions therefrom.
6. **Cross-Collateralization**: Distributor shall recoup the Minimum Guarantee on a cross-collateralized basis from Licensor's share of the Gross Receipts obtained from the exploitation of the Licensed Rights. If Distributor's Cinematic Distribution Expenses exceed Cinematic Gross Receipts, then

Distributor may deduct the shortfall from all other Gross Receipts obtained from the exploitation of the Picture. Unless otherwise noted below, in no event shall Distributor cross-collateralize the Gross Receipts of the Picture with the Gross Receipts of any other picture licensed by Licensor to Distributor.

H. **Delivery**: Within thirty (30) days of Licensor's notification to Distributor that the initial materials are available for delivery to Distributor ("Notice of Initial Delivery"), Distributor shall notify Licensor in writing of Distributor's delivery requirements and shall concurrently pay for the costs of such delivery items and shipping thereof as specified in the materials/price list furnished to Distributor with the Notice of Initial Delivery. Distributor shall be responsible for creating any and all necessary alternate language dubbed or subtitled tracks in the Authorized Language(s) at its own cost. Licensor (and/or its designees) shall have free access to all materials (including all language tracks) created by or for Distributor. The initial materials shall consist of:

One (1) 35mm print or one (1) digital video master of the Picture.

I. **Release Requirements**: If requested by the US Distributor, the Picture shall not be released in any media in the Territory prior to the U.S. Theatrical Release. Subject to the foregoing holdback, Theatrical Release of the Picture in the Territory by Distributor must occur within six (6) months after Notice of Initial Delivery. Licensor will notify Distributor of any further holdbacks required by the U.S Distributor, prior to Notice of Initial Delivery. The Picture shall otherwise be released in each medium within six (6) months from the expiration of the applicable holdback. Distributor shall supply Licensor with all marketing/P&A costs for its written approval prior to release of the Picture(s) in the Territory(ies).

Minimum Prints and Ad Commitment: US\$ \_\_\_\_\_. Maximum Prints and Ad Commitment: US\$ \_\_\_\_\_.

This writing, together with the Standard Terms and Conditions attached hereto [i.e. WIPO or IFTA] and Exhibit "A" attached hereto, which are incorporated herein by this reference and such riders and exhibits as are expressly referenced above and executed by the parties (all of which are collectively referred to as the "Agreement") constitutes a binding and enforceable contract between the parties. The provisions of this writing (including any rider(s) an exhibit(s) hereto) shall govern and control



over any conflicting provisions contained in the Standard Terms and Conditions. All capitalized terms used but not defined herein shall have the meanings set forth in the Standard Terms and Conditions.

ABC Distribution "Licensor" \_\_\_\_\_ "Distributor"  
By: \_\_\_\_\_ By: \_\_\_\_\_  
Its: \_\_\_\_\_ Its: \_\_\_\_\_

**EXHIBIT "A"**

**A. Distributor Default:** Without limiting any of Licensor’s other rights and remedies under this Agreement, at law, in equity or otherwise, Distributor shall be in default of this Agreement and this Agreement may be immediately terminated by Licensor in the event that (i) Distributor fails to pay any amounts specified hereunder (including, without limitation, the Minimum Guarantee, materials costs, or any portion thereof) within ten (10) days after the date due hereunder ; (ii) Distributor fails to issue statements as required by the Standard Terms and Conditions (iii) Distributor fails to sign a Notice of Assignment and Distributor’s Acceptance (if required hereunder) in the form required by Licensor’s bank within ten (10) days after the date which is the later of (a) the execution of this Agreement by Distributor and (b) Distributor’s receipt of such Notice of Assignment and Distributor’s Acceptance or (iv) Distributor fails to issue a letter of credit (if required hereunder) in the form required by Licensor’s bank within fourteen (14) days after the date required hereunder. In addition to any other right or remedy of Licensor, any payment not made by its due date hereunder will incur a finance charge at three percent over the 3-month LIBOR rate from the date payment was due until paid in full to Licensor. Distributor acknowledges and agrees that, in reliance upon the promises made herein (including the promise to timely pay all amounts of the Minimum Guarantee), Licensor will remove the Picture(s) from the marketplace for the Term in Territory for the Licensed Rights for the express benefit of Distributor, and that, in the event of Distributor’s default, Licensor will be entitled to compensation for holding the Picture(s) off the market for such period. Accordingly, in consideration of Distributor’s holding the Licensed Rights in the Picture(s) in the Territory for such period of time, and without limiting in any way Licensor’s right to seek and obtain the full amount of the Minimum Guarantee and any other remedies available, Distributor agrees that all sums paid to Licensor prior to such default shall be retained by Licensor as compensation in the event of a default regardless of whether Licensor is subsequently able to re-license the Picture(s) in the Territory.

B. **Cancellation**: In the event that principal photography of the Picture does not commence within NINE (9) months of the date hereof, or if Licensor's rights with respect to the Picture shall be terminated for any reason, Licensor shall have the right to terminate this Agreement by written notice to Distributor. If any monies have been paid by Distributor, Licensor shall refund such amounts in full, together with such notice. Upon any such termination, each party shall be fully released from any further obligations, liability or claim by the other arising from this Agreement.

C. **Dispute Resolution; Governing Law; Forum** :

[Option 1 – WIPO Clause:

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules for Film and Media. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [30][60] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. Alternatively, if, before the expiration of the said period of [30][60] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].]

[Or Option 2 - IFTA Clause:

Any dispute arising out of or relating to this Agreement will be resolved by binding arbitration under the IFTA Rules of International Arbitration in effect at the time



the notice of arbitration is filed; provided, however, that Distributor expressly acknowledges and agrees that Licensor shall be entitled to injunctive or other equitable relief to restrain, prevent or enjoin any breach by Distributor of this Agreement or any infringement of Licensor's rights in the Picture(s). Distributor further agrees that its remedies will be limited to an action at law for damages, and in no event shall Distributor have the right to seek or obtain any injunctive relief against Licensor relating to this Agreement or the Picture(s), and Distributor hereby waives any right to such relief. The prevailing party in any arbitration or other legal proceeding brought pursuant hereto shall be entitled to recover all of its attorneys' fees and expenses actually incurred. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California (without regard to the conflict of laws provisions thereof). Distributor hereby consents and submits to the jurisdiction of the state and federal courts located in Los Angeles County, California with respect to any action arising out of or relating to this Agreement or the Picture(s).]

**D. Additional Terms and Conditions:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**ANNEX II****Exhibit A – Sample Errors and Omissions (E&O) Application Form<sup>3</sup>****Television and Film Errors and Omissions Insurance****Proposal****YOUR BUSINESS**

Name of insured \_\_\_\_\_

Date of establishment \_\_\_\_\_

Address of insured \_\_\_\_\_

Postcode \_\_\_\_\_

Name of partners or directors \_\_\_\_\_

Years in the industry \_\_\_\_\_

**THE PRODUCTION**

Title of production \_\_\_\_\_

Names of writer or author \_\_\_\_\_

Names of producer \_\_\_\_\_

Names of executive producer \_\_\_\_\_

Is this production based on another work? If so, explain and list title, date and name of author of such work. \_\_\_\_\_

- The production is:
- |  |                          |
|--|--------------------------|
| Television “entertainment”                 | <input type="checkbox"/> |
| Television factual (but not investigative) | <input type="checkbox"/> |
| Television factual (investigative)         | <input type="checkbox"/> |
| Television drama                           | <input type="checkbox"/> |
| Television: Children and religious         | <input type="checkbox"/> |
| Television: Daytime                        | <input type="checkbox"/> |
| Television: Other. Please give details.    | <input type="checkbox"/> |
| _____                                      |                          |
| Film for: Cinema release                   | <input type="checkbox"/> |
| Film for: Television release               | <input type="checkbox"/> |

<sup>3</sup> Source: This form was kindly supplied by UK solicitor, Mr. Peter Dally.



If any of the above are a "series", how many episodes? \_\_\_\_\_

Running time of production? \_\_\_\_\_

Initial release or air date? \_\_\_\_\_

Territory of broadcast or distribution? \_\_\_\_\_

Is the agreement for distribution subject to U.S. law? \_\_\_\_\_

- Is the production Entirely fictional?
- Entirely fictional, but inspired by specific events and/
- or occurrences?
- A portrayal of actual facts which includes
- significant fictionalisation?
- A true portrayal of actual facts or happenings?
- Other than above (explain)?

Brief description of storyline. \_\_\_\_\_

\_\_\_\_\_

The time frame for the setting of the plot is (e.g. the present, ten years in the future, within the last twenty years, etc.) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Estimated gross annual turnover derived from the program. \_\_\_\_\_

\_\_\_\_\_

**CLEARANCE PROCEDURES**

Has a title report been obtained from any title clearance service? \_\_\_\_\_

\_\_\_\_\_

If yes, please indicate the name of service and attach copy. If no, explain. \_\_\_\_\_

\_\_\_\_\_

Have copyright reports been obtained? \_\_\_\_\_

\_\_\_\_\_

If yes, are there any ambiguities, gaps or problems in the Chain of Title? \_\_\_\_\_

\_\_\_\_\_

If no copyright report has been obtained, please explain the reason. \_\_\_\_\_

\_\_\_\_\_

Is the production based upon or does it include, any literary or musical works which were first published or registered for copyright prior to January 1st, 1978? \_\_\_\_\_

\_\_\_\_\_

If you answered yes, please provide the title, writer's name and year of first publication (or registration) for each such pre-1978 work and then answer questions (a) and (b) below. \_\_\_\_\_

\_\_\_\_\_

If you answered no, disregard the rest of this question. \_\_\_\_\_

\_\_\_\_\_

Title	Writer's name	Year
_____	_____	_____
_____	_____	_____
_____	_____	_____

\_\_\_\_\_

Did you clear each of the words identified above to be certain that your production will not infringe (now or in the future) the renewal copyrights to those works in light of the United States Supreme Court in *Stewart vs Abend*, 110 S.Ct.1750 (1990) (commonly referred to as the "Rear Window" case)? \_\_\_\_\_

\_\_\_\_\_

If you answered "yes" to question (a), please describe the clearance procedures you used to be certain that your production will not infringe (now or in the future) the renewal copyrights to those pre-1978 works. \_\_\_\_\_

\_\_\_\_\_

If you answered no to question (a), please explain why not. (Attach additional sheets for your response, if necessary.) \_\_\_\_\_

\_\_\_\_\_

Is the name or likeness of any living person used in the production? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



If yes, have clearances been obtained? \_\_\_\_\_

\_\_\_\_\_

If no, explain. \_\_\_\_\_

\_\_\_\_\_

Is there a plausible risk that a living person could claim (without regard to the merits) to be identifiable in the production (whether or not the person's name or likeness is used or the production purports to be fictional)? \_\_\_\_\_

\_\_\_\_\_

If yes, have clearances been obtained? \_\_\_\_\_

\_\_\_\_\_

If no, explain. \_\_\_\_\_

\_\_\_\_\_

Is the name or likeness of any deceased person used in the production? \_\_\_\_\_

\_\_\_\_\_

If yes, have clearances been obtained from personal representatives, heirs or owners of such rights? \_\_\_\_\_

\_\_\_\_\_

If no, explain. \_\_\_\_\_

\_\_\_\_\_

It is hereby confirmed that we have carried out a full negative check which has been confirmed as satisfactory by our lawyers who are party to this application. \_\_\_\_\_

\_\_\_\_\_

If no, please explain. \_\_\_\_\_

\_\_\_\_\_

If yes, have all necessary changes been made? \_\_\_\_\_

\_\_\_\_\_

If no, please explain. \_\_\_\_\_

\_\_\_\_\_

Will any film clips be used in this production? \_\_\_\_\_

\_\_\_\_\_

If yes, have licences and consents for the film clips been obtained as follows:

From copyright owners? \_\_\_\_\_

From writers and others? \_\_\_\_\_

From performers or persons appearing in clip? \_\_\_\_\_

From music owners? \_\_\_\_\_

If any of the answers above is no, please explain. \_\_\_\_\_

Are any photographs used in the production? \_\_\_\_\_

If yes, have licences and consents been obtained as follows:

From individuals or businesses depicted? \_\_\_\_\_

From copyright holders? \_\_\_\_\_

If any of the answers above is no, please explain. \_\_\_\_\_

Have the following musical rights been cleared:

Recording and synchronisation? \_\_\_\_\_

Performing rights? \_\_\_\_\_

Right to distribute for all forms of distribution contemplated (home video, etc.)? \_\_\_\_\_



If the response to any of the above is no, please explain. \_\_\_\_\_

\_\_\_\_\_

Has a music cue sheet been prepared? If no, explain. \_\_\_\_\_

\_\_\_\_\_

If original music has been commissioned, has a "Hold Harmless" been obtained from the composer? If no, explain. \_\_\_\_\_

\_\_\_\_\_

Will a soundtrack album be produced? \_\_\_\_\_

\_\_\_\_\_

If yes, answer the following:

Have you acquired all necessary rights and licences? \_\_\_\_\_

\_\_\_\_\_

Have you acquired separate insurance coverage for this recording? \_\_\_\_\_

\_\_\_\_\_

If the response to any of the above questions is no, please explain. \_\_\_\_\_

\_\_\_\_\_

Will any merchandise (i.e. toys, dolls, clothing, etc.) be created from this production?

\_\_\_\_\_

If yes, describe. \_\_\_\_\_

\_\_\_\_\_

If merchandise is to be created and distributed based upon the production, have all necessary consents and licences been obtained from performers, authors, artists, etc. to produce and distribute this merchandise? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

If no, explain. \_\_\_\_\_

Has additional or separate insurance coverage for this merchandise been obtained?

If no, explain. \_\_\_\_\_

Will there be any computer version of this production (i.e. computer game, video game, interactive CD)? If yes, describe. \_\_\_\_\_

If a computer version of this production is to be created and distributed based upon the production, have all necessary rights been obtained from the performers, authors, programmers, etc. to produce and distribute this version in all territories and software platforms contemplated? If no, explain. \_\_\_\_\_

Has additional or separate insurance coverage for the computer version been obtained? If yes, explain. \_\_\_\_\_

Have you or any of your agents been unable to obtain or been refused an agreement or release after having

(a) negotiated for rights in literary, musical or other materials or \_\_\_\_\_

(b) negotiated for release from any persons with the production? \_\_\_\_\_

If yes, explain. \_\_\_\_\_



### LAWYERS USED FOR CLEARANCES

Name, address and telephone number of your lawyers (if a firm, also name individual at firm). \_\_\_\_\_

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Have your lawyers read and agreed to use their best efforts to ensure that the "Clearance Procedures" attached are followed? If no, explain. \_\_\_\_\_

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### CLAIMS DECLARATION

Has any claim been brought against you arising out of :  
invasion of privacy, infringement of copyright (statutory or common law), defamation, unauthorised use of titles, formats, characters, plots, idea, other programme material embodied in any production or breach of implied contract arising out of the alleged submission of any literary or musical material? If yes, please give details. \_\_\_\_\_

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Are you aware of any existing or threatened claims or legal proceedings of any kind, based on the production to be insured or any material contained in or upon which such production is based? If yes, please give details. \_\_\_\_\_

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**DECLARATION**

1. I/we declare that (a) this proposal form has been completed after proper enquiry, (b) its contents are true and accurate, and (c) all facts and matters which may be relevant to the consideration of our proposal for insurance have been disclosed.
2. I/we undertake to inform you before any contract of insurance is concluded, if there is any material change to the information already provided or any new fact or matter arises which may be relevant to the consideration of our proposal for insurance.
3. I/we agree that this proposal form and all other written information which is provided are incorporated into and form the basis of any contract of insurance.

Signature of principal/partner/director \_\_\_\_\_

Date \_\_\_\_\_

As lawyers for the above insured, we believe the statements contained in the proposal form are correct. We are familiar with the underwriters' standard clearance procedures, which are attached to the proposal form, and we have been retained by the insured to, and will, use our best efforts to see that those clearance procedures are followed.

Signature of lawyer(s) \_\_\_\_\_

Date \_\_\_\_\_

## ANNEX III

### RECOMMENDED WIPO CONTRACT CLAUSES AND SUBMISSION AGREEMENTS FOR WIPO MEDIATION AND EXPEDITED ARBITRATION FOR FILM AND MEDIA

#### Model Contract Clauses for Future Disputes:

##### *Mediation for Film and Media*

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules for Film and Media. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].”

##### *Mediation for Film and Media Followed, in the Absence of a Settlement, by Expedited Arbitration for Film and Media*

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules for Film and Media. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [30][60] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. Alternatively, if, before the expiration of the said period of [30][60] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. The arbitral tribunal shall consist of a sole arbitrator. The

place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].”

#### *Expedited Arbitration for Film and Media*

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

### **Model Submission Agreements for Existing Disputes:**

#### *Mediation for Film and Media*

“We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules for Film and Media the following dispute:

[brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].”

#### *Mediation for Film and Media Followed, in the Absence of a Settlement, by Expedited Arbitration for Film and Media*

“We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules for Film and Media the following dispute: [brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

We further agree that, if, and to the extent that, the dispute has not been settled pursuant to the mediation within [30][60] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. Alternatively, if, before the expiration



of the said period of [30][60] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].”

*Expedited Arbitration for Film and Media*

“We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media: [brief description of the dispute]

The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].”

For more information contact WIPO at [www.wipo.int](http://www.wipo.int)

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